

Federal Court



Cour fédérale

Date: 20231108

Docket: IMM-9035-22

Citation: 2023 FC 1487

Toronto, Ontario, November 8, 2023

PRESENT: Justice Andrew D. Little

BETWEEN:

PENG WANG

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision by the Refugee Appeal Division (the “RAD”), which dismissed an appeal from a decision of the Refugee Protection Division (the “RPD”) made under section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the “IRPA”).

[2] For the following reasons, the application will be allowed.

I. Facts and Events Leading to this Application

[3] The applicant is a citizen of China. He claimed protection under the *IRPA* based on his fear that if he returns to China and practices Falun Gong, he will be discovered by Chinese authorities and prevented from practising it.

[4] The applicant arrived in Canada on a student visa in 2017. He did not want to study in Canada but came at the behest of his parents. While in Canada, he dropped out of university but maintained a façade to his parents, which caused him to suffer from insomnia and feel depressed.

[5] In January 2018, a friend suggested that the applicant try Falun Gong. He started practising and attended group sessions in February 2018. The applicant's Basis of Claim stated:

After I continued practicing for about 3 months, I felt my sleeping and depression improve, so, I decided to continue practicing and studying Falun Gong. When the Covid-19 pandemic hit, I continued my practice at home.

[6] In June 2021, the applicant filed a claim for refugee protection in Canada under the *IRPA*.

[7] By decision dated April 22, 2022, the RPD concluded that the applicant was not credible and/or lacked subjective fear because of misrepresentations made in documents in support of his 2017 student visa application, and because he had delayed claiming refugee status until 2021.

[8] The RPD found that the home address provided to Canadian universities in the applicant's applications were false. The RPD did not accept the applicant's explanation for the falsehoods – that the applications were done by an agent and he did not want to disappoint his parents.

[9] The RPD did not accept the applicant's explanation of why he practised Falun Gong for three years before becoming a "real" practitioner. There was a "remarkable gap" in the applicant's account for the three years. The RPD drew a negative inference as to the applicant's general credibility from his delay in claiming *IRPA* protection.

[10] The RPD found that the applicant displayed a high level of Falun Gong knowledge, but his misrepresentations reduced the weight of his testimony. The RPD found that his beliefs were not consistent with his current religious practices, as he continued to lie to his parents for four years about his failure to study in Canada. The RPD found that the applicant did not understand the inherent contradiction between his beliefs and his actions, which undermined his credibility and sincerity.

[11] The RPD concluded that the applicant acquired his knowledge of Falun Gong for the purpose of bolstering a refugee claim. There was insufficient evidence that he would practice Falun Gong if he returned to China. The applicant had not established a viable claim for protection under the *IRPA*.

[12] The applicant appealed to the RAD, which dismissed his appeal by decision dated August 31, 2022. The determinative issue was credibility. The RAD concluded:

- a) The applicant was aware of the misrepresentations made about his home address in his applications to Canadian universities – he was a "party to the dishonesty" and provided no innocent explanation for why he, his parents or the agent had lied about his home address. While providing false addresses was not directly material to his *IRPA* claim, the applicant's willingness to use deceit or allow others to do so on his behalf with Canadian government officials to obtain a study permit

provided “evidence of a disregard for the truth” that impacted his likely willingness to mislead in his refugee claim.

- b) The applicant provided an “unreasonable and incredible explanation” for why he did not file his claim for protection earlier than 2021. The RAD found a contradiction between the applicant’s statement in his Basis of Claim narrative that his health (insomnia and depression) improved after three months of practising Falun Gong, but his testimony was that he delayed claiming *IRPA* protection because he continued to suffer from insomnia and depression. Thus the applicant’s claim “directly contradict[ed]” his narrative. The RAD also found that his testimony contradicted a letter from a friend who introduced him to Falun Gong. The applicant’s delay in claiming undermined his subjective fear and his credibility.
- c) The applicant was not a genuine Falun Gong practitioner. Rather, considering the issues described in paragraphs a) and b) above, the applicant was claiming to be one and engaging in practices in Canada in order to advance a fraudulent refugee claim. Because he was not a genuine practitioner, the RAD found that he would not engage in the practice of Falun Gong in China and therefore did not face a serious possibility of persecution or a likelihood of other harm on that basis on his return to China.

[13] The applicant applied for judicial review of the RAD’s decision.

II. Analysis

[14] The parties agreed that the standard of review of the RAD's decision is reasonableness, and I agree: *Alkarra v. Canada (Citizenship and Immigration)*, 2023 FC 1219, at paras 29-30; *Salim v. Canada (Citizenship and Immigration)*, 2023 FC 1059, at para 20.

[15] Reasonableness review is a deferential and disciplined evaluation of whether an administrative decision is transparent, intelligible and justified: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 SCR 653, at paras 12-13 and 15; *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21, at paras 8, 63. The starting point is the reasons provided by the decision maker, which are read holistically and contextually, and in conjunction with the record that was before the decision maker. A reasonable decision is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrained the decision maker: *Vavilov*, esp. at paras 85, 91-97, 103, 105-106 and 194; *Canada Post Corp v. Canadian Union of Postal Workers*, 2019 SCC 67, [2019] 4 SCR 900, at paras 2, 28-33, 61; *Mason*, at paras 8, 59-61, 66.

[16] A reviewing court does not consider whether the decision maker's decision was correct, or what the court would do if it were deciding the matter itself: *Mason*, at para 62; *Vavilov*, at para 83; *Canada (Justice) v. D.V.*, 2022 FCA 181, at paras 15, 23.

[17] Instead, a key focus is on the "reasoning process" used by the decision maker: *Vavilov*, at paras 83, 84 and 87.

[18] In *Vavilov*, the Supreme Court held that a reasonable decision is one that justified in relation to the facts and law that constrained the decision maker: *Vavilov*, at paras 85, 99, 105-106, 125-126, 194.

A. *Misrepresentations in prior applications to universities*

[19] The applicant argued that the RAD erred in its assessment of the misrepresentation of his home address because the RAD took a microscopic approach to the erroneous addresses, which were immaterial to his refugee claim. The applicant argued that he gained no benefit from them. The respondent submitted that the RAD may consider false information in previous immigration applications to assess the applicant's general credibility (citing *Yaffa v. Canada (Citizenship and Immigration)*, 2022 FC 1094, at paras 20-23, 30-33; *Senghor v. Canada (Citizenship and Immigration)*, 2016 FC 1041, at paras 9-11, 22-27).

[20] In my view, the applicant's submission raised a viable concern about the RAD's use of the evidence related to the incorrect home addresses in the applicant's university applications. I do not agree with the applicant's argument that the RAD wrongly speculated about the perceived advantage to the applicant from including the incorrect addresses in the application. However, I do agree that the issue was somewhat removed from the applicant's refugee claim – as the RAD itself acknowledged, the false addresses were part of the visa application process and “not directly material” to his *IRPA* claim. The RAD's conclusions went beyond those of the RPD. The RAD found that it “was clear” from the applicant's testimony that he “was aware of the misrepresentations”, that he was a “party to the dishonesty”, that the deception was “apparent on

the record” and that the applicant’s willingness to “use deceit” or allow others to do so on his behalf with Canadian government officials was “evidence of a disregard for the truth”.

[21] It is apparent from the hearing transcript before the RPD that the applicant was aware of the misrepresentations when he testified; indeed, the transcript reveals that the applicant raised the point that the agent may have inserted the incorrect addresses without being prompted about the issue. However, what is not clear from the record is *when* he learned of them. There was no evidence at all that he was aware of the misrepresentations *when they were made years earlier*. The applicant was not asked. As I read it, the RAD’s assessment was predicated on the fact that the applicant knew about the false addresses from the beginning, and weighed the falsehoods and their effect on his credibility accordingly.

[22] I hasten to emphasize that the applicant was responsible for the contents of his applications to the Canadian universities including the actions of the agent – or whoever included the incorrect addresses. However, the RAD’s reasoning suggests a possible disproportionate use of the prior misrepresentations concerning the applicant’s home address, which it acknowledged were not directly material to his *IRPA* claim.

[23] These concerns are relevant to, but not determinative of, my overall confidence in the reasoning process used by the RAD to reach its decision.

B. *The Applicant's Delay in Claiming IRPA Protection*

[24] While delay in making a refugee claim in Canada is not determinative, it may be an important factor in assessing the credibility and subjective fear of an individual seeking protection under the *IRPA*: see e.g., *Reyes v. Canada (Citizenship and Immigration)*, 2023 FC 110, at para 11; *Labana v. Canada (Citizenship and Immigration)*, 2022 FC 414, at para 19; *Zeah v. Canada (Citizenship and Immigration)*, 2020 FC 711, at para 61; *Zhou v. Canada (Citizenship and Immigration)*, 2020 FC 676, at para 24.

[25] The RPD drew an adverse inference about the applicant's general credibility due to the applicant's long delay of three years before he filed his claim for *IRPA* protection. It did not accept his explanation that he did not become a true Falun Gong practitioner until 2021.

[26] The RAD had a different concern from the RPD: that the applicant's testimony that he continued to suffer from depression and insomnia after 2018 directly contradicted his narrative in the Basis of Claim.

[27] The RAD relied on the following testimony of the applicant:

RPD: So, you only, if you started practicing almost four (4) years ago, why only claim protection in 2021 after three (3) years?

Applicant: Because in 2018 that time I was suffering from insomnia and also I have some depressions. At that time, I just use somewhat give a trial, I do not really believe in the, at that time. So, after a long time of practicing, I become a real Falun Gong practitioner. I really, is my faith now. This is why I apply for refugee application now.

[28] The RAD found a specific contradiction between, on one hand, the applicant's statement in his Basis of Claim narrative that his health improved after three months as a Falun Gong practitioner ("i.e. that, by mid May 2018, three months after he began to practice Falun Gong in February 2018, his insomnia and depression improved and Falun Gong brought him 'peace, tranquility and good health'") and, on the other hand, his testimony at the RPD hearing that the reason he delayed claiming was because he "continued to suffer insomnia and depression".

[29] In this analysis, the RAD misapprehended the applicant's testimony. In fact, the applicant did not testify in the passage quoted above that the reason he delayed claiming was because he continued to suffer insomnia and depression until 2021. He testified that in 2018, he suffered from insomnia and "some depressions". The applicant's express explanation for his delayed *IRPA* claim was that after a "long time of practising" he became a real practitioner of Falun Gong. His testimony did not mention any continuation of his health conditions. In addition, the rest of the applicant's testimony did not address the reasons for his delay in filing. Nor, as the respondent properly acknowledged during oral argument, did he testify elsewhere about whether his insomnia and feelings of depression continued until 2021. The "direct" contradiction perceived by the RAD, which it based on the applicant's alleged testimony that he delayed filing his claim because he "continued to suffer insomnia and depression", was not supported by the testimony that the RAD relied upon in its reasons and there is no other testimony that supported it.

[30] At the hearing in this Court, the respondent submitted that the RAD's analysis was based on an inference from the applicant's narrative, which (along with his friend's letter) advised that

his health “improved” after three months of practising Falun Gong in 2018. Given the RAD’s statements at several places in its reasons and its express reliance on the applicant’s quoted testimony, I am not persuaded. The RAD made no reference to making an inference; it found a direct contradiction using the applicant’s testimony. The applicant’s testimony about the reason he delayed claiming refugee status concerned when he became a true practitioner of Falun Gong, not when his insomnia and feelings of depression were resolved. Further, the statement in the applicant’s narrative and his testimony at the hearing, read side by side, appear to be consistent that he suffered from insomnia and feelings of depression in 2018. There was no testimony from the applicant about his health in 2019, 2020 or 2021. I am not permitted look at the evidence myself and supply revised reasoning for the conclusion reached by the RAD.

C. *The RAD’s decision must be set aside*

[31] The analysis in these Reasons has identified flaws in the RAD’s reasoning process and concerns about whether its decision was intelligible and justified in relation to the evidence that constrained it, applying the judicial review principles in *Vavilov*.

[32] The RAD dismissed the applicant’s claim for *IRPA* protection because it concluded he was not a genuine Falun Gong practitioner, and that he claimed to be one in order to advance a fraudulent refugee claim. Those conclusions were based on the RAD’s negative credibility assessment owing to the misrepresentations and the applicant’s delay in filing a claim for *IRPA* protection. In my view, there were sufficient and fundamental flaws in the RAD’s reasoning process, related to the misrepresentations and the effect of the applicant’s delay, that the RAD’s decision was unreasonable and cannot stand: *Vavilov*, at paras 100, 125-126.

[33] Consistent with *Vavilov* and other appellate authorities, the Court makes no comment on the merits of the applicant's appeal to the RAD or whether the RAD should or should not find that the applicant has a viable claim for protection under the *IRPA*. That will be for the RAD on redetermination.

III. Conclusion

[34] The application is therefore allowed. The matter will be returned for redetermination by a different member of the RAD.

[35] Neither party proposed a question to certify for appeal and none arises.

JUDGMENT in IMM-9035-22

THIS COURT'S JUDGMENT is that:

1. The application is allowed.
2. The decision of the Refugee Appeal Division dated August 31, 2022, is set aside and the matter is remitted for redetermination by a different member.
3. No question is certified for appeal under paragraph 74(d) of the *Immigration and Refugee Protection Act*.

"Andrew D. Little"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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**REASONS FOR JUDGMENT
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