Federal Court  Cour fédérale

Date: 20200113

Docket: IMM-2683-19

Citation: 2020 FC 34

Ottawa, Ontario, January 13, 2020

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

JIE LIN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This judicial review application is concerned with a decision of the Refugee Protection Division [RPD] of April 8, 2009. The claim for Refugee Protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c 27 [the *Act*] was dismissed. The judicial review application is made pursuant to section 72 of the *Act*.

I. The facts

[2] The facts of this case are very simple. The applicant alleges that he became a practitioner of Falun Gong in August 2011, because, suffering from sharp pain in his arms and shoulders, he was encouraged to become a practitioner. The applicant was a cook in his country of origin, China. Having seen a doctor who advised that there was no good medicine to alleviate the pain, as well as a traditional health practitioner in China, he took advice, in July 2011, from a good friend who suggested he try Falun Gong. According to the applicant's Personal Information Form (PIF), the friend "told me that Falun Gong could make me strong and once I was strong my pain would be gone" (Certified Tribunal Record (CTR) p. 20). It appears that the applicant was aware that the practice was frowned upon by the authorities in China because he states in his PIF that "(b)ut I asked him whether he had any fear of the Government's crackdown and he told me that they had lookouts during their practice and they had escape plans in case emergency happened [*sic*]" (CTR, p. 21).

[3] The applicant started the practice with a group in early August 2011: they were 13 people. The practice happened on weekends. It appears that the pain in the shoulders and the arms almost disappeared within a few months.

[4] On June 24, 2012, the applicant was practicing Falun Gong with his group in someone else's house. At about the halfway mark of the session, a lookout called the coach, which allowed the applicant to escape through the back door before the Public Security Bureau (PSB) arrived at the front door. The applicant went into hiding to his cousin's house. Three days later,

on June 27, the applicant's parents called the cousin's house to inform that "the PSB had gone to my parents' house looking for me". There is no indication as to how the PSB could have identified the applicant as one of the practitioners when they raided the Falun Gong practice on June 24, 2012. Nevertheless, the PSB is said to have left a summons, dated June 27, 2012, for an appearance to take place on June 29, 2012. The summons indicated the offence as "being involved in illegal Falun Gong activities and recruiting members for illegal organization" (plaintiff's factum, para 6 m)).

[5] The applicant was smuggled out of China, travelling on a boat to Taiwan from which he travelled to Canada on a false Taiwanese passport. However, the applicant testified that he had no evidence of his departure from China and arrival in Canada as the false Taiwanese passport was retrieved by the smuggler. The PIF, which is stamped on October 12, 2012, states that he travelled from China to Canada on August 11, 2012 and made a Refugee Protection Claim on August 15, 2012. However, there are no details offered with respect to those events. As a matter of fact, not much more information was offered when the applicant appeared before the RPD for the hearing on March 26, 2019.

II. The RPD decision

[6] The case before the RPD was largely argued on the basis that it had been established that the applicant was a practitioner of Falun Gong. In a sense, the RPD found that the applicant lacked in credibility as a *bona fide* Falun Gong practitioner, whether that be in China, or here in Canada as part of a *sur place* application.

[7] The story of this applicant is that, once warned that the PSB was about to raid the place where he was practicing Falun Gong, he was able to escape through the back door. The evidence presented in support of that story did not satisfy the RPD. There was no evidence of the applicant's departure from China where, allegedly, he left mainland China to go to Taiwan on a boat before being smuggled from Taiwan to Canada, using a false Taiwanese passport. Merely telling that story did not satisfy the RPD, which was looking for some corroboration about his actual exit from China. Furthermore, the visit by the PSB some three days later to leave a summons for the applicant to present himself to the third criminal division of a Court left a lot to be desired. Indeed, the RPD was quizzical about summons allegedly being left on June 27, 2012, but which appeared for the first time in March 2019. Is also somewhat unclear how it can be that the said PSB would have attended his parents' house on a regular basis for a period of seven years since June 2012, the last time being in February 2019. For the RPD, this applicant does not have the kind of profile that could attract such attention. The Board relies specifically on a United Kingdom (UK) Home Office Operational Guidance Note on China, published in November 2016. It is a note that was prepared following comments coming from Courts in the United Kingdom. The RPD quotes the following passage at paragraph 12 of its decision:

> ...our first conclusion as to risk, from the objective evidence as a whole, is that, absent special factors, there will not normally be any risk sufficient to amount to "real risk" from the Chinese authorities for a person who practices Falun Gong in private and with discretion. On any assessment the number of Falun Gong practitioners in China is very large indeed. The figures quoted range from 2 million to some 100 million. So far as can be gathered from the evidence before us, the number of people who have faced detention or re-education by the Chinese authorities as a consequence of Falun Gong activity, whilst large in absolute terms, is a relatively small proportion of the overall number of practitioners. This indicates that the large majority of those who practice Falun Gong in China in privacy and with discretion do not experience material problems with the authorities.[2]

[Footnote omitted.]

[8] In fact, the RPD noted that the motivation of this applicant to start Falun Gong was to get rid of some upper body pain which, after three months of practicing, seemed to have subsided significantly. Given that the applicant indicated at his hearing before the RPD that he knew that there was danger in practicing Falun Gong, the RPD questioned why the applicant would continue with the practice he knew was somewhat seen as subversive by the authorities after the pain was almost gone. Furthermore, there was no explanation for how the PSB would have become aware of the practice by a group of 13 people and why he was subsequently targeted personally.

[9] Thus, the RPD is doubtful about the events and it finds that "it is unlikely that the PSB would be interested in or continue to search for the claimant, given his minor profile as a member of a group consisting of thirteen individuals who got together for an hour on weekends to practice FG in the privacy of their homes" (RPD decision, para 13).

[10] The RPD was also very much concerned about the summons of June 27, 2012 and the document submitted to the RPD and presented as being a "Detention Dismissal Notice" concerning a person supposedly found guilty of "using Falun Gong to sabotage the social order" who was sentenced to four years in prison. That document, according to the translation that was offered, spoke of the jailed person being "deprived of political right 1 year from June 24, 2012 to June 23, 2016" (RPD decision, para 16).

[11] As for the summons, the RPD finds quite remarkable that the summons, as well as the Detention Dismissal Notice, were sent to Canada in March 2019 (the case was heard on March 26, 2019, many years after the June 24, 2012 raid). Furthermore, it is surprising, in the view of the RPD, that no other document was ever issued by the Chinese authorities despite what is being presented as multiple visits to his parents' house. The RPD says that "(t)he absence of any follow-up documents, in light of the PSB's continual interest in the claimant, undermines his assertion that the PSB has targeted him and is still interested in pursuing him" (RPD decision, para 15). The Detention Dismissal Notice is even more problematic in that it states that the person was released on June 23, 2016, exactly four years after the detention began, yet the document declares that the person was "deprived of political right 1 year from June 24, 2012 to June 23, 2016" (RPD decision, para 16). That does not make much sense especially in view of article 58 of the Criminal Law of the People's Republic of China which provides that "(a) term of deprivation of political rights as a supplementary punishment shall be counted from the date on which imprisonment or criminal detention ends…" (RPD decision, para 16). The Detention Dismissal Notice, offered by the applicant, does not conform to what is being presented as the law in China. The RPD concludes:

> The panel finds that the information in the document is inconsistent with Article 58 of the Criminal Law of the People's Republic of China, and therefore suspect, further undermining the claimant's credibility regarding events in China prior to his arrival in Canada.
>
> (RPD decision, para 16.)

These various difficulties and discrepancies made the RPD conclude that the applicant is not credible.

[12] As for the refugee *sur place* claim, the RPD had to assess whether the applicant is a *bona fide* practitioner. Quoting from the *United Nations Handbook on Procedures and Criteria for Determining Refugee Status*, the RPD notes that "(w)hether such actions are sufficient to justify a well-founded fear of persecution must be determined by a careful examination of the circumstances. Regard should be had in particular to whether such actions may have come to the notice of the authorities of the person's country of original and how they are likely to be viewed by those authorities." (RPD decision, para 19).

[13] The evidence presented by the applicant is considered to be insufficient. Isolated photographs do not establish in this case a *bona fide* practitioner of Falun Gong. The two letters of support from practitioners in Canada are also insufficient given the generality of their contents and the fact that the authors of these letters did not participate in the hearing of March 2019. Evidence offered by friends without subjecting themselves to any cross-examination is considered not to be highly probative or credible evidence (*El Bouni v Canada (Minister of Citizenship and Immigration)*, 2015 FC 700). Although, the applicant was able to answer questions about the Fallun Gong practice, that evidence in and of itself is said to be readily available and relatively simple to understand. More importantly, perhaps, is that when asked if he could return to China if not wanted by the PSB, the applicant now says that "he needed to practice with others freely in order to obtain the full benefit of FG" (RPD decision, para 22); a practice that began for the sole purpose of alleviating upper body pain now needs to be practiced with others.

III. Standard of review and analysis

[14] This case was heard before the Supreme Court of Canada decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] was released, on December 19, 2019. Neither party suggested subsequently that the *Vavilov* decision be the framework through which the matter ought to be considered. In my view, the old framework, with its focus on deference (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190), would take the Court to the same result as *Vavilov* with its focus on justification of a decision in order to be reasonable.

[15] No one doubts that the standard of review in a case of this nature is reasonableness. It has been confirmed in *Vavilov* that reasonableness constitutes presumptively the standard of review for questions of law as well as questions of fact. None of the exceptions to the presumption is present in this case. There is still room for a measure of deference (*Vavilov*, above, paras 13, 75) for the decision taken by an administrative tribunal, but the new focus since *Vavilov* is on the reasonableness of the decision measured by reference to the reasons given. At paragraph 99 of *Vavilov*, one reads:

> [99] A reviewing court must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision: *Dunsmuir*, at paras. 47 and 74; *Catalyst*, at para. 13.

[16] Even with the focus on the decision maker's decision itself, the Court must not seek to decide the issues themselves, but rather it develops an understanding that led to the decision through an examination of the reasons given (*Vavilov*, para 85). But the burden remains on an applicant to show that the decision is unreasonable (*Vavilov*, para 100). The reviewing court will be considering if the decision is internally coherent and justified in light of the legal and factual constraints. But it continues to be true that perfection is not the required standard and the exercise does not involve the "line-by line treasure hunt for error" of *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd.*, 2013 SCC 34; [2013] 2 SCR 458, as endorsed by *Vavilov*, at paragraph 22.

[17] Rather, the reviewing court looks for the rational chain of analysis within the reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived (*Law Society of New Brunswick v Ryan*, 2003 SCC 20; [2003] 1 S.C.R. 247, at para 55, as cited in *Vavilov*, at para 102). Logical fallacies, circular reasoning, false dilemmas, unfounded generalization or an absurd premise may all signal an internally incoherent reasoning. Finally, the record continues to be important and the reviewing court considers the reasons in light of the record. Once again, the Court cites with approval the decision of this Court in *Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431, 16 Imm LR (4th) 267, at paragraph 11:

> [11] *Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. It is ironic that *Newfoundland Nurses*, a case which at its core is about deference and standard of review, is urged as authority for the supervisory court to do the task that the decision maker did not do, to supply the reasons that might have been given and make findings of fact that were not made. This is to turn the jurisprudence on its head. *Newfoundland*

> *Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn. Here, there were no dots on the page.

[18] In other words, the reviewing judge is not to do the job not done by a tribunal, re-writing the reasons in order to make the decision reasonable (*Vavilov*, para 96). But it is appropriate to connect the dots which have been identified by consulting the record.

[19] In the case at hand, whether the old framework or the new one is used, the result is the same: the applicant did not satisfy his burden to show that the decision was not reasonable. The applicant's argument boils down to a different emphasis on some of the evidence on both counts, the original refugee application and the *sur place* application. The standard of review that must be applied remains the same: the decision must be shown to be unreasonable, which has not been accomplished on this record. It is understandable that the RPD would have found the story told by the applicant as lacking details and granularity such that it would be believable and believed. The Detention Dismissal Notice and the summons "arrived" just in time for the hearing, some 7 years later, and their contents left a lot to be desired. It was open to the RPD to conclude that it would be surprising if the Chinese authorities had any interest in this applicant. The record in this case was very weak. The story around the events of June 2012 lacked granularity, there was no evidence to speak of around the escape from China to Taiwan to Canada, and the "corroborative" evidence was next to inexistent. The *sur place* application is equally weak. At the end of the day, the RPD does not have to be right. The standard of review is reasonableness, not correctness. It is rather that the applicant must show that the decision was unreasonable in that it is not justified, intelligible and transparent. It is. The judicial review application must therefore be dismissed.

[20] There is no question that ought to be certified pursuant to s. 74 of the Act.

JUDGMENT in IMM-2683-19

THIS COURT'S JUDGMENT is that:

1. The judicial review application is dismissed.

2. There is no serious question of general importance that ought to be certified.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2683-19
STYLE OF CAUSE:	JIE LIN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	DECEMBER 17, 2019
JUDGMENT AND REASONS:	ROY J.
DATED:	JANUARY 13, 2020

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