

Federal Court



Cour fédérale

**Date: 20210112**

**Docket: IMM-6904-19**

**Citation: 2021 FC 44**

**Ottawa, Ontario, January 12, 2021**

**PRESENT: Mr. Justice McHaffie**

**BETWEEN:**

**YAN JIANG  
YUESHI XIAO**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] Yan Jiang claims refugee protection as a Falun Gong practitioner, asserting she fled China in 2012 after the Public Security Bureau (PSB) sought to arrest her. The Refugee Protection Division (RPD) dismissed Ms. Jiang’s claim and that of her daughter, Yueshi Xiao, finding on a balance of probabilities that Ms. Jiang “is not nor has ever been [a] Falun Gong

practitioner in the People's Republic of China or in Canada.” This finding was based in large part on the RPD's assessment of errors Ms. Jiang made in demonstrating a Falun Gong exercise during her refugee hearing. In reaching its conclusion, the RPD discounted corroborative evidence filed in the form of photographs and two statements from an individual who said they practised Falun Gong with Ms. Jiang in Canada and that she was a Falun Gong practitioner.

[2] Having reviewed the RPD's decision, the record, and the parties' written submissions, I had particular concerns regarding the RPD's treatment of the corroborative evidence. I put those concerns to counsel for the Respondent at the hearing of the application for judicial review. The Respondent's arguments on this issue were candid and to the point. However, having heard those submissions, I concluded that the RPD's treatment of the corroborative evidence was unreasonable, and that this was determinative of this application. I therefore indicated that I would be granting the application for judicial review, with reasons to follow. These are those reasons.

## II. The RPD's Treatment of the Corroborative Evidence

[3] In support of her initial claim, Ms. Jiang filed a handwritten statement (with translation) from Ming Sheng He, who said he met Ms. Jiang in 2012 when practising Falun Gong in Milliken Park in Scarborough, and that they practise every Saturday and Sunday morning for two hours. Mr. He confirmed “I am here to testify that Ms. Jiang, Yan is a Falun Gong practitioner.” Ms. Jiang also filed a series of ten photographs purporting to show her engaged in practising Falun Gong or participating in Falun Gong activities.

[4] Ms. Jiang and Ms. Xiao's claim was refused by the RPD on August 29, 2018, but this refusal was quashed by this Court on consent of the parties (*Jiang v Canada (Citizenship and Immigration)*), May 17, 2019, Court File No IMM-4987-18, Justice Diner). In advance of the redetermination of their claim, Ms. Jiang filed an updated statement from Mr. He, again handwritten with a translation. Mr. He again attested to his first meeting with Ms. Jiang, to their ongoing weekly practice of Falun Gong each Saturday and Sunday morning, and to the fact that Ms. Jiang "is a Falun disciple." Ms. Jiang also filed a further nine photographs purporting to show her engaged in practising Falun Gong or participating in Falun Gong activities.

[5] The RPD addressed this evidence in its reasons exclusively in the following one-sentence paragraph:

[13] The photos and letters of support I give no weight since the photos were taken in a public place, and the authors of the letters were not made available to test their veracity.

[Emphasis added; footnote omitted.]

### III. The RPD's Decision was Unreasonable

[6] The parties agreed, as do I, that the RPD's rejection of Ms. Jiang and Ms. Xiao's refugee claim on its merits is reviewable on the reasonableness standard: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25. In undertaking reasonableness review, the Court begins "by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion": *Vavilov* at para 84. The Court is to assess whether the decision as a whole is transparent, intelligible, and justified, and should not seize on a "minor misstep" or

peripheral flaw, nor engage in a “line-by-line treasure hunt for error”: *Vavilov* at paras 15, 85, 100, 102. Rather, the Court “must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency” before setting aside a decision as unreasonable: *Vavilov* at paras 99–100.

[7] For the following reasons, I am satisfied that the RPD’s decision shows sufficiently serious shortcomings with respect to an important issue of corroborative evidence that it cannot be said to bear the hallmarks of justification, intelligibility, and transparency.

[8] I begin by noting that the corroborative evidence in question was material to a central issue in Ms. Jiang’s refugee claim, namely whether she was a Falun Gong practitioner. The evidence was directly probative of that question. Mr. He’s statements that Ms. Jiang is a Falun Gong practitioner, and that he had practised with her twice a week for at least seven years, support her assertions regarding her Falun Gong practice. The photographs that purport to show Ms. Jiang engaged in the practice of Falun Gong and in other Falun Gong activities (what appear to be public gatherings or demonstrations) similarly relate to her evidence regarding her Falun Gong practice.

[9] The only reason given by the RPD for giving the photographs no weight is that they “were taken in a public place.” As the Minister candidly conceded, it is impossible to tell from this statement why this would justify discounting the photographs. The RPD gave no explanation why it considered the photographs unreliable, or otherwise unworthy of evidentiary weight,

simply because they were taken in a public place. Nor did the RPD put any questions to Ms. Jiang regarding the photographs or make any statements during the course of the hearing that might possibly cast light on why the fact that they were taken in a public place was relevant to their weight. Indeed, given that Ms. Jiang's (and Mr. He's) evidence was that she participates in a "group practice on Saturday and Sunday mornings at Milliken park," the fact that the photographs were taken in a public place would be consistent with that evidence. Thus, even read in light of the record, there is a fundamental gap in the RPD's chain of analysis: *Vavilov* at para 96.

[10] As for the two statements from Mr. He, the only reason given by the RPD for giving them no weight was that "the authors of the letters were not made available to test their veracity." I note as an aside that there was only one "author," as the two statements were both made by the same individual.

[11] As Ms. Jiang points out, the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] does not require evidence to be presented to the RPD *viva voce*. Rather, the RPD is not bound by any legal or technical rules of evidence, and may receive evidence that is adduced in the proceedings and considered credible or trustworthy in the circumstances: *IRPA*, ss 170(g)–(h). Given this flexibility, the Federal Court of Appeal has found that it is unreasonable to discount evidence based solely on the unavailability of a witness for cross-examination, since "[i]t is not for the Refugee Division to impose on itself or claimants evidentiary fetters of which Parliament has freed them": *Fajardo v Canada (Minister of Employment & Immigration)*, [1993] FCJ No 915, 157 NR 392 (CA) at para 4. Justice Fuhrer recently applied this principle in *Oria-*

*Arebun*, finding that it was improper for the Refugee Appeal Division to give a letter “little weight” based on the author’s unavailability for cross-examination, as their attendance was not required: *Oria-Arebun v Canada (Citizenship and Immigration)*, 2019 FC 1457 at paras 51–52. As Ms. Jiang underscores, the RPD did not raise any concerns at the hearing regarding Mr. He’s statements or about him not being put forward as a *viva voce* witness. Nor did the RPD ask whether Mr. He could be made available for questions.

[12] The Minister argues that the RPD’s assessment of the corroborative evidence was effectively a finding that the photographs and statements were not sufficient to overcome the concerns about Ms. Jiang’s credibility arising from her testimony. I cannot accept this argument. It goes beyond simply trying to understand the RPD’s reasons and into the realm of creating reasons for the RPD. The RPD did not say the photographs and statements were insufficient to overcome credibility concerns (*i.e.*, even if they were accepted). It discounted them because the photographs were taken in a public place and the author of the statements was not made available to test their veracity. While the Court must seek to understand the RPD’s reasoning process, and should not expect perfection in the manner in which reasons are written, this does not permit the Court to fashion its own reasons to buttress those of the decision maker, or substitute potentially reasonable reasons for unreasonable ones: *Vavilov* at paras 84, 86, 91, 96, 98. It is in part by giving attention to the reasons actually given by an administrative decision maker that the Court demonstrates its respect for the decision-making process: *Vavilov* at paras 15, 83, 86.

[13] The Minister also argues that the key basis for the RPD’s decision was its finding that Ms. Jiang was not credible based on her testimony, and that the other findings, including its

findings at paragraph 13 regarding the corroborative evidence, flowed from that finding. Again, however, this argument is not supported by the reasons as written. The RPD did not discount the corroborative evidence because it had already made credibility findings, but for the reasons repeated above. In any case, to the extent that the RPD made its credibility finding before considering the corroborative evidence, and then discounted the corroborative evidence on that basis, this would be contrary to the principles regarding corroborative evidence set out by this Court in *Chen v Canada (Citizenship and Immigration)*, 2013 FC 311 at paras 20-21.

[14] In my view, the RPD's unreasonable discounting of the corroborative evidence for unjustified reasons is enough to render the decision as a whole unreasonable. Had the RPD accepted Mr. He's evidence that he knew Ms. Jiang to be a Falun Gong practitioner since he had been practising with her since 2012, or had the RPD accepted that the photographs showed Ms. Jiang practising Falun Gong and participating in related activities, this may very well have affected the RPD's ultimate conclusion on the critical issue of whether Ms. Jiang is a Falun Gong practitioner. In other words, the treatment of the corroborative evidence shows "sufficiently serious shortcomings" on an issue that is "sufficiently central or significant" that it renders the decision as a whole unreasonable: *Vavilov* at para 100.

#### IV. Conclusion

[15] Having concluded that the RPD's treatment of the corroborative evidence was unreasonable and that this renders the decision as a whole unreasonable, I need not address the other arguments raised by the parties. These included arguments pertaining to the RPD's reliance on Ms. Jiang's mistakes in demonstrating the exercise, the distinction the RPD drew between

Falun Gong and “religions in general,” the RPD’s analysis of the ability to exit China, and the RPD not addressing the *sur place* claim.

[16] The application for judicial review is therefore granted, and the application for refugee protection is again remitted to the RPD for redetermination by a differently constituted panel.

[17] Neither party proposed a question for certification. The issue that I have concluded is determinative raises no certifiable question.

**JUDGMENT IN IMM-6904-19**

**THIS COURT'S JUDGMENT is that**

1. The application for judicial review is granted, and the claim for refugee protection by Yan Jiang and Yueshi Xiao is remitted for redetermination by a differently constituted panel of the Refugee Protection Division.

“Nicholas McHaffie”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-6904-19

**STYLE OF CAUSE:** YAN JIANG ET AL v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**HEARING HELD BY VIDEOCONFERENCE ON JANUARY 11, 2021 FROM  
OTTAWA, ONTARIO (COURT) AND TORONTO, ONTARIO (PARTIES)**

**JUDGMENT AND REASONS:** MCHAFFIE J.

**DATED:** JANUARY 12, 2021

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