Federal Court  Cour fédérale

Date: 20210119

Docket: IMM-3909-19

Citation: 2021 FC 61

Ottawa, Ontario, January 19, 2021

PRESENT: Mr. Justice Norris

BETWEEN:

WEIBIN MAI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The applicant, Weibin Mai, is a citizen of the People's Republic of China. He sought refugee protection in Canada on the basis that, as a practitioner of Falun Gong, he has a well-founded fear of persecution in China.

[2] The applicant arrived in Canada on December 8, 2012. He submitted his claim for refugee protection on December 11, 2012. His claim was not heard by the Refugee Protection Division ("RPD") of the Immigration and Refugee Board of Canada ("IRB") until May 8, 2019. For reasons delivered orally the same day, the RPD rejected the claim on credibility grounds. Since this was a "legacy" case, the applicant did not have a right to appeal to the Refugee Appeal Division of the IRB (he missed being eligible to appeal by only a matter of days).

[3] The applicant has now applied for judicial review of the RPD's decision under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*"). He contends that the RPD's assessment of the evidence is unreasonable.

[4] As I explain in the reasons that follow, I do not agree. This application for judicial review will therefore be dismissed.

II. BACKGROUND

[5] The applicant was born in Taishan City, Guangdong Province, China, in November 1990. He claims that, when he was in his early twenties, stress from his employment as a clerk caused him to suffer from insomnia. Unable to resolve his insomnia through conventional medical treatment, in November 2011, on the recommendation of a friend, the applicant took up the practice of Falun Gong. He joined a group that had about half a dozen members. They practiced together in an isolated location to avoid detection by the authorities. The applicant found that his sleep and energy levels improved.

[6] The applicant claims that, on November 18, 2012, a meeting of his practice group was raided by the Public Security Bureau ("PSB"). The applicant was able to escape and hid at his aunt's house. He called his parents from there.

[7] A few days later, the applicant's parents called the applicant at his aunt's house. They told him that the PSB had been to their house looking for him. They had left a summons (*chuanpiao*) for him. The summons accused the applicant of involvement in illegal Falun Gong activities and recruiting members for an illegal organization. It directed him to attend at the 3rd Criminal Division of the People's Court of Taishan City the next day, November 23, 2012. The applicant's parents also relayed the news that some of the applicant's fellow group members had been apprehended by the authorities while another had also gone into hiding.

[8] Fearing what would happen if he were found by the authorities, the applicant remained hidden at his aunt's house. Eventually, his aunt found a smuggler who would assist him to escape from China. The smuggler provided the applicant with a false passport and arranged for his departure for Canada via Hong Kong on December 8, 2012.

[9] In the narrative attached to his Personal Information Form (which was provided one month after the applicant arrived in Canada) the applicant stated that "recently" he had learned from his aunt that the PSB "continuously" went to his house looking for him. No other details are provided. At the hearing before the RPD, the applicant testified that the PSB had returned to his parents' house once while he was still in hiding at his aunt's house. He also testified that, during the seven years he had been in Canada, the PSB had continued to look for him, visiting

his parents' house during festival times, New Year's, other holidays, and at least seven additional times. The applicant confirmed that at no time did the PSB leave an arrest summons for him.

[10] Before the RPD, the applicant testified that he had continued to practice Falun Gong in Canada. He presented corroborative evidence in the form of photographs of himself participating in Falun Gong events as well as a brief letter from a fellow practitioner. He claimed that his continuing practice of Falun Gong would have come to the attention of the Chinese authorities and submitted that this gave rise to an additional basis for his claim for protection.

III. DECISION UNDER REVIEW

[11] The RPD concluded that the applicant is neither a Convention refugee nor a person in need of protection. In the view of the RPD, the applicant had not been a Falun Gong practitioner in China, he had never been sought by the PSB, and the summons the applicant tendered was therefore likely fraudulent. Moreover, the applicant's practice of Falun Gong in Canada was not genuine. The applicant had attended Falun Gong practices and events in Canada and had learned something about its doctrines solely for the purpose of advancing a fraudulent claim for refugee protection.

[12] These conclusions rested on the following findings:

- The applicant testified that his Falun Gong group in China had planned that, in the event that a meeting was raided by the PSB, they would hide any Falun Gong materials and pretend that they were simply having a social gathering. However, when the raid actually

took place, everyone tried to get away instead of staying put and acting innocently. The RPD found that there was an inconsistency in the applicant's account of the escape plan. When this was put to the applicant, he explained that they had simply followed the group leader's instructions. Nevertheless, in the view of the RPD, there remained an inconsistency in the applicant's account.

- When asked to describe his understanding of how Falun Gong had improved his health, the applicant failed to mention its most basic teachings.

- The applicant's claim that in November 2012 the PSB had only issued a summons to question him as a witness was inconsistent with his claim that other members of his practice group had already been arrested.

- The fact that the PSB never returned with an arrest summons was inconsistent with the applicant's claim that he had failed to comply with a genuine summons on November 23, 2012, and that the PSB had continued to look for him at his parents' house for many years afterwards. It was reasonable to expect that, in view of the multiple visits to the applicant's parents' house, the PSB would have issued an arrest summons if they were actually looking for the applicant. This in turn suggested that the PSB were not looking for the applicant and, consequently, that the summons the applicant had tendered was not genuine.

- Since the summons the applicant had tendered was likely fraudulent, "little weight" could be given to it as establishing that the applicant was being sought by the PSB.

- The foregoing in turn supports the conclusion that the applicant was not a Falun Gong practitioner in China.

- In sum regarding the applicant's claim for protection grounded on events before he came to Canada, the RPD found that there was insufficient credible evidence to support the applicant's claims. Further, the RPD found on a balance of probabilities that the applicant had made a fraudulent claim for protection when he arrived in Canada and, as a result, his "general credibility" was in doubt.

- The RPD carried this finding over to its assessment of the evidence supporting the *sur place* claim. The applicant's testimony was found not to be credible in this respect as well. Consequently, since the only evidence that Chinese authorities were aware of the applicant's continuing Falun Gong practice was the applicant's own testimony, there was insufficient credible evidence to support this allegation.

- This adverse credibility finding also led the RPD to reject the sincerity of the applicant's involvement in Falun Gong activities in Canada, including those that had been documented in photographs.

- The only other corroboration for the applicant's claim to have been involved in Falun Gong activities in Canada was a letter from a co-practitioner stating that the applicant was a genuine practitioner of Falun Gong. The RPD gave the letter "little weight" because the author of the letter was "unknown to the panel" and, since the author did not attend the hearing, he could not be questioned by the RPD regarding the basis for the statement that the applicant was a genuine practitioner of Falun Gong.

- In sum regarding the *sur place* claim, given the general credibility concerns that arose with respect to the applicant's account of events in China, the RPD found that the applicant had a "heavy burden" to discharge to establish that he is now a genuine practitioner and he had failed to do so.

IV. STANDARD OF REVIEW

[13] There is no issue that the RPD's decision should be reviewed on a reasonableness standard. Reasonableness is now the presumptive standard of review, subject to specific exceptions "only where required by a clear indication of legislative intent or by the rule of law" (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 10). There is no basis for derogating from the presumption that reasonableness is the applicable standard of review here. That this is the appropriate standard of review of the RPD's evidentiary determinations was well-established long before *Vavilov.*

[14] Reviewing administrative decisions on a reasonableness standard "aims to give effect to the legislature's intent to leave certain decisions with an administrative body while fulfilling the constitutional role of judicial review to ensure that exercises of state power are subject to the rule of law" (*Vavilov* at para 82).

[15] The exercise of public power "must be justified, intelligible and transparent, not in the abstract but to the individuals subject to it" (*Vavilov* at para 95). Consequently, an administrative decision maker has a responsibility "to justify to the affected party, in a manner

that is transparent and intelligible, the basis on which it arrived at a particular conclusion" (*Vavilov* at para 96).

[16] Reasonableness review is a deferential form of review. The reasonableness standard is meant to ensure that "courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process" (*Vavilov* at para 13).

[17] The reviewing court should focus on "the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" (*Vavilov* at para 83). An assessment of the reasonableness of a decision must be sensitive and respectful yet robust (*Vavilov* at paras 12-13). Where the decision maker has given reasons for the decision, a reviewing court should begin its inquiry "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, internal quotation marks omitted). On review, "close attention" should be paid to a decision maker's reasons; they "must be read holistically and contextually, for the very purpose of understanding the basis on which a decision was made" (*Vavilov* at para 97).

[18] A reasonable decision "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). The reasonableness standard "requires that a reviewing court defer to such a decision" (*ibid.*). A court applying this standard "does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the 'range' of

possible outcomes that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the ‘correct’ solution to the problem” (*Vavilov* at para 83).

[19] The burden is on the applicant to demonstrate that the RPD’s decision is unreasonable. He must establish 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” (*Vavilov* at para 100).

V. ANALYSIS

[20] The applicant submits that the RPD’s decision is unreasonable in five respects:

a) in drawing an adverse inference about the applicant’s credibility from an inconsistency between the practice group’s plan for how to avoid detection by the authorities and what the applicant said had actually happened when the practice was raided;

b) in treating the applicant’s incomplete account of his early Falun Gong practice as what he understood about Falun Gong at the time of the RPD hearing and then drawing an adverse inference from that limited understanding;

c) in making an adverse finding with respect to the applicant’s credibility without expressly determining that the PSB raid did not take place;

d) in drawing an adverse inference with respect to the credibility of the applicant’s claim that he was being sought by the PSB from the fact that the PSB had never followed-up with an arrest warrant; and

e) in importing adverse credibility findings with respect to events in China into its assessment of the applicant's *sur place* claim without considering the amount of time that had passed since the events in China occurred.

[21] As I will explain, in my view none of these challenges to the RPD's decision can succeed.

A. *The Plan to Evade Arrest*

[22] The applicant submits that it was unreasonable for the RPD to draw an adverse inference with respect to his credibility from an "inconsistency" in his testimony regarding the plan for how to avoid apprehension (if the authorities appeared, they were to pretend they were simply having a social gathering) and what he said had actually happened (when the authorities appeared, everyone tried to escape). According to the applicant, there is nothing inconsistent about things not unfolding according to plan.

[23] If this were what the RPD had held, I would have agreed that there is some force to the applicant's argument. However, while at first glance this might appear to be how the RPD reasoned, on closer examination I am satisfied that the RPD's actual concern was the applicant's failure to provide a consistent account of the plan for what to do if the authorities turned up. In my view, this concern was not unreasonable. It, in turn, reasonably supported the adverse inference that was drawn concerning the applicant's credibility.

[24] I begin by noting that the applicant did not provide a transcript of his testimony before the RPD. Instead, he provided only three short excerpts that are transcribed in an affidavit prepared by an articling student. Only one of these excerpts concerned the plan for what to do if the authorities arrived.

[25] The applicant has not presented any evidence that this was the only time he was questioned about this issue at the hearing. The articling student who provided the affidavit merely states that she listened to and transcribed "relevant portions" of the recording. While the CD of the audio recording of the RPD hearing is part of this Court's record, it is not my responsibility to listen to it to determine whether this issue was addressed elsewhere or not (see also my comments in *Zararsiz v Canada (Citizenship and Immigration)*, 2020 FC 692 at paras 61-64). Nevertheless, for the sake of argument, I am prepared to proceed on the basis most favourable to the applicant and assume that the excerpt he provided is all that was said about this issue. In my view, reading this excerpt in the context of the record as a whole, it provides a reasonable basis for the RPD to have found that the applicant gave inconsistent accounts of what should happen if the authorities arrived.

[26] In his testimony before the RPD, the applicant stated the following about the venue where he and the others practiced Falun Gong:

> [. . .] it is very safe, secure and also the books would be placed there and we wouldn't bring the books back home and also we have people for lookout if we discover anybody coming, approaching our venue we have precautions and we will be able to exit safely.

[27] The RPD then asked the following question: “They say they had an escape plan – what was the escape plan?”

[28] Although the RPD does not refer to the applicant’s narrative in his Personal Information Form, from the vantage point of the present application, it is a reasonable inference that this is what it had in mind when posing this question about an “escape plan” (a term the applicant had not used in the preceding answer). This is because the applicant stated the following in his narrative:

> Our group practice always took place in a practitioner’s house in a remote area. Lookouts were arranged and locations were changed frequently for the safety’s sake [*sic*]. Our coach also told me about the escape plans in case emergency happened.

[29] In response to the question from the RPD about the escape plan, the applicant stated the following:

> A. There’s a lookout and the house is in a very isolated place and not many people know about this house and if someone approaches the house and the lookout, the person involved in gaging [*sic*] the lookout, if this person observes and sees there is someone approaching then immediately, this person, this individual, will call the instructor over the phone; and then the instructor would bring all the materials, Falun Gong materials, away; and the practitioners, they will put the food on the table and the books and pretend that we are just having fun, you know, it’s just a façade.
>
> Q. So the escape plan was not to go anywhere, just stay there and have a party, is that what you are saying?
>
> A. Yes.

[30] The RPD pointed out that in his narrative, the applicant had stated that when the PSB came, "you all ran out of the house." The RPD then asked: "Why didn't you have a party like you just said?" The following exchange then occurred:

> A. Because at that time it was urgent and we have to listen to the instruction from the instructor.
>
> Q. Well you didn't tell me that before. What you told me was, if the lookout said someone was coming you would put the books away and have a party.
>
> A. It just depends on the instructor's decision.

[31] As set out above, the RPD drew an adverse inference concerning the applicant's credibility from an "inconsistency" in his testimony. The applicant is entirely correct that there is nothing inconsistent about having a plan but then doing things differently when the time came to act. However, I do not understand the RPD to have reasoned in this way. Rather, the RPD's concern is with the applicant's failure to give a consistent account of what they would do if the authorities turned up and not the fact that things did not go according to plan.

[32] The applicant testified that the plan was to pretend to be having a party unless the instructor gave different instructions. However, the applicant never mentioned this ruse in his narrative. Instead, he simply referred to the fact that they had "escape plans" in case of emergency. Later in his narrative, the applicant states: "Thanks to the lookout's timely call of our coach we were able to escape immediately without being caught. After my escape I immediately went to my paternal aunt's house for hiding." There was no suggestion in the narrative that things had not gone according to the escape plan the applicant mentioned earlier in the narrative or that the "escape plan" involved something other than getting away. On the

contrary, it is clear that, in using the word "escape" in his narrative, the applicant meant "to get away from the authorities." However, as the RPD pointed out, the *faux* party plan was not an "escape" plan at all; they would just stay where they were. Comparing the applicant's narrative with his testimony, in these material respects the applicant had failed to give a consistent account of what the plan was in the event that the authorities turned up at a practice. This reasonably gave rise to concerns about the credibility of the applicant's account.

[33] Read against the backdrop of the excerpt of the applicant's testimony and the contents of the applicant's narrative, the RPD's analysis of this aspect of the applicant's account is transparent, intelligible and justified. The applicant has failed to demonstrate that it is unreasonable.

B. *The Applicant's Knowledge of Falun Gong*

[34] The applicant submits that the RPD erred by characterizing an answer he gave pertaining to his first six months of Falun Gong practice as exemplifying a deficient present-day understanding of Falun Gong and then drawing an adverse inference from this.

[35] I do not agree. The RPD's reasons on this point relate to the applicant's claim that, after about six months of practice in China, Falun Gong had improved his health. The RPD found that the applicant had provided an incomplete explanation of how he had achieved the benefits of Falun Gong during this time. Without a better record of the proceeding than the applicant has provided, there is no way to determine whether this is an unreasonable mcharacterization of the applicant's evidence or not. (The applicant provided only a very brief excerpt relating to this

issue that is entirely bereft of context.) As for the applicant's specific objection to the inference he asserts that the RPD drew from this finding, contrary to the applicant's submission, there is no basis in the reasons to think that the RPD related the finding to the applicant's understanding of Falun Gong as of May 8, 2019 (the date of the hearing) as opposed to the applicant's description of his practice between November 2011 and (roughly) May 2012.

C. *The Raid on the Practice on November 18, 2012*

[36] The applicant submits that it was unreasonable for the RPD to make an adverse finding with respect to his credibility without expressly determining that the PSB raid on November 18, 2012, did not take place.

[37] I do not agree. As I understand the RPD's reasoning, concerns with respect to the applicant's credibility led it to conclude not merely that the applicant had failed to establish the basis for his claim but also that the claim was fraudulent – in other words, that the applicant had made the whole thing up. While this is a harsh conclusion, it is reasonably supported by the RPD's other findings, which in turn are reasonably supported by the record. That the RPD must have concluded that the raid did not take place is certainly implied by the finding that the claim was fraudulent, even if this was not stated expressly, but it is not necessary to posit such a finding to understand the RPD's chain of reasoning. The adverse credibility finding and the conclusion that the claim was fraudulent rested on reasonable concerns with respect to other aspects of the applicant's narrative. Crucially, the RPD did not find that the claim was fraudulent because the applicant failed to establish that the raid took place. Had it done so, this

would have been an error (simply failing to discharge the burden of proof with respect to a material fact does not entail that a claim is fraudulent). But this is not how the RPD reasoned.

D. *The Absence of an Arrest Warrant*

[38] The applicant submitted in his Memorandum of Fact and Law that it was unreasonable for the RPD to draw an adverse inference about the credibility of his narrative from the fact that, according to the applicant, the PSB only ever summoned him as a witness and never issued an arrest warrant. The applicant cited *Chen v Canada (Citizenship and Immigration)*, 2013 FC 311 at para 17 for the proposition that it is speculative to think that an arrest warrant would have issued given the continued interest in him demonstrated by the PSB.

[39] At the hearing of this application, counsel for the applicant did not press this argument, candidly acknowledging that, while *Chen* supports his position, other cases decided by this Court weigh against it, the issue could be argued either way, and it would not be determinative in any event.

[40] In my view, this Court's jurisprudence weighs heavily against the applicant's original position given how the RPD analyzed the issue here. Particularly when the tribunal acknowledges that PSB practices are not invariable and provides a reasoned basis for its conclusion, determinations that the absence of an arrest warrant implies that the PSB are not in fact pursuing the claimant tend to be upheld as not unreasonable. In this connection, see, among other cases, *Zhang v Canada (Citizenship and Immigration)*, 2011 FC 654 at paras 19-23, and *Cao v Canada (Citizenship and Immigration)*, 2015 FC 790 at para 47, cited by the respondent.

[41] In the present case, the RPD acknowledged that the practice with respect to the issuance of arrest warrants varies from one locality to another but found, in the context of multiple visits by the PSB over a number of years, "that it is reasonable to expect that an arrest warrant would have issued." There is no basis for me to interfere with this determination. As Justice Mosley recently concluded in *Liang v Canada (Citizenship and Immigration)*, 2020 FC 720 with respect to an almost identical set of circumstances, the fact that the PSB's visits to the applicant's home after delivering the summons were not followed up by a compelled appearance notice reasonably raised doubts as to whether the applicant was genuinely being pursued and therefore persecuted by the state authorities (at para 22).

E. *Importing Adverse Credibility Findings into the Sur Place Claim*

[42] The applicant acknowledges that, as a general proposition, it is not unreasonable for the RPD to bring adverse credibility findings with respect to a claimant's evidence concerning events in their home country to bear on the other parts of their evidence that support a *sur place* claim: see *Gong v Canada (Citizenship and Immigration)*, 2020 FC 163 at para 52 and the cases cited therein. He submits, however, that it was unreasonable for the RPD to reason in this way in his case without considering that the events in China occurred some seven years ago. In the applicant's submission, the circumstances of his case required a more "nuanced" approach which took into account how long ago the events that underlay the principal claim for protection occurred before applying adverse credibility findings with respect to that claim to the *sur place* claim. The failure of the RPD to follow this approach renders its decision unreasonable.

[43] I am not persuaded by this submission, essentially for three reasons.

[44] First, there is no indication that this argument was ever put to the RPD. The RPD cannot be faulted for not addressing an argument that was not raised before it. This is the converse of the principle that, generally speaking, a decision maker must meaningfully grapple with the key issues or central arguments raised by the parties: see *Vavilov* at paras 127-28.

[45] Second, the applicant points out that some of the cases relied on by the RPD in this connection (*Jiang v Canada (Citizenship and Immigration)*, 2012 FC 1067; and *Zhou v Canada (Citizenship and Immigration)*, 2015 FC 5) concern much shorter periods of time between events in the applicant's home country and the hearing before the RPD than the seven years one finds here. However, as the applicant also acknowledges, another of the cases the RPD relied on (*Li v Canada (Citizenship and Immigration)*, 2019 FC 454) involved a six year delay, which is much closer to the present case (although in fairness, it does not appear that this particular issue was raised there). In *Liang*, Justice Mosley concluded with respect to a claim that is very similar to the present one that it was not unreasonable for the RPD to import its finding that the applicant was not a genuine Falun Gong practitioner in China into its *sur place* analysis (see para 29). As in the present case, the gap between the events in China and the RPD hearing in *Liang* was almost seven years (although again, to be fair, there is no indication that this was raised as an issue in that case). Thus, the jurisprudence does not support the applicant's attempt to limit the importing of adverse credibility findings to *sur place* claims to cases where the hearing takes place relatively soon after the claimant fled their home country.

[46] Third, and most importantly, there is a fundamental flaw in the applicant's argument. If a decision maker has concerns about the *reliability* of a claimant's evidence because the events described occurred long ago, it could be unreasonable to extend that concern to the claimant's

evidence regarding more recent events without considering whether the lack of a time gap could make a difference. On the other hand, if, as was the case here, the decision maker has concerns about the *credibility* of the claimant's evidence, this is a determination with respect to the claimant's present-day testimony before the tribunal. The age of the events being described is irrelevant. Contrary to the applicant's submission, the RPD did not apply "seven year old evidence" regarding the events in China to the *sur place* claim. The events might be seven years old but the applicant's testimony concerning those events was not. It was the same age as his testimony in support of the *sur place* claim. It was therefore not unreasonable for the RPD to apply its concerns about the applicant's credibility with respect to the former aspect of the claim to the latter.

[47] In sum, the applicant has not persuaded me that it was unreasonable for the RPD to apply its adverse finding concerning his general credibility, based on its findings concerning his testimony about events in China, to his evidence concerning events in Canada that supported his *sur place* claim and to reject the *sur place* claim on this basis.

VI. CONCLUSION

[48] For these reasons, the application for judicial review is dismissed.

[49] The parties did not suggest any serious questions of general importance for certification under paragraph 74(d) of the *IRPA*. I agree that none arise.

JUDGMENT IN IMM-3909-19

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3909-19
STYLE OF CAUSE:	WEIBIN MAI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

HEARING HELD BY VIDEOCONFERENCE ON DECEMBER 9, 2020 FROM OTTAWA, ONTARIO (COURT) AND TORONTO, ONTARIO (PARTIES)

JUDGMENT AND REASONS:	NORRIS J.
DATED:	JANUARY 19, 2021

APPEARANCES:

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