Federal Court  Cour fédérale

Date: 20210429

Docket: IMM-4887-19

Citation: 2021 FC 380

Ottawa, Ontario, April 29, 2021

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

XIAOCHEN LIN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Xiaochen Lin, seeks judicial review of a decision of the Refugee Appeal Division ("RAD"), confirming the determination of the Refugee Protection Division ("RPD") that he is neither a Convention refugee nor a person in need of protection under sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*"). The RAD rejected the Applicant's claim for refugee protection because it found he was not credible.

[2] The Applicant submits the RAD breached its duty of fairness because it did not provide the Applicant with adequate notice that it would rely upon the updated National Documentation Package ("NDP"). The Applicant further submits that the RAD unreasonably relied upon the NDP to determine that the detention notice and arrest summons he submitted were not authentic.

[3] In my view, the RAD's decision was procedurally fair and reasonable. The RAD's notice to the Applicant concerning the updated NDP upheld its duty of fairness, as the RAD was not required to inform the Applicant of how it intended to rely on that evidence. Furthermore, I find no reviewable errors in the RAD's determination that the Applicant's evidence is not authentic. I therefore dismiss this application for judicial review.

II. Facts

A. *The Applicant*

[4] The Applicant is a 32-year-old male. He is a citizen of China and the father of two children.

[5] Pursuant to China's family planning policy, the Applicant's wife was sterilized and the family was forced to pay a large fine because they had a second child. In October 2015, while the Applicant was feeling helpless and depressed due to the actions of the Chinese government, a friend introduced him to Christianity. The Applicant then became a member of the Christian Shouters, an evangelical organization.

[6] The Applicant began attending a house church in November 2015. One of the members of the church, Mr. Peng Li, decided to build an attachment to the house to accommodate the church's expanding membership. The local government, however, demolished the attachment because it was built for a religious purpose.

[7] On July 28, 2016, members of the church held a protest in response to the government's demolition of the attachment. The police eventually intervened and arrested Mr. Li and two other members of the church. The Applicant escaped and went to his cousin's home to hide.

[8] On July 29, 2016, while the Applicant was in hiding, the police came to the Applicant's home and left a warrant for his arrest with the Applicant's spouse. The police returned and looked for the Applicant four days later, on August 2, 2016, and two further times throughout the following year. On August 5, 2016, the Applicant fled to Canada using the services of a smuggler and applied for refugee protection.

[9] In a decision dated March 12, 2018, the RPD held that the Applicant was not credible and denied his claim for refugee protection. The RPD noted a number of inconsistencies in the Applicant's testimony, concerning his travel to Canada, his identity documents, his children's registration under China's family planning policy, and his religious knowledge, among other things. The Applicant appealed the RPD's decision to the RAD.

B. *Decision Under Review*

[10] In a decision dated July 12, 2019, the RAD confirmed the RPD's determination that the Applicant was not credible and dismissed the Applicant's appeal. The Applicant now seeks judicial review of the RAD's decision.

[11] As a preliminary matter, the RAD noted that it must consider the most recent NDP in making its decision and has a duty to advise the Applicant that it is relying on such information (*Zhang v Canada (Citizenship and Immigration)*, 2015 FC 1031 ("*Zhang*") at para 54). Accordingly, on June 19, 2019, the RAD notified the Applicant that it would be "making reference" to Item 9.2 and Item 9.6 of the March 29, 2019 NDP for China and invited the Applicant to make submissions on that evidence. On June 26, 2019, the Applicant responded and requested that the RAD specify how it intended to rely upon Item 9.2 and Item 9.6. The RAD did not respond to the Applicant's request prior to issuing its decision.

[12] Item 9.2 of the NDP contains sample forms of police summonses used in China, including those used by the Public Security Bureau ("PSB"). Item 9.6 is similar but pertains to notices of detention and arrest.

[13] In its decision, the RAD explained that the samples in the updated NDP were used to address the existing issue of the authenticity of the detention notice for Mr. Li and the arrest summons for the Applicant, both of which were issued by the PSB. The RAD held that in

relying on the updated NDP, *Zhang* does not require it "to quote specific paragraphs or make specific references within new items when making disclosure."

[14] On the merits of the Applicant's claim, the RAD found that the Applicant was not credible for three reasons: (i) the detention notice and arrest summons submitted by the Applicant were not authentic; (ii) the Applicant was inconsistent in his testimony concerning his travel from China to Canada; and (iii) the Applicant's knowledge of Christianity was not commensurate with the duration and depth of his claimed religious activities. Having determined that the Applicant is not a genuine Christian Shouter, the RAD rejected the Applicant's claim for refugee protection.

III. Preliminary Issue: Failure to File Personal Affidavit

[15] The Respondent notes that the affidavit in support of the Applicant's record is sworn by a legal assistant of the Applicant's counsel, not the Applicant himself. According to the Respondent, the lack of a personal affidavit is a fatal flaw.

[16] Under Rule 10(2)(d) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-2, the Applicant's record for judicial review must contain "one or more supporting affidavits verifying the facts relied on by the applicant in support of the application." Under Rule 12(1), those affidavits "shall be confined to such evidence as the deponent could give if testifying as a witness before the Court."

[17] In my view, so long as the supporting affidavit is sworn by someone who has personal knowledge of the decision-making process, and the essential facts necessary for the determination of the application are contained in the certified tribunal record, the Applicant's failure to swear a personal affidavit is not fatal to an application's success (*Krah v Canada (Citizenship and Immigration)*, 2019 FC 361 at para 16, and the cases cited therein). I shall therefore give no weight to the Applicant's supporting affidavit and proceed on the merits of this application (*Ismail v Canada (Citizenship and Immigration)*, 2016 FC 446 at para 21, citing *Dhillon v Canada (Citizenship and Immigration)*, 2009 FC 614 at para 10).

IV. Issues and Standard of Review

[18] In oral submissions, counsel for the Applicant conceded that his case hinges upon whether the RAD's treatment of the updated NDP was procedurally fair and reasonable. I agree. I therefore find this application for judicial review raises the following two issues:

A. *Did the RAD breach its duty of fairness by relying on the updated NDP?*

B. *Did the RAD reasonably determine that the Applicant's PSB documents were not genuine?*

[19] The applicable standard of review for the first issue is correctness, as it concerns a question of procedural fairness (*Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35, and the cases cited therein). The Applicable standard of review for the second issue is reasonableness, as it concerns the

RAD's assessment of credibility (*Adelani v Canada (Citizenship and Immigration)*, 2021 FC 23 at paras 13-15, citing *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*")).

[20] Correctness is a non-deferential standard of review. The reviewing court must undertake its own analysis of the issue and choose either to uphold the decision-maker's determination or to substitute its own view with the correct answer (*Vavilov* at para 54, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50). The central question for issues of procedural fairness is whether the procedure was fair having regard to all of the circumstances (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54, citing *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 21-28).

[21] In contrast, reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). 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). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[22] Where a decision provides reasons, those reasons are the starting point for review (*Vavilov* at para 84). Reasons for a decision need not be perfect; as long as the reasons allow the

reviewing court to understand why the decision-maker made its decision and permit it to determine whether the conclusion falls within the range of acceptable outcomes, the decision will normally be reasonable (*Beddows v Canada (Attorney General)*, 2020 FCA 166 at para 25, citing *Vavilov* at para 91). Conversely, where a decision-maker's rationale for an essential element of the decision is not addressed in the reasons and cannot be inferred from the record, the decision will normally be unreasonable (*Vavilov* at para 98).

[23] For a decision to be unreasonable, the applicant must establish that the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125). Findings of credibility are accordingly provided "significant deference" upon review (*Azenabor v Canada (Citizenship and Immigration)*, 2020 FC 1160 at para 6, citing *N'kuly v Canada (Citizenship and Immigration)*, 2016 FC 1121 at para 21).

V. Analysis

A. *Did the RAD breach its duty of fairness by relying on the updated NDP?*

[24] As previously discussed at paragraph 11 of this judgment, the RAD notified the Applicant prior to rendering its decision that it would be "making reference" to Item 9.2 and Item 9.6 of the updated NDP and invited the Applicant to make submissions on that evidence.

[25] The Applicant submits that the RAD breached its duty of fairness by failing to specify how the updated NDP items were relevant to the Applicant's case or how the RAD intended to rely upon them. In order to know the case to be met, the Applicant asserts that *Zhang* requires the RAD to disclose such information if it is not self-evident.

[26] The jurisprudence is clear that the RAD only has a duty to disclose an updated NDP if the information in the NDP arose "after an applicant has perfected their appeal and made their submissions and that information is different and shows a change in the general country conditions" (*Zhang* at para 54; see also *Marino Ospina v Canada (Citizenship and Immigration)*, 2019 FC 930 at para 24, citing *Chen v Canada (Minister of Citizenship and Immigration)*, [2002] 4 FC 193, [2002] FCJ No 341 (FCTD) ("*Chen*") at para 33). The logic behind this principle is that claimants are deemed to have knowledge of publicly available documents describing general country conditions, such as the NDP (*Chen* at para 44). It is only when that information changes and the claimant's opportunity to make submissions has passed that the duty of fairness requires a decision-maker to disclose the new information it intends to rely upon and provide the claimant with an opportunity to respond, as the claimant can no longer be deemed to know the case to be met.

[27] In the case at hand, the Applicant perfected his appeal to the RAD on April 24, 2018, before the NDP relied upon by the RAD was issued on March 29, 2019. The RAD therefore correctly found it had a duty to disclose to the Applicant the items in the updated NDP that it intended to rely upon. The question is whether the RAD's June 19, 2019 letter fulfilled that obligation. In my view, it did.

[28] None of the authorities cited in *Zhang* stand for the principle that the duty of fairness requires a decision-maker to disclose how or what segments of the NDP it intends to rely upon (*Zhang* at paras 48-54). Rather, a decision-maker breaches its duty of fairness by relying on documentary evidence that a claimant is not aware of, nor deemed to be aware of (*Chen* at paras 33-34). The RPD, for example, is not required to inform a claimant how it intends to use the NDP but only to disclose a copy of the NDP that it will rely upon (see *Refugee Protection Division Rules*, SOR/2012-256, Rule 33). The Applicant has not persuaded me that the RAD is under any greater of an obligation. I therefore find that the RAD upheld its duty of fairness by informing the Applicant that it would be "making reference" to Item 9.2 and Item 9.6 of the updated NDP and providing the Applicant with an opportunity to make submissions.

B. *Did the RAD reasonably determine that the Applicant's PSB documents were not genuine?*

[29] The RAD found that the PSB documents submitted by the Applicant did not match the samples of detention notices and arrest summonses in Item 9.2 and Item 9.6 of the NDP. In coming to this conclusion, the RAD noted Item 9.10 of the NDP, which states that the form of PSB summonses "are supposed to be used throughout the country and that 'regional variations are not meant to exist.'" As the Applicant's PSB documents did not match the samples in the NDP and regional variations in PSB documents are unlikely, the RAD determined that the Applicant's PSB documents were not genuine.

[30] According to the Applicant, it was unreasonable for the RAD to rely on the samples contained in the updated NDP because there is a possibility, albeit slight, that regional variations of PSB documents exist.

[31] As noted by the Respondent, instructive of this issue is *Zhuang v Canada (Citizenship and Immigration)*, 2019 FC 263 ("*Zhuang*") at para 17, wherein my colleague Justice Strickland stated:

> Inconsistencies on the face of a document provided by an applicant, identified by comparison to sample documents contained in the NDP, may provide grounds, in whole or in part, to conclude that a submitted document is not genuine and the RAD is owed deference in its assessment of such documents.
>
> [citations omitted]

[32] Considering the principle in *Zhuang*, I find it was reasonable for the RAD to conclude that the Applicant's PSB documents are not authentic by relying on the samples in Item 9.2 and Item 9.6 of the NDP. The structure of the Applicant's documents do not match any of the samples in the NDP, nor has the Applicant argued otherwise. Absent a reviewable error identified by the Applicant, this Court must refrain from interfering with the RAD's determination (*Vavilov* at para 125).

[33] I am not persuaded by the Applicant's argument that the RAD's decision is unreasonable in light of its finding that variations from the samples contained in Item 9.2 and Item 9.6 are unlikely. The applicable standard of proof for the RAD's decision is a balance of probabilities; therefore, the fact that a reasonable doubt exists as to whether the Applicant's PSB documents

are genuine but deviate from the norm does not render the RAD's decision unreasonable. Furthermore, as noted by the Respondent, this Court has previously found that it was reasonable for the RAD to use Item 9.10 to support its reliance on the samples of PSB documents in Item 9.2 and Item 9.6 (*He v Canada (Citizenship and Immigration)*, 2018 FC 627 at paras 24-25).

VI. Conclusion

[34] I find the RAD's decision was procedurally fair and reasonable. I therefore dismiss this application for judicial review. The parties have not identified a question of general importance for certification and I agree that none arises.

JUDGMENT IN IMM-4887-19

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. There is no question to certify.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4887-19
STYLE OF CAUSE:	XIAOCHEN LIN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE BETWEEN OTTAWA AND TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 24, 2021
JUDGMENT AND REASONS:	AHMED J.
DATED:	APRIL 29, 2021

APPEARANCES:

Shelley Levine	FOR THE APPLICANT
Matthew Siddall	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT