

Federal Court



Cour fédérale

Date: 20231020

Docket: IMM-13175-22

Citation: 2023 FC 1397

Ottawa, Ontario, October 20, 2023

PRESENT: Madam Justice McDonald

BETWEEN:

DEYU OU

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] On this judicial review application the Applicant, Deyu Ou [Ms. Ou], challenges the decision of the Immigration Division [ID] dated December 5, 2022 [Decision] finding her inadmissible to Canada pursuant to paragraph 37(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The ID found there were reasonable grounds to believe the Applicant was a member of an organization that engaged in a pattern of fraud that would constitute fraud over \$5000 in Canada.

[2] For the reasons that follow, this judicial review application is dismissed as the Decision of the ID is reasonable and the Applicant has not established any basis for this Court to intervene.

[3] The Applicant's request for an Anonymity Order is also dismissed.

I. Background

[4] The Applicant is a 49-year-old citizen of China, and Antigua and Barbuda. She claimed refugee protection in Canada on the grounds of fearing persecution from the government of the People's Republic of China (PRC) and related individuals who act at the behest of the PRC government.

[5] In China, the Applicant was a financial officer at Xinjiang Fanya Non-ferrous Metal Investment Management Company [Company]. Criminal proceedings in China found that a group of senior managers of the Company operated a fraudulent investment scheme called "Fanya Metal Exchange" [Fanya Exchange] that raised 5.1 billion yuan (approximately \$944 million Canadian dollars) from thousands of investors.

[6] In response to the Applicant's claim for refugee protection, the Minister of Public Safety and Emergency Preparedness [Minister] alleged the Applicant was inadmissible to Canada for organized criminality pursuant to paragraphs 37(1)(a) and 37(1)(b) of the IRPA.

A. Decision Under Review

[7] The ID Decision details the grounds for the allegation of organized criminality based upon the Applicant's involvement in the Company in China. In 2018, several employees of the Company, including the Applicant's husband, were convicted in China of "raising funds by means of fraud" in relation to the Ponzi scheme. The Minister took the position that the Applicant was in senior management at the Company and, hence, her role amounted to "membership" in a group that intended to plan and organize a pattern of fraudulent behaviour for financial benefit.

[8] The evidence before the ID included the Criminal Judgment from the Tianshan District People's Court of Urumqi [Criminal Judgment] in China.

[9] The ID also relied upon the Minister's witness Christine Duhamie, a financial crime expert who prepared a detailed report on Fanya Exchange [Duhamie Report].

[10] The Duhamie Report concluded that the Company was engaged in organized financial fraud and that the Applicant was operating many companies in China associated with the Company. Corporate records showed that the Applicant was a branch operator of the Company and the co-owner and co-manager of two companies that worked with the Company. The Duhamie report concluded:

In the absence of other evidence to the contrary, it is reasonable to conclude that the kingpins of the organized fraud were those officers and supervisors who were in charge of the Fanya-related entities and made executive decisions, namely for the corporate

entities in this Report, Jiuliang Shan, Di Wen, Xukui Han and Deyu Ou.

[11] In considering if there was organized criminality, the ID referenced the decision in *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58. In considering subsection 467.1(1) of the *Criminal Code*, RSC 1985, c C-46 to assess organized criminality under IRPA, the ID concluded the Minister provided credible and trustworthy evidence to establish reasonable grounds to believe the Company is a criminal organization.

[12] The ID found the Criminal Judgment from the court in China to be credible, trustworthy, and compelling evidence.

[13] The ID noted that the Criminal Judgment refers to the Applicant, alleging she held an integral role in the Ponzi scheme. The Criminal Judgment identifies the Applicant as the financial officer for the Company who was responsible for approving and signing for capital expenditures. Her husband was identified as the “boss” of the Company. The ID found the Criminal Judgment weighed in favour of the Company being found to be a criminal organization.

[14] The ID concluded the Company had several indicia of a criminal organization, including a leadership group that consisted of more than three individuals, a distinct corporate hierarchy, an intricate scheme that could not have survived over four years without tremendous organization and communication, a common goal of financial benefit through investor fraud, and activity considered criminal in China.

[15] The ID was satisfied there were reasonable grounds to believe the Applicant was a member of the Company, a criminal organization for the purposes of paragraph 37(1)(a) of IRPA. The ID concluded there was credible and trustworthy evidence to establish the Applicant had a long-standing commitment to the Company, made consistent and meaningful contributions to the fraud, and that she likely had knowledge that the fraudulent activity was criminal.

[16] The ID found the Applicant's testimony denying meaningful affiliation with the Company was not credible. The testimony of the individuals subject to the Criminal Judgment consistently identified the Applicant as playing a significant and active role in the Company. The ID was also satisfied that the corporate documents for the Company, which listed the Applicant as a high-level executive, reflected the actual positions she held, as opposed to being meaningless titles.

[17] The ID noted that several witnesses had described the Applicant's significant involvement in the Company and found it unlikely the witnesses colluded to falsely implicate the Applicant. The Applicant's husband identified her as "the financial officer," another defendant in the Criminal Judgment stated she was the "legal person" and a third defendant identified her as being "in charge of finance." Five witnesses testified before the Chinese court about the Applicant's meaningful role in the Company. The ID concluded the financial and legal positions the Applicant was identified as occupying were critical aspects of the Ponzi scheme.

[18] The Criminal Judgment drew several conclusions about the Applicant's prominent role in the Ponzi scheme. The Chinese court concluded the Applicant, along with her husband, recruited

three of the defendants into important positions with the Company and that the Applicant had directed staff to illegally raise funds. The ID found these conclusions compelling, considering the Applicant was not a defendant in the Chinese criminal proceedings.

[19] The Chinese court believed the Applicant was an integral accomplice to the crime and issued an arrest warrant for her. Interpol also issued a Red Notice for her.

[20] The ID also noted the Duhamie Report included the results from several corporate databases listing the Applicant as directly tied to numerous Company-related entities, and as occupying the role of legal representative or registered supervisor for many of those subsidiary companies.

[21] The ID considered the Applicant's submissions that she was merely a figurehead and that her husband put her name on corporate documents for legal convenience. The ID noted that this was contrary to the testimony of employees who identified her as having an important role in the Company. As noted by the ID, "All the evidence suggesting that Ms. Ou played a meaningful role within Fanya came from sources independent of this admissibility hearing and at a time that preceded the Minister's decision to report her for organized criminality."

[22] The Applicant asserted that the Chinese court documents are not reliable, as the Chinese courts are not independent from the Communist Party of China [Communist Party]. She claimed that the Communist Party endorsed the Company, and when people started to get upset about the endorsement, the company was unable to sustain the Ponzi scheme and the Communist Party

targeted the Company employees instead of accepting responsibility. She asserts the result was a “charade”—instead of a fair trial—by the Chinese court wherein the Company employees admitted to everything the Communist Party wanted them to say.

[23] The ID acknowledged that evidence from Chinese criminal trials cannot always be taken at face value and considered the 2021 Immigration and Refugee Board’s National Documentation Package on China [NDP] noting that the Chinese system is below the standard Western society deems appropriate regarding trial and procedural fairness.

[24] The Minister provided a report from an expert on Chinese law, Vincent Yang [Yang Report]. The Yang Report discusses the deficiencies in the Chinese legal system as noted in the NDP but notes that improvements have been made within the system to combat its reputation for being corrupt.

[25] The ID accepted the NDP package as credible but found the Yang Report presented a comprehensive and balanced view of the Chinese legal system. As such, the ID afforded more weight to the Yang Report, as it was based on firsthand knowledge of the system that Mr. Yang worked in, studied, and advised on for 30 years. The ID acknowledged the possibility of corruption in the Chinese legal system but noted it could not be assumed that every case is a charade. The ID noted that the Applicant had no evidence to support her claim that the criminal proceedings were a sham.

[26] The ID was satisfied there were reasonable grounds to believe the Applicant was a member of a criminal organization for the purposes of the inadmissibility proceeding. The ID concluded the Applicant's participation was not minimal or marginal but that she was part of the inner circle, occupying legal, executive, and supervisory roles. The Applicant was known to the employees who were also subject to criminal charges. The ID concluded "[t]he likelihood of Ms. Ou being so committed to Fanya but lacking knowledge of its fraudulent and criminal activity [is] low."

[27] The Applicant urged the ID to consider the *Chairperson's Guideline 4: Gender Considerations in Proceedings Before the Immigration and Refugee Board* [Gender Guidelines], as she was a refugee claimant. Her position was that she only knew about the Company and the Ponzi scheme from newspapers, and that when she asked her husband about work, he would not provide her with any details. However, the ID found the Gender Guidelines did not apply. Based upon the evidence, the ID had already concluded that the Applicant actively participated in the Company's business.

[28] The ID concluded that the Applicant was inadmissible pursuant to paragraph 37(1)(a) of IRPA and issued a deportation order.

II. Issues

[29] The Applicant raises a number of issues with the ID's Decision which I will address as follows:

- A. Preliminary issue: should an anonymity order be issued?
- B. Are the ID findings reasonable on the following issues:
 - (1) Credibility
 - (2) Did the ID engage in speculation?
 - (3) Did the ID reverse the onus?
 - (4) Did the ID consider the Chairperson's Gender Guidelines?
- C. Does a certified question arise?

III. Standard of Review

[30] The applicable standard of review on the issues raised is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65).

IV. Analysis

- A. Preliminary Issue: should an anonymity order be issued?

[31] The Applicant seeks an anonymity order, pursuant to section 8.1 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 [Rules].

[32] Her Application for Leave and for Judicial Review was filed under a pseudonym, without first obtaining a Court order allowing her to do so.

[33] The Applicant seeks an Anonymity Order under rule 8.1 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 to have her name redacted

on the style of cause in her judicial review application to make her identity anonymous. She claims to fear persecution from the Chinese government, specifically the Communist Party, and reprisals while in Canada. She does not seek a sealing order.

[34] Court proceedings are presumptively open to the public (*Sherman Estate v Donovan*, 2021 SCC 25 at paras 37-38 [*Sherman*]). Accordingly, the Applicant must establish that the Anonymity Order is necessary and proportionate to prevent a serious risk.

[35] The risk raised by the Applicant is fear of being identified by Chinese authorities. However, the Urumqi Public Security Bureau in China has issued an Interpol Red Notice, which is an arrest warrant for the Applicant. At this stage, it is difficult to conceive how having the Applicant identified by name on these Court proceedings puts her at a heightened risk in China. Further, the facts giving rise to the ID Decision were already on the public record and no sealing order has been requested.

[36] In the circumstances, I am not satisfied that the Applicant has provided any grounds upon which to justify an Anonymity Order. In other words, she has not overcome the default that court proceedings should be open to the public.

[37] There are no grounds to grant an Anonymity Order and the style of cause is amended herewith to identify the Applicant by name.

B. Are the ID findings reasonable?

[38] The Applicant raises a number of issues with the ID's Decision that I will address below.

(1) Credibility

[39] The Applicant argues that the ID finding that she was not credible is unreasonable. She argues there was no evidence to contradict her testimony that she was only involved with the Company "on paper" and did not know about the Ponzi scheme. She asserts that the evidence did not demonstrate she took part in the operation of the Company, only that she held certain positions on paper. She argues that the evidence of her "positions and titles" does not demonstrate that she held "actual positions as opposed to meaningless titles." She submits the testimony from the Company's employees similarly refers to titles and positions, as opposed to actual activities she undertook for the Company.

[40] The Applicant argues that the evidence only shows that she signed papers to set up her husband's Company but does not show that she participated in the running of the Company. The Applicant submits the ID did not refer to any evidence that proved she was an active participant but instead infers such activity from a list of titles and positions. In essence, she argues that evidence of titles is not evidence of activities.

[41] The evidence considered by the ID included the following: the Criminal Judgment; the Duhamie Report; corporate documents for the Company; investigative news reports; and statements from five witnesses. There was evidence the Applicant was involved in capital

expenditure decisions. The Applicant did not hold one or two titles but rather, she held multiple titles with several different companies and factions associated with the Company.

[42] Further, the ID reviewed a variety of evidentiary sources demonstrating the Applicant's breadth and depth of the various roles, titles, and ties to the Company. Based on this review, the ID concluded that the Applicant was actively involved in the Company and "made consistent and meaningful contributions to the fraud."

[43] In my view, there was sufficient evidence for the ID to conclude there were reasonable grounds to believe the Applicant was a member of the Company, and to accept that evidence over the Applicant's claim of non-involvement.

(2) Did the ID engage in speculation?

[44] In a related argument regarding her involvement in the company, the Applicant argues the ID engaged in speculation in finding the Applicant was "doing something" in the Company based on the employees' testimonies that she held certain titles. She argues that a title does not amount to active involvement. She also challenges the finding of the ID at paragraph 26 of its Decision, that "[h]ad the various witnesses not testified about Ms. Ou being important within Fanya, the notion of Ms. Ou's husband inserting her name on documents for legal convenience may have been believable." She argues the testimony demonstrated she held important positions but not that she did anything in the Company.

[45] Similarly, she asserts there is no evidence for the ID to find that “the [Chinese] court would have issued a warrant for Ms. Ou’s arrest if they had reason to believe that her involvement in Fanya was limited to signing papers.”

[46] Despite the Applicant’s assertions of a lack of evidence of her role, the evidence relied upon by the ID was that of the other parties involved in the companies as follows:

- 1) The applicant’s husband, who was in charge of Xingjian [sic] Fanya Company, stated that “Deyu Ou was the financial officer responsible for the company’s finance, approving and signing on capital expenditure”, and that his wife was “aware of the account” where large sums of money from the scam were paid;
- 2) Bin Ma, a Deputy General Manager of Xinjiang Fanya Company, identified Deyu Ou as “the legal person” for the company;
- 3) Qinke Wang, also a Deputy General Manager of Xinjiang Fanya Company, described how Deyu Ou “was put in charge of Finance”;
- 4) Jiangyan Wang, an employee working in an advertising branch of the Fanya Exchange known as Bona, described Deyu Ou as the “boss” of Bona, and that she had “advised Wang to dispose of some of the company’s furniture and four vehicles”;
- 5) Yue Shi, a Fanya Exchange employee responsible for introducing and assisting bank employees with the purchase of Fanya’s fraudulent financial products, described having witnessed Deyu Ou instruct another employee on what to do with a property purchase agreement and receipt; and
- 6) Wenbi Tian, the applicant’s mother, indicated that Deyu Ou registered a company using Tian’s identification, in which Tian was made “the...legal person”, but that Tian did not take part in running the company.

[Footnotes omitted.]

[47] In light of this evidence, it was reasonable for the ID to consider these statements were sufficient to provide reasonable grounds to believe the Applicant played an active role in the Company.

[48] The Applicant argues that her titles in the Company do not amount to active involvement in the Company. She relies upon a number of cases including *Onukwufor v Canada (Citizenship and Immigration)*, 2020 FC 442, to argue that the inference made by the ID is unreasonable. However, I do not agree that the ID engaged in speculation on this issue. Rather, the ID referred to specific *activities* completed by the Applicant that the witnesses testified to, such as her husband's testimony that her role as financial officer included "approving and signing on capital expenditure."

[49] Further, the Duhamie Report notes that "Deyu Ou and Xuhui Han have both stated, although Deyu Ou not consistently, that they were involved in some companies that were engaged in some aspects of the Fanya Exchange business." The Duhamie Report relied, at least in part, on the Applicant's own statements of her involvement with the Company.

[50] In the circumstances, the ID did not speculate or make an inference on the Applicant's involvement in the companies but rather relied upon the evidence from witnesses and information contained in the Duhamie Report. Based upon this, the ID concluded that there were reasonable grounds to believe the Applicant was active in the Company.

[51] On a reasonableness standard of review, this finding is justifiable and grounded in the evidence considered by the ID.

(3) Did the ID reverse the onus?

[52] The Applicant argues that the ID reversed the onus on her by making a credibility assessment against her, without also assessing the credibility of the information from the Chinese court the prosecution, and the media reports. She argues that she was required to prove her innocence and highlights paragraph 34 of the Decision, where the ID wrote:

While the general possibility of corruption with the Chinese legal system at large may exist, one cannot assume that every case that goes before a court in China is a charade or that every admission that an accused makes is done under duress.

[53] The challenge for the Applicant is that she bore the onus to satisfy the ID of the merits of her defence. However the Applicant did not provide any evidentiary basis or tangible proof that the Criminal Judgment was untrustworthy or was a “charade.”

[54] The Minister had the onus of establishing the elements of inadmissibility under paragraph 37(1)(a) of IRPA. The ID found the Criminal Judgment to be “credible, compelling, and trustworthy.”

[55] The ID assessed the objective evidence in the NDP as well as the Yang Report and accepted the general possibility of corruption in the Chinese legal system but was not prepared to accept that all Chinese court cases are a sham.

[56] The ID made an express determination of the credibility of the Chinese Criminal Judgment and explained why it reached that conclusion. The Decision states at paragraph 11:

[11] The Tianshan District People's Court judgement is credible, trustworthy, and compelling; the existence of the Fanya scandal and convictions against Ms. Ou's husband and others were not disputed. The details in the court's ruling mirror the information contained in the various news articles from a variety of domestic and international media outlets that followed the case since its inception. The ruling provides details of the offence, the defined roles of the perpetrators and the collaboration that took place in carrying out this pattern of financial fraud. Much of the information in the judgement is a summary of the depositions and testimony of the individuals who were convicted, amongst other witnesses. The judgement regularly refers to Ms. Ou, alleging that she had an integral role in the scheme, working alongside her husband Xukui Han and other members of the Fanya executive.

[Emphasis added.]

[57] The ID considered the Applicant's arguments on the reliability of the Chinese court system, and did not reverse the onus or put the onus on the Applicant. Rather the ID expressly considered the reliability, trustworthiness and credibility of the evidence relied upon. In so doing, the ID acted reasonably.

(4) Did the ID consider the Chairperson's Gender Guidelines?

[58] The Applicant argues that the ID did not properly apply the Gender Guidelines to her circumstances. The Applicant submits the ID's reasoning is that because of her positions in the businesses of her husband, the Applicant could get the information directly from these businesses and did not need to rely on her husband or the media. The Applicant argues that the ID's reasoning is not reasonable and is unrealistic.

[59] The Gender Guidelines provide that “[w]omen from certain cultures where men do not share details of their political, military or even social activities with their spouses, daughters or mothers may find themselves in a difficult situation when questioned about the experiences of their male relatives.”

[60] Despite raising the Gender Guidelines, the Applicant provided no specific evidence or incidents of how her husband treated her so as to support her position that the Gender Guidelines apply to her circumstances. Even if the Gender Guidelines applied, it would not vitiate the ID’s finding of the Applicant’s credibility notwithstanding the status of her relationship with her husband.

[61] It was reasonable for the ID to find the Gender Guidelines did not apply in this case given the evidence.

C. Does a certified question arise?

[62] The morning of the hearing of this judicial review, Applicant’s counsel advised that he was proposing a certified question. Although this approach is not in keeping with the Court’s *Practice Guidelines for Citizenship, Immigration, and Refugee Law Proceedings* dated November 5, 2018, I will nonetheless consider the question posed for certification.

[63] The Applicant requests that the following question be certified:

Where inadmissibility is sought based on a Chinese court judgment which, because of the importance and complexity of the Chinese case, may have been determined by a judicial committee, must the

Government of Canada obtain assurances from the Government of China that there was no such judicial committee determination, failing which the Government may not rely on that judgement in inadmissibility proceedings? [*sic*]

[64] The question posed for certification must accord with the facts of the case and should be stated in a manner that recognizes the proper standard of review by linking the certified question to the decision under review (*Canada (Citizenship and Immigration) v Galindo Camayo*, 2022 FCA 50 at paras 34, 35, 44 and 45 [*Camayo*]).

[65] The question should be framed to address a point that arises in the decision itself and poses a general question of importance, rather than an abstract question or one that focuses on the unique facts of the case (*Camayo* at paras 40 and 45).

[66] In *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22, Justice Laskin explains the test as follows at paragraph 46:

This means that the question must have been dealt with by the Federal Court and must arise from the case itself rather than merely from the way in which the Federal Court disposed of the application. An issue that need not be decided cannot ground a properly certified question (*Lai v. Canada (Public Safety and Emergency Preparedness)*, 2015 FCA 21, 29 Imm. L.R. (4th) 211, at paragraph 10). Nor will a question that is in the nature of a reference or whose answer turns on the unique facts of the case be properly certified (*Mudrak v. Canada (Citizenship and Immigration)*, 2016 FCA 178, 485 N.R. 186, at paragraphs 15, 35).

[67] Here the question asks “if the Chinese case, may have been determined by a judicial committee”. The issue of a judicial committee is not addressed by the ID in its decision and no submissions were made by the Applicant to the ID on the potential involvement of a judicial

committee. I therefore do not see this as an issue arising from the facts of this case. I do accept that the reliability of the materials relied upon by the ID arising from the Chinese court proceedings were in issue. That is addressed above. However the suggestion which is embedded in the proposed certified question that the Chinese court decision was reached by a judicial committee was not raised with the ID.

[68] An appeal on this question would serve to only provide an opportunity for the Applicant to re-argue her position that the ID was unreasonable in its consideration of the facts of her case. The question as posed is hypothetical as it asks if her case “may have been determined by a judicial committee”. Further, this was not an issue raised with the ID directly. Accordingly, this does not support a basis upon which to certify a question for the Federal Court of Appeal.

[69] In conclusion, the Applicant’s proposed question will not be certified.

V. Conclusion

[70] The request for an Anonymity Order is dismissed. The style of cause shall be amended to name the Applicant with immediate effect.

[71] For the above reasons, this judicial review application is dismissed as the Decision of the ID is reasonable.

[72] I also decline to certify the question posed by the Applicant.

JUDGMENT IN IMM-13175-22

THIS COURT'S JUDGMENT is that:

1. The request for an Anonymity Order is dismissed. The style of cause shall be amended to name the Applicant with immediate effect.
2. This judicial review application is dismissed.
3. No question is certified.

“Ann Marie McDonald”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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