Federal Court  Cour fédérale

Date: 20211213

Docket: IMM-5544-19

Citation: 2021 FC 1405

Ottawa, Ontario, December 13, 2021

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

TONG JIANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Ms. Tong Jiang, is a Chinese citizen who reports that she began to practice Falun Gong for health reasons in March 2011. The Public Security Bureau [PSB] raided her Falun Gong group in March 2012. The Applicant escaped through a back door, went into hiding and, with the assistance of a smuggler, arrived in Canada in August 2012.

[2] The Refugee Protection Division [RPD] found the Applicant's general credibility to be in doubt, citing discrepancies with supporting documentation, and found she would not have been able to exit China using her own passport as she claimed. The RPD further found that despite demonstrating a basic knowledge of Falun Gong, the Applicant had adduced insufficient evidence to establish she was a Falun Gong practitioner in China. The RPD also gave little weight to the documentary evidence submitted in support of the *sur place* aspect of her claim in concluding the Applicant was not a Convention refugee nor a person in need of protection.

[3] The Applicant applies for judicial review of the RPD's July 31, 2019 decision pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[4] For the reasons that follow, the Application is dismissed.

II. Issues and Standard of Review

[5] In written submissions, the Applicant raised two primary issues: (1) the RPD violated the principles of procedural fairness by failing to bring credibility concerns to her attention; and (2) the RPD unreasonably assessed the evidence relating to her claim and her ability to exit China. In the course of oral submissions, counsel for the Applicant advised the procedural fairness argument would not be pursued, leaving a single issue: the reasonableness of the RPD's decision, including its treatment of the evidence.

[6] The RPD's findings, including credibility determinations and the weight given to evidence, are reviewable on a reasonableness standard (*Canada (Minister of Citizenship and*

Immigration) v Vavilov, 2019 SCC 65 at para 10 [*Vavilov*]). A decision will be reasonable if it "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" (*Vavilov* at para 85). The party challenging a decision has the burden of demonstrating the decision is unreasonable. A reviewing court must be satisfied that any shortcomings or flaws are sufficiently central or significant to render the decision unreasonable (*Vavilov* at para 100).

III. Preliminary Matter – Improper Affidavit

[7] The Applicant has not filed an affidavit in support of the Application. The Application is supported by an affidavit sworn by Yuanyuan Xu [Xu Affidavit], a law clerk employed by the Applicant's former counsel.

[8] The Respondent submits the absence of a personal affidavit sworn by the Applicant may be sufficient to reject the Application (citing former paragraph 10(2)(d) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, amended June 17, 2021 to become subparagraph 10(2)(a)(v)). Relying on *Muntean v Canada (Minister of Citizenship and Immigration)*, [1995] FCJ No 1449, 103 FTR 12 at paragraph 11, the Respondent argues an affidavit is a primary source of information in immigration matters and it is important that it be sworn by an individual with personal knowledge of the decision making process, usually the applicant.

[9] In the alternative, the Respondent takes the position that, in the absence of evidence based on personal knowledge, any error asserted by an applicant must appear on the face of the record (*Ling v Canada (Minister of Citizenship and Immigration),* 2003 FC 1198 at para 14).

[10] The Xu Affidavit attaches as exhibits various documents relevant to the Application. These documents are also found in the Certified Tribunal Record [CTR]. Paragraph 5 of the Affidavit sets out a summary of "counsel's transcription of the Applicant's hearing" before the RPD. Neither the transcript relied upon to generate this summary nor an audio recording of the hearing before the RPD are provided in the Applicant's Record or in the CTR.

[11] The failure of an applicant to include a supporting affidavit based on personal knowledge will not automatically result in the dismissal of an application for judicial review. However, evidence provided in an affidavit based on information and belief will normally be afforded little weight (*Huang v Canada (Minister of Citizenship and Immigration),* [1998] F.C.J. No. 788 (F.C.T.D.).

[12] Paragraph 5 of the Xu Affidavit summarizes and interprets what occurred in the course of the hearing before the RPD. This information is not within the personal knowledge of the affiant nor are the source documents relied upon in preparing the summary found in the record. In the circumstances, I attribute little weight to paragraph 5 of the Xu Affidavit. However, the record coupled with the Xu Affidavit is sufficient to allow for a review of the identified issues. The absence of a personal affidavit is not fatal in this circumstance.

IV. Analysis

A. *The RPD's assessment of the evidence was not unreasonable*

[13] The Applicant reported that after the raid on her Falun Gong group and the arrest of five of her co-practitioners, the PSB went to her home numerous times and left summonses with her parents on two separate occasions. The RPD described the documents as criminal summonses and noted they were identical with the exception of their dates.

[14] The RPD found the summonses to be likely fraudulent and gave them little weight. The RPD found it was reasonable to expect the PSB to initially issue a coercive summons rather than a criminal summons. It based this finding on evidence in the National Documentation Package [NDP] and the Applicant's allegation that five of her co-practitioners had been arrested. The RPD further found that even if the PSB had initially issued a criminal summons, the second summons would certainly have been a coercive summons and not simply a repetition of the first criminal summons. This finding is consistent with a standard PSB criminal summons, which warns a summonsed person "failure to appear without cause will result in a forcible summons being issued." These findings are congruent with and supported by the documentary evidence and they were reasonably available to the RPD.

[15] The RPD also took issue with the form of the criminal summonses presented noting, after comparing the summonses with samples in the NDP, that the part of the summonses reportedly left with the Applicant's parents was the portion of the document that should have been retained by the PSB.

[16] The Applicant submits the RPD unreasonably concluded the two summonses were fraudulent. The Applicant relies on a sentence in the NDP stating PSB procedures for issuing summonses are not always followed and the PSB sometimes issue repeat summonses. The Applicant further argues it was unreasonable for the RPD to compare summonses issued in 2012 to samples in the NDP from 2006 on the basis that the samples are dated and it is possible the forms used may have changed. I am not persuaded by these arguments.

[17] As stated above, the RPD's findings relating to the type of summons issued are reasonable. The RPD was aware of the evidence in the record indicating differences in PSB procedures; the RPD expressly acknowledged PSB practices relating to the issuance of arrest warrants vary between localities. The RPD's failure to explicitly address a single sentence in the NDP indicating procedures are not always followed is not sufficient on these facts to impugn the reasonableness of the decision. In reaching its conclusion, the RPD did not limit its consideration to inconsistencies with the form of the summonses or errors on the face of the documents. The RPD also assessed the evidence within the broader context of the Applicant's narrative of a PSB raid where other group members had been arrested and multiple PSB visits to her parents' home while the Applicant was in hiding and after she had departed China.

[18] In considering the absence of an arrest warrant, the RPD acknowledged the documentary evidence disclosed varied PSB practice in issuing arrest warrants. However, the RPD found it was reasonable to expect an arrest warrant would have issued in the context of multiple PSB visits and cited prior jurisprudence from this Court guiding it on this issue. The Applicant has not taken issue with the RPD's interpretation or application of the jurisprudence and I am satisfied

the RPD's consideration of the issue was reasonable (*Cao v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1398 at para 35; *Zhang v Canada (Minister of Citizenship and Immigration)*, 2011 FC 654 at para 22; *Lin v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1200 at para 30).

[19] I am similarly not convinced the RPD's comparison of the 2012 summons to a 2006 sample contained in the current NDP renders the decision unreasonable simply on the basis that there is a possibility the form of summons may have changed in the intervening period. I accept a decision maker must be alert to the possibility that, over time, the form of documents may change. However, in the absence of some evidence indicating a revision or demonstrating a sample may be unreliable for some other reason, it is not unreasonable for a decision maker to rely on a sample form contained in the current NDP. Mere speculation that a change may have occurred cannot be a basis for intervention on judicial review.

[20] The Applicant cites *Lin v Canada (Citizenship and Immigration)*, 2012 FC 288 [*Lin*] and *Chen v Canada (Citizenship and Immigration)*, 2013 FC 311 [*Chen*] to support the view that the mere passage of time is sufficient to render reliance on sample documents unreasonable. To the extent this may be so, I respectfully disagree. However, I do not believe either decision stands for this proposition.

[21] For example, the Court's concern in *Chen* was not limited to simply the passage of time. The Court also noted the document in issue, a notice of summons, was compared to an arrest summons, a distinction the Court held the decision maker was required to acknowledge (*Chen* at

paras 16 and 18). In *Lin*, the Court's treatment of the sample forms arose in the context of a prior finding that the decision maker had unreasonably assessed the applicant's identity documents and this in turn had unreasonably tainted the assessment of the applicant's claim, including the assessment of the applicant's other documents.

[22] The Applicant also submits the RPD unreasonably found the Applicant's ability to pass through numerous airport security checkpoints using her own genuine passport supported its prior conclusions and indicated she was not being pursued by the PSB. Specifically, the Applicant argues the RPD engaged in pure speculation by finding the smuggler would have been required to bribe all airport officials responsible for the monitoring of exiting passengers.

[23] In addressing the Applicant's exit from China, the RPD noted and relied on the documentary evidence concerning China's Golden Shield Project. This Court's jurisprudence has held that where an applicant does not know how a smuggler has arranged for transit through airport security checks without detection, caution should be exercised in finding it implausible that an individual wanted by the police could leave China using their own passport (*Zhang v Canada (Citizenship and Immigration),* 2008 FC 533). However, where the evidence is vague (as it is here), contradictory or speculative, a negative inference or adverse plausibility finding will not be unreasonable (*Cao v Canada (Citizenship and Immigration),* 2015 FC 790 at para 45; also see *Li v Canada (Citizenship and Immigration),* 2018 FC 877 at paras 17-21; *Wei v Canada (Citizenship and Immigration),* 2019 FC 230 at para 20).

[24] The Applicant also argues that evidence relating to passport examination at the airport was not considered by the RPD. The evidence the Applicant relies on is not contained in the record. The argument has not been considered.

V. Conclusion

[25] I am not convinced the RPD erred in its consideration of the Applicant's claim and am satisfied the RPD's finding that the Applicant is neither a Convention refugee nor a person in need of protection was reasonable.

[26] The Application is dismissed. The parties have not identified a question of general importance for certification, and none arises.

JUDGMENT IN IMM-5544-19

THIS COURT'S JUDGMENT is that:

1. The Application is dismissed.

2. No question is certified.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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