

Federal Court



Cour fédérale

**Date: 20230118**

**Docket: IMM-475-22**

**Citation: 2023 FC 75**

**Toronto, Ontario, January 18, 2023**

**PRESENT: Madam Justice Go**

**BETWEEN:**

**Xiaopei ZENG  
Xintong YE  
Lucas YE**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] Ms. Xiaopei Zeng [“Principal Applicant” or “PA”] and her minor children, Xintong Ye and Lucas Ye [together, the “Applicants”] allege fear of persecution from Chinese authorities based on the Principal Applicant’s identity as a Falun Gong [FG] practitioner.

[2] The PA, a citizen of China, alleges that she began attending FG group practices after being introduced to FG by a friend in May 2016 to deal with her post-partum depression. The PA alleges that her FG group was raided on January 29, 2017. Following this incident, the Applicants, along with the minor Applicants' father with whom the PA has become estranged, used existing visas to travel to Canada on February 2, 2017, and filed claims for refugee protection.

[3] The Applicants allege that following their departure, the Public Security Bureau [PSB] looked for the PA at hers and her then mother-in-law's homes. The PSB allegedly left a court-issued subpoena dated February 5, 2017, called a *chuanpiao*, for the PA [Subpoena]. The Applicants also allege that following the issuance of the Subpoena, Xintong was expelled from her school because the PSB informed the school of the PA's involvement with FG.

[4] The Refugee Protection Division [RPD] rejected their claims on credibility grounds and their appeal to the Refugee Appeal Division [RAD] was rejected in March 2020 [First RAD Decision].

[5] The Applicants successfully sought leave and judicial review of the First RAD Decision and their matter was sent for redetermination before a new panel. Upon redetermination, the RAD rejected their appeal, confirming that the Applicants are neither *Convention* refugees nor persons in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27, in a decision dated December 15, 2021 [Decision]. The Applicants seek judicial review of the Decision.

[6] I grant the application because the RAD's finding that the Subpoena is fraudulent was unreasonable.

## II. Issues and Standard of Review

[7] The Applicants raise the following issues in this application:

- a) The RAD erred in finding that the Subpoena is fraudulent;
- b) The RAD erred in finding that the PA did not show sufficient knowledge of FG;
- c) The RAD erred in finding that the PA did not adequately explain why it was unnecessary for her to obtain a support letter from Falun Dafa Association of Canada;
- d) The RAD capriciously assessed and discounted the other documentary evidence; and
- e) The RAD unreasonably dismissed the *sur place* claim.

[8] The parties agree that the Decision is reviewable on a reasonableness standard, per *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[9] 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 onus is on the Applicants to demonstrate that the Decision is unreasonable: *Vavilov* at para 100. To set aside a decision on this basis, “the reviewing 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”: *Vavilov* at para 100.

## III. Analysis

[10] In my view, the determinative issue in this case is the RAD's unreasonable finding that the Subpoena is fraudulent.

A. *Preliminary Issues: The Applicants' failure to provide updated submissions to the RAD and the Court's prior findings on the Subpoena*

[11] Before I conduct my review of the Decision, a brief recap of this application's procedural background and the related prior decisions is in order.

[12] The RPD found that the Applicants' claims were not credible because the Principal Applicant did not demonstrate an adequate level of knowledge of FG concepts and practices, and the Subpoena was found not to be genuine. These negative credibility inferences led the RPD to find that the PA is not a genuine FG practitioner and that she engaged in FG activities in Canada to bolster the Applicants' refugee claim.

[13] The First RAD Decision upheld the RPD's findings, including that the Subpoena is not genuine. The RAD conducted its own assessment of the Subpoena and found discrepancies in the structure and format of the document compared to the specimen found in the National Documentation Package [NDP] for China dated April 30, 2018 that was in front of the RPD.

[14] In *Zeng v Canada (Citizenship and Immigration)*, 2021 FC 318 [*Zeng*], Justice Barnes found that both the RPD and the RAD erred with respect to their assessment of the Principal Applicant's knowledge of FG. The Applicants' matter was remitted back to the RAD.

[15] By a Member's Direction dated November 9, 2021, the RAD invited the Applicants to make submissions based on an updated NDP dated November 5, 2021 for China [2021 NDP], particularly Item 9.2 dealing with Summons and Subpoenas. No further submissions were received by the RAD.

[16] Before this Court, the Applicants made extensive arguments regarding the errors made by the RAD in finding the Subpoena fraudulent. As these arguments were never made before the RAD, I asked the parties for their positions on whether I should consider these arguments. The Applicants asserted that the Court is permitted to address this issue the moment it was assessed by the RAD, and the Respondent reiterated that the Applicants did not use their opportunity to make submissions when invited to do so by the RAD.

[17] The Respondent also pointed out that the issue was addressed in *Zeng*. Noting that the burden is on a claimant to explain or justify any inconsistencies between a public document they tender with a specimen available in an NDP, the Court in *Zeng* found the Applicants' failure to do so could reasonably lead to an adverse credibility finding: at para 4. However, the Respondent also conceded that the Court's finding in *Zeng* is not binding on me.

[18] I find it troubling that the Applicants did not respond to the RAD's request for further submissions, nor did they explain to the Court why this was the case.

[19] Nevertheless, I conclude that I should consider the Applicants' submissions on the Subpoena issue. Courts have the discretion not to consider an issue raised for the first time on

judicial review where it would be inappropriate to do so: *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 22. However, the issue before me is not new. The authenticity of the Subpoena was raised and addressed in all the previous decisions pertaining to the Applicants' claim. Further, it was assessed by the RAD and formed a critical part of the Decision.

[20] While I acknowledge *Zeng* endorsed as reasonable the First RAD Decision confirming the RPD's conclusion regarding the Subpoena, I note that the basis for the RPD's finding differed from that of the RAD in the Decision. Further, the Decision relied on the 2021 NDP, as opposed to the older version relied on by the previous panels.

[21] For these reasons, I will consider the Applicants' submissions with respect to the Subpoena. However, I observe that applicants have themselves – or in some cases their counsel – to blame if they do not respond to a tribunal's request for submissions. While in this case the Applicants will have a chance to have their claim redetermined by the RAD, their failure to take advantage of the opportunity to file submissions has delayed the processing of their claim. Had the Applicants provided their submissions in time, the outcome of their claim could well have been different.

B. *The RAD erred in finding that the Subpoena is fraudulent*

[22] As noted above, the RAD relied on the 2021 NDP for its findings. The RAD noted that Item 9.2 of the 2021 NDP consists of a Request to Information Response [RIR] dated September 27, 2021, which explains how *chuanpiao* are “standardized.” The RIR also includes a link to a

template *chuanpiao* found on the official website of China's highest court, the Supreme People's Court.

[23] The RAD focused on the list of information that the RIR states *chuanpiao* contain, including "usually" the consequences of non-appearance and reminders to bring originals of evidence. The RAD noted that this information was not on the tendered Subpoena.

[24] The RAD acknowledged that similar wording was found in the tendered Subpoena to the 2021 NDP specimen's statement that the person subject to the subpoena shall bring the subpoena when reporting to the court. The tendered Subpoena states that the person being summonsed must bring the summons as an entry certificate.

[25] The RAD rejected the Applicants' argument that foreign documents are presumed to be genuine, finding that this presumption was rebutted. The RAD relied on *Jiang v Canada (Minister of Citizenship and Immigration)*, 2018 FC 1064 [*Jiang*], where the Court held that the authenticity of documents can be questioned even on microscopic differences, since that is often where a forgery may be exposed: at para 31.

[26] The RAD also acknowledged the Applicants' argument that documentary evidence of the availability of fraudulent documents in China cannot be relied on. However, the RAD found that the "widespread availability and use of fraudulent documents in China" can support a finding that a document is fraudulent where there is already reason to doubt its authenticity.

[27] The RAD compared the tendered Subpoena and the 2021 NDP sample and found on a balance of probabilities that the Subpoena is fraudulent, and that it was tendered to establish the Applicants' claim that the PA is wanted by PSB for illegal FG activities. The RAD opined that the Subpoena was central to the alleged fear of persecution or harm so its inauthenticity not only undermined the Applicants' credibility generally, but undermined the assertion that the PA was a FG practitioner in China and was sought by the PSB.

[28] Before this Court, the Applicants launch several arguments to dispute the RAD's findings. I do not find all of the Applicants' arguments persuasive.

[29] I agree, however, that the RAD's conclusion that the tendered Subpoena does not match the 2021 NDP sample was based on minor or immaterial differences. I also find that the RAD did not provide cogent reasons for its findings that the Subpoena is missing certain mandatory information and contains information that does not meet the requirements relating to subpoenas in China.

[30] In *Ma v Canada (Citizenship and Immigration)*, 2018 FC 163 [*Ma*], this Court warns tribunals not to make determinative findings based on immaterial differences relating to "formatting and spacing, and not substantive content": at para 23. Citing *Attakora v Canada (Minister of Employment and Immigration)*, [1989] FCJ No 44, the Court in *Ma* found the differences noted by the RAD microscopic, and therefore not reasonable: at para 23.



[31] In the case before me, the RAD highlighted three discrepancies between the Subpoena and the template attached to the 2021 NDP:

- A. In the “points for attention” section, the 2021 NDP template contains three numbered points. The tendered Subpoena is missing the third point which requires the person subject to the subpoena to affix their signature or seal, which the RAD interpreted as a mandatory requirement that can be reasonably expected to appear on all subpoenas. The 2021 NDP template also contains the statement that additional items may be added with the appropriate numbering, which the RAD interpreted to mean that all subpoenas would have at least three points, but the tendered Subpoena only has two.
- B. The 2021 NDP template contains instructions at the bottom for the person served with the subpoena. Such instructions are missing from the tendered Subpoena. The RAD noted that similar instructions are not on other types of sample summonses in the same 2021 NDP, concluding that the particular instruction should appear on all subpoenas of the type at issue. Further, the RAD pointed out that the instructions are clear that the subpoena *shall* be served three days prior to the date set for the party to appear. The tendered Subpoena purported to require the Principal Applicant’s attendance the following day, which does not comply with the requirements in the instructions.
- C. The RAD pointed to various differences in the headings and format between the 2021 NDP sample and the tendered Subpoena. In particular, the RAD noted that the headings appearing on the left and boxes on the right (containing pre-printed information) on the sample were either different or lacking in the tendered Subpoena. With respect to the pre-printed information in the boxes to the right, which are responsive to the questions asked on the 2021 NDP sample, the RAD found it unclear why the template would be altered away from standard terminology mandated by the Supreme People’s Court.

[32] Before I analyse the RAD's findings, it is worth setting out, in full, the relevant section in the 2021 NDP concerning court-issued subpoenas [Section 6]:

#### 6. Court-Issued Subpoena (*chuanpiao* 传票)

The Senior Research Fellow reported that subpoenas are to be delivered to recipients “in person,” but can be presented to “adult family members or the responsible party” at their workplace “if the person is not present” (Senior Research Fellow 19 Aug. 2021). The same source added that “if the recipient ... refuses to sign his name or affix a seal, the person giving service may request that neighbors or other witnesses act as authenticating witnesses and leave the documents at the residence” (Senior Research Fellow 19 Aug. 2021). Corroborating information on the delivery of court-issued subpoenas could not be found among the sources consulted by the Research Directorate within the time constraints of this Response.

According to the Senior Research Fellow, court-issued subpoenas are “standardized” and include the following information:

- the name of the court
- the case number
- the charge
- the name of the person summoned
- the address for service
- the reason for the summons (usually proceedings beginning)
- the time and place for the appearance
- an area for the presiding or chief judge to sign, as well as the court's clerk, indicating the date
- a larger area ... for specific notes
- “usually” [the] consequences of non-appearance
- reminders to bring originals of evidence. (Senior Research Fellow 19 Aug. 2021)

A template for a court-issued subpoena is available on the website of the Supreme People's Court of the People's Republic of China and is attached to this Response (Attachment 8).

[33] In other words, Section 6 sets out certain information as being part of the “standardized” court-issued subpoena, namely: a) the name of the court; b) the case number; c) the charge; d) the name of the person summoned; e) the address for service; f) the reason for the summons; g) the time and place for the appearance; and h) an area for the judge as well as the court’s clerk to sign and date.

[34] I agree with the Applicant that all of the information noted in Section 6 as being “standardized” appear to match the various headings in the Subpoena, *albeit* with different English translations, which appear as “case no.,” “reason of the case,” “person to be subpoenaed”, “address”, “case”, “time to report” and “place to report.” I note also that the Subpoena contains a signature, the name of an official, and a date at the bottom, which is also consistent with the list of “standardized” information.

[35] The RAD appeared to acknowledge these similarities, in particular the fact that the information on the right appears to be responsive to the questions/headings posed on the left. Nevertheless, the RAD concluded that “there is no obvious reason why someone completing a form based on the template would not use the same standard terminology mandated by the Court in the template.”

[36] By focusing on the so-called “terminology” which in reality was the English translation of the original Chinese terminology, the RAD failed to consider that the differences may be attributable to the differences in the English translation of the two documents by different individuals, as the Applicants submit. This conclusion was particularly unreasonable given the

RAD's own acknowledgement that the responses provided in fact correspond to the questions posed in the Subpoena. These findings suggest that the RAD was being "microscopic" in its focus. Further, the RAD adopted a form over substance approach to its analysis when it based its finding on the differences in format between the sample and the Subpoena.

[37] Similar conclusions can be drawn with respect to the RAD's finding that the instructions at the bottom for the person served with the subpoena in the 2021 NDP sample are missing from the tendered Subpoena, when the Subpoena does in fact contain wording to that effect.

[38] In addition, I find that the RAD relied on alleged differences that may or may not be part of the "standardized" features to find the Subpoena fraudulent.

[39] As noted above, Section 6 does not suggest that there must always be three bullet points in a court-issued subpoena, nor does it refer to the instructions at the bottom of the subpoena as part of the "standardized" document. Instead, Section 6 only notes the subpoena includes "a large area for specific notes", which reminds the person subpoenaed to bring originals of evidence and which may or may not mention the "consequences of non-appearance."

[40] I also note that after describing how the subpoenas can be delivered and on whom they can be served, Section 6 specifically warns that "corroborating information on the delivery of court-issued subpoenas could not be found among the sources consulted by the Research Directorate."

[41] Yet the RAD found that the requirement for the person to affix their signature was “mandatory”, even though it was not listed in Section 6, which specifically warns of the lack of corroborating information in this regard.

[42] At the hearing, I asked the Respondent to comment on the differences between the list of “standardized” information in Section 6 as compared to the 2021 NDP sample itself. I asked whether the information not found on the list, but which appears on the sample is in fact “standardized.” The Respondent acknowledged that some of the information in the sample is not on the standardized list, but continued to assert that the RAD’s finding that the Subpoena is fraudulent was reasonable.

[43] The Respondent relies on the “significant ways” in which the tendered Subpoena and the sample found in the 2021 NDP differ, reiterating the discrepancies pointed out by the RAD. As noted above, I do not find many of these differences “significant.” As such, I reject this argument.

[44] Relying on *Jiang*, which the RAD also cited, the Respondent maintains that “[i]t is in the small or microscopic details where a forgery may well be exposed”: at para 31. The Respondent argues that it was open for the RAD, based on the discrepancies and the documentary evidence stating that fraudulent documents are readily available in China, to conclude that the Subpoena is fraudulent.

[45] I note, however, that the issue of authenticity of documents was not determinative in *Jiang*. As such, I regard the Chief Justice's comment as relied on by the Respondent as *obiter*.

Further, as the Chief Justice noted at para 31:

Ultimately, whether such details provide a reasonable basis for a finding that a document is not authentic will turn on the facts of each particular case.

[46] In the facts of this case, for the reasons already set out, I find the RAD's focus on the microscopic differences to be unreasonable.

[47] My findings above are sufficient to set aside the RAD's finding that the Subpoena is fraudulent. Strictly as *obiter*, I will address the following two issues not raised by the parties.

[48] First, the RAD found that the Subpoena is fraudulent because it was dated one day before the PA was scheduled to appear. The RAD noted the 2021 NDP sample contains an instruction that subpoenas "*shall* be served on the subject person three days prior to the date set for the party to appear" [emphasis in original], per the requirements under the law in China. I note however, under Section 2 of Item 9.2, the 2021 NDP notes:

Sources reported that summons or subpoenas are not always used in accordance with the prescribed regulations (Senior Lecturer 11 Aug. 2021; Visiting Professor 12 Aug. 2021). According to the Visiting Professor, because the Chinese legal system does not recognize "political cases," and that for such "politically sensitive cases," the criminal procedure is "not followed" and "the secret police, the C[hinese] C[ommunist] P[arty], and the [P]olitical [L]egal [C]ommittee [of the Party] have the arbitrary power to bend the rules," in which "they do not issue summons, they do not give any documents" (Visiting Professor 12 Aug. 2021). The Senior Research Fellow reported that the "standard for when a person is a 'suspect' and able to be summoned is unclear, but often described as

something akin to ‘reasonable suspicion’” (Senior Research Fellow 19 Aug. 2021).

[49] The RAD did not address this particular aspect of the 2021 NDP suggesting that the requirements surrounding subpoenas are not always followed by Chinese police, especially in “political cases.” This documentary evidence appears to contradict the RAD’s finding that the PSB would not have served the Subpoena on the Applicant one day prior to the date of compelled appearance because it would be in contravention of the three-day notice requirement.

[50] Second, as I noted above, the authenticity of the Subpoena has been flagged as a critical issue since the RDP decision. I also note Justice Barnes’ comment in *Zeng*, responding to the Applicants’ concern about assessing the document based in part on its translation:

[4] The Applicant argues that the RAD’s treatment of the tendered PSB summons was unreasonable because it focussed on the format of the document and not on its content. The tendered document was translated and the specimen document was not, making it impossible to compare their content. I accept the point that a comparison of both the content and format of a tendered document with a reliable specimen is a safer approach to assessing reliability than the method used here. However, when a refugee claimant tenders a public document that is inconsistent with a specimen available in the IRB National Documentation library, it is up to the claimant to explain or justify the inconsistencies. Failing to do so can lead to an adverse credibility finding as was the case here. This was not an unreasonable finding.

[51] Thus far, the 2021 NDP sample has yet to be translated into English, and no attempt has been made by either the Applicants or the RAD to authenticate and compare the Chinese characters contained in the 2021 NDP sample and the Subpoena. This issue will likely resurface when the matter is sent back for redetermination. As per Justice Barnes’ comment, the

Applicants carry the responsibility to prove the authenticity of the document; this obligation shall remain upon redetermination, notwithstanding this Court's decision to grant their judicial review.

[52] In conclusion, I find that the RAD's focus on the microscopic differences between the 2021 NDP sample and the Subpoena is unreasonable. I also find that the RAD did not provide cogent reasons for its findings that the missing information in the Subpoena was mandatory.

C. *Other Findings Made by RAD*

[53] The Applicants argue that the RAD's erroneous finding that the Subpoena is fraudulent pervaded the RAD's process and served as a basis to impugn the *sur place* claim and forward-looking risk, and to discount Ms. Zeng's knowledge of FG.

[54] I agree.

[55] The Applicants submitted a letter from Jinan University to prove their claim that the daughter, Xintong, was expelled from school because the PSB informed the school that the PA was a FG practitioner. The RAD addressed the letter and found it interrelated to the Subpoena since it relies on the assertion that the PA was wanted by the PSB for her FG activities. Since the RAD found the Subpoena to be fraudulent, the RAD was not satisfied that the letter is authentic and afforded it no weight.

[56] The RAD also found that merely having knowledge of FG concepts is insufficient to establish the PA's identity as a genuine FG practitioner. This finding was made in light of the



significant weight attached to the negative credibility findings associated with the fraudulent Subpoena and, flowing from that, the claim about the PSB's alleged interest in the PA. The RAD relied on these findings and credibility concerns to conclude that the PA has not satisfied on a balance of probabilities that her participation in FG amounts to her being a genuine practitioner. The RAD accordingly found there is no serious possibility that the PA would practice FG if she returned to China.

[57] These reasons confirm that the RAD's findings regarding the Subpoena played a critical role in the RAD's decision to discount other evidence submitted by the Applicants, and ultimately reject the Applicants' claim.

[58] As I find the RAD's finding with regard to the Subpoena unreasonable, all of the findings flowing from this erroneous finding are also unreasonable. The Decision as a whole therefore cannot stand.

#### IV. Conclusion

[59] The application for judicial review is allowed.

[60] There is no question to certify.

**JUDGMENT in IMM-475-22**

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is granted.
2. The decision under review is set aside and the matter referred back for redetermination by a different decision-maker.
3. There is no question to certify.

"Avvy Yao-Yao Go"

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Judge

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

**DOCKET:** IMM-475-22

**STYLE OF CAUSE:** XIAOPEI ZENG, XINTONG YE, LUCAS YE v THE  
MINISTER OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** HELD VIA VIDEOCONFERENCE

**DATE OF HEARING:** JANUARY 13, 2023

**JUDGMENT AND REASONS:** GO J.

**DATED:** JANUARY 18, 2023

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