

Federal Court



Cour fédérale

Date: 20230425

Docket: IMM-7354-21

Citation: 2023 FC 602

Ottawa, Ontario, April 25, 2023

PRESENT: Madam Justice Pallotta

BETWEEN:

YU, XUEHUI

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The applicant, Mr. Xuehui Yu, applies for judicial review of a decision of the Refugee Appeal Division (RAD) of the Immigration and Refugee Board that dismissed his appeal, and confirmed the Refugee Protection Division's (RPD) determination that he is not a Convention refugee or a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001 c 27 [IRPA].

[2] Mr. Yu is a citizen of China who fears religious persecution as a Falun Gong practitioner. Mr. Yu states he began practising Falun Gong in February 2017 and attended group practices at the homes of fellow practitioners until the Public Security Bureau (PSB) raided a group practice in January 2018. Mr. Yu learned that the PSB were looking for him, and that other members of the practice group were arrested. He hid at his aunt's home until he was able to leave China in April 2018 with the help of a smuggler.

[3] Credibility was the determinative issue before the RPD and the RAD.

[4] The RPD found Mr. Yu was not a genuine Falun Gong practitioner in China as he was unable to articulate basic Falun Gong principles despite three years of practice, and if he were truly of interest to the authorities, he would have been discovered when leaving China using his own passport. Mr. Yu had not established a *sur place* claim for protection as the RPD found he engaged in Falun Gong activities in Canada to bolster his refugee claim rather than as a genuine practitioner, and it was unlikely his practice in Canada had come to the attention of the Chinese authorities.

[5] On appeal, the RAD agreed with Mr. Yu that the RPD had erred by concluding he was not of interest to the PSB because he was able to leave China with his own passport. The RPD failed to account for evidence that Mr. Yu used a smuggler to circumvent border controls, as well as country condition evidence of corruption and bribery. However, the RAD agreed with the RPD's overall conclusion that Mr. Yu was not a Falun Gong practitioner in China, and he is not

a genuine Falun Gong practitioner in Canada. Mr. Yu alleges the RAD's decision in this regard is both unreasonable and procedurally unfair, and he asks this Court to set it aside.

[6] Mr. Yu alleges the RAD made findings about the genuineness of his Falun Gong practice in China and Canada based purely on his knowledge level, contrary to *Gao v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1139. Furthermore, he contends the RAD unreasonably assessed the answers he gave at the RPD hearing to questions about Falun Gong, particularly in view of his explanation that nervousness inhibited his ability to respond.

[7] Mr. Yu alleges the RAD also erred by finding that he was not credible overall and he is not a *bona fide* Falun Gong practitioner or wanted by the PSB because he submitted a fraudulent document—a detention notice regarding a friend's arrest—to support his claim for refugee protection. Mr. Yu states the RAD breached procedural fairness by failing to provide notice and an opportunity to respond to concerns about the authenticity of the detention notice, and the RAD relied on unreasonable inferences to support its finding that the detention notice is not authentic. Mr. Yu submits the RAD's breach of procedural fairness "trumps" any other errors, and is in itself a sufficient basis to set aside the decision.

[8] The respondent submits the RAD reasonably determined that Mr. Yu was not a genuine Falun Gong practitioner in China or in Canada and it made a reasonable finding regarding the authenticity of the detention notice. The respondent submits the RAD did not breach procedural fairness by making a new credibility finding, as part of its independent assessment of the record, on an issue that was already before the RPD: *Hassan v Canada (Minister of Citizenship and*

Immigration), 2021 FC 1162 at paras 9-15 [*Hassan*]; *Tan v Canada (Minister of Citizenship and Immigration)*, 2016 FC 876 at paras 30, 32 [*Tan*]; *Kawekwune v Canada (Minister of Citizenship and Immigration)*, 2020 FC 333 at paras 13-17 [*Kawekwune*].

[9] The reasonableness of the RAD's decision is reviewed according to the guiding principles set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. Reasonableness is a deferential but robust standard of review: *Vavilov* at paras 12-13, 75 and 85. In applying the reasonableness standard, the reviewing court determines whether the decision bears the hallmarks of reasonableness—justification, transparency, and intelligibility: *Vavilov* at para 99. A reasonable decision is based on an internally coherent and rational chain of analysis and it is justified in relation to the facts and law that constrain the decision maker: *Vavilov* at para 85. The party challenging the decision bears the onus of demonstrating that it is unreasonable: *Vavilov* at para 100.

[10] Mr. Yu's allegation that the RAD breached procedural fairness is reviewed on a standard that is akin to correctness: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*Canadian Pacific Railway*]. The duty of procedural fairness is "eminently variable", inherently flexible, and context-specific: *Vavilov* at para 77, citing *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at paras 22-23, among other cases. The central question is whether the procedure was fair, having regard to all of the circumstances: *Canadian Pacific Railway* at para 54.

[11] For the reasons below, I find Mr. Yu has established that it was procedurally unfair for the RAD not to provide notice and an opportunity to respond to concerns about the authenticity of the detention notice, and the breach of procedural fairness warrants setting aside the RAD's decision.

[12] The parties agree that the RPD made no findings regarding the detention notice. The RAD had concerns about the authenticity of the document, and consequently, Mr. Yu's credibility. The RAD stated it was not required to give notice of inconsistencies in Mr. Yu's own documents, relying on *Konare v Canada (Minister of Citizenship and Immigration)*, 2016 FC 985 [*Konare*]. The finding that Mr. Yu had submitted a fraudulent document led to an overall negative credibility finding that supported the RAD's conclusions that Mr. Yu was not a genuine Falun Gong practitioner, and that he was not of interest to the PSB.

[13] The RAD's decision identifies three concerns with the detention notice: (i) it incorrectly refers to Mr. Yu's friend as a female; (ii) it does not provide the detention centre address; and (iii) it cites Article 91 of the Criminal Procedure Law of the People's Republic of China when Article 80 seems applicable to the friend's scenario. The second and third concerns were based on a comparison to information in the National Documentation Package (NDP) for China. The RAD found that the three "errors", viewed together with the RPD's findings about Mr. Yu's credibility that were upheld on appeal and the widespread availability of fraudulent documents in China, provided a sufficient basis to conclude that the friend's detention notice is not genuine. The RAD then stated, "[Mr. Yu's] submission of a fraudulent document to support his claim

leads me to conclude, on a balance of probabilities, that he is not credible overall, that he is not a bona fide Falun Gong practitioner, and that he is not wanted by the PSB”.

[14] Mr. Yu argues that the RAD’s reliance on *Konare* was misplaced. He states that in *Konare*, there was a bald contradiction between the applicant’s testimony and a document submitted in support of his claim, and the Court held that the RAD was not required to confront the applicant with his own inconsistencies. Mr. Yu notes the Court in *Konare* also stated that, in general, a tribunal must inform an applicant of discrepancies between the evidence and testimony to give him or her a chance to address it. He contends that a bald contradiction in an applicant’s own evidence that is apparent on the face of the record, as was the case in *Konare*, is an exception to the general rule that does not offend the principle that an applicant has a right to know the case to meet.

[15] Mr. Yu argues his case is unlike *Konare* because the detention notice had no obvious inconsistency of which he should have been aware. Indeed, only one of the alleged errors, the incorrect referral to the friend as female, relates to the document itself—the others are alleged inconsistencies with information in the NDP.

[16] Furthermore, Mr. Yu submits none of the alleged errors were clear inconsistencies. Rather, the fraud finding rests on unreasonable inferences: (i) while the English translation of the detention notice incorrectly refers to the friend as “she”, the RAD ought to have clarified whether the reference to “she” was a translation error; (ii) the NDP evidence indicates that sometimes the address of the detention centre is not included; and (iii) the NDP evidence does

not establish that Article 91 is inapplicable to the friend's scenario; the question is at least debatable, and the RAD should have provided an opportunity for submissions.

[17] Finally, Mr. Yu states that even if the RAD did not breach procedural fairness or rely on unreasonable inferences, it erred in attributing blame to Mr. Yu without a basis to conclude he played a part in producing the document or knew that the document provided to him by a friend was allegedly not genuine.

[18] The respondent submits that the question of whether the RAD breached procedural fairness depends on whether the RAD raised a new issue, and *Konare* is not the final answer on when a difference between the RAD's and the RPD's reasons amounts to a new issue that requires an opportunity to respond. According to *Hassan, Tan* and *Kawekwune*, a new issue is one that is legally and factually distinct from the grounds of appeal. In performing its role of independently assessing the record, the RAD is entitled to make new findings of fact relating to issues already in play, without giving notice and an opportunity to respond. Doing so does not breach procedural fairness because applicants will have had prior notice of the issue. In any event, even if the RAD erred in its assessment of the detention notice, the respondent states it is immaterial because this was only a subsequent ground for impugning Mr. Yu's credibility, and Mr. Yu has had an opportunity to respond on judicial review, curing any breach of procedural fairness by the RAD.

[19] Mr. Yu counters that the breach of procedural fairness cannot be cured by his submissions to this Court, as he should have had the opportunity to provide submissions to the

RAD before it made its decision. Also, he states the respondent's arguments improperly buttress the RAD's determination with reasons that it did not give. The RAD's reason for not giving notice and an opportunity to respond was that it was not required to give notice of inconsistencies in Mr. Yu's own document, and *Konare* was the only case the RAD relied on in support.

[20] In my view, the RAD's finding that Mr. Yu is not credible overall because he submitted a fraudulent document is legally and factually distinct from the grounds of appeal, and cannot reasonably be said to stem from the grounds of appeal or from the RPD's findings: see, for example *Tan* at para 30; see also *Zhang v Canada (Minister of Citizenship and Immigration)*, 2019 FC 870 at para 13; *Lopez Santos v Canada (Minister of Citizenship and Immigration)*, 2021 FC 1281 at para 45. The RPD's decision mentions Mr. Yu's allegation that other Falun Gong practitioners were arrested, but it makes no findings about the arrests, does not refer to the detention notice, and does not question its authenticity or the authenticity of any document filed in support of the claim. Mr. Yu's arguments on appeal to the RAD did not mention the detention notice or rely on arrests of other Falun Gong practitioners. As a result, in my opinion the RAD raised a new issue by impugning Mr. Yu's credibility based on the authenticity of the friend's detention notice, and I find that principles of procedural fairness required the RAD to provide notice and an opportunity to respond.

[21] I disagree with the respondent that the failure to provide notice was immaterial, or that any breach of procedural fairness was cured by Mr. Yu's submissions on this application for judicial review. The RAD stated that the fact Mr. Yu submitted a fraudulent document to

support his claim for refugee protection led it to conclude that he is not credible overall, that he is not a *bona fide* Falun Gong practitioner, and that he is not wanted by the PSB. The authenticity of the detention notice was clearly material to the RAD's decision to reject Mr. Yu's claim for refugee protection, and I fail to see how Mr. Yu's submissions before this Court would serve to cure the denial of an opportunity to present submissions to the RAD on the point, before the RAD rendered its decision. I agree with Mr. Yu that the breach of procedural fairness warrants this Court's intervention to set aside the RAD's decision and return the matter for redetermination.

[22] While this finding is dispositive of the application for judicial review, the parties provided written and oral submissions on other issues, and I will provide limited comments on some of them.

[23] I would agree with Mr. Yu that the RAD relied only on *Konare* to find that it was not required to provide notice of a new issue, and I agree that the RAD went beyond the circumstances described in *Konare* to impugn the authenticity of the detention notice based on evidence in the NDP for China. It is not clear to me, however, that the alleged error of relying on *Konare* when it did not fit the circumstances of Mr. Yu's case amounted to a breach of procedural fairness. Whether the alleged error amounted to a sufficiently serious shortcoming so as to render the RAD's decision unreasonable is not a point that needs to be decided for the purposes of this application, and I will say no more about it.

[24] In view of my finding that the RAD erred by failing to provide notice and an opportunity to respond to the authenticity issue, I decline to comment on the parties' submissions about whether the authenticity finding was unreasonable.

[25] While Mr. Yu's submissions on this application have not persuaded me that the RAD made unreasonable findings about his answers to Falun Gong questions, as noted above these findings were not the RAD's sole basis for concluding that Mr. Yu was not a genuine Falun Gong practitioner. The RAD's decision does not indicate that the findings provided an independent basis supporting its overall determination, and it is unnecessary to address them further.

[26] In conclusion, this application for judicial review is allowed on the basis that Mr. Yu has established a breach of procedural fairness that warrants setting aside the RAD's decision. The parties did not propose a question for certification, and I find this matter does not raise a question for certification.

JUDGMENT in IMM-7354-21

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed.
2. The RAD's decision is set aside and the matter shall be redetermined by a different panel of the RAD.
3. There is no question to certify.

"Christine M. Pallotta"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-7354-21

STYLE OF CAUSE: YU, XUEHUI v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: HELD BY WAY OF VIDEOCONFERENCE

DATE OF HEARING: DECEMBER 20, 2022

JUDGMENT AND RESONS: PALLOTTA J.

DATED: APRIL 25, 2023

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