Federal Court Cour fédérale

Date: 20230428

Docket: IMM-6035-21

Citation: 2023 FC 625

Montréal, Quebec, April 28, 2023

PRESENT: Mr. Justice Gascon

BETWEEN:

YAMEI TONG

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Ms. Yamei Tong, is a citizen of China. Ms. Tong asks for the judicial review of an exclusion order issued against her by the Immigration Division [ID] on July 15, 2021 [Decision], on the ground that she was inadmissible to Canada under paragraph 41(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. This paragraph provides that a foreign national can be found inadmissible for failing to comply with the IRPA.

[2] Ms. Tong submits that the ID made unreasonable findings in its assessment of her credibility and in its determination that she performed work in Canada, in violation of her temporary resident visa.

[3] For the following reasons, Ms. Tong's application for judicial review will be dismissed. Having considered the Decision, the evidence before the ID, and the applicable law, I conclude that the ID performed a reasonable assessment of the evidence and provided a reasonable interpretation of the applicable statutory provisions. I am satisfied that the ID's reasons have the qualities that make its analysis logical and consistent in relation to the relevant legal and factual constraints.

II. Background

A. *The factual context*

[4] On February 26, 2019, Ms. Tong arrived in Canada as a visitor on a temporary resident visa. On May 1, 2019, she applied for an extension of her temporary visa, which was valid for six months, until August 26, 2019. Her application for an extension was refused on August 21, 2019.

[5] Ms. Tong's temporary resident visa did not allow her to work in Canada.

[6] During her stay in Canada, Ms. Tong regularly visited Ms. Li Feng at her business, the Hamilton Mountain Wellness Centre. Ms. Tong testified that Ms. Feng was her cousin and that she was allegedly teaching her English when she had the time.

[7] On November 28, 2019, as part of a multi-agency operation called Project Orchid, the Royal Canadian Mounted Police [RCMP], the Canada Border Services Agency [CBSA], and the Hamilton Police Services visited Ms. Feng's business due to suspicions of labour trafficking. Ms. Tong was on the premises, in a massage room with a client, with oily and granular substances on her hands — which was believed to be massage oil and Epsom salts —, and seemed to be about to perform a massage on the client.

[8] The authorities asked Ms. Tong to provide identification documents. Ms. Tong later explained that she was not working when the authorities arrived at Ms. Feng's business. Rather, Ms. Feng allegedly had an asthma attack, and Ms. Tong was helping her with the client because the smell of the massage products was aggravating her asthma.

[9] The Minister of Public Safety and Emergency Preparedness [Minister] requested an admissibility hearing on December 16, 2019.

[10] On February 7, 2020, Ms. Tong's application to restore her visitor status was approved. Her status was only valid until March 7, 2020. Therefore, on February 26, 2020, she applied for an extension.

[11] In the meantime, on January 16, 2020, Ms. Tong got married to a Canadian citizen, Mr. Donald Earl Allan.

[12] Ms. Tong's admissibility hearing before the ID was held on June 16, 2021. At the time, Ms. Tong's application for an extension of her visitor status was still being processed.

B. *The ID Decision*

[13] The ID held that Ms. Tong was not credible, based on her interest in the outcome of the proceeding and on the inconsistencies between her testimony and the evidence. Therefore, the ID gave more weight to the evidence provided by the Minister, specifically the statutory declarations of the CBSA officers as well as the statements from the RCMP constable and the peace officer from the Hamilton Police Services who intervened at Ms. Feng's business on November 28, 2019.

[14] Because it is undisputed that Ms. Tong was in a massage room with a client, the ID held that the only issue to determine was whether Ms. Tong was working for Ms. Feng. The ID found that Ms. Tong attempted to distance herself from the business in order to support the allegation that she did not work there, which only led her to create inconsistencies in her narrative.

[15] The ID further held that even if it were to accept that the help Ms. Tong provided to Ms. Feng on November 28, 2019 was a one-time event, it would still conclude that, according to section 2 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR], Ms. Tong engaged in work by performing a service that another Canadian citizen or permanent resident in the labour market could have provided.

[16] The ID found Ms. Tong to be inadmissible under paragraph 41(a) of the IRPA as she breached subsection 30(1) of the IRPA prohibiting foreign nationals from working without authorization. The ID also rendered an exclusion order against Ms. Tong.

C. *The standard of review*

[17] Ms. Tong and the Minister both submit that the standard of reasonableness applies to this application for judicial review. I agree (*Alexander v Canada (Citizenship and Immigration)*, 2021 FC 762 [*Alexander*] at para 33; *Regala v Canada (Citizenship and Immigration)*, 2020 FC 192 at para 5).

[18] Reasonableness is the presumptive standard that reviewing courts must apply when conducting judicial review of the merits of an administrative decision (*Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]). Reasonableness focuses on the decision made by the administrative decision maker, which encompasses both the reasoning process and the outcome (*Vavilov* at paras 83, 87). Where the applicable standard of review is reasonableness, the role of a reviewing court is to examine the reasons given by the administrative decision maker and to determine whether the decision is based on "an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). The reviewing court must therefore consider whether the "decision bears the hallmarks of reasonableness — justification, transparency and intelligibility" (*Vavilov* at para 99). The reviewing court must be knowledgeable of the factual and legal constraints upon the decision maker (*Vavilov* at paras 90, 99), without "reweighing and reassessing the evidence" before it (*Vavilov* at para 125).

[19] A judicial review must include a rigorous evaluation of administrative decisions. However, as part of its analysis of the reasonableness of a decision, the reviewing court must begin its inquiry by examining the reasons provided with "respectful attention," and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion

(*Vavilov* at para 84). The reviewing court must adopt an attitude of restraint and intervene "only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process" (*Vavilov* at para 13).

[20] The onus is on the party challenging the decision to prove that it is unreasonable. Flaws must be more than superficial for the reviewing court to overturn an administrative decision. The court must be satisfied that there are "sufficiently serious shortcomings" (*Vavilov* at para 100).

III. Analysis

[21] Ms. Tong raises two main arguments to challenge the ID's Decision.

A. *Ms. Tong's lack of credibility*

[22] Ms. Tong first claims that the ID erred in undermining her credibility for having a vested interest in the outcome of the proceedings. She also submits that, in multiple instances, the ID erred in finding that she was not credible without giving proper reasoning and without relying on any evidence.

[23] I am not persuaded by Ms. Tong's submissions.

[24] Regarding Ms. Tong's first point, I accept that the ID was not authorized to undermine Ms. Tong's credibility solely because she had a "vested interest" in the outcome of the proceedings. On multiple occasions, the Court cautioned against such reasoning in weighing the evidence (*Nasufi v Canada (Citizenship and Immigration)*, 2011 FC 586 at para 30; *Nilam v Canada (Citizenship and Immigration)*, 2008 FC 689 at para 16; *Coitinho v Canada (Minister of*

Citizenship and Immigration), 2004 FC 1037 at para 7). It arguably goes against the presumption of truthfulness in the sworn evidence of a refugee claimant (*Maldonado v Minister of Employment and Immigration*, [1980] 2 FC 302 (FCA) [*Maldonado*] at para 5).

[25] As the Court held in *Nagarasa v Canada (Citizenship and Immigration)*, 2018 FC 313 at paragraphs 24 and 25, and reiterated in *Al Mamun v Canada (Citizenship and Immigration)*, 2022 FC 534 at paragraph 17, refusing evidence "exclusively on the basis of an alleged 'vested interest' is a reviewable error that must be corrected on redetermination." However, the present case can be distinguished from these precedents since, in addition to the "vested interest" element, the ID had several other reasons to disregard Ms. Tong's evidence and to question her credibility.

[26] In sum, the ID did not do so solely based on the "vested interest" reasoning (*Alexander* at para 65). In the circumstances, having reviewed the reasons and the totality of the evidence, I am satisfied that the ID provided a sufficient analysis to support its conclusion on the lack of credibility of Ms. Tong's evidence and testimony.

[27] First, the ID identified inconsistencies as to the relationship between Ms. Tong and Ms. Feng. The ID noted that, during the November 28, 2019 event, Ms. Feng initially declared to the authorities that Ms. Tong was her niece, then said they were sisters, and finally stated that they were distant relatives.

[28] Second, the ID observed that no reasonable explanation was provided as to the location of Ms. Tong's passport in Ms. Feng's residence, because Ms. Tong did not testify on that aspect. Accordingly, it was open to the ID to give more weight to the statutory declarations provided by

the authorities and third party officers regarding Ms. Tong's passport, which support the position that Ms. Feng had control of it and was possibly involved in labour trafficking.

[29] Third, the ID considered Ms. Tong's explanation as to why she was found in a massage room with a client and about to perform a massage. However, the ID held that her explanation was not credible and did not believe that Ms. Feng was really in a "medical urgency" that would force her to rely on Ms. Tong's help, a woman supposedly not trained to provide such services. Moreover, the ID did not believe the plausibility that Ms. Feng's asthma attacks would be aggravated by massage substances that would prevent her from performing the very services representing a substantial part of her business. As stated in the Decision, the ID found that Ms. Tong provided no credible evidence to support this conclusion.

[30] Fourth, Ms. Tong first testified that Ms. Feng's business only had two employees, namely Ms. Feng and her niece, but later affirmed that Ms. Feng's niece was not an employee.

[31] Finally, the ID found that Ms. Tong's testimony was, on multiple occasions, a final attempt to distance herself from Ms. Feng's business, which only created inconsistencies in her testimony. On one hand, Ms. Tong testified that she did not know the closing hours of the business, but on the other, she supposedly met Ms. Feng at the closing of the business regularly. Ms. Tong also testified that she had no knowledge about Ms. Feng's business and the services she offers, but at the same time, testified that she was close to Ms. Feng and was visiting her frequently at her business because Ms. Feng was supposedly teaching her English. The ID explained that such answers are inconsistent with the relationship that Ms. Tong claimed she had with Ms. Feng.

[32] Based on these numerous inconsistencies, I am satisfied that the ID could reasonably prefer the statements and declarations from the different officers belonging to three public authorities (the CBSA, the RCMP, and the Hamilton Police Services) over the evidence of Ms. Tong. While Ms. Tong can identify other reasonable interpretations of the evidence, she does not meet her burden of proving that the ID's analysis of the evidence is unreasonable. I underline that, when a reviewing court applies the standard of reasonableness, the question is not whether other alternative interpretations or conclusions would have been possible. Rather, it is whether the interpretation chosen by the decision maker passes the muster of reasonableness, even though other interpretations or conclusions might have been possible.

[33] Throughout her submissions, Ms. Tong claimed that the ID erred in preferring the evidence of the third party officers that took part in Project Orchid over hers, as such approach goes against the principles established in *Maldonado*.

[34] I do not agree. First, the *Maldonado* precedent is of no assistance to Ms. Tong as it applies to evidence provided by refugee claimants, not by visa applicants. Second, Ms. Tong misconstrues the teachings of the *Maldonado* decision. In *Warrich v Canada (Citizenship and Immigration)*, 2022 FC 76 [*Warrich*], *Lunda v Canada (Citizenship and Immigration)*, 2020 FC 704 [*Lunda*], and *Fatoye v Canada (Citizenship and Immigration)*, 2020 FC 456 [*Fatoye*], I discussed the scope and limits of the *Maldonado* presumption of truthfulness in refugee claims (*Warrich* at paras 32–33; *Lunda* at paras 29–31; *Fatoye* at paras 35–37). I take the liberty of reproducing the following paragraphs from *Lunda*:

> [29] ... *Maldonado* does not raise an irrebuttable presumption of truthfulness or immunity from suspicion for the applicants' testimony. On the contrary, *Maldonado* simply establishes the

principle that "[w]hen an applicant swears to the truth of certain allegations, this creates a presumption that those allegations are true unless there be reason to doubt their truthfulness" (emphasis added) (*Maldonado* at para 5). This reservation is important because it means that the presumption is extinguished when reasons arise to doubt the veracity of the allegations made in a refugee protection claim. Thus, the presumption is rebuttable where the evidence on the record is inconsistent with a claimant's sworn testimony *(Su v Canada (Citizenship and Immigration)*, 2015 FC 666 at para 11, citing *Adu v Canada (Minister of Employment and Immigration)*, [1995] FCA No 114 (FCA) (QL)), or where the RPD is not satisfied with the claimant's explanation for inconsistencies in the evidence (*Lin v Canada (Citizenship and Immigration)*, 2010 FC 183 at para 19).

[30] The reason underlying the presumption of truthfulness in *Maldonado* is that claimants who have experienced certain types of emergency situations cannot reasonably be expected to always have documents or other evidence to support their claims. These circumstances may include passage through refugee camps, war-torn country situations, discrimination, or events in which claimants have only a very short period of time to escape from their agents of persecution and subsequently cannot access documents or other evidence from Canada (*Fatoye v Canada (Citizenship and Immigration)*, 2020 FC 456 at paras 35–38).

[31] However, in cases where a claimant has the opportunity to gather corroborative evidence before or after arriving in Canada, the strength of the presumption of truthfulness may depend directly on the extent to which corroborative evidence is provided. It follows that, if there is any reason to doubt the veracity of the allegations made in a claimant's affidavit or sworn testimony, adverse inferences about credibility may be drawn if the claimant is unable to provide an explanation for the lack of reasonably expected corroborative evidence (*Canadian Association of Refugee Lawyers v Canada (Citizenship and Immigration)*, 2019 FC 1126 at para 184; *Murugesu v Canada (Citizenship and Immigration)*, 2016 FC 819 at para 30; *Ndjavera v Canada (Citizenship and Immigration)*, 2013 FC 452 at para 7). Similarly, where corroborative evidence should reasonably be available to establish the essential elements of a claim for refugee protection and there is no reasonable explanation for its absence, the administrative decision maker may make an adverse credibility finding based on the claimant's lack of effort to obtain such evidence (*Ismaili v*

> *Canada (Citizenship and Immigration)*, 2014 FC 84 at paras 33, 35).
>
> [Emphasis in original.]

[35] As reflected in this extract, the *Maldonado* presumption is rebuttable where the evidence on the record is inconsistent with a claimant's sworn testimony (*Lunda* at para 29), where there are grounds to find that the claimant's testimony lacks credibility (*He v Canada (Citizenship and Immigration)*, 2019 FC 2 at para 22), or where the decision maker is not satisfied with a claimant's explanations for the inconsistencies in the evidence (*Lin v Canada (Citizenship and Immigration)*, 2010 FC 183 at para 19). So, even if I were to assume that the *Maldonado* presumption could apply to a visa applicant like Ms. Tong — which is not the case —, it would have been rebutted as Ms. Tong's testimony and evidence are inconsistent and directly contradicted by other evidence on the record.

[36] In the end, I find that the lack of corroborative evidence from Ms. Tong and the contradictions in the evidence and in her testimony could reasonably lead the ID to its finding on lack of credibility. In other words, there is enough left from the ID's analysis on lack of credibility to sustain the reasonableness of the Decision, even if I were to ignore its "vested interest" reasoning. Errors need to be sufficiently central or significant to render a decision unreasonable (*Alexander* at para 67). Here, I am not convinced that the error committed by the ID on the "vested interest" reasoning is central enough to lead me to lose confidence in the outcome reached in the Decision regarding Ms. Tong's lack of credibility (*Vavilov* at paras 106, 122).

[37] A judicial review is not a "line-by-line treasure hunt for error" and a reviewing court must instead consider the administrative decision maker's reasoning and conclusion as a whole (*Vavilov* at para 102; *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 53; *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Papier Ltd*, 2013 SCC 34 at para 54). In the Decision, the ID notes several elements that led it to question Ms. Tong's credibility, and it is in regard to the reasons as a whole that the reasonableness of the Decision is to be assessed. It is well established that the Court must show deference to a decision maker on credibility issues (*Dunsmuir v New Brunswick*, 2008 SCC 9, at para 53; *Aguebor v Canada (Minister of Employment and Immigration)* (1993), 160 NR 315 (FCA) at para 4). Indeed, these issues of credibility are at the very heart of their jurisdiction and expertise. The arguments presented by Ms. Tong merely express her disagreement with the ID's evaluation and weighing of the evidence and ask the Court to prefer her opinion and interpretation of the evidence to those of the ID. However, this is not the role of a reviewing court in judicial review applications.

B. *Performance of work according to the IRPA and the IRPR*

[38] As her second main argument, Ms. Tong submits that the ID unreasonably found that she performed "work" at Ms. Feng's business as the ID failed to account for the substantial differences between the facts of her case and the facts of the decisions on which the ID relied. The meaning of the word "work" in subsection 30(1) of the IRPA is set out in section 2 of the IRPR, which defines "work" as "an activity for which wages are paid or commission is earned, or that is in direct competition with the activities of Canadian citizens or permanent residents in the Canadian labour market."

[39] Again, I disagree with Ms. Tong. Contrary to what Ms. Tong argues, the ID did not rely on the factual pattern of the cases it cited. Rather, it used the underlying principles of the case law to determine whether Ms. Tong's actions effectively amounted to the performance of "work" as defined by the IPRA and the IRPR.

[40] First, from *Georgas v Minister of Employment and Immigration*, [1979] 1 FC 349 at paragraph 2, the ID retained that whether an activity falls within the definition of "work" as defined by the IRPA and the IRPR, depends on the nature of the work and the circumstances in which it was performed. That led the ID to pay particular attention to the work performed on November 28, 2019.

[41] Then, having considered *Juneja v Canada (Citizenship and Immigration)*, 2007 FC 301, the ID observed that the intention behind the broad definition of "work" in the IRPR is to protect job opportunities for citizens and permanent residents of Canada by prohibiting activities that compete with people who are legally entitled to work in Canada, whether a wage is paid or not.

[42] Finally, from the *Lung* case (which is referred to as *Yu Lung v Canada (Citizenship and Immigration)* (June 27, 2013), IMM-5523-12 (FC) in *Petinglay v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1371 at para 11), the ID determined that the amount of time spent assisting someone is not an essential element to determine whether a claimant performed work or not.

[43] Having considered these principles, the ID turned to Ms. Tong's situation and held that Ms. Tong worked at Ms. Feng's business because she was found on the premises and about to perform a massage — which is an activity material to the nature of Ms. Feng's business. The ID

found that such activity had the potential to deprive Canadian citizens or permanent residents of the opportunity to work at the wellness centre and to perform the same activity in exchange of a wage. Contrary to what Ms. Tong argues, the ID did not find that she performed work solely because of the way the Court ruled in the cases the ID relied on. Instead, the ID referred to those cases for the purpose of circumscribing the concept of illegal work in Canada, and made its findings based on the evidence from Ms. Tong's situation. It is certainly not unreasonable to infer, from Ms. Tong's presence in the massage room and from the massage oil and salts coating her forearms and hands, that she was about to perform a massage.

[44] Ms. Tong claims that there is no evidence that she "consistently worked or helped out" at Ms. Feng's business. However, as appealing as this argument may look, this element does not appear to be a requirement of the definition of "work" under the applicable law or jurisprudence. A one-time event can be sufficient. Ms. Tong only proposes an alternative to how the word "work" should be interpreted. However, this is not the state of the law.

[45] According to *Vavilov*, "[a]dministrative decision makers are not required to engage in a formalistic statutory interpretation exercise in every case" (*Vavilov* at para 119), but "the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision" (*Vavilov* at para 120). Upon judicial review of the interpretation of a statutory provision by an administrative decision maker, "the court must examine the administrative decision as a whole, including the reasons provided by the decision maker and the outcome that was reached" (*Vavilov* at para 116).

[46] In the circumstances, I am not persuaded that Ms. Tong has discharged her burden of proof as to how the ID's reasoning on the interpretation of "work" for the purposes of the IRPA

is unreasonable. Nothing indicates that the ID's interpretation, however rigid it might appear to be, departed from the "modern principle" of statutory interpretation, namely the approach focused on text, context, and purpose (*Vavilov* at para 117). The Decision eloquently shows that the ID considered all of the evidence, weighed it and analyzed it in a detailed and cogent manner.

[47] *Vavilov*'s revised framework for reasonableness requires the reviewing court to take a "reasons first" approach to judicial review. Where a decision maker has provided reasons, the reviewing court must begin its inquiry into the reasonableness of the decision "by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion" (*Vavilov* at para 84). The reasons must be read holistically and contextually in light of the record as a whole and with due sensitivity to the administrative setting in which they were given (*Vavilov* at paras 91–94, 97, 103). An assessment of the reasonableness of a decision must be robust, but it must remain sensitive to and respectful of the administrative decision maker (*Vavilov* at paras 12–13). Reasonableness review is an approach anchored in the principle of judicial restraint and in a respect for the distinct role and specialized knowledge of administrative decision makers (*Vavilov* at paras 13, 75, 93). In other words, the approach to be followed by the reviewing court is one of deference, especially with respect to findings of facts and the weighing of evidence. Before a decision can be set aside on the basis that it is unreasonable, 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). Here, there are no shortcomings nor flaws in the ID's analysis of Ms. Tong's performance of work within the meaning of the IRPA and the IRPR that are sufficiently central or significant to render the Decision unreasonable (*Vavilov* at paras 96–97, 100).

IV. Conclusion

[48] For the above-mentioned reasons, Ms. Tong’s application for judicial review is dismissed. The Decision constitutes a reasonable outcome based on the law and the evidence, and it has the requisite attributes of transparency, justification, and intelligibility. According to the reasonableness standard, it is sufficient for the Decision to be based on an internally coherent and rational analysis, and to be justified having regard to the legal and factual constraints to which the decision maker is subject. This is the case here with respect to the ID’s conclusions, and there are no grounds justifying the Court’s intervention.

[49] The parties did not raise a question of general importance to be certified, and I agree there is none.

JUDGMENT in IMM-6035-21

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed, without costs.

2. There is no question of general importance to be certified.

"Denis Gascon"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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