Federal Court  Cour fédérale

Date: 20220714

Docket: IMM-6101-20

Citation: 2022 FC 1043

Ottawa, Ontario, July 14, 2022

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

YANLING MA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Yanling Ma, seeks judicial review of a decision of the Refugee Appeal Division ("RAD"), dated November 3, 2020, confirming the determination of the Refugee Protection Division ("RPD") that the Applicant is neither a Convention refugee nor a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*").

[2] The Applicant fears persecution in China at the hands of the Chinese government including the Public Security Bureau ("PSB"), due to her participation in an anti-government protest. The RAD dismissed the Applicant's appeal because it found that the Applicant was not credible.

[3] The Applicant submits that the RAD committed several errors in its credibility findings that render its decision unreasonable.

[4] For the reasons that follow, I find the RAD's decision is unreasonable. I therefore grant this application for judicial review.

II. **Facts**

A. *The Applicant*

[5] The Applicant is a 41-year-old citizen of China. In May 2015, she leased land to operate a pig farm. In May 2018, the Applicant and other farmers from her village received notice that the government would expropriate their land. The Applicant was offered compensation and directed to leave her property by June 30, 2018. The Applicant found the compensation to be insufficient.

[6] On June 13, 2018, the Applicant allegedly participated in an anti-government protest, accusing the government of corruption and unfair compensation. She states that while the police arrested protestors, she escaped and went into hiding at her maternal aunt's home. While in

hiding, the Applicant claims that she learned from her parents that the PSB had searched for her at her house and accused her of taking the lead in anti-government action, slander and sabotaging social order.

[7] The Applicant left China on September 7, 2018 and came to Canada with the assistance of a smuggler. The Applicant arrived in Canada on September 18, 2018 and made a refugee claim.

B. *The RPD Decision*

[8] In a decision dated December 16, 2019, the RPD rejected the Applicant's refugee claim. The determinative grounds for the refusal were credibility and the RPD's finding that the Applicant faced prosecution in China rather than persecution. With respect to the Applicant's credibility, the RPD made the following findings:

- The Applicant's credibility is undermined by the fact that, until she was questioned by the RPD, the Applicant failed to disclose that she travelled to Canada on a falsified Canadian visa.

- The Applicant provided conflicting evidence with respect to what occurred at the protest: her Basis of Claim ("BOC") form states that she led the protest, whereas she testified that those who were arrested led the protest.

- The Applicant's testimony regarding the PSB's visits lacks credibility, is inconsistent with her BOC, and consists of an attempt on the part of the Applicant to embellish her claim. The Applicant testified before the RPD that the PSB visited her home on June 14, 2018, and returned on various occasions thereafter and as recently as October 2019, yet this information was not included in her BOC.

- The Applicant has not provided sufficient credible and reliable evidence that she is being pursued by the PSB. Since the Applicant alleges that the PSB continued to inquire about her whereabouts on multiple occasions, and others involved in the protest were arrested, it is reasonable to expect that an arrest warrant or summons would have been left with the Applicant's family. Given the lack of an arrest warrant or summons, the Applicant lacks credibility.

C. *Decision Under Review*

[9] The Applicant appealed the RPD's decision to the RAD. In a decision dated November 3, 2020, the RAD dismissed the Applicant's appeal and affirmed the RPD's determination that the Applicant is neither a Convention refugee nor a person in need of protection. The RAD made the following findings:

- The RPD erred by drawing a negative credibility inference from the Applicant's fraudulently obtained Canadian visa. The Applicant's Schedule 12 form indicates that she had an improperly obtained Canadian visa.

- The RPD was correct to draw a negative credibility inference from the inconsistencies between the Applicant's testimony and her BOC regarding the PSB visits. The Applicant stated in her BOC that the PSB had visited her home and that this prompted her to find a smuggler. Since the evidence indicates the smuggler applied for a Canadian visa on July 28, 2018, the PSB visit(s) would have occurred before this date. The RPD did not err in drawing a negative inference from the omission of the PSB visits that followed the Applicant's decision to retain a smuggler, including the PSB visits since her arrival in Canada in September 2018. The Applicant did not provide an adequate explanation for why the visits were omitted from her BOC.

- The RPD did not err by drawing a negative inference from the lack of a summons or other documentation from the PSB.

- A negative credibility inference is drawn from the Applicant's testimony on her participation in the protest, which was evasive and contradictory.

- Due to a lack of sufficient credible evidence, the RPD did not err by concluding that the PSB are not looking for the Applicant.

III. **Issue and Standard of Review**

[10] The sole issue in this application for judicial review is whether the RAD's decision is reasonable.

[11] Both parties concur that the applicable standard of review in evaluating the RAD's decision is reasonableness. I agree (*Adelani v Canada (Citizenship and Immigration)*, 2021 FC 23 at paras 13-15; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*") at paras 10, 16-17).

[12] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). 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). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[13] For a decision to be unreasonable, the applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). Not all errors or concerns about a decision will warrant intervention. A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125). Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep" (*Vavilov* at para 100; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156, at para 36).

IV. **Analysis**

[14] The Applicant submits that the RAD made several errors in affirming the RPD's credibility finding. First, the Applicant submits that the RAD made an unreasonable finding with respect to the PSB visits. The RAD found that the RPD was correct to draw a negative credibility inference from the inconsistencies between the Applicant's testimony and her BOC regarding the PSB visits, as well as the Applicant's omissions from her BOC. The Applicant argues that the RAD's finding is inconsistent with the evidence provided at the RPD hearing, in which the Applicant stated that the PSB had visited her home on June 14, 2018 and returned on other occasions, as recently as October 2019. Furthermore, both the RPD and the RAD failed to assess the substance of the Applicant's evidence regarding whether the PSB visits took place. Instead, the RPD and the RAD focused on whether the evidence could be disregarded because it was not included in the BOC.

[15] The Respondent maintains that it was reasonably open to the RAD to find that the Applicant's BOC omissions undermined her credibility. The PSB visits are central to the Applicant's claim and the onus was on the Applicant to include this information in her BOC. During the hearing, counsel for the Respondent stressed that the RAD did not make a general credibility finding on this point, but rather found that the RPD was correct to draw a negative inference from the omission of the PSB visits in the BOC. This omission, when considered alongside other negative inferences, contributed to the overall credibility finding.

[16] I agree with the Applicant's position on this point. I find that it was improper of the RPD to ask the Applicant if the PSB had returned to her home after June 14, 2018, only to draw a negative inference from the fact that she failed to amend her BOC to include subsequent PSB visits. As noted by counsel for the Applicant during the hearing, the very purpose of an RPD hearing is to allow refugee claimants to testify in order to clarify information in their BOC and to address information that arose between the signing of the BOC form and the RPD hearing. It is not uncommon for new evidence to arise between the signing of the BOC and the RPD hearing. I therefore find that the RAD erred by placing undue focus on the BOC omissions, rather than assessing the credibility and substance of the Applicant's evidence regarding whether the PSB visits in fact took place.

[17] Second, the Applicant submits that the RAD erred in affirming the RPD's finding that a negative inference can be drawn from the lack of a summons or other documentation from the PSB. Specifically, the Applicant argues that the RPD failed to provide a reference for its view that a summons would have been issued in the Applicant's circumstances. While the RPD did cite the case of *Huang v Canada (Citizenship and Immigration)*, 2019 FC 148 ("*Huang*"), which supports the finding that when summons are issued in China they can be left with family members, the RPD only cited *Huang* in the part of its decision that discusses prosecution versus persecution. The Applicant therefore argues that the RAD misapprehended the RPD's decision in finding that the RPD was correct to rely on *Huang* because it is factually similar to the Applicant's situation and to support its finding that a summons would likely have been left with the Applicant's family.

[18] The Respondent submits that given that Chinese authorities allegedly continued to enquire about the Applicant on a number of occasions, and that others were arrested following the protest, it was reasonable of the RAD to find that a summons would have been left with the Applicant's family. During the hearing, the Respondent's counsel asserted that the case at hand bears several similarities to *Huang*, and that any supposed misquoting by the RPD could only be characterized as a small typographical error.

[19] I disagree with the Respondent and find that the RAD did indeed misconstrue the RPD's reliance on *Huang*. In finding that it is reasonable that an arrest warrant or summons would have been left with the Applicant's family, the RPD's decision states:

> The claimant was asked if a summons had been issued following the PSB's visit to her home. The panel notes that country condition documents indicate that a summons is often left with or shown to family members when the police want someone to come to their headquarters. In addition, the summons is the documentary basis for the subsequent issuance of an arrest warrant, if the person in whom they are interested does not respond to the summons. Although this policy is not always implemented, it is reasonable that one would have been issued in respect of the claimant, given that she testified that the PSB have gone to her home in search of her on multiple occasions, even as recently as October of this year.

[20] The footnote corresponding with the paragraph above cites to the October 2019 National Documentation Package for China. Nowhere in the four paragraphs of the RPD's discussion of the summons is the *Huang* decision cited. While the RPD does cite *Huang* later in its decision, it does so in the context of its distinction between prosecution and persecution, and not to support its finding regarding the issuance of a summons or other documentation by the PSB.

[21] In her submissions to the RAD, the Applicant cited *Chen v Canada (Citizenship and Immigration)*, 2013 FC 311 ("*Chen*"), which states that the documentary evidence on China indicates that policing standards are highly inconsistent and it is speculative for the RPD to reason that a summons would have been issued (at para 17). In its decision, the RAD finds *Chen* to be factually distinguishable from the Applicant's situation, and finds that the RPD correctly relied on the *Huang* case in its analysis to support the conclusion that a summons would have been left with the Applicant's family in this case:

> […] I find [*Chen*] is factually different from the Appellant's situation as the claimant in *Chen* did provide the Board with a notice of summons. However, the Court ultimately found that the Board erred in its analysis of the summons by expecting that an arrest summons would have been issued instead of a notice of summons. In the Appellant's case, the RPD quoted the 2019 case of *Huang* which I find is more factually similar to the Appellant's situation. In *Huang*, similar to the Appellant, the claimant also managed to escape the police from the protest, also went into hiding, was also notified that the PSB had visited his home, also used a smuggler to leave China and also did not provide any documentary evidence to the Board such as a summons or warrant. The Court in *Huang* determined that when a claimant testifies that the PSB is relentlessly pursuing him or her, one may expect to see a summons or some other kind of documentation. The Court did note that this by itself would not be determinative and indicated that the RPD had also made other negative credibility findings.
>
> Similar to in *Huang*, the Appellant has conveyed that the PSB has relentlessly pursued her. That is, the Appellant's situation is not such that she was cursorily apprehended at the scene of the protest itself and therefore only issued an oral summons. In the Appellant's case, even though the Appellant escaped at the protest, the PSB still managed to identify her and locate her residence. This suggests that the PSB went through the effort of conducting some sort of investigative process with respect to the Appellant, on a balance of probabilities. The Appellant also alleges that the PSB have been continuing to seek her for well over a year. I find that these factors therefore connote that the PSB interest in the Appellant is relentless. On the basis that the PSB have gone to the lengths of identifying, locating and continuously searching for the

> Appellant, I find it is more likely than not that the PSB would have issued a summons or similar document. As a result, I find the RPD's reliance on *Huang* is correct and I do not find that the RPD erred by drawing a negative inference from the lack of a summons or other documentation from the PSB.
>
> [Emphasis added]

[22] While the facts in *Huang* are indeed similar to the case at hand, I agree with the Applicant that the RAD's reliance on the *Huang* decision to affirm the RPD's finding lacks rationale and cannot simply be characterized as a typographical error. Specifically, the RPD did not in fact cite *Huang* to support its conclusion that a summons would have been left at the Applicant's home if the PSB were indeed searching for her. The RPD only cited *Huang* in its discussion of the distinction between prosecution and persecution. As noted by counsel for the Applicant during the hearing, this can be characterized as the RAD erroneously attempting to "bootstrap" the RPD's decision by misapprehending the case law relied on by the RPD.

[23] Third, the Applicant submits that the RAD erred in finding that the evidence was inconsistent regarding whether the Applicant 'took the lead' in the protest. The RAD's finding was based on a very short exchange between the Applicant and the RPD panel at the hearing. The Applicant argues that the RAD failed to acknowledge how brief and unclear this exchange was, and therefore misconstrued the evidence. The Respondent maintains that it was reasonably open to the RAD to find that the Applicant gave inconsistent evidence as to whether she was a protest leader.

[24] Upon listening to the recording of the RPD hearing and the exchange referenced by the Applicant, I agree with the Applicant. The exchange between the Applicant and the RPD

member regarding the Applicant's participation in the protest was brief and lacks clarity. I therefore find that the RAD erred by drawing a negative inference from such a short exchange.

[25] In my view, while the RAD's errors with respect to its credibility analysis may not warrant a finding of unreasonableness if considered individually, I find that when these errors are weighed cumulatively, they are more than "minor missteps" (*Vavilov* at para 100). Overall, the RAD's analysis does not stand up to scrutiny, and its errors affect the reasonableness of the decision as a whole.

[26] Having determined that the RAD made sufficient errors in its credibility assessments to render the decision unreasonable, there is no need to decide whether the risk of being prosecuted amounts to persecution in the Applicant's case.

V. **Conclusion**

[27] Based on the above analysis, I find the RAD's decision to be unreasonable. This application for judicial review is allowed. No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-6101-20

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed. The decision under review is set aside and the matter is referred back for redetermination by a different panel.

2. There is no question to certify.

"Shirzad A."
Judge

FEDERAL COURT

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