Federal Court  Cour fédérale

Date: 20180223

Docket: IMM-443-17

Citation: 2018 FC 203

Toronto, Ontario, February 23, 2018

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

YONG ZHANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION
THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

JUDGMENT AND REASONS

I. Introduction

[1] This judicial review challenges the refusal of a "Restricted" Pre-Removal Risk Assessment [Restricted PRRA], where the Minister's Delegate [MD] found that Yong Zhang would be unlikely to face risks upon his return to China.

[2] Mr. Zhang raises two issues in this application: whether the MD (1) breached principles of procedural fairness, and (2) made unreasonable factual errors in her risk assessment.

[3] For the reasons below, I conclude that the MD did not commit any error with respect to procedural fairness. However, I agree with Mr. Zhang that the MD's risk assessment was unreasonable.

[4] Accordingly, the application for judicial review is allowed.

II. Background

[5] Mr. Zhang, aged 51, is a Chinese citizen. He first visited Canada in 2003 and attempted to establish himself in the country as an investor. He obtained a multiple-entry temporary resident visa as a worker in January 2005. However, in February 2007, Chinese authorities issued a warrant for his arrest for fraud and other related economic crimes, which was followed by an Interpol warrant. As a result, on September 13, 2007, Mr. Zhang was found inadmissible under sections 44(1) and 36(1)(c) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. Mr. Zhang was arrested on September 18, 2007 as a result, and subsequently claimed refugee protection while in detention in October 2007. He was released in November 2007.

[6] On May 10, 2012, Mr. Zhang was convicted of kidnapping and extortion arising from events which occurred in Canada in August 2010, and was sentenced to over 34 months' imprisonment on December 16, 2013.

[7] On or around July 10, 2014, the Refugee Protection Division terminated Mr. Zhang's refugee claim after receiving notice of ineligibility from the Canada Border Services Agency [CBSA] under sections 104(1)(b) and 101(1)(f) of IRPA (incorporating the Article 1(F)(b) exclusion of the *Convention relating to the Status of Refugees*) due to Mr. Zhang's inadmissibility for serious criminality.

[8] On July 15, 2014, CBSA issued an inadmissibility report against Mr. Zhang on grounds of serious criminality under sections 44(1) and 36(1)(a) of IRPA, and a deportation order was issued by the MD.

[9] Mr. Zhang filed a Restricted PRRA on November 28, 2014, which was refused on March 2, 2015. He applied for leave and judicial review of that decision on March 20, 2015. Leave was granted by the Federal Court on June 15, 2015 and the Minister agreed to reopen the case for redetermination.

[10] Mr. Zhang filed additional Restricted PRRA submissions on October 2, 2015. A Senior Immigration Officer [Officer] rendered a positive risk opinion on December 17, 2015, which constitutes the first stage of the Restricted PRRA process. Mr. Zhang's case was then referred to the Case Management Branch of Citizenship and Immigration for the second stage, namely a final decision by the MD.

[11] In her January 11, 2017 decision [Decision], the MD refused the Restricted PRRA, finding that there was not more than a mere possibility that Mr. Zhang would face (1) the death

penalty, (2) cruel and unusual treatment or torture, or (3) retaliation from organized criminals, if returned to China.

III. Analysis

A. *Standard of Review*

[12] The standard of review for questions of procedural fairness pertaining to the right to be heard is correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43). However, a reasonableness standard applies to the merits of the factual analysis of a PRRA (or Restricted PRRA) (*Chen v Canada (Citizenship and Immigration*), 2016 FC 702 at para 13; *Muhammad v Canada (Citizenship and Immigration)*, 2014 FC 448 at para 52 [*Muhammad 2014*]).

B. *Procedural Fairness*

[13] The crux of Mr. Zhang's procedural fairness argument is that the MD suggested that Mr. Zhang ought not to submit additional evidence. The Respondents oppose this argument, arguing that Mr. Zhang had ample and fair opportunity to respond and that Mr. Zhang misstates the factual underpinnings of the Decision.

[14] The MD informed Mr. Zhang on November 9, 2016 that she had enough evidence to make a decision and that Mr. Zhang did not have to send in more evidence, writing:

> I realize that a large number of documents and translations were received from the Chinese authorities and that there is a fair amount of repetition in the documents. Based on my initial review,

> it seems there is sufficient information on my file to provide me with an adequate understanding of the case, but should you feel there are any missing documents of significance, I ask that you provide them to me […]

[15] I do not agree with Mr. Zhang that this statement amounts to a breach of procedural fairness. The MD did not prevent Mr. Zhang from sending in more evidence. To the contrary, the MD invited further documents of significance, and Mr. Zhang submitted additional comments and exhibits to the MD on November 24, 2016.

[16] As a result, I find that the MD respected Mr. Zhang's right to be heard.

C. *Reasonableness of the MD's Restricted PRRA Assessment*

[17] The factual errors alleged by Mr. Zhang relate to the MD's assessment of the death penalty and her assumption that it would not be imposed. Specifically, Mr. Zhang contends that the MD did not give due weight to the Officer's conclusions outlining the risks of return, but rather conducted her own analysis of the risks, thus failing to give due weight to the evidence of risk of cruel and unusual treatment. Mr. Zhang further asserts that the MD erred by adjudicating foreign law, and that she failed to seek advice on the *Charter* (*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]) implications of deportation and/or diplomatic assurances of treatment upon return to China.

[18] The Respondents, relying on *Muhammad 2014* and *Placide v Canada (Citizenship and Immigration)*, 2009 FC 1056, submit that the assessment made by the Officer under section

172(2) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR] did not amount to a decision, that the MD was not bound by the Officer's opinion, and that all aspects of the Decision fell directly into the MD's jurisdiction, who in no way exceeded or shirked her duty, and provided ample opportunity for Mr. Zhang to respond and provide submissions. The Respondents further argue that the MD's conclusions were reached after reviewing all the evidence well within her jurisdiction and expertise, including the review of the Chinese legal provisions. The Respondents maintain this is regularly done in analogous contexts, including common equivalency analyses routinely conducted by visa officers.

[19] While the MD did not commit any error on the first ground raised, I find that the MD erred in her assessment relating to the risk, per IRPA section 97, which the Applicant would face in China. Specifically, I find that she erred in her treatment of evidence on the record in the form of the risk assessment by the Officer below, as well as a detailed report from Margaret K. Lewis, a Seton Hall Law School Professor specializing in Chinese criminal law [Lewis Report]. These two documents both discussed risk to the Applicant.

[20] The law is clear that in a Restricted PRRA, the decision-maker does not have to follow the conclusions of the officer in the ultimate evaluation on risk assessment. As Justice Strickland held in *Muhammad 2014*:

> [77] Based on *Placide*, the PRRA Officer's risk assessment is merely advice or a suggestion which does not bind the Minister's Delegate, who is permitted to make her own decision with reasons. Further, any balancing of the risk and security assessments only comes into play if the Minister's Delegate determines that a section 97 risk exists.

[21] The PRRA officer thus simply provides an opinion, constituting one of various pieces of evidence which must be balanced against other factors that the MD takes into account in conducting a Restricted PRRA analysis.

[22] Here, as explained in greater detail below, what I find to be unreasonable is the MD's failure, given common ground in the evidence provided in the Lewis Report and PRRA risk determination made by the Officer, to explain why she was rejecting those opinions, and instead arriving at the opposite conclusion.

(1) Risk of Torture

[23] The MD found that Mr. Zhang was likely to be charged with contract fraud and other economic crimes, including defrauding purchasers and financial institutions, falling under sections 266 and 264, as well as with bribery offences described in sections 389, 390, 393 of the Criminal Law of the People's Republic of China [PRC Criminal Law]. The MD found that these offences do not carry the death penalty.

[24] However, quite apart from the question of the death penalty, there was significant evidence in the record, including in the Lewis Report and that of the Officer, a risk assessment specialist, that even non-capital offences could subject Mr. Zhang to a risk of torture.

[25] Mr. Zhang submitted that he would not be afforded a fair trial, that he would be severely sentenced for a number of reasons, and that he would therefore face cruel and unusual treatment,

including while under detention and subsequent incarceration, where he would be tortured. As to these submissions of Mr. Zhang, the Officer had stated in his December 2015 risk opinion:

> […] I find that there are substantial grounds to conclude that he will be exposed to a danger of torture pursuant to Article 1 of the Convention against torture. I also find that there are substantial grounds to believe that he faces a risk of cruel and unusual treatment or punishment due to prison conditions and the severe ill-treatment of detainees and prisoners in China.

[26] The MD, on the other hand, determined in her Decision that Mr. Zhang was wanted for the alleged criminal acts he committed in China between 2003 and 2005, and not for improper (political) motives. The MD found that Mr. Zhang was likely to be prosecuted after returning to China, but that he would be represented by a lawyer during the criminal process, and would be permitted to advance arguments in his defence. The MD concluded that Mr. Zhang would more likely than not be convicted of contract fraud and possibly of bribery, with a potential sentence of up to life imprisonment, but that the imposition of such a long sentence was not more than a mere possibility, and that even then, it was unlikely to be grossly disproportionate to what might be an appropriate sentence in Canada. The MD further held that although prison conditions in China may be harsh, Mr. Zhang's personal circumstances would allow for a greater degree of comfort while in prison.

[27] In sum, the MD was satisfied that there was not more than a mere possibility that Mr. Zhang would face cruel and unusual treatment due to an unfair trial, or due to prison conditions. The MD also concluded that evidence already amassed by the Chinese authorities against Mr. Zhang meant that confession evidence would appear not to be required for the

prosecution, and therefore there was not more than a mere possibility that Mr. Zhang would be tortured after being returned to China, in connection with the investigation process.

[28] These conclusions again appear to, at worst, contradict, and, at best, overlook key conclusions contained in the Lewis Report, which opined that Mr. Zhang would most likely receive a harsh sentence without parole, be the subject of seriously flawed legal proceedings, and be at risk of physical abuse.

[29] While the MD referred to the Lewis Report with respect to the death penalty, she failed to advert to the Lewis Report's conclusions relating to torture and imprisonment, and/or the cruel and unusual treatment that would likely await Mr. Zhang within China's criminal justice system. Given that the Lewis Report addressed Mr. Zhang's potential torture, and cruel and unusual treatment in China, the MD therefore unreasonably failed to engage with this evidence. I also find that the MD's reasons are inconsistent with the evidence on file. The MD referenced recent reports such the 2016 UNCAT (United Nations Committee Against Torture) Report on China. This UNCAT Report establishes that torture and ill-treatment were still deeply entrenched in China's criminal justice system. Similarly, the 2016 US Department of State (DOS) report on China speaks about harsh and degrading conditions in penal institutions.

[30] Furthermore, the MD's findings regarding Mr. Zhang's personal circumstances allowing for "more comfort" while in prison amount to mere speculation and are inconsistent with the evidence on file (*Muhammad 2014* at para 165).

(2) Risk of the death penalty

[31] The MD further found that Mr. Zhang would likely be charged with economic offences, which do not carry the death penalty in China, such as section 263 of the PRC Criminal Law. She concluded that:

> In my opinion, the facts of the case as described in the prosecution summary and summarized elsewhere in the materials does not suggest that Mr. Zhang's activities of defrauding purchasers and financial institutions could fit the description as outlined above which appears to be more equivalent to armed robbery or robbery with violence as those terms are understood on Canadian Criminal Law.

[32] Robbery combined with violence, of the sort the MD was referring to here, carries harsher sentences, up to capital punishment. For instance, the PRC Criminal Law reads as follows (as excerpted from the Decision):

> Those robbing public or private property using force, coercion, or other methods are to be sentenced to three to ten years in prison in addition to fine. Those falling in one or more of the following cases are to be sentenced to 10 years or more in prison, given life sentences or sentenced to death in addition to fines or confiscation of property:
>
> (1) those intruding into other's houses to rob;
>
> (2) those committing robbery on public transportation vehicles;
>
> (3) those robbing banks or other financial institutions;
>
> (4) those committing several robberies or robbing large amounts of money or other properties;
>
> (5) those causing serious injuries to or death while robbing;
>
> (6) those committing robbery posting as servicemen or policemen;
>
> (7) those committing robbery using guns;
>
> (8) those robbing materials for military use, or materials for fighting disasters or relieving disaster victims.

[33] The MD considered the Lewis Report in the context of whether section 263 — and thus the death penalty — would be a risk for Mr. Zhang. The MD considered the Chinese investigation documents on file, along with the criminal charges against Mr. Zhang, and convictions levied against Mr. Zhang's former associates and co-accused. She found there was not more than a mere possibility that Mr. Zhang would be charged under section 263, and thus at risk of the death penalty.

[34] This conflicts with the Lewis Report, which at page 3 reads:

> The Eighth Amendment to the PRC Criminal Law, which took effect in May 2011, decreased the number of death eligible crimes from sixty-eight to fifty-five and the PRC government has since publicly expressed its intention to further restrict the number of death eligible crimes. This decrease has thus far been largely symbolic because the crimes removed from being death eligible were those for which the death penalty was seldom imposed in practice (e.g., smuggling cultural relics). Moreover, many non-violent, economic-related crimes remain within the scope of the death penalty. Today, the actual number of executions annually remains a state secret. Well-informed estimates are that there are still approximately 2,400 executions annually, which means that the PRC currently executes more people every year than the rest of the world combined.

[35] The Lewis Report concluded that these reforms did not clearly mitigate the risk to Mr. Zhang.

[36] The MD, however, rejected the Lewis Report's conclusions on the death penalty, finding that its author:

> […] was provided with some materials related to Mr. Zhang's case. I note that she was not provided with the entire file that is before me […]. If this information was before Ms. Lewis and she read it, she does not explain why she prefers the version of the

> facts presented to her by Mr. Zhang rather than the criminal record information provided by the authorities. If the information was not before Ms. Lewis than I note she did not have a complete picture of Mr. Zhang's criminal record in China.

[37] The MD specifically referred to Mr. Zhang's claims that he was involved in the pro-democracy student protests in the 1988-1992 period, and that Mr. Zhang had been sentenced to prison for 6 years during that period, which, as the Respondents pointed out during the hearing, related to a break and enter.

[38] It appears to me that the MD's reasons for rejecting the Lewis Report's findings are inconsistent. The Lewis Report was clear, finding that it was "entirely possible" Mr. Zhang could be charged under section 263 of the PRC Criminal Law and thus be subject to the death penalty. The documentation in the record, including the Lewis Report, is also clear that Chinese authorities frequently issue formal charges only shortly before trial, and the extent of the charges against Mr. Zhang may not yet be fully known. Furthermore, the Lewis Report considered the fact that Chinese Public Service Bureau authorities have visited Mr. Zhang on more than one occasion while he has been detained in Canada, and accused him of massive fraud, suggesting that he "faces very serious charges".

[39] The Lewis Report observed that the co-accused, Mr. Zhang's business associates, pointed their fingers at Mr. Zhang, stating his central role. It concluded that because Mr. Zhang was considered a fugitive, he would likely receive a much harsher sentence than his associates:

> Turning to Section 263, it allows for the death penalty when a person by violence, coercion, or other methods robs a banking institution or the robbery involves a huge sum of money. The complicated and unclear financial transactions underlying the

> allegations against Mr. Zhang make it difficult to ascertain whether the PRC government would charge him under Section 263. Nonetheless, it is entirely possible that the government may invoke this section, especially seeing as banking institutions were allegedly involved in the transactions.
>
> […] Moreover, many non-violent, economic-related crimes remain within the scope of death penalty.

[40] The MD dismissed these conclusions on the basis that (i) intervention packages had already set out the facts upon which Mr. Zhang would be charged, which would not be consistent with the death penalty provisions, and (ii) his work colleagues never received anything close to the convictions for which the death penalty would result.

[41] I find that the MD's Decision is unreasonable because it failed to adequately engage with the evidence to the opposite effect — namely, why Mr. Zhang likely would be at risk of the death penalty, and the argument relating to the primary role of Mr. Zhang in the economic crimes, as opposed to the supporting role of his associates, in addition to the consequences of his flight from China to Canada (see *Muhammad v Canada (Citizenship and Immigration)*, 2012 FC 1483 at para 61 [*Muhammad 2012*]).

[42] Finally, as in *Muhammad 2012*, given my conclusions above, there is no need for me to address the other issues raised by Mr. Zhang regarding the alleged requirement for the MD to obtain advice on foreign law and the *Charter*, and assurances on the prospective treatment of Mr. Zhang from China.

IV. Request for Certification

[43] Mr. Zhang submits the following question for certification as a serious question of general importance:

> Does the Minister reviewing a favourable PRRA decision have a duty to seek diplomatic assurance that death penalty will not be applied to an individual removed from Canada if he intends to overturn this decision?

[44] Given that this issue is not dispositive of this application, there is no reason to certify the question (*Zhang v Canada* (*Citizenship and Immigration*), 2013 FCA 168 at para 9).

V. Conclusion

[45] I find that the MD unreasonably failed to address key points contained in the evidence regarding risk of torture, and cruel and unusual punishment, including with respect to the death penalty. While the Respondents appropriately note that the MD's assessment of evidence in a Restricted PRRA commands a high degree of deference, for the reasons set out above, the MD's failure to address key evidence in this case is unreasonable, and amounts to a reviewable error. The application for judicial review is accordingly allowed. The Decision is set aside, and shall be considered anew by a different decision-maker. No question is certified and no costs are awarded.

JUDGMENT in IMM-443-17

THIS COURT'S JUDGMENT is that:

1. The judicial review is allowed.
2. The Decision of the Minister's Delegate, dated January 11, 2017, is set aside and shall be considered anew by a different decision-maker.
3. No question will be certified.
4. There is no award as to costs.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-443-17
STYLE OF CAUSE:	YONG ZHANG v THE MINISTER OF CITIZENSHIP AND IMMIGRATION, THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	DECEMBER 5, 2017
JUDGMENT AND REASONS:	DINER J.
DATED:	FEBRUARY 23, 2018

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