Federal Court  Cour fédérale

Date: 20190510

Docket: IMM-777-18

Citation: 2019 FC 639

Ottawa, Ontario, May 10, 2019

PRESENT: Mr. Justice Norris

BETWEEN:

FENGLING XU
MIN JIN YANG
JIE TAO YANG (A MINOR)

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] Fengling Xu and Min Jin Yang are a married couple. Jie Tao Yang is their son. All three have sought protection in Canada under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. Ms. Xu claims to fear persecution in China, her country of nationality, because she is a Falun Gong practitioner and because of that country's oppressive

family planning practices. She acted as the designated representative for her son, who is also a citizen of China. Mr. Yang is a citizen of China as well but he is also a citizen of Guyana. He claims to fear persecution in Guyana and that he is a person in need of protection because of his ethnicity. Ms. Xu and their son make similar claims with respect to Guyana. Mr. Yang also sought protection vis-à-vis China as the spouse of a Falun Gong practitioner. All three applicants relied on the personal narrative submitted by Ms. Xu in support of their claims for protection.

[2] The claims were heard jointly by the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada [IRB] on May 4, 2017. In a decision dated May 24, 2017, the RPD rejected the claims under both sections 96 and 97 of the *IRPA*. The RPD member was satisfied that the applicants had established their personal identities and nationalities. However, with respect to Mr. Yang, the member concluded that, while there is some discrimination against Chinese people in Guyana, it did not rise to the level of persecution, nor would circumstances there cause Mr. Yang to be a person in need of protection. At most, he faced a generalized risk of violence. With respect to Ms. Xu and her son, the member concluded that, because they "had access to the rights of nationals of Guyana," they fell within Article 1E of the *United Nations Convention Relating to the Status of Refugees,* 189 UNTS 150 [*Refugee Convention*] and, therefore, were excluded from refugee protection in Canada. (Article 1E is incorporated into Canadian domestic law by section 98 of the *IRPA*.) The member also concluded that there was no basis to exempt them from the application of Article 1E of the *Refugee Convention* because his findings with respect to Mr. Yang's claim applied equally to them. The member therefore did not address any of the allegations with respect to China.

[3] The applicants appealed this decision to the Refugee Appeal Division [RAD] of the IRB. They did not file any new evidence or request a hearing. In a decision dated January 29, 2018, the RAD confirmed the decision of the RPD and dismissed the appeal.

[4] The applicants now apply for judicial review of this decision under section 72(1) of the *IRPA*. They submit that the RAD denied them procedural fairness when it decided the issue of state protection against them without first giving them notice that this issue was in play or an opportunity to address it. They also submit that the RAD's determinations with respect to the lack of nexus to a *Convention* ground, with respect to the nature of the risk they face in Guyana, and with respect to exclusion under Article 1E of the *Refugee Convention*, are unreasonable.

[5] For the reasons set out below, I am allowing this application for judicial review. I am satisfied that the RAD's determination with respect to Article 1E exclusion is unreasonable. I am also satisfied that the RAD's consideration of the issue of state protection breached the requirements of procedural fairness. As a result, a new hearing is required.

II. BACKGROUND

[6] Ms. Xu was born in China in July 1977. Mr. Yang was born there in November 1975. Their son Jie Tao was born there in August 2003. All three are Chinese nationals by birth.

[7] In February 2004, Mr. Yang left China to work in Guyana and support the family.

[8] Ms. Xu claims that after their son was born she faced a number of medical problems in China as a result of Chinese family planning practices and requirements. Eventually, in December 2010 she decided to join her husband in Guyana. Their son remained behind with his grandparents in China.

[9] In May 2013, Mr. Yang was granted Guyanese citizenship. That same month, he bought a restaurant in Georgetown, Guyana. Both he and Ms. Xu worked there. According to Ms. Xu's narrative, the restaurant was robbed at gunpoint twice – the first time on December 10, 2013; the second time on May 5, 2014. In the first robbery, a gun was put to Ms. Xu's head and she was assaulted. Shots were fired in the second robbery. After the second robbery, Ms. Xu and Mr. Yang decided to sell the restaurant and leave Guyana. Ms. Xu left for China on June 16, 2014. Mr. Yang stayed behind to sell the restaurant.

[10] Ms. Xu claims that her difficulties with Chinese family planning practices and requirements continued after she returned to China. On the advice of a cousin, she took up the practice of Falun Gong as a way to deal with these difficulties. However, on August 31, 2014, a Falun Gong group session in which she was participating was raided by the Public Security Bureau [PSB]. Ms. Xu was able to make her escape and went into hiding. Upon learning that the PSB were searching for her, Ms. Xu made arrangements with a smuggler to leave China for the United States with her son. The two of them met up with Mr. Yang in Seattle, Washington, in February 2015. They then all entered Canada irregularly near Vancouver. They submitted their refugee claims in Toronto approximately one month later.

[11] Ms. Xu and Mr. Yang each submitted a Basis of Claim Form and other required documents but both relied on the information set out in Ms. Xu's narrative. While the factual basis for the claims was advanced in common, each of the applicants raised distinct claims vis-à-vis China and Guyana. Their respective claims are summarized concisely in the following paragraph from Ms. Xu's narrative:

> In China I fear arrest, imprisonment and abuse by the authorities because of my being a Falun Gong practitioner. I also fear being forced to wear an IUD against my will which I am against. In terms of my son, I fear for his safety as well because of my practice of Falun Gong. My husband too fears living in Guyana where he is worried that he will again be targeted by criminals and gangsters. It is similarly not safe for him to live in China because of my being a Falun Gong practitioner. For these reasons we are all seeking refugee protection in Canada.

[12] Counsel for the applicants filed written submissions shortly after the hearing before the RPD. Counsel continued to rely on all the grounds identified in Ms. Xu's narrative. The legal submissions were framed around three specific issues: (1) identity; (2) credibility; and (3) exclusion ("ability of wife and minor son to get status in Guyana"). There is no suggestion in the RPD member's reasons that he had a different view of what the material issues in the case were.

[13] As noted, the RPD member was satisfied that identity had been established. However, the member rejected the claims under both sections 96 and 97 of the *IRPA*. He limited his analysis to the claims vis-à-vis Guyana.

[14] With respect to Mr. Yang, the member evidently accepted that the restaurant robberies had occurred but found that they were not indicative of a future risk that would engage either section 96 or 97. Even if the robberies were "precipitated by" the claimants' ethnicity, the

member found that the risk "was still in relation to the claimants' restaurant which has now been sold." In the member's view, there was "no suggestion or allegation that the claimants would be unable to live safely in Guyana in another employment capacity other than as restaurant owners." The member also found that while there is some discrimination against ethnic Chinese in Guyana, it did not rise to the level of persecution nor would Mr. Yang be exposed to anything more than a general risk of being a victim of crime there. The member did not make any findings with respect to state protection.

[15] With respect to Ms. Xu and her son, the member found that the decision of the Federal Court of Appeal in *Tretsetsang v Canada (Citizenship and Immigration)*, 2016 FCA 175 [*Tretsetsang*], was "determinative." In the member's view, "Guyanese citizenship is within the control of the wife and child, and whereas they have not made any attempts to secure Guyanese citizenship, the panel finds that they have not made any reasonable efforts to overcome whatever impediments there may be, if any would even exist." On this basis, the member concluded that Ms. Xu and her son "have access to the rights of nationals of Guyana as contemplated in Article 1E of the *Refugee Convention* and they are excluded from refugee consideration in Canada." Further, the member found that neither sections 96 nor 97 of the *IRPA* was engaged with respect to Ms. Xu and her son vis-à-vis Guyana. The member applied the same findings as he made with respect to Mr. Yang's claim and added: "There was no suggestion and no evidence that Falun Gong practitioners are persecuted in Guyana, nor that the wife would be required to wear an IUD in Guyana." (To be sure, Ms. Xu's claim for protection was never advanced on this basis.)

III. DECISION UNDER REVIEW

[16] The applicants appealed this decision to the RAD. In their written submissions in support of the appeal, the applicants identified and directed their submissions to the following three issues:

a) Did the RPD err in finding that there is no nexus between Mr. Yang's fear and a *Convention* ground?

b) Did the RPD err in finding that Mr. Yang only faces a generalized risk in Guyana?

c) Did the RPD err in finding that Ms. Xu and Jie Tao are excluded from protection pursuant to Article 1E of the *Refugee Convention*?

[17] The Minister did not participate in the appeal.

[18] In his reasons for dismissing the appeal, the RAD member instructed himself in accordance with the decision of the Federal Court of Appeal in *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 [*Huruglica*] as well as the decision of the three member RAD panel in *X (Re)*, 2017 CanLII 33034 (CA IRB). As the member understood these authorities, with respect to findings of fact and mixed fact and law he was "to review the RPD decisions applying the correctness standard. Thus, after carefully considering the RPD's decision, the RAD carries out its own analysis of the record to determine whether, as submitted by the Appellant, the RPD erred." While the member does not say so expressly, it must be presumed that he also followed the direction of the Federal Court of Appeal in *Huruglica* (as

elaborated upon by the three member panel of the RAD) that the RAD will normally apply a standard of correctness to all the findings of the RPD but where the RPD enjoys a meaningful advantage over the RAD in making a particular finding, the RAD may assess that finding using a standard of reasonableness, modified to suit the RAD context. As it happened, none of the grounds of appeal were determined on this basis. Credibility was not an issue.

[19] The RAD dismissed the appeal for the following reasons.

[20] First, while the RAD found that the RPD member's statement that "[e]ven if the robberies were precipitated by the claimants' ethnicity, it was still in relation to the claimants' restaurant which has now been sold" was less clear than it could have been, the RAD rejected the applicants' contention that they were at risk in Guyana, whether they were restaurant owners or not, because of their ethnicity. The RAD member conducted his own review of the documentary evidence before the RPD regarding country conditions in Guyana and concluded that the applicants had failed to establish a well-founded fear that they would be targeted on a *Convention* ground. In short, the RAD agreed with the RPD that the applicants had failed to establish a nexus between their fears and a *Convention* ground.

[21] Second, turning to whether the applicants were persons in need of protection under section 97 of the *IRPA*, the RAD member considered that the determinative issue was whether the applicants personally faced a risk that "is not faced generally by other individuals in or from that country" (*IRPA*, s 97(1)(b)(ii)). The member reviewed the evidence before him, including evidence relating to state protection in Guyana, and concluded that the applicants' fear of crime

"is a risk faced generally by others in Guyana" and that the applicants had "not rebutted the presumption that state protection is not [*sic*] available to them in Guyana." Thus, the RAD member agreed "with the finding of the RPD that the evidence does not support the Appellants' allegations that they were specifically targeted by criminals in Guyana because of their Chinese ethnicity and that protection is not available to them."

[22] Finally, the RAD member stated that he agreed with the assessment of the RPD that Mr. Yang "is excluded from refugee protection under Article 1E" of the *Refugee Convention*. The RAD member also found "as did the RPD that [Ms. Xu and her son] have access to the rights of nationals of Guyana as contemplated in Article 1E of the *Convention* and they are excluded from refugee consideration in Canada."

[23] Accordingly, the RAD confirmed the decision of the RPD under section 111(1)(a) of the *IRPA* and dismissed the appeal.

IV. STANDARD OF REVIEW

[24] The RAD's determinations of factual issues and issues of mixed fact and law are reviewed on a reasonableness standard (*Huruglica* at para 35). Reasonableness review "is concerned with the reasonableness of the substantive outcome of the decision, and with the process of articulating that outcome" (*Canada (Attorney General) v Igloo Vikski Inc*, 2016 SCC 38 at para 18). That is to say, the reviewing court must look at both the outcome and the reasons that are given for that outcome (*Delta Air Lines Inc v Lukács*, 2018 SCC 2 at para 27). The reviewing court examines the decision for "the existence of justification,

transparency and intelligibility within the decision-making process" and determines "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). These criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16). The reviewing court should intervene only if these criteria are not met. It is not the role of the reviewing court to reweigh the evidence or to substitute its own view of a preferable outcome (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61 [*Khosa*]).

[25] On the other hand, if the issue is whether there was a breach of procedural fairness before the RAD, no standard of review is engaged. Rather, the reviewing court must determine for itself whether the process the member followed satisfied the level of fairness required in all the circumstances (*Khosa* at para 43; *Canadian Pacific Railway Co v Canada (Attorney General)*, 2018 FCA 69 at para 54).

V. ISSUES

[26] I would frame the issues raised on this application for judicial review as follows:

a) Is the RAD's determination that the applicants are excluded from refugee protection in Canada because of Article 1E of the *Refugee Convention* unreasonable?

b) Did the RAD deny the applicants procedural fairness by deciding the issue of state protection against them without first giving them notice that this issue was in play or an opportunity to address it?

c) Is the RAD's conclusion that the applicants failed to establish that they had a well-founded fear of persecution in Guyana unreasonable?

d) Is the RAD's conclusion that the applicants failed to establish that they were persons in need of protection in Guyana unreasonable?

[27] The applicants did not present their grounds for review in exactly this order. However, as I will explain, I have found the first two of these issues to be determinative of this application. It is therefore not necessary to address the other two issues.

VI. ANALYSIS

A. *The Role of the RAD*

[28] Before addressing the grounds of judicial review set out above, it may be helpful to review the role of the RAD briefly.

[29] Section 110(1) of the *IRPA* provides that a person or the Minister "may appeal, in accordance with the rules of the Board, on a question of law, of fact or of mixed fact and law, to the Refugee Appeal Division against a decision of the Refugee Protection Division to allow or reject the person's claim for refugee protection." Section 110(2) provides that there is no appeal

to the RAD in certain classes of cases; however, where there is a right of appeal to the RAD, no other limitations are placed on the grounds of appeal that may be advanced.

[30] Section 110(3) of the *IRPA* provides that generally an appeal to the RAD "must proceed without a hearing, on the basis of the record of the proceedings of the Refugee Protection Division." Sections 110(4) and (5), which govern the admission of new evidence from the person who is the subject of the appeal, create an exception to this general rule. So too does section 110(6), which permits the RAD to hold a hearing provided certain preconditions are met. As the Federal Court of Appeal explained in *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96, placing restrictions on the admissibility of new evidence on appeal helps to preserve the integrity of the process by promoting finality with respect to the factual record at the first level of decision-making (with limited exceptions) and encouraging the narrowing of issues as matters move up the appellate ladder (at paras 43 and 50).

[31] An appeal to the RAD is not a true *de novo* proceeding (*Huruglica* at para 79). The RAD conducts an appeal of the RPD's decision, which is the initial point of reference. It does so generally on the basis of the evidentiary record that was before the RPD. After "carefully considering" the RPD's decision, the RAD should carry out "its own analysis of the record to determine whether, as submitted by the appellant, the RPD erred" (*Huruglica* at para 103).

[32] The RAD has a broad mandate to intervene to correct any error of fact, law, or mixed fact and law made by the RPD (*Huruglica* at paras 78 and 103). The RAD reviews the RPD's findings on the standard of correctness, although it may defer to the RPD on credibility findings

"where the RPD enjoys a meaningful advantage" (*Huruglica* at para 70). After considering the appeal, the RAD may confirm the determination of the RPD; it may set aside the determination of the RPD and substitute a determination that, in its opinion, should have been made; or it may refer the matter to the RPD for a redetermination (but only if it has found that the RPD has erred but the RAD cannot decide whether to confirm the determination of the RPD or substitute a different one without hearing the evidence that was presented to the RPD) (*IRPA*, s 111(1) and (2)).

[33] If there is an error, the RAD can still confirm the decision of the RPD on another basis (*Huruglica* at para 78). Nevertheless, this power must be exercised in accordance with the principles of natural justice and procedural fairness. Thus, before confirming a decision of the RPD on a basis that cannot reasonably be said to stem from the issues as framed by the parties, the RAD must give the affected parties notice and an opportunity to make submissions (*Ching v Canada (Citizenship and Immigration)*, 2015 FC 725 at paras 65-76; *Ojarikre v Canada (Citizenship and Immigration)*, 2015 FC 896 at paras 20-23; *Kwakwa v Canada (Citizenship and Immigration)*, 2016 FC 600 at paras 24-26; *Tan v Canada (Citizenship and Immigration)*, 2016 FC 876 at para 40). As Justice Hughes rather colourfully put it, "[t]he point is that if the RAD chooses to take a frolic and venture into the record to make further substantive findings, it should give some sort of notice to the parties and give them an opportunity to make submissions" (*Husian v Canada (Citizenship and Immigration)*, 2015 FC 684 at para 10).

B. *Is the RAD's determination that the applicants are excluded from refugee protection in Canada because of Article 1E of the Refugee Convention unreasonable?*

[34] Article 1E of the *Refugee Convention* states: "This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of nationality in that country."

[35] I begin by observing that the RAD member's conclusions with respect to the application of Article 1E in the present case are puzzling in at least two respects.

[36] First, the RAD member finds that Mr. Yang is excluded from refugee protection under Article 1E. While the matter is not entirely clear, it appears that the RAD member is expressing agreement with the RPD member's conclusion in this regard. However, the RPD member drew no such conclusion with respect to Mr. Yang. Unsurprisingly, the ground of appeal in relation to Article 1E as framed by the applicants refers only to Ms. Xu and her son (see paragraph 16, above). In any event, the issue of the applicability of Article 1E to Mr. Yang would appear to be a red herring. He was seeking refugee protection vis-à-vis two different countries of which he is a national – China and Guyana. Under section 96(a) of the *IRPA*, the burden was on him to demonstrate a well-founded fear of persecution in relation to both of these countries of citizenship before he could seek asylum in Canada (cf. *Canada (Minister of Citizenship and Immigration) v Williams*, 2005 FCA 126 at para 20). This has nothing to do with Article 1E exclusion.

[37] Second, the RAD member states that he finds "as did the RPD that [Ms. Xu and her son], have access to the rights of nationals of Guyana as contemplated in Article 1E of the *Convention* and they are excluded from refugee consideration in Canada." While it is true that the RPD member found that Ms. Xu and her son were excluded under Article 1E, he did so on what is clearly an erroneous basis. As noted above, the RPD member considered the decision of the Federal Court of Appeal in *Tretsetsang* to be "determinative on this point." *Tretsetsang*, however, concerns the meaning of "each of their countries of nationality" in section 96(a) of the *IRPA*, not Article 1E of the *Refugee Convention*. The RAD member does not mention this flaw in the RPD's analysis, although perhaps it is why he went on to conduct his own analysis under the proper test, as stated in *Canada (Citizenship and Immigration) v Zeng*, 2010 FCA 118 [*Zeng*]. As I will explain, however, that analysis is unreasonable.

[38] In *Zeng*, the Federal Court of Appeal formulated the test for exclusion under Article 1E of the *Refugee Convention* as follows (at para 28):

> Considering all relevant factors to the date of the hearing, does the claimant have status, substantially similar to that of its nationals, in the third country? If the answer is yes, the claimant is excluded. If the answer is no, the next question is whether the claimant previously had such status and lost it, or had access to such status and failed to acquire it. If the answer is no, the claimant is not excluded under Article 1E. If the answer is yes, the RPD must consider and balance various factors. These include, but are not limited to, the reason for the loss of status (voluntary or involuntary), whether the claimant could return to the third country, the risk the claimant would face in the home country, Canada's international obligations, and any other relevant facts.

[39] As I understand the RAD member's reasons, he answered these questions in the following way.

[40] First, neither Ms. Xu nor her son had status in Guyana substantially similar to that of its nationals at the time of the hearing. They were therefore not excluded from refugee protection on this basis.

[41] Second, the RAD member was unable to conclude that Ms. Xu and her son ever had such status although it was clear that Ms. Xu (at least) had had a right to reside in Guyana during the time she was there.

[42] Third, in any event, they did have access to status substantially similar to that of nationals of Guyana – in particular, when Ms. Xu was living there with Mr. Yang between December 2010 and June 2014. The RAD member found on the basis of Ms. Xu's testimony before the RPD that "she was aware of her ability to apply for status in Guyana, but she took no action or made any attempt to normalize her status" and that she failed "without good and sufficient reason" to preserve her right to be permitted to return to Guyana. The RAD member therefore concluded that Ms. Xu and her son were excluded from refugee protection under Article 1E of the *Refugee Convention*.

[43] In their appeal to the RAD, the applicants specifically took issue with the RPD member's finding that Guyanese citizenship was "within the control" of Ms. Xu and her son (this being the test the RPD member had applied). Interestingly, there is Canadian case law dealing specifically with Guyana which holds that potential Guyanese citizenship is not "within the control" of the spouse of a Guyanese citizen because whether it is granted or not is determined by the Executive in the exercise of its discretion (*Khan v Canada (Citizenship and Immigration)*, 2008 FC 583 at

para 21). The evidence before the RAD suggested that this was still the case but the member does not address the applicants' argument.

[44] I do not need to determine how this case law, which pertains to section 96(a) of the *IRPA*, fits in the *Zeng* test, if at all. In my view, the determinative issue here is the failure of the RAD member to engage in any meaningful way with Ms. Xu's explanation for why she did not attempt to secure her status in Guyana (whether by applying for citizenship or at least trying to preserve her rights as a temporary resident) before seeking Canada's protection. Ms. Xu left Guyana because she had been the victim of two violent armed robberies within less than six months. She feared being a victim again. Neither the RPD nor the RAD member disbelieved Ms. Xu's account of these events. Even assuming, as the RPD and the RAD concluded, that these experiences were insufficient to establish her claims under sections 96 or 97 of the *IRPA*, it does not follow that they could not still be a very good reason for Ms. Xu not to want to "normalize" her status in Guyana (or to bring her son there). Under *Zeng*, Ms. Xu's explanation for why she lost her status in Guyana must be considered but the member never does so. As a result, his conclusion that she is excluded from refugee protection under Article 1E of the *Refugee Convention* lacks justification, transparency and intelligibility.

C. *Did the RAD deny the applicants procedural fairness by deciding the issue of state protection against them without first giving them notice that this issue was in play or an opportunity to address it?*

[45] On their appeal to the RAD, the applicants challenged the RPD's determinations that any risk they faced in Guyana lacked a nexus to a *Convention* ground, as required by section 96 of the *IRPA*, and, further, that it did not rise to the level of a personalized risk, as required by

section 97. The RAD upheld these determinations. In doing so, however, the RAD relied on evidence in the record relating to efforts by the authorities in Guyana to protect ethnic Chinese there and made specific findings with respect to state protection. The applicants submit that this breached the duty of procedural fairness because they did not have notice that this issue was in play or an opportunity to make submissions with respect to it. I agree with the applicants.

[46] As set out above, the duty of procedural fairness requires that before the RAD confirms a decision of the RPD on a new basis, the party or parties to the appeal must be told that the issue is in play and given an opportunity make submissions on it. There does not appear to be any disagreement in the jurisprudence about this principle or about the test for "newness" – i.e. that the issue cannot reasonably be said to stem from the issues as framed by the parties. Rather, disputes arise only with respect to the application of the principle in given cases.

[47] I am satisfied that the issue of state protection is a new one in the requisite sense in this case. It is true that a claimant for refugee protection could always be called upon to rebut the presumption of state protection in making his or her case. After all, persecuted persons are required to approach their home state for protection before the responsibility of other states is engaged (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 709 [*Ward*]). As well, their home state's inability to protect "is a crucial element in determining whether the claimant's fear is well-founded" (*Ward* at 722). And, as the respondent points out, there are at least passing references in the applicants' Basis of Claim Forms (including the narrative) to the alleged inadequacy of state protection in Guyana. However, it appears that state protection was not identified as a material issue in this case at the hearing before the RPD, as a result the applicants'

written submissions to the RPD do not address it, and the RPD member did not make any determinations in relation to it. There being no determinations on this issue which could form the basis for a ground of appeal to the RAD, the applicants' appeal was understandably – indeed, necessarily – directed to other issues. In particular, in relation to section 96, the issue was the RPD's finding of a lack of nexus to a *Convention* ground. The question of whether the applicants' subjective fear was well-founded in the sense that engages state protection was never reached by the RPD. In my view, the issue of state protection cannot reasonably be said to stem from the issues as framed by the applicants in their appeal to the RAD and they had no reason to think that it would become an issue. As a result, they were entitled to be told that state protection was in play at the RAD and they should have had an opportunity to make submissions on it before the appeal was decided.

[48] The respondent submits, in effect, that even if this is so, the issue of state protection is immaterial in this case because it is really only an alternative basis for upholding the RPD's decision to reject the claims. In particular, the RAD could have upheld the determinations of a lack of nexus and the absence of personalized risk without ever considering the issue of state protection. In fact, some of the reasons the RAD offered for upholding the RPD's determinations have nothing whatsoever to do with state protection and those reasons are not tainted by any other reviewable error. According to the respondent, an adverse outcome for the applicants was legally inevitable (cf. *Marin v Canada (Citizenship and Immigration)*, 2018 FC 243 at paras 39-40 and the cases cited therein).

[49] After careful consideration, I am not persuaded that the breach of procedural fairness should be overlooked because the result in this case was legally inevitable. I say this for three main reasons.

[50] First, the breach of procedural fairness pertains to the applicants' claims vis-à-vis Guyana. However, looking at the case more broadly, the applicants had also made claims vis-à-vis China. These claims have never been examined on their merits (either by the RPD or by the RAD) because of erroneous determinations (by both the RPD and the RAD) that Ms. Xu was excluded from refugee protection under Article 1E of the *Refugee Convention*. I am in no position to say that her claim for protection (or the related claims of her husband and her son) is doomed to fail in its entirety after proper consideration.

[51] Second, looking specifically at the claims vis-à-vis Guyana, I am not satisfied that the issue of state protection can safely be disentangled from the rest of the RAD member's reasons in this case. This is especially so with respect to the member's determination under section 97 of the *IRPA*, a substantial part of which is devoted to state protection. The member expressly makes and relies upon the finding that the applicants have not rebutted the presumption that state protection is available to them in Guyana. This determination was made in the complete absence of submissions from the applicants on this issue at any stage of this matter. Even if, as the respondent submits, a finding of generalized risk on its own is fatal to the claims made under section 97, this is not how the RAD member actually approached the matter. To uphold the result on the basis advanced by the respondent would require fundamentally re-writing the member's reasons, something that exceeds the proper bounds of judicial review in the

circumstances of this case (cf. *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 54).

[52] Third, while state protection is less prominent in the member's discussion under section 96 of the *IRPA*, it is important nonetheless and relates directly to the issue of nexus with a *Convention* ground. A key reason the member gave for upholding the finding of a lack of nexus was that the probative value of information the applicants drew from two news reports to demonstrate the existence of persecution of persons of Chinese ethnicity in Guyana was diminished because the applicants had taken that information "out of context." However, the ostensibly missing context considered by the member is other information in the reports relating to efforts by the authorities in Guyana to provide additional assistance and protection to persons of Chinese ethnicity as a result of the (then) recent increase in the number of attacks upon them. The RPD member had not placed any reliance on this information. The applicants had no reason to think that its significance for their appeal needed to be addressed until they received the RAD member's reasons. By then, of course, it was too late.

[53] Given that the issue of state protection was not engaged before, and given that it did not reasonably stem from the issues on the appeal as they framed them, the applicants could not have known that it would be raised and determined by the RAD. The applicants should have been given an opportunity to make submissions on this issue before the appeal was decided. The failure to do so resulted in a breach of procedural fairness.

VII. CONCLUSION

[54] For these reasons, the application for judicial review of the decision of the RAD dated January 29, 2018, is allowed, the decision is set aside, and the matter is remitted for redetermination by a different decision-maker.

[55] The parties did not suggest any serious questions of general importance for certification under section 74(d) of the *IRPA*. I agree that none arise.

JUDGMENT IN IMM-777-18

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.
2. The decision of the Refugee Appeal Division dated January 29, 2018, is set aside and the matter is remitted for redetermination by a different decision-maker.
3. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Georgina Murphy	FOR THE APPLICANTS
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