

Federal Court



Cour fédérale

**Date: 20190401**

**Docket: IMM-4422-18**

**Citation: 2019 FC 392**

**Ottawa, Ontario, April 1, 2019**

**PRESENT: The Honourable Mr. Justice Gleeson**

**BETWEEN:**

**YULIN MA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] The applicant, Mr. Yulin Ma, is a citizen of China. He fled China in October 2016 and entered the United States, where he worked for a number of months before entering Canada illegally in March 2017. Upon arrival in Canada, he sought protection, fearing persecution on the basis that he and his wife violated the Chinese family planning policy [FPP]. His claim for protection was refused, the Refugee Appeal Division [RAD] upholding the finding of the

Refugee Protection Division [RPD] that he was 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 seeks judicial review of the RAD's decision under subsection 72(1) of the IRPA. He submits the RAD erred in finding that the RPD had not breached the duty of fairness and that the circumstances did not disclose a reasonable apprehension of bias on the part of the RPD. He further submits the RAD itself breached procedural fairness in failing to give him adequate time to address new evidence and unreasonably assessed the evidence.

[3] The respondent submits that the RAD did not breach procedural fairness and that the decision is reasonable.

[4] For the reasons that follow, the application is dismissed.

## II. Background

[5] Mr. Ma reports that he and his wife have three children. He states they were fined when they had their second child in 2012 in violation of the FPP. In August 2015, his wife became pregnant again; as a result, she was subjected to a forced abortion, and the couple was fined. In November 2015, they received a notice that they were required to be sterilized within three months. They went into hiding.

[6] In May 2016, Mr. Ma's wife became pregnant again. She fled China in August 2016 with the couple's oldest child, using the services of a smuggler who could only bring one adult and one child at a time. Mr. Ma's wife and their oldest child entered Canada through the United States and made a refugee claim, which was accepted in November 2016.

[7] In October 2016, Mr. Ma fled China with the assistance of a smuggler, leaving his daughter in China. He entered the United States and worked in Florida for approximately five months. He reports that he then crossed the border from Seattle to Vancouver in March 2017 and ultimately reunited with his family in Toronto. He initiated his claim for protection in April 2017.

[8] The RPD dismissed his claim on the basis that it was not credible. The RPD noted discrepancies and omissions in the documentary evidence and found that his narrative relating to his flight from China and entry into Canada was not credible, that he had relied on fraudulent documentation to support his claim, and that the events precipitating his flight from China were also not credible.

### III. The Decision under Review

[9] In his appeal to the RAD, Mr. Ma alleged the RPD had denied him natural justice, erred in assessing his credibility, and erred in assessing whether he was a Convention refugee or a person in need of protection.

[10] Mr. Ma argued before the RAD that the RPD had breached procedural fairness by: (1) requiring his wife to testify and denying an adjournment request; (2) engaging in conduct at its first sitting that gave rise to a reasonable apprehension of bias; and (3) making microscopic credibility findings largely unsupported by evidence.

[11] After reviewing the record and listening to the audio recording of the hearing before the RPD, the RAD concluded that the RPD did provide abbreviated advance notice of its wish to have Mr. Ma's wife testify. Although the RPD did not respond to a request for an adjournment, the request was addressed at the outset of the hearing. The RPD acknowledged that insufficient notice had been provided and that Mr. Ma's wife would not be required to testify on that date. The RAD noted that on the suggestion of counsel, the RPD proceeded to hear Mr. Ma's testimony. The RAD concluded no breach of procedural fairness had occurred.

[12] The alleged bias on the part of the RPD resulted from its inquiry during the prehearing conference as to why it should not draw a negative inference from the failure of Mr. Ma's wife to testify. The RAD set out the test for bias, noting that a member is allowed to hold tentative views on matters in a case but must not pre-judge the case or issues. The RAD concluded the RPD was essentially seeking submissions on whether an adverse inference should be drawn and found no apprehension of bias.

[13] In addressing the issues of credibility, the RAD noted the RPD had various concerns with documentary evidence, which were too numerous to ignore. After considering each in turn, the RAD concluded that key documents were not genuine and that aspects of the claim were not

established on a balance of probabilities. The RAD further concluded that Mr. Ma's delay in leaving China and failure to claim protection in the United States undermined his subjective fear. A negative inference was drawn from Mr. Ma's illegal entry into Canada, the RAD noting he could have done so legally at a legal border crossing given that his wife had refugee status in Canada. The RAD also noted the absence of any documentation evidencing Mr. Ma's residence in the United States or of his travel from Florida to Seattle and then Toronto. The RAD did find the RPD erred in drawing conclusions relating to the couple's family planning choices.

#### IV. Issues

[14] The application raises the following issues:

- A. Did the RAD breach procedural fairness in relying on new evidence without granting the applicant enough time to respond?
- B. Did the RAD unreasonably conclude the circumstances before the RPD did not disclose a reasonable apprehension of bias or breach procedural fairness?
- C. Was the RAD's independent assessment of the oral and documentary evidence unreasonable?

#### V. Standard of Review

[15] The standard of review is not in dispute.

[16] It has been generally held that a correctness standard of review is to be applied where questions of procedural fairness arise. However, the jurisprudence has acknowledged that a reviewing court must afford some deference to a decision maker's procedural choices. In *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69, the Court held that introducing the notion of deference where correctness is held to be the standard was both "confusing and unhelpful." Instead, the question a reviewing court must answer is "whether fairness has been met" (paras 44, 46 [emphasis in original]). In the end, the Court found that "even though there is awkwardness in the use of terminology, the reviewing exercise is 'best reflected in the correctness standard'" (para 54). However, in this context, correctness requires the Court to assess whether it is satisfied, in light of the factors set out in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*], that the process followed achieved the standard of fairness required in the circumstances (*Lv v Canada (Citizenship and Immigration)*, 2018 FC 935 at para 16).

[17] A reasonableness standard of review presumptively applies to the RAD's credibility findings and conclusions in relation to the alleged breaches of fairness by the RPD. Reasonableness is a deferential standard, and a reviewing court is to be concerned with whether (1) the decision-making process reflects the elements of justification, transparency, and intelligibility; and (2) the decision falls within the range of possible, acceptable outcomes that are defensible in respect of the facts and the law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

VI. Analysis

A. *Did the RAD breach procedural fairness in relying on new evidence without granting the applicant enough time to respond?*

[18] Mr. Ma submits that the RAD breached procedural fairness by relying on extrinsic evidence not directly relevant to the matters in issue and by not providing him sufficient time to address the evidence. I disagree.

[19] The evidence in issue is a Response to Information Request [RIR] dated January 26, 2018 that was not publicly available at the time of the RAD's decision. The RAD forwarded the RIR in issue to the applicant by letter dated July 16, 2018, advising him that a reply was required within five business days. The applicant sought a two-week extension and was provided an additional three days. The RAD again wrote to the applicant two days prior to the revised deadline for comments, inquiring as to whether an additional extension was required. No response was provided to the RAD's inquiry. Instead, Mr. Ma's counsel provided submissions in accordance with the initial extension and in doing so did not raise fairness concerns or identify any prejudice.

[20] The applicant takes the view that the RAD likely had the RIR in January yet chose not to disclose it until July 16 and that this was unfair. While there is evidence on the record indicating the RAD was in possession of the RIR as early as January 26, 2018, there is no evidence indicating the member had received the RIR or that it had been brought to her attention prior to its disclosure in July 2018. The applicant's submissions in this respect are speculative.

[21] The RAD did disclose the RIR and sought Mr. Ma's submissions. In doing so, it granted an extension of time and later inquired as to whether further time was required. The record simply does not support Mr. Ma's view that the opportunity to respond was inadequate and therefore unfair. The RAD did not proceed in a procedurally unfair manner.

B. *Did the RAD unreasonably conclude the circumstances before the RPD did not disclose a reasonable apprehension of bias or breach procedural fairness?*

[22] Mr. Ma alleges the RAD erred in addressing the RPD's alleged denial of natural justice. The allegation arises as a result of the RPD's request that the applicant's wife be produced as a witness two days prior to the scheduled hearing, contrary to the *Refugee Protection Division Rules*, SOR/2012-256 [*RPD Rules*].

[23] In response to the RPD's request, Mr. Ma sought a postponement of the hearing before the RPD. The request was addressed at a pre-hearing conference on the scheduled hearing date. In the course of the pre-hearing conference, the RPD noted it had the discretion to draw a negative inference in circumstances where evidence or witnesses are not called and asked Mr. Ma's counsel why it should not do so if Mr. Ma's wife did not testify.

[24] Mr. Ma takes the position that the RPD's comments in the pre-hearing conference raised a real apprehension that the RPD had come to a determination on Mr. Ma's credibility prior to questioning him and hearing all of the evidence. Mr. Ma sought a *de novo* hearing before the RPD, but his request was denied. The RAD concluded the reasonable apprehension of bias allegation was unfounded.



[25] I am satisfied that the RAD adequately addressed the alleged breaches of fairness before the RPD and reasonably concluded that a reasonable apprehension of bias did not arise nor was there a breach of fairness.

[26] The RAD identified and accurately summarized the applicable jurisprudence in setting out the legal test to be applied where bias issues arise: “what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think it was more likely than not that the [decision maker], whether consciously or unconsciously, would not decide fairly” (*Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369 at 394). The RAD noted that a decision maker may hold tentative views on matters so long as the issue has not been pre-judged (*Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25 at para 33).

[27] Having accurately identified the applicable law, the RAD then engaged in a detailed review and consideration of the proceedings before the RPD. In doing so, the RAD concluded the RPD was sensitive to the concerns raised by Mr. Ma’s counsel with respect to the request that Mr. Ma’s wife appear as a witness. The RAD found that the RPD acknowledged that the short notice request for a witness was contrary to the *RPD Rules* and did not insist that the witness be produced. The RAD considered the exchange relating to the RPD’s ability to draw negative inferences where a witness is not called and found the exchange evidenced a request for submissions on the question, not a conclusion. The RAD ultimately found that the allegation that bias coloured the RPD’s credibility findings was not “substantiated in any manner.”

[28] Mr. Ma has not demonstrated any reviewable error on the part of the RAD in addressing the RPD's alleged denial of natural justice in addressing his claim. The RAD's assessment of this issue was reasonable.

C. *Was the RAD's independent assessment of the oral and documentary evidence unreasonable?*

[29] Mr. Ma argues that the RAD unreasonably assessed documentary evidence in support of his claim for protection. He submits that the RAD erred in concluding that his children's birth certificates and his *hukou* were not genuine documents. I disagree.

[30] Again, the RAD engaged in a detailed consideration and analysis of Mr. Ma's documentary evidence and his narrative. In doing so, the RAD identified inconsistencies between marriage dates as set out in the marriage certificate and the date of marriage reported in Mr. Ma's application for protection. Mr. Ma reported that he and his wife had been divorced for a short period in 2013, but he provided no documentary evidence to support this claim despite its relevance to apparent inconsistencies between Mr. Ma's narrative and his *hukou*. The RAD similarly noted numerous inconsistencies in respect of the children's birth certificates and the *hukou*. The RAD also noted that key elements of Mr. Ma's narrative were unsupported by documentary evidence, evidence that would be easily available to Mr. Ma but for which no explanation was provided for its absence. This included evidence to support his narrative claim that, after fleeing China, he worked in Florida for some months, travelled to Seattle, entered Canada in the Vancouver area, and finally travelled from Vancouver to Toronto, where he initiated a claim for protection.

[31] In submitting that the RAD unreasonably concluded his children's birth certificates were not genuine, Mr. Ma argues that the RAD relied on an RIR that described birth certificates in a single province of China and then universally applied that evidence to China as a whole. Mr. Ma then engages in a detailed critique of the RAD's concerns with the birth certificates. He submits that in addressing a security feature, the RAD was clearly in error: it relied on the translated version of the birth certificate to conclude there was an inconsistency, whereas the original document reflects the security feature described in the documentary evidence. Mr. Ma engages in a similarly detailed critique of the RAD's consideration of the *hukou*.

[32] I have carefully considered each of the errors Mr. Ma alleges the RAD committed in finding the birth certificates and *hukou* not to be genuine. While I accept that the RAD did err in finding that a single feature was absent on the birth certificate documents when in fact the original certificate did include the feature, this error is insufficient to render the RAD's overall conclusions unreasonable.

[33] The role of a reviewing court is not to engage in a "line-by-line treasure hunt for error" when considering a decision on judicial review but rather to consider the decision as an organic whole (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at para 54). In considering the decision as a whole, it is evident that the RAD considered the documentary evidence relating to the genuineness of the birth certificates and the *hukou*. Where the documentary evidence was inconsistent or contradictory, the RAD explained why it preferred certain evidence. The RAD also set out and addressed Mr. Ma's

explanations for identified inconsistencies between the documents he relied upon and other evidence, including his narrative.

[34] While Mr. Ma may disagree with the weight the RAD has attributed to the evidence and the conclusions reached, his disagreement does not render the RAD's conclusions unreasonable. The RAD's credibility findings are numerous and in many cases are not challenged on this application for judicial review. The RAD's independent assessment of the oral and documentary evidence that was before it was not unreasonable.

[35] I am also satisfied that the RAD's subjective fear findings do not undermine the reasonableness of the decision. In noting Mr. Ma's delayed flight from China and his failure to claim protection in the United States undermined his claim on the basis of subjective fear, the RAD acknowledged these factors were not determinative of the claim. Rather, the factors impacting on subjective fear were simply two of a multitude of factors and circumstances that were considered by the RAD. The RAD reasonably found credibility to be determinative, and its overall credibility assessment is justified, transparent, and intelligible.

## VII. Conclusion

[36] The RAD's decision is reasonable, and the application is dismissed. The parties have not identified a serious question of general importance and none arises.

**JUDGMENT IN IMM-4422-18**

**THIS COURT'S JUDGMENT is that:**

1. The application is dismissed; and
2. No question is certified.

"Patrick Gleeson"  
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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-4422-18

**STYLE OF CAUSE:** YULIN MA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** MARCH 20, 2019

**JUDGMENT AND REASONS:** GLEESON J.

**DATED:** APRIL 1, 2019

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