Federal Court  Cour fédérale

Date: 20211109

Docket: IMM-2004-21

Citation: 2021 FC 1196

Ottawa, Ontario, November 9, 2021

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

SHIJUN WANG

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision of the Immigration Division ("ID") of the Immigration and Refugee Board ("IRB"). The ID found the Applicant inadmissible according to s. 36(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*") for serious criminality, but not inadmissible for organized criminality under s. 37(1)(a). The ID found reasonable grounds to believe the Applicant had been convicted of a crime in China,

which would be equivalent to assault causing bodily harm under s. 267(b) of the *Criminal Code*, RSC 1985, c C-46, and found the Applicant's claims of having been tortured into confessing as not being credible.

II. Background

[2] The Applicant, Mr. Shijun Wang, is a citizen of China who arrived in Vancouver on August 13, 2018, on a visitor's visa, after travelling through Hong Kong and San Francisco. He was the subject of an Interpol Red Notice on September 19, 2018, which stated he was wanted by China for the "crime of picking quarrels, provoking troubles, and extortion." That same day, he filed a refugee claim on the basis that if he were returned to China, he would suffer persecution from China's Public Security Bureau.

[3] The Applicant stated in his application that he had previous criminal convictions, in 1999 and 2007, but that in both cases he was framed by the police and targeted by the Public Security Bureau. He asserts that this is part of a Chinese Communist Party ("CCP") campaign of cracking down on "crimes committed by black and evil forces," and that these accusations are politically motivated and a wealth grab. If he were returned to China, the Applicant states that he would be tortured into confessing to these crimes and would face a death sentence.

[4] Subsequent to the receipt of his refugee claim, the Canada Border Services Agency ("CBSA") began background checks on the Applicant and received information from the Chinese Ministry of Public Security regarding the Applicant. This information stated he had several criminal convictions, including one from January 24, 1995, for the intentional injury of

another. According to documents from the “Lishi County People’s Court”, Mr. Wang picked up a brick and hit the victim with it, resulting in the victim being hospitalized. Mr. Wang asserts it was self-defence, while the Court Documents indicate that it was not. The report indicates that Mr. Wang was detained on November 9, 1993, arrested on May 5, 1994, and convicted (after confessing) on January 24, 1995, of “intentionally inflicting injury to another person” in violation of Article 134 of the Criminal Law of the People’s Republic of China. He received a 14-month sentence, and was required to pay restitution.

[5] CBSA Officers interviewed the Applicant on September 12, 2019. When asked about convictions, the Applicant mentioned his 1999 and 2007 arrests, but did not mention his 1995 conviction until asked explicitly about it. In that interview, he stated that he was drunk, young, had an argument, and both parties were hurt, as well as that the incident was exaggerated. Based on the Applicant’s circumstances, a s. 44(1) report was issued as there were reasonable grounds to believe he was inadmissible to Canada on grounds of serious criminality per s. 36(1)(b) of the *IRPA* in relation to this 1995 conviction. He was referred to the ID for an admissibility hearing.

[6] During the admissibility hearing, the Applicant stated that the victim of his 1995 conviction was the aggressor. He asserted that he was held in detention from May 1994 (the time of his arrest) until July 1995, and tortured into confessing and then was convicted, and sentenced to time served.

[7] Further, in the Minister’s disclosure and the ID decision, there is documentation that Mr. Wang also has several other criminal convictions in China for violent offences *after* the 1995

conviction. He was convicted in October 1999 of negligently endangering public safety, when – after a street brawl – Mr. Wang aggressively reversed at high speed into a crowd, killing an individual. For this, he received a 3-year term of imprisonment. In July 2001, Mr. Wang was convicted of the aforementioned "picking quarrels" and provoking trouble, as well as gathering others to engage in gambling, and false imprisonment. These offences were related to a spree of violence and gambling debt collection, for which he received a 7-year executive sentence that was reduced on appeal. Finally, in 2007, he was arrested (and in 2008 convicted) for "defiance and affray" in relation to a group brawl outside a hotel, where a car was destroyed and several individuals were stabbed. Mr. Wang received a 4-month custodial sentence for this.

[8] Based on the facts and evidence before them, the ID concluded that the Applicant was inadmissible under s. 36(1)(b) with respect to serious criminality, but not inadmissible for organized criminality under s. 37(1)(a). The finding under s. 37(1)(a) is not at issue in this application.

III. Issue

[9] The issue is whether the ID's determination that the Applicant is inadmissible for serious criminality pursuant to s. 36(1)(b) of the *IRPA* was reasonable.

IV. Standard of Review

[10] The proper standard of review in this case is reasonableness. As set out by the Supreme Court of Canada in *Canada (MCI) v Vavilov*, 2019 SCC 65, at paragraph 23 [*Vavilov*], "where a

court reviews the merits of an administrative decision … the starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness." Reasonableness review begins with the principle of judicial restraint and respect for the distinct role of administrative decision-makers, and the Court does not conduct a de novo analysis or attempt to decide the issue itself (*Vavilov,* at paras 13, 83). Rather, it starts with the reasons of the administrative decision-maker and assesses whether the decision is reasonable in outcome and process, considered in relation to the factual and legal constraints that bear on the decision (*Vavilov,* at paras 81, 83, 87, 99). A reasonable decision is one that is justified, transparent, and intelligible to the individuals subject to it, reflecting "an internally coherent and rational chain of analysis" when read as a whole and taking into account the administrative setting, the record before the decision-maker, and the submissions of the parties (*Vavilov*, at paras 81, 85, 91, 94-96, 99, 127-128).

V. Analysis

A. *Was the ID's determination that the Applicant is inadmissible for serious criminality pursuant to s. 36(1)(b) of the IRPA reasonable?*

(1) Did the ID err in finding the Applicant's claim of torture to not be credible?

[11] The critical issue in this analysis is whether the ID erred in finding the Applicant's claim of torture not to be credible. The Applicant submits that the ID erred both in their use of his historical omissions of this allegation as evidence of his non-credibility, and in their giving no weight to the psychologist's report.

[12] In their reasons, the ID noted that the evidence against the Applicant – if obtained by torture – may not be admissible. In doing so, it is important to note the test for the exclusion of evidence obtained by torture (from *Mahjoub (Re),* 2010 FC 787), as well as the onus. At the first step, the Applicant bears the burden to demonstrate a plausible connection between the use of torture and the information to be used against him. If the Applicant establishes this, the burden then shifts to the Minister to show why the evidence is admissible. In conducting this analysis, the ID acknowledged the Applicant's concerns that the Chinese justice system has issues, and that torture does occur. However, the Member noted that despite this, genuine criminality still does occur in China, and thus it is the role of the ID to determine whether there was sufficient evidence adduced by the Applicant that this conviction was obtained by torture to exclude it. The Respondent takes issue with this conclusion, arguing that Mr. Wang's omission was borne out of the time passed since the torture – some 26 years.

[13] The ID's analysis centers on the Applicant's omission from his Basis of Claim ("BOC") form, as well as his first interview with the CBSA where he failed to claim or suggest that his 1995 conviction was the result of torture. The ID reasonably concluded that this omission was determinative and found that claim he was tortured to be not credible especially as he mentioned other individuals were tortured. In addition, he gave an alternative explanation for the conviction in his interview, rather than saying he was tortured. The completion of one's BOC form is a critical step and is to be done in a manner that carefully considers one's past and reasons for seeking refugee protection. To fail to do so in his BOC form, coupled with his failure to mention it when interviewed by CBSA officers and indeed to present an alternative story is, in the words of the ID, "unthinkable." Based on these omissions, it was well within the range of possible

reasonable outcomes for the ID to conclude that the Applicant failed to establish that the evidence against him was the result of torture.

[14] The Applicant asserts that the ID erred in giving the report of the psychologist no weight. The Applicant said that the psychologist assessed Mr. Wang and that the report established the credibility of Mr. Wang's claims of torture. I find no error in the ID's treatment of this report. It fell within the range of reasonable outcomes justified in light of the facts and law before them, as set out in *Vavilov* at paragraph 83. The ID cited *Ameir v Canada*, 2005 FC 876, for the proposition that the ID may prefer their own assessment of the Applicant's credibility to the assessment of a psychologist. The ID noted this evidence, dealt with it in a manner that is in line with the relevant jurisprudence, and came to an outcome that is within a range of reasonable outcomes in light of the facts and law.

(2) Did the ID err in not resolving the divergence in expert evidence regarding self-defence?

[15] The Applicant argues that the ID erred in concluding that it was unnecessary to consider the defence of self-defence for Mr. Wang's 1995 conviction is an error. He says this because, in the "facts ascertained by the court" (the Chinese court), there is no suggestion of self-defence; the reason for this, according to the Applicant, is that self-defence is not a discrete concept in Chinese law. Thus, the Applicant submits that the ID should have resolved the resultant conflict in expert evidence, and their failure to do so was unreasonable.

[16] I do not agree. The ID commented that "both experts on Chinese criminal law agreed that the defence of self-defence exists in the Chinese criminal code," but that where the experts diverged was on whether self-defence is available as a defence to assault in China. The reason the ID held that it was unnecessary to resolve the differing opinion was not because of a lack of self-defence as a legal concept – which would lend credence to the Applicant's argument – but rather due to the fact that, having reviewed the Chinese court documents, there was no *factual* evidence that the Applicant acted in self-defence. Taken in conjunction with the fact that it is not the ID's role to look behind any foreign conviction, but rather to simply determine whether they were convicted and whether it equates to a Canadian offence, I find that the ID's decision on this point was reasonable.

(3) Did the ID err in their equivalency analysis?

[17] The Applicant asserts that the ID erred in not accepting his assertion that the injury to the victim was only a slight injury, exaggerated by the victim to obtain compensation from Mr. Wang. The Chinese law under which Mr. Wang was charged criminalizes anyone who "intentionally inflicts bodily injury upon another," which they argue includes minor injuries, which would not justify a Canadian conviction. The Applicant cites a case, *Riobueno v Canada (Public Safety and Emergency Preparedness)*, 2013 CanLII 101907 (CA IRB), in which a number of bruises and a Venezuelan conviction was insufficient for equivalency in Canada. Thus, he argues that the "facts ascertained by the (Chinese) court" do not explain why the victim's injury – if it was as serious as asserted – was referred to as "a slight injury," and that given this lack of an explanation, it was an error for the ID to conclude that this was equivalent to the Canadian offense of assault causing bodily harm.

[18] I disagree with the Applicant. As set out in *Li v Canada (MCI)*, [1997] 1 FC 235 ["*Li*"], equivalency analysis does not require a consideration of whether the individual would have been convicted in Canada for the offence. *Li*, above, tells me that what is required is rather a comparison of the offence abroad to an offence in Canada in order to find the Canadian equivalent. It is not the role of the ID to look behind the conviction and begin to question it (see: *Svecz v Canada (MPSEP)*, 2016 FC 3 at para 39), but rather simply to transpose what transpired abroad into the Canadian legal context (*Bellevue v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 56 at para 33). The ID, in their analysis, engaged in a detailed comparison of the statutes, punishment, and elements of the given offenses, finding them to be "almost similar enough to find an equivalence" without any reference to the facts of the Chinese court. After reference to the facts as ascertained by the Chinese court, the ID found equivalence. Despite use of the phrase "slight injury" in one report, the reality exists that the Applicant hit the victim with a brick intentionally, resulting in – at the minimum – a broken nose, several other injuries, and a 70-day hospitalization. The Applicant suggests that there may be other reasons for the long hospital stay and reported injuries; namely, that the victim is exaggerating the injuries for the purpose of compensation. This type of speculation is not the role of this Court on judicial review.

[19] In light of the relevant Chinese law and s. 267(b) of the *Criminal Code*, it was reasonable for the ID to conclude that this Chinese offense of “intentionally afflicting injury to another” has an equivalent in s. 267(b).

[20] This application is dismissed.

[21] No question was presented for certification.

JUDGMENT IN IMM-2004-21

THIS COURT'S JUDGMENT is that:

1. The style of cause is to be amended to have "Minister of Public Safety and Emergency Preparedness" as the only Respondent;

2. The application is dismissed;

3. No question is certified.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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