

Federal Court



Cour fédérale

Date: 20220928

Docket: IMM-7035-21

Citation: 2022 FC 1360

Ottawa, Ontario, September 28, 2022

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

LIGUANG YU

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision by the Refugee Appeal Division [RAD], dated September 17, 2021, affirming a decision of the Refugee Protection Division [RPD], which found the Applicant is neither a Convention refugee nor a person in need of protection.

II. Facts

[2] The Applicant is a citizen of China. He fears persecution from the Public Security Bureau [PSB] due to his political opinion after he was targeted for protesting what he considered the unfair expropriation of his farmland in his village. His narrative is as follows.

[3] In 2013 he started his own orchard business on a 15 year lease. However, in 2017 the local government provided notice to him and 19 other farms their land must be expropriated so high-rise structures could be built. The Applicant was, therefore, given an order that his lease agreement was to be terminated. The government offered some compensation to affected households, but the Applicant and his wife found this amount unacceptable.

[4] After meeting with other farmers, representatives were chosen to speak with the government and seek a resolution. In September 2018, the chosen representatives attended the local government and met with a high-ranking official. Ultimately, they were told that the project must be carried on and land expropriated before the deadline. They followed up several times with no success.

[5] The group subsequently went to the local People's Congress and were told they would receive an answer soon, but were redirected to the local government once again. With frustrations rising, the group decided to organize a public demonstration.

[6] In the fall of 2017, the group organized about 20 villagers, including the Applicant, to demonstrate outside the local government. The protestors stood outside the entry of the building, held banners and shouted slogans regarding corruption. The Applicant stood beside the three main representatives at the front of the group and shouted slogans. The protestors swelled to a group of about 100 people.

[7] The local Government led the protestors, including the Applicant, into the building to negotiate. However, shortly thereafter PSB officers rushed into the room and detained them for questioning. The PSB officers demanded that the Applicant “stop organizing and protesting in any anti-government demonstration.” The Applicant was then allegedly threatened with “severe consequences” if he continued to protest.

[8] After spending one night in detention, the protestors were released. In meeting with the representatives after the meeting, the Applicant declared that he would not give up. The representatives agreed and decided to go to the provincial government for assistance. On their way, the bus was stopped on the highway by PSB officers and the group was ordered to get off the bus. They were subsequently taken to Yinxi PSB station and detained for four nights.

[9] When asked about the purpose of their trip, the Applicant admitted that they were going to complain about the provincial government’s corruption. The Applicant was subsequently beaten by officers and threatened with jail. They were released two days later and made to sign documents stating that they would no longer protest.

[10] The Applicant then had to report to the local Town Government where he was beaten for not having the details of his whereabouts every day for the past month. The Applicant was warned again that he must not make any anti-government speeches. The Applicant fled China in late, 2017. His wife received a call shortly after that the PSB had been looking for her husband. They asked that the Applicant report to the police station without delay, otherwise he would be punished severely. A summons was also left with his wife. The PSB allegedly attended his house three more times and threatened his wife if she did not reveal his whereabouts.

III. Decision under review

[11] In conducting an independent assessment of the evidence provided by the Applicant, the RAD found that the Applicant is not wanted by Chinese authorities for protesting the expropriation of his farmland. The RAD also found that the Applicant has not established that, on a balance of probabilities, that he was involved in protests against the government, arrested twice, required to check in monthly with authorities, and that he is still being sought out.

A. *Expropriation and compensation documents*

[12] The RAD found documents provided by the Applicant could only attest to “information regarding the expropriation of some leased land in the village, but not specifically the land leased by the Appellant.” The RAD did acknowledge that the document indicated that the local government intended to expropriate leased land in the area but noted that the Applicant had not provide additional documentation, such as the lease agreement to show the exact location of the property. As such, this evidence was given little weight.

B. *Prisoner visitor cards*

[13] The RAD found there was a lack of clarity regarding to whom the prisoner cards relate. The Applicant's statement that they were the cards for the three chosen representatives ran in contravention of his oral testimony, which provided that the cards were for other individuals who had attended the protest. The RAD also noted that the Applicant's narrative, which stated that the three chosen representatives were continually detained after their arrest in December 2017 and barred from receiving visitors, was inconsistent with the issuance of the visitor cards themselves. As such, the RAD found the Applicant's evidence on these documents evolving and internally inconsistent, which draws a negative credibility inference. Similarly, the RAD affirmed the RPD's finding that these documents could be assigned little weight in establishing the Applicant's allegations he protested against the government and is being sought out by the PSB.

C. *Lack of corroboration from the Applicant's wife*

[14] The RPD panel had noted that the Applicant lacked credibility in his testimony about why he had not had a corroborating letter or affidavit from his wife, given her knowledge of the events that took place. The Applicant stated that his wife did write a letter in 2019, but that he had not received it as it had been taken by customs. The RAD found the Applicant's evidence to be evolving regarding whether his wife had written a letter. During his testimony, the RAD pointed out, the Applicant first stated had not asked his wife to write a letter. Then, upon questioning from his Counsel, the Applicant stated that his wife wrote a letter in 2019, but he did not receive it. The Applicant stated that attempts to reacquire the letter would have been

“dangerous”. The Applicant was also not able to clearly articulate how he knew the letter had been taken by customs.

D. *Passport issue*

[15] The RAD noted the Applicant left China using his own passport with help provided by a smuggler to acquire a Canadian visa through fraudulent means. His passport contained an exit stamp from China. His evidence was also that a summons had been delivered and the PSB officers continued to look for him after his departure. Given that he used his own passport, the RAD is unclear how the PSB would not be aware he had left the country, because an integrated database – the Golden Shield - exists which is accessible to all police authorities in China. The RAD found Chinese authorities would have been aware of his exit from China. The RAD suggested this was not consistent with the Applicant’s narrative that Chinese authorities continued to seek him and issued a summons for him after he left China.

IV. Issues

[16] In my view, the determinative issue in this case is procedural fairness.

V. Standard of Review

A. *Procedural Fairness*

[17] Questions of procedural fairness are reviewed on the correctness standard: *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, per Binnie J at para 43. That

said, I note in *Bergeron v Canada (Attorney General)*, 2015 FCA 160, per Stratas JA at para 69, the Federal Court of Appeal says a correctness review may need to take place in “a manner ‘respectful of the [decision-maker’s] choices’ with ‘a degree of deference’: Re: *Sound v Fitness Industry Council of Canada*, 2014 FCA 48, 455 N.R. 87 at paragraph 42.” But see *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [per Rennie JA]. In this connection I also note the Federal Court of Appeal’s recent decision holding judicial review of procedural fairness issues is conducted on the correctness standard: see *Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 per de Montigny JA [Near and LeBlanc JJA concurring]:

[35] Neither *Vavilov* nor, for that matter, *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, have addressed the standard for determining whether the decision-maker complied with the duty of procedural fairness. In those circumstances, I prefer to rely on the long line of jurisprudence, both from the Supreme Court and from this Court, according to which the standard of review with respect to procedural fairness remains correctness.

[18] I also understand from the Supreme Court of Canada’s teaching in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 23 that the standard of review for procedural fairness is correctness:

[23] Where a court reviews the merits of an administrative decision (i.e., judicial review of an administrative decisions other than a review related to a breach of natural justice and/or the duty of procedural fairness), the standard of review it applies must reflect the legislature’s intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law. The starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness.

[Emphasis added]

[19] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50, the Supreme Court of Canada explains what is required of a court reviewing on the correctness standard of review:

[50] When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

VI. Analysis

[20] In my respectful view, the Decision of the RAD was arrived at in breach of procedural fairness. In this connection, the RAD's central finding is:

20. Although he has argued that the authorities are not aware that he had left China, I note that he left the country using his own passport. According to the Schedule 12 form, the help provided by the smuggler was to acquire a Canadian visa through fraudulent means. His testimony at the hearing regarding what else the smuggler did for him was vague and ultimately, he stated that he did show his passport to the authorities on more than one occasion. I note that the passport contains an exit stamp from China. Given that he used his own passport, it is unclear how the PSB in China would not be aware that he had exited the country, as an integrated database exists which is accessible to all police authorities in the country. I find, on a balance of probabilities, that the authorities would have been aware of his exit from China. I find that the Appellant has not established, on a balance of probabilities, that the authorities sought him out and issued a summons for him after he left China.

[Emphasis added]

[21] I am satisfied of two errors in this aspect of the Decision. First, it starts with an incorrect premise. The Applicant points to the RAD's statement that he "argued that the authorities are not

aware he left this country using his own passport”. The Applicant says this statement is not accurate. I agree. With respect, I was pointed to no evidence of the Applicant raising this issue before the RAD.

[22] Secondly, and fundamentally, the RAD breached procedural fairness by not giving the Applicant a chance to respond to its new and significant credibility finding.

[23] With respect, the leading authority in this connection is *Corvil v Canada (MCI)*, 2019 FC 300 [*Corvil*] [per Leblanc J, as he was then] which has been cited and applied in the Court’s subsequent jurisprudence on many if not most occasions with this type of procedural fairness argument arises.

[24] *Corvil* stands for the proposition that when the credibility of a refugee protection claimant is at the heart of the RPD’s decision and the grounds for appeal before the RAD, the RAD is entitled to make independent findings in this regard, without having to question the applicant or giving the applicant another opportunity to make submissions. I adopt and will apply *Corvil* and in particular the following passage:

[13] It goes without saying that when considering a question which was not raised before the RPD or by any of the parties to the appeal, the RAD must first notify the parties accordingly and give them an opportunity to respond thereto (*Ching v Canada (Citizenship and Immigration)*, 2015 FC 725 at para 71 [*Ching*]). However, it is now a well-established fact that when the credibility of a refugee protection claimant is at the heart of the RPD’s decision and the grounds for appeal before the RAD, the RAD is entitled to make independent findings in this regard, without having to question the applicant or giving the applicant another opportunity to make submissions. That said, the RAD must avoid disregarding contradictory evidence on the record or making

findings based on evidence unknown to the applicant (*Ibrahim v Canada (Citizenship and Immigration)*, 2016 FC 380 at paras 26, 30 [*Ibrahim*]; *Koffi v Canada (Citizenship and Immigration)*, 2016 FC 4 at para 38; *Kwakwa v Canada (Citizenship and Immigration)*, 2016 FC 600 at para 24; *Marin v Canada (Citizenship and Immigration)*, 2018 FC 243 at paras 35–37 [*Rodriguez Marin*]; *Oluwaseyi Adeoye v Canada (Citizenship and Immigration)*, 2018 FC 246 at para 13 [*Adeoye*]).

[Emphasis added]

[25] In the case at bar, the issue resolves into whether the Applicant's credibility was at the heart of the RPD's decision and the grounds for appeal before the RAD. In my respectful with, this precondition is not met. While I agree the RPD said in its reasons the Applicant's credibility was determinative that to my mind is not the end of this issue for several reasons.

[26] The first is that the passport issue was not raised before the RPD. Indeed, the RPD made no reference to the passport issue and its consequences.

[27] Secondly, on this judicial review we are looking at the RAD and its decision, i.e., what was before the RAD and the impact of the RAD's decision on the case.

[28] Notably, the passport issue was not raised before the RAD in written submissions. I was given nothing to suggest the RAD raised the passport issue when the parties and counsel were before it. If the issue arose then, it should have been raised with the parties. If it occurred after the hearing, it could and should have been canvassed in some form of procedural fairness notice.

[29] This case comes down to deciding on which side of the line the RAD decision falls. I am not persuaded the issue of credibility was at the heart of the RPD's decision.

[30] More importantly, I am certainly not persuaded the issue of credibility was at the heart of the grounds for appeal before the RAD, which were a) did the Board err in assessing Mr. Yu's documentary evidence? b) did the Board err in assessing whether Mr. Yu faced persecution due to his political activities?

[31] In my view, the passport issue and its consequences was a new issue not raised before either the RPD or the RAD. It seems clear to me the RAD, in addition, made a credibility finding having set out the issue as it did, and in addition made consequential findings in terms of other evidence before it as a result.

[32] I am asked in effect to disregard the raising, determination and assessment of the impact of this new argument on the Applicant's case because in effect it would not make any difference, since there were many other unchallenged credibility findings which were more than sufficient to find the Applicant not credible.

[33] In response the Applicant correctly notes this would entail my reassessing material evidence: I agree. In my view this was a material and important finding. Such a reassessment would necessarily include the presence or absence of alleged summons, what if any efforts the PSB were or were not making to find the Applicant after he left, whether and to what extent the

Applicant used a smuggler, and perhaps other factual issues. These are for the RAD not this Court to make.

[34] I close by noting in this connection that *Corvil* is a double-edged sword. While it sets out when the RAD may make independent factual findings without notice, it also sets out that when considering a question not raised before the RPD or by any of the parties to the appeal, the RAD must first notify the parties accordingly and give them an opportunity to respond thereto. This did not occur in the case at hand.

[35] Given this procedural issue determines this appeal, there is no need to deal with the other issues raised.

VII. Conclusion

[36] For the reasons above, the Application for judicial review will be granted.

VIII. Certified Question

[37] Neither party proposed a question of general importance, and none arises.

JUDGMENT in IMM-7035-21

THIS COURT'S JUDGMENT is that the application for judicial review is granted, the matter is remanded for redetermination by a differently constituted decision-maker, no question of general importance is certified, and there is no Order as to costs.

"Henry S. Brown"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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