

Federal Court



Cour fédérale

Date: 20151214

Docket: IMM-3201-15

Citation: 2015 FC 1384

Vancouver, British Columbia, December 14, 2015

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

**HUA SENG ZHAO, JIN HUA GAO,
GEN LE ZHAO**

Applicants

and

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

Respondents

JUDGMENT AND REASONS

I. Introduction

[1] Hua Seng Zhao, Jin Hua Gao, and their minor son Gen Le Zhao [the Applicants] have brought an application for judicial review of a decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board [the Board]. The RAD held that it had no jurisdiction to

hear the Applicants' appeal of an adverse decision of the Board's Refugee Protection Division [RPD], because the Applicants had arrived in Canada from the United States of America. The RAD declined to hear the Applicants' appeal based upon the provisions of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA] that implement the Safe Third Country Agreement [STCA] between Canada and the United States (*Agreement between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries* [2004] Can T.S. No 2).

[2] The Respondents agree that the application for judicial review should be allowed and the matter remitted to the RAD for redetermination. The Respondents acknowledge that the Applicants did not make their claim for refugee protection at a port of entry, and accordingly they are not subject to the provisions of the IRPA that implement the STCA.

[3] For the reasons that follow, I agree with the parties that the RAD wrongly declined jurisdiction to hear the Applicants' appeal. The application for judicial review is therefore allowed, and the matter is remitted to the RAD to determine the Applicants' appeal on its merits.

[4] The Respondents also request that the style of cause be amended to add the Minister of Citizenship and Immigration. The Applicants consent to this request and the style of cause is amended accordingly.

II. Background

[5] The Applicants are citizens of China. In 2009, Mr. Zhao's application for permanent residence was rejected and he was declared to be inadmissible to Canada for misrepresentation contrary to s 40(1) of the IRPA. In 2013, Mr. Zhao and Ms. Gao were denied temporary resident visas. On April 6, 2014, the Applicants travelled by boat from Seattle to an unknown location in British Columbia. A smuggler drove them directly to a relative's house in British Columbia, and they were never examined at a port of entry. On April 14, 2014, they made a claim for refugee protection at an office of Citizenship and Immigration Canada [CIC] on the basis of China's one-child policy.

[6] In a decision dated July 4, 2014, the RPD rejected their claim. The determinative issue was credibility. The Applicants filed an application for leave and for judicial review of the RPD's decision, which is currently being held in abeyance pending determination of the RAD's jurisdiction to hear their appeal (Order of Prothonotary Aalto dated August 24, 2015, Federal Court No. IMM-3226-15).

[7] The Applicants appealed the RPD's decision to the RAD pursuant to s 110(1) of the IRPA. The Minister of Public Safety and Emergency Preparedness [MPSEP] intervened and argued that the RAD did not have jurisdiction to hear the appeal.

[8] The MPSEP's position before the RAD was that it lacked jurisdiction to hear the Applicants' appeal because they entered Canada from the United States, a party to the STCA. The Applicants did not dispute that they had entered Canada from the United States, but argued that s 110(2)(d) of the IRPA did not bar their access to the RAD because their claim was never referred to the RPD by an officer at a port of entry.

[9] In a decision dated June 24, 2015, the RAD found that it lacked jurisdiction to hear the appeal. The RAD noted that it was not bound by an earlier decision of the RAD, which held that the RAD had jurisdiction to hear an appeal in similar factual circumstances (*Re (X)*, 2015 Canlii 30384 (CA IRB) [*Re (X)*]). In brief reasons, the RAD noted that if the Applicants had complied with Canada's border control laws, then they would have been prohibited from submitting an appeal to the RAD by virtue of s 110(2)(d) of the IRPA. The RAD concluded that those who defy Canada's laws should not be "given an advantage [by having access to an appeal to the RAD] over other claimants who respect and observe Canada's border control laws".

III. Issue

[10] The sole issue in this application for judicial review is whether the RAD has jurisdiction to hear an appeal of an adverse decision of the RPD if the appellants entered Canada from the United States of America but did not make their claim for refugee protection at a port of entry.

IV. Applicable Legislative Provisions

[11] The following provisions of the IRPA are relevant to this application for judicial review:

Ineligibility

101.(1) A claim is ineligible to be referred to the Refugee Protection Division if

[...]

(e) the claimant came directly or indirectly to Canada from a country designated by the regulations, other than a country of their nationality or their former habitual residence;

Regulations

102.(1) The regulations may govern matters relating to the application of sections 100 and 101, may, for the purposes of this Act, define the terms used in those sections and, for the purpose of sharing responsibility with governments of foreign states for the consideration of refugee claims, may include provisions

[...]

(c) respecting the circumstances and criteria for the application of paragraph 101(1)(e).

Irrecevabilité

101. (1) La demande est irrecevable dans les cas suivants :

[...]

e) arrivée, directement ou indirectement, d'un pays désigné par règlement autre que celui dont il a la nationalité ou dans lequel il avait sa résidence habituelle;

Règlements

102. (1) Les règlements régissent l'application des articles 100 et 101, définissent, pour l'application de la présente loi, les termes qui y sont employés et, en vue du partage avec d'autres pays de la responsabilité de l'examen des demandes d'asile, prévoient notamment :

[...]

c) les cas et les critères d'application de l'alinéa 101(1)e).

Restriction on appeals

110(2) No appeal may be made in respect of any of the following:

[...]

(d) subject to the regulations, a decision of the Refugee Protection Division in respect of a claim for refugee protection if ...

(i) the foreign national who makes the claim came directly or indirectly to Canada from a country that is, on the day on which their claim is made, designated by regulations made under subsection 102(1) and that is a party to an agreement referred to in paragraph 102(2)(d), and

(ii) the claim – by virtue of regulations made under paragraph 102(1)(c) – is not ineligible under paragraph 101(1)(e) to be referred to the Refugee Protection Division;

Restriction

(2) Ne sont pas susceptibles d'appel :

[...]

d) sous réserve des règlements, la décision de la Section de la protection des réfugiés ayant trait à la demande d'asile qui, à la fois :

(i) est faite par un étranger arrivé, directement ou indirectement, d'un pays qui est — au moment de la demande — désigné par règlement pris en vertu du paragraphe 102(1) et partie à un accord visé à l'alinéa 102(2)d),

(ii) n'est pas irrecevable au titre de l'alinéa 101(1)e) par application des règlements pris au titre de l'alinéa 102(1)c);

[12] The following provisions of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations] are also relevant:

Non-application – ports of entry other than land ports of entry

159.4 (1) Paragraph 101(1)(e) of the Act does not apply to a claimant who seeks to enter

Non-application : points d'entrée autres que les points d'entrée par route

159.4 (1) L'alinéa 101(1)e) de la Loi ne s'applique pas au demandeur qui cherche à entrer

Canada at	au Canada à l'un ou l'autre des endroits suivants :
(a) a location that is not a port of entry; ...	a) un endroit autre qu'un point d'entrée; ...

V. Analysis

[13] The Respondents acknowledge that “[p]ersons arriving in Canada from the United States who are found eligible to make a refugee claim at a place other than a land border port of entry have a right to appeal to the RAD because the STCA does not apply to them” [Emphasis added]. Contrary to the position taken before the RAD, the Respondents now concede that the RAD incorrectly found that ss 101(1)(e) and 110(2)(d) of the IRPA and s 159.4 of the Regulations applied to the Applicants.

[14] The Respondents’ position before this Court is that the STCA does not apply to the Applicants because they did not enter Canada, nor did they make their refugee claims, at a land border port of entry. They are therefore not subject to s 101(1)(e), and are not barred from either a hearing before the RPD or an appeal to the RAD. The Respondents now endorse the analysis found in the RAD’s earlier decision in *Re X*. The Applicants also support this approach.

[15] I agree with the parties that the RAD in this case wrongly declined jurisdiction to hear the Applicants’ appeal. A plain reading of the applicable legislative provisions confirms that a refugee claimant who enters Canada from the United States is not ordinarily eligible to have his

or her claim determined by the RPD (IRPA, s 101(1)(e)). However, the IRPA also provides that regulations may govern the application of this provision. Paragraph 159.4(1)(a) of the Regulations states that s 101(1)(e) does not apply to a claimant who seeks to enter Canada at a location that is not a point of entry. The restriction on appeals to the RAD found in s 110(2) of the IRPA arises only when a claimant enters Canada from the United States and is referred to the RPD by an officer at a port of entry pursuant to one of the exceptions to the STCA.

[16] In this case, the Applicants did not make their claim for refugee protection at a port of entry, but at an office of CIC. The STCA therefore did not apply to them (*Re X* at para 37), and they were entitled to both a hearing before the RPD and an appeal to the RAD.

[17] The RAD in this case was understandably concerned that those who defy Canada's laws should not be "given an advantage [by having access to an appeal to the RAD] over other claimants who respect and observe Canada's border control laws". However, it appears that this possibility was envisaged by the Governor-in-Council when s 159.4(a) of the Regulations was enacted. The Regulatory Impact Analysis Statement that accompanied s 159.4(a) included the following observation:

An increase in refugee claims at inland offices and airports may result as persons seek to bypass the provisions of the Act and Regulations. Citizenship and Immigration Canada (CIC) is developing operational contingency strategies to prepare for these impacts and will reallocate resources as required.

[18] The RAD, like this Court, must apply the law as it is written, and must refrain from giving legislative provisions an interpretation that they cannot reasonably bear in an attempt to achieve an unstated policy objective of CIC. It is for CIC to implement “operational contingency strategies” to address the situation, or amend the Regulations, if the Respondents are concerned about refugee claimants bypassing the effect of s 159.4(a) of the Regulations by making their claims at a location that is not a port of entry.

[19] Because both parties agree to the disposition of this application for judicial review, it is unnecessary to certify a question for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed and the matter is remitted to a differently-constituted panel of the RAD to determine the Applicants' appeal on its merits. The style of cause is amended to add the Minister of Citizenship and Immigration. No question is certified for appeal.

"Simon Fothergill"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3201-15

STYLE OF CAUSE: HUA SENG ZHAO, JIN HUA GAO, GEN LE ZHAO v
THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS AND THE MINISTER
OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

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DATED: DECEMBER 14, 2015

APPEARANCES:

Peter D. Larlee FOR THE APPLICANTS

Cheryl D. Mitchell FOR THE RESPONDENTS
Philippe Alma

SOLICITORS OF RECORD:

Larlee Rosenberg FOR THE APPLICANTS
Barristers & Solicitors
Vancouver, British Columbia

William F. Pentney FOR THE RESPONDENTS
Deputy Attorney General of Canada
Vancouver, British Columbia