Federal Court  Cour fédérale

Date: 20171218

Docket: IMM-959-17

Citation: 2017 FC 1162

Ottawa, Ontario, December 18, 2017

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

YONGSHENG LI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] On October 8, 2015, Yongsheng Li [the Applicant], who describes himself as a political activist, fled China. He came directly to Canada where he made a refugee claim saying that he is a Convention refugee or a person in need of protection as described in sections 96 and 97(1) of the *Immigration and Refugee Protection Act,* SC 2001, c 27 [IRPA].

[2] When the Refugee Protection Division [RPD] dismissed his claim on July 14, 2016, the Applicant appealed to the Refugee Appeal Division [RAD] along with seven new pieces of evidence. None of the new evidence was admitted and on February 14, 2017, the RAD upheld the RPD's decision because of cumulative adverse credibility findings that he was not credible and his overall allegations lacked veracity.

[3] The Applicant now asks this Court to judicially review the RAD's decision, which means he must show the RAD decision was unreasonable or breached his right to procedural fairness. Because the RAD's credibility findings and *sur place* analysis are reasonable and because no error occurred by not conducting a separate section 97 analysis or refusing the evidence, I will dismiss this application for judicial review for the reasons that follow.

II. Background

[4] In these reasons, I refer to the Applicant as Yongsheng Li, which is his name as it appears on his Notice of Application for Leave and for Judicial Review to the Federal Court. But I am mindful of the fact that his name is spelled differently on different documents within his file. For instance, he is also referred to as Yonsheng Li, Yong Sheng Li, and Li Yongsheng. The Notice of Application is his originating document, and for that reason I use his name as it appears there.

[5] The Applicant is a Chinese citizen who describes himself as a political activist and freelance writer. He alleges that after publishing several online articles criticizing the Chinese government, he wrote a 283 page fictional novel in Chinese titled "New York Holidays." He says the Chinese government forbids this type of content, so he self-published this novel in

New York in May 2014 through his corporation and hired a printer. A summary of the novel (from translated excerpts) is that it is "about an individual who traveled to the eastern United States on vacation during the New Year holiday, where he meets a woman and falls in love while overcoming obstacles to their relationship… The summary also indicates that the protagonist has a strong sense of responsibility to China and that the country's immigration background is discussed." According to the Applicant, the Chinese authorities deleted an online excerpt of the novel.

[6] Other translated excerpts provided by the Applicant to the RPD and RAD involve the removal of Falun Gong practitioners' organs and food safety in China. The evidence is that the Applicant first had someone else print the novel in New York, and then distributed the novel in the United States, Taiwan, and Hong Kong. Approximately 14,000 copies were printed and it may have been possible to purchase the book online through a website.

[7] The Applicant alleged to the RPD and RAD that, after he returned to China on May 27, 2015, the Public Security Bureau [PSB] arrested him in June 2015. During his detention he was beaten, forced to stay awake, and questioned about his novel. The Applicant says the PSB told him "New York Holidays" was insulting and contrary to the Chinese government and then forced him to write a letter promising to stop his activities. The Applicant says the PSB told him he would be put in jail if he broke his promise.

[8] The Applicant alleges that because he continued to make online political posts, the PSB came to look for him at his home on July 6, 2015. As the Applicant was in Beijing that day, the

PSB left a summons with the Applicant's mother. On October 8, 2015, a smuggler helped the Applicant flee China. The Applicant's mother has since told him the PSB still come to her house and his sibling's home to look for him.

[9] Once in Canada, the Applicant made a refugee claim. His RPD hearing occurred on January 20 and June 9, 2016. The RPD issued its decision on July 14, 2016 dismissing the Applicant's refugee claim for three reasons: 1) he lacked credibility; 2) he failed to establish essential elements; and 3) he lacked a well-founded fear of persecution.

[10] The Applicant appealed the RPD's decision to the RAD and submitted new evidence to support his claim. The RAD reviewed all the new evidence, including a letter from Professor Burton, an associate professor at Brock University who is fluent in Chinese. The review found that six of the seven pieces of evidence did not satisfy the statutory requirements of IRPA section 110(4). In its review, the RAD also noted that the Applicant failed to explain why some of the documents could not have been provided prior to the RPD hearing. The one document that did satisfy section 110(4) of the IRPA was a letter addressing interpretation concerns and an accompanying document. But the RAD explained translation is not an exact science and the new translation did not change the findings. Since this meant the document was irrelevant, the RAD did not admit it. No oral hearing took place because no new evidence was submitted.

[11] The RAD issued its decision on February 9, 2017 which dismissed the Applicant's appeal. The RAD decision determined the Applicant is not a credible person due to cumulative

credibility findings and there was no serious possibility of persecution. The RAD also found the Applicant will not have a risk to life, of cruel and unusual treatment or punishment, or danger of torture in China.

III. Issues

[12] The issues are:

A. Did the RAD unreasonably find the Applicant's evidence failed the statutory requirements set out in IRPA section 110(4)?
B. Were the RAD's credibility findings unreasonable?
C. Was the RAD required to perform a separate analysis under IRPA section 97?
D. Was the wrong legal test used in the *sur place* claim?

IV. Standard of review

[13] The standard of review of a RAD decision is reasonableness. The standard of review of procedural fairness and errors of law is correctness (*Canada (Minister of Citizenship and Immigration) v Huruglic*a, 2016 FCA 93).

V. Analysis

A. *Did the RAD unreasonably find the Applicant's evidence failed the statutory requirements set out in IRPA section 110(4)?*

[14] A full translation of "New York Holiday" (costing $30,000) could not be obtained with the Applicant's Legal Aid funding. Therefore, before the RAD hearing, the Applicant requested

Professor Burton's expertise to alleviate this cost. The Applicant submits the RAD erred by not admitting Professor Burton's evidence for two reasons. First, the Applicant says the RAD erred because it didn't understand what expert evidence is. Second, the Applicant says the RAD erred by finding this evidence was foreseeable prior to the RPD's decision being issued.

[15] The Applicant says Professor Burton's letter is important because it addresses the implausibility findings which include his exit from the Beijing Airport. He argues that he could not have known Professor Burton's expertise would be required prior to the decision being issued, and so the RAD erred by excluding it. He submits that *Shafi v Canada (Minister of Citizenship and Immigration)*, 2005 FC 714 at paras 13-16, illustrates that not even a Pre-Removal Risk Assessment application can object to evidence that could not have been anticipated before the RPD, and this Court should come to the same conclusion in this case.

[16] The Applicant also argued that the RAD erred when they failed to go further and look at the *Raza v Canada (Minister of Citizenship and Immigration*), 2007 FCA 385 [*Raza*] factors and did not follow *Canada (Minister of Citizenship and Immigration) v Singh*, 2016 FCA 96 [*Singh*] when they determined that they would not accept any of the seven pieces of new evidence.

[17] I disagree with the Applicant as the RAD, starting at paragraph 14, assessed the new evidence as set out in *Singh* using the *Raza* factors. Each piece of evidence is looked at and detailed reasons that run several pages are given of why the RAD did not admit the material provided as new evidence.

[18] Regarding the arguments related to the letter from Professor Burton, it is not my role to reweigh or assess the evidence.

[19] Furthermore, it is up to the Applicant to decide how to present his claim (*Marin v Canada (Minister of Citizenship and Immigration)*, 2016 FC 847 at paras 26-27). The Applicant, aware of the novel's content and what would be seen as critical of the Chinese government, selected the translated excerpts and determined what portions to provide. He alleges the PSB arrested him because of the novel, so logically it would follow that he would know what portions upset the Chinese authorities. Considering that the novel was central to his claim, there are many steps the Applicant could have taken. For instance, he could have put forward whatever additional excerpts he needed to at the RPD hearing, or obtained an expert at that point, or had the matter translated at the hearing, or chosen different portions of the novel to be translated if they supported his claim. The test is not whether it is foreseeable that Professor Burton's evidence would be necessary. The responsibility to know what is important for his claim, especially when in fact he wrote the fictional novel, is the Applicant's.

[20] But the Applicant says that the evidence issue did not just surprise him like the *Marin* applicant, it shocked him. As the novel was central to the issue, I disagree that it is a surprise or shock that the RPD would be interested in the novel. Again, the Applicant chose the portions of the book to have translated for the RPD hearing, and he could have obtained an expert for the RPD hearing. In addition, even without an expert if at some point during the hearing the Applicant had felt that another portion of the book would be helpful to his claim, he could have

brought it to the RPD's attention and had it translated by the translator at the hearing. The onus is on the Applicant to put his best foot forward at the hearing.

[21] The Applicant has simply failed to explain how any of the newly submitted evidence satisfies the statutory and common law requirements. The Court must be satisfied as to the existence of justification, transparency and intelligibility within the decision-making process, and find that 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 [*Dunsmuir*] at paras 47-48). I find that the RAD's treatment of the proposed new evidence satisfied me that it met this test.

B. Were the RAD's credibility findings unreasonable?

[22] The Applicant submits that *Djama v Canada (Minister of Employment and Immigration),* 1992 CarswellNat 1136 (FCA) [*Djama*] stands for the principle that the RAD cannot determine if someone is wholly not credible if there is some evidence that supports his claim. The Applicant argues the RAD misconstrued *Djama,* and submits that case is applicable due to the evidence the RAD did accept (such as the fact the novel was published).

[23] I disagree with the Applicant and find the RAD's decision carried out the principles in *Djama*. While the *Djama* panel ignored other proof of that applicant's persecution, this RAD decision did not ignore the other evidence. In this case, the RAD examined the other evidence, but found that it did not overcome the evidentiary threshold required to prove the Applicant is a

political activist or that he faces a serious possibility of persecution. A second difference is the applicant in *Djama* established a well-founded fear of persecution, but in this case the Applicant does not have evidence of a well-founded fear of persecution and the RAD determined he is not a political activist.

[24] In addition, the RAD's credibility findings were reasonable because there was no credible evidence to support a fear of persecution. This is because the Applicant submitted fraudulent documentation, and the evidence that was accepted (blogs and the existence of the novel) was not determinative evidence.

[25] The Applicant's argument about his exit from China is not a reviewable error. The reasons illustrate a very detailed analysis of the airport he exited, and the RAD used the documentary evidence. The Court will not reweigh the evidence and the decision reached was within the range of acceptable outcomes.

B. *Authenticity of Documents*

[26] The Applicant submits two reasons the RAD erred in holding the RPD reasonably found the detention warrant is fraudulent. First, the Applicant submits it is insufficient to compare the detention warrant to documentary evidence. Second, the Applicant submits the RAD erred by failing to consider the absence of the rule of law and lack of procedure in China. The Applicant relies on *Lin v Canada (Minister of Citizenship and Immigration)*, 2014 FC 746 at para 42 for his position that a possible failure to follow procedure in the detention warrant does not mean it is not authentic.

[27] In the Applicant's case, the RAD did not make a blanket finding but looked to the documentary evidence that included examples of authentic documents and indicated what should be considered. They made their determination with this information and I find that the RAD properly considered the RPD's finding that the detention warrant contained inconsistencies.

C. *Was the RAD required to perform a separate analysis under IRPA section 97?*

[28] The Applicant submits the RAD erred by failing to perform a separate section 97 analysis as required by this Court in *Asu v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1693. The error the Applicant says occurred is the RAD specifically needs to evaluate an applicant's profile, even if an applicant is found discreditable. This profile should then be analysed in accordance with section 97 (is there risk of cruel or unusual treatment, punishment, risk to life, or risk of torture).

[29] The jurisprudence illustrates that when an applicant is found discreditable, the separate section 97 analysis is not required. So in this case, a separate section 97 analysis was not required because the Applicant is discreditable. In *Balakumar v Canada (Minister of Citizenship and Immigration)*, 2008 FC 20 at para 13, Justice Michael Phelan of this Court stated:

> It is not necessary that there be a rigid bright line between the s. 96 and s. 97 considerations. A finding that the objective element of s. 96 had not been met could, depending on the circumstances, dispose of the s. 97 issue as well. However, the rejection of the subjective element of s. 96 does not entitle the Board to ignore the objective element of fear particularly in respect of s. 97. The form in which that consideration occurs is not one which the Court should direct - what is important is that it be done and appear to be done.

[30] The RPD reasonably found that, for the same reasons articulated in its section 96 analysis, which took into account the subjective and objective evidence, there was insufficient evidence to support a section 97 finding of risk to the Applicant.

D. *Was the wrong legal test used in the* sur place *claim?*

[31] The Applicant argued that the RAD used the wrong legal test of future persecution because he argues authenticity should not be the evidentiary standard based on *Ghasemian v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1266 and *Ejtehadian v Canada (Minister of Citizenship and Immigration)*, 2007 FC 158.

[32] The Applicant also submits the RAD ignored his *sur place* argument. In particular, he submits the RAD did not analyse his submission that the Chinese Consulate has security surveillance and therefore the Chinese government will be aware of the Applicant's political activism in Canada.

[33] Yet despite the Applicant's submissions, the reasons demonstrate that the RAD did consider the *sur place* claim. The RAD found the Applicant is not a political activist, and did not find his Canadian activities would increase his risk, and the *sur place* analysis done by the decision maker was reasonable.

[34] Based on the foregoing, I am satisfied that it was reasonably open to the RAD to conclude that the Applicant had not established he was a Convention refugee nor a person in need of protection pursuant to section 96 and subsection 97(1) of the IRPA. In my view, the

decision was within the range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*). I can find no grounds upon which this Court should intervene in the RAD's decision.

[35] The parties did not submit a Certified Question and none arose.

JUDGMENT IN IMM-959-17

THIS COURT'S JUDGMENT is that

The application is dismissed.

No question is certified.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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