

Federal Court



Cour fédérale

**Date: 20180524**

**Docket: IMM-4517-17**

**Citation: 2018 FC 536**

**Ottawa, Ontario, May 24, 2018**

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

**BETWEEN:**

**ZENGGUI LI**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

[1] The Applicant is a citizen of China who travelled to Toronto on June 13, 2017. Shortly after his arrival in Canada, he made a claim for refugee protection on the basis that he was wanted by the Chinese Public Security Bureau following a demonstration precipitated by the government's decision to expropriate his and others' lands in order to build a paper mill and other factory buildings. The Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada heard the Applicant's claim for refugee status on September 12, 2017. At the

conclusion of the hearing that day, the RPD rejected the claim because of the Applicant's credibility and lack of corroborating documentation. The Applicant has now applied under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [IRPA], for judicial review of the RPD's decision. He asks the Court to quash the RPD's decision and return the matter for redetermination by another member of the RPD.

I. Background

[2] The Applicant claims he was informed in August 2016 at a local government meeting that his and other farmers' lands would be expropriated. Government officials advised the Applicant that he had to vacate his lands by November 15, 2016, and offered him 60,000 renminbi as compensation. Believing the amount of compensation to be insufficient, the Applicant and other villagers demonstrated outside the district government office on October 11, 2016. After approximately three hours, members of the Public Security Bureau [PSB] disrupted the demonstration, dispersing and arresting several protesters. The Applicant escaped with one of the protest leaders and went into hiding in a cousin's home in a neighbouring village. The Applicant learned that evening members of the PSB had searched his home and advised his wife that he was accused of interfering with government officials' business, participating in an illegal gathering, helping a representative evade arrest, and damaging the social order and government's reputation.

[3] The Applicant then decided to leave China to escape the PSB. He made arrangements with a smuggler to prepare false documents to help him leave China. After unsuccessfully trying to obtain an American visa, he obtained a Canadian visa using false information in February

2017. The Applicant travelled directly from Beijing to Toronto on June 13, 2017; his passport was taken by the smuggler upon arrival. The Applicant claims that the protesters who were detained have yet to be released and that his land was expropriated in late November 2016.

## II. The RPD's Decision

[4] At the outset of the RPD hearing on September 12, 2017, at which the Applicant spoke through a Mandarin interpreter and was represented by a lawyer, the RPD stated that identity and credibility were the issues before the panel and that after the Applicant was questioned there would be an opportunity for his counsel to make oral submissions. The RPD then proceeded to question the Applicant concerning his identity documents, his travel documentation, his address and farm land in China, his level of education, and the chain of events which led him to claim refugee status in Canada. After the RPD completed its questioning of the Applicant, the following exchange occurred between the RPD and counsel:

**MEMBER:** [...] Counsel, do you have any questions?

**COUNSEL FOR CLAIMANT:** No, I don't.

**MEMBER:** Okay. Very well. Did you want to make any submissions, counsel?

**COUNSEL FOR CLAIMANT:** Is there anything in particular you'd like me to address?/ [sic]

**MEMBER:** There's nothing that I particularly want you to address.

**COUNSEL FOR CLAIMANT:** Okay. Then, that's fine.

**MEMBER:** Very well. Thank you very much.

[5] After this exchange, the hearing recessed and when it resumed the RPD proceeded to render its decision orally. The RPD noted that the Applicant had not produced his passport or resident ID card since he claimed that both had been confiscated by the smuggler. The RPD further noted a discrepancy of two years between the Applicant's date of birth in the Global Case Management System [GCMS] notes and on his marriage certificate. The RPD did not accept that the smuggler had taken his resident ID card since his Basis of Claim [BOC] form only stated that his passport had been taken by the smuggler. When asked about this, the Applicant said he had not mentioned the resident ID card in his BOC form because he did not tell his lawyer about it. Since the Applicant was represented by counsel who was unlikely to overlook something so central, the RPD did not accept the Applicant's explanation and drew a negative credibility inference. The RPD did, however, in view of the GCMS notes and the Applicant's testimony, accept the Applicant's personal identity and that he is a citizen of China.

[6] After making this conclusion, the RPD reiterated that the main issue in the case was credibility and, in particular, corroborating documents. The RPD noted that the Applicant had supplied no documents evidencing his travel to Canada. The Applicant had testified that Canadian authorities had taken his flight itinerary and that he had left his flight ticket at home. In response to this testimony, the RPD stated the Applicant was responsible for having his travel documents with him, and drew a negative credibility inference. The RPD drew another negative credibility inference because the Applicant could not remember his street name after having lived there for 20 years. As to the lack of documentation showing the Applicant's ownership of his father's land, the RPD did not accept his explanation that his father had passed away before he could provide him with this documentation. With respect to the three photographs provided

by the Applicant purporting to show the land in question, the RPD found there was no way to know that these showed the Applicant's land and, in any event, they did not demonstrate ownership or show there was an orchard on the land as claimed by the Applicant. The RPD drew a negative credibility inference in this regard.

[7] With respect to the absence of documentation showing that the Applicant had leased land from the government in 1994, the RPD did not accept the Applicant's explanation that he was illiterate and did not know to send the lease. The RPD considered a discrepancy in the Applicant's evidence as to whether he had two or five years of education, and did not accept his explanation that three of those years were spent in kindergarten. The RPD remarked that the Applicant spoke Mandarin, rather than a dialect, which was a sign of education, and that he knew how to get to Canada, make a refugee claim, retain a lawyer, and had no difficulty communicating with the interpreter. The RPD also did not accept the Applicant's explanation that his family had not sent a 2004 lease renewal because they were busy dealing with the PSB, and drew a negative credibility inference.

[8] The RPD next considered the absence of official documentation showing that the Applicant's land had been expropriated. Because the Applicant's BOC form suggested that notification had been provided in writing, and the Applicant had testified that notification was provided orally at a local government meeting, the RPD drew yet another negative credibility inference. The RPD also drew a negative credibility inference because the Applicant had provided no appraisal documents to corroborate his belief that his land was worth more than 60,000 renminbi. The RPD noted that the *hukou* provided by the Applicant suggested he was an

agricultural labourer rather than a landowner, and found that a receipt for fertilizer submitted by the Applicant did not demonstrate he was a landowner, or show anything about the government wanting the Applicant's land, since he might have purchased fertilizer for a boss.

[9] The RPD concluded that, as a result of the many negative credibility findings, the Applicant was not wanted by the PSB and there was no *sur place* claim to consider because he had not been involved in any activities in Canada which would put him in jeopardy in China. After considering a Jurisprudential Guide (Decision TB6-11632) [Jurisprudential Guide], which states that it is not plausible that a Chinese national wanted by the PSB can escape China using his or her own passport, the RPD stated in its written version of the oral decision:

So, there is no evidence on the table upon which the panel could possibly find in the claimant's favour and therefore his claim is rejected for those reasons, both as to s. 96, s. 97 and the surplus [*sic*] claim mentioned above. For the avoidance of doubt, the panel finds that there is no credible basis for the claim, pursuant to s. 107 (2) of the *IRPA*.

[10] After making this determination, the following exchange occurred between counsel for the Applicant and the RPD:

**COUNSEL:** Well, I just want to say I am rather stunned that the panel would make a negative determination at this point after indicating to counsel that there were no issues which he wished to have addressed... not only in reference to credibility issues, but also particularly in reference to such things as the jurisprudential guide which were not raised as an issue at the outside [*sic*] of the hearing or any of the issues... and I need that put on the record, because I think there are issues with respect to natural justice and procedural fairness. Thank you.

**MEMBER:** [...] the panel would note in response to that last point that it is the claimant's responsibility to prove his case. There is a common, but misguided misunderstanding amongst counsel before this administrative tribunal on this point. The burden of the proof

lies on the claimant to prove his case through acceptable documentation, through testimony and through other evidence that is acceptable to the board.

The panel is not responsible to tell the claimant how to prove his case or what submissions need to be made. There was nothing that the panel needed to know from counsel with regards to the issues and so it did not seek clarification.

The claimant's lawyer is responsible as a representative for her client to ensure that all the evidence that the panel needs to make a finding is before the panel and that any points that need to be made as to applicable law, legislation or her interpretation of the credibility is properly before the panel to consider. Thank you.

### III. Analysis

#### A. *Standard of Review*

[11] The standard of review for credibility findings by the RPD is that of reasonableness with considerable deference owed to the advantageous position of the trier of fact (*Cambara v Canada (Citizenship and Immigration)*, 2017 FC 1019 at para 13, 286 ACWS (3d) 531; *Aguebor v (Canada) Minister of Employment and Immigration*), [1993] FCJ No 732 at para 4, 160 NR 315 (FCA)). The reasonableness standard tasks the Court with reviewing an administrative decision for “the existence of justification, transparency and intelligibility within the decision-making process” and determining “whether 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 at para 47, [2008] 1 SCR 190). Those criteria are met if “the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes” (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at

para 16, [2011] 3 SCR 708). So long as “the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome”; nor is it “the function of the reviewing court to reweigh the evidence” (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61, [2009] 1 SCR 339 [*Khosa*]).

[12] The standard of review for an allegation of procedural unfairness is correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79, [2014] 1 SCR 502; *Khosa* at para 43). The Court must determine whether the process followed in arriving at the decision under review achieved the level of fairness required by the circumstances of the matter (see *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 115, [2002] 1 SCR 3). The analytical framework is not so much one of correctness or reasonableness but, rather, one of fairness. In other words, a procedural choice which is unfair will be neither reasonable nor correct, while a fair procedural choice will be both reasonable and correct. Thus, “even though there is awkwardness in the use of the terminology, this reviewing exercise is ‘best reflected in the correctness standard’ even though, strictly speaking, no standard of review is being applied” (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54, [2018] FCJ No 382). However, a reviewing court will pay respectful attention to a tribunal’s procedural choices and will not intervene except where they fall outside the bounds of natural justice (*Bataa v Canada (Citizenship and Immigration)*, 2018 FC 401 at para 3, [2018] FCJ No 403).

B. *Did the RPD breach procedural fairness by rendering a negative decision without hearing submissions from counsel?*

[13] The Applicant contends that the RPD member breached procedural fairness by rendering a negative decision without hearing submissions from his legal counsel. According to the Applicant, his counsel relied on over 20 years' experience that if a member had any outstanding issues, he would have indicated that he did not need to hear about a particular issue or that all issues remained outstanding, and that RPD members typically indicate they want to hear about nothing in particular when they intend to render a positive decision. In the Applicant's view, in this case the member's indication that he did not require submissions on any particular issue amounted to either a deliberate attempt to mislead his counsel and allow the case to proceed in the absence of submissions, or a failure to ensure that the hearing was conducted in accordance with the principles of natural justice.

[14] The Applicant says RPD members must strictly adhere to the principles of fairness and transparency in the conduct of hearings. In this case, the Applicant maintains that the facts make it clear that the member was well aware his counsel had misunderstood the response to counsel's question about whether there was anything in particular he wanted counsel to address and, consequently, violated his right to know the case against him and be given an opportunity to meet it. The Applicant relies on *Gracielome v Canada (Citizenship and Immigration)*, [1989] FCJ No 463, 18 ACWS (3d) 340, and its progeny, for the proposition that if a RPD member draws a negative credibility inference, the member must first put the issue to an applicant and provide a chance to explain the inconsistency.

[15] According to the Respondent, there was no breach of procedural fairness and it is clear from a review of the context of this case that the Applicant and his counsel should have been aware that credibility was an issue. The Respondent says credibility is an issue in every refugee claim. The Respondent notes the RPD stated at the outset of the hearing that credibility would be an issue, and that after the Applicant had been questioned, his counsel would then be given an opportunity to make submissions. In the Respondent's view, the nature of the RPD's questions clearly indicated that credibility was an issue.

[16] The Respondent maintains that the RPD afforded the Applicant's counsel an opportunity to make submissions, and after stating that it did not require submissions on any particular issue, the Applicant's counsel declined to make submissions. In such circumstances, the Respondent argues there was no breach of procedural fairness or in the RPD member failing to repeat at the end of the hearing that credibility was an issue. According to the Respondent, in view of *Tesema v Canada (Citizenship and Immigration)*, 2012 FC 613 at paras 15-16, 411 FTR 267 [*Tesema*], and *Ge v Canada (Citizenship and Immigration)*, 2007 FC 890 at paras 23-25, 160 ACWS (3d) 857, the RPD is not required to explicitly state that an applicant's testimony has raised credibility concerns; and, in any event, the Respondent says the RPD had explicitly stated that credibility was at issue and the nature of the RPD's questions reinforced this.

[17] In my view, the Applicant's arguments as to there being a breach of procedural fairness are answered by the decision in *Tesema*, where the Court determined as follows:

[14] The Applicant's submissions concerning the alleged failure to allow her to respond to concerns about credibility arise from the Board's findings that she had failed to present credible evidence about her political opinion and whether that political opinion

would support a claim for protection pursuant to section 96 of the Act. Her arguments in this regard are not so much an allegation of breach of procedural fairness but an attack upon the Board's alleged failure to give her the opportunity to address its credibility concerns.

[15] I see no merit in the Applicant's arguments on this issue. It is trite law that an Applicant, seeking protection as either a Convention refugee or as a person in need of protection, carries the burden of establishing his or her case; see the decision in *Kovacs v. Canada (Minister of Citizenship and Immigration)*, [2006] 2 F.C.R. 455 at para 33.

[16] In the present case, the Applicant had the opportunity to be heard. She had the opportunity to present her case. There was no obligation upon the Board to point out to her, in the course of the hearing, that it had concerns about her credibility. This argument must fail.

[18] In this case, the RPD explicitly advised the Applicant's counsel that credibility was an issue, and offered his counsel the opportunity to make submissions after the Applicant had been questioned. In my view, given the lack of any objective or corroborating evidence to ground the Applicant's claim, the absence of submissions from the Applicant's counsel would not have made any difference to the outcome of the matter.

[19] As to the Applicant's argument that the RPD must raise any inconsistency with an applicant and allow them a chance to respond, the record in this case is clear that the RPD did precisely that. This case is unlike *Kumara v Canada (Citizenship and Immigration)*, 2010 FC 1172 at para 3, 195 ACWS (3d) 223, where the RPD member "simply lay in the weeds, waited till the hearing is over, then pulled out apparent contradictions and used them as the basis for disbelieving the Applicants' claim." In this case, each inconsistency, including the Applicant's missing identity documents, his travel itinerary, his street address in China, the lack of

documentary evidence showing ownership of the land, his literacy, the lack of expropriation documents or proof of land valuation, proof of his occupation, and his difficulties with the PSB, was put to the Applicant. It was the Applicant's burden to satisfy the RPD that there was a reasonable explanation for the discrepancies and lack of corroborating documentation, and he failed to do so.

C. *Was the RPD's Decision Reasonable?*

[20] In the Applicant's view, the RPD unreasonably applied the Jurisprudential Guide without considering the specific facts of the case and without stating why it applied to the specific facts at hand. The Applicant observes that there is conflicting jurisprudence on whether it is plausible that a person who is wanted by Chinese authorities can escape China on his or her own passport. According to the Applicant, the RPD's decision was unreasonable because it: failed to explain why the Applicant's explanation that he had left his travel documents at home was not accepted; was overzealous in building a negative credibility case against the Applicant on the issue of land ownership by rejecting the photographs for what they did not prove rather than what they did prove; made a logically flawed inference that the Applicant was illiterate; drew a negative credibility inference against the Applicant for not remembering his street name, while overlooking the fact that the street name was contained in the Applicant's *hukou* evidence; failed to explain why the Applicant's explanation as to how he was notified about the expropriation was insufficient; and drew a negative inference from the Applicant's lack of land appraisal documents in the face of country condition evidence showing that unfair compensation for land expropriation is widespread in China.

[21] According to the Applicant, the RPD misinterpreted and misapplied the test for making a “no credible basis” determination in spite of the Applicant’s supporting documentation and detailed, uncontradicted testimony, contrary to *Rahaman v Canada (Citizenship and Immigration)*, 2002 FCA 89 at paras 27-30, [2002] FCJ No 302 [*Rahaman*]. In the Applicant’s view, the RPD conflated the issue of credibility with the issue of “no credible basis,” and made such a finding in spite of the Applicant’s trustworthy and credible evidence, including photographs of his property and receipts for fertilizer, which did not appear to be fraudulent and could have led to a positive determination. The Applicant notes the high threshold for “no credible basis” determinations, arguing that adverse credibility findings against an applicant do not automatically lead to a “no credible basis” finding and that the RPD must not make such a finding where objective evidence has been led which could support a positive determination. The Applicant says his evidence was impugned only by discrepancies with corollary issues, and his documentary evidence was not challenged or found to be lacking in credibility.

[22] According to the Respondent, the Applicant was unable to provide a single document to corroborate his allegation that he was a landowner in China, that his land was expropriated, or that he was wanted by the PSB for any reason. The Respondent notes that credibility is at the heart of a RPD’s expertise, and in view of the numerous credibility issues and problems with the reliability of the evidence, the RPD reasonably found that there was no credible basis for the Applicant’s claim. As to the Applicant’s arguments concerning the RPD’s credibility findings, the Respondent says the Applicant’s submissions amount to “after-the-fact explanations” or alternate interpretations for his testimony, which do not show any reviewable error.

[23] I agree with the Applicant that there is a high threshold for a finding of there being “no credible basis” for a refugee claim. As the Court stated in *Tsikaradze v Canada (Citizenship and Immigration)*, 2017 FC 230, 277 ACWS (3d) 614 [*Tsikaradze*]:

[19] ... In advance of reaching a conclusion of no credible basis, the RPD must look to any objective documentary evidence for any credible or trustworthy support for an applicant’s claim (see: *Eze* at para 26). Moreover, the RPD can only make a finding that a claim has no credible basis under subsection 107(2) of the *IRPA* where “the only evidence before the RPD is the testimony of the claimant”; hence, if a claimant before the RPD adduces independent and credible evidence capable of supporting the claim, “then his or her claim will have a ‘credible basis’ even if the claimant’s testimony is found not to be credible” (see: *Chen v Canada (Citizenship and Immigration)*, 2015 FC 1133 at paras 16-17, [2015] FCJ No 1191).

[20] The RPD’s finding that the Applicants were not credible does not automatically result in a “no credible basis” finding (see: *Foyet v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 1591 at paras 23-26, 187 FTR 181 (FC)). The threshold for a no credible basis finding is a high one because it precludes the possibility of an appeal to the Refugee Appeal Division [RAD] of the IRB by virtue of paragraph 110(2)(c) of the *IRPA*. Claimants who seek judicial review of a negative RAD decision benefit from an automatic stay of removal under section 231 of the Immigration and Refugee Protection Regulations, SOR/2002-227, as am, unless they are from countries designated under subsection 109.1 (1) of the *IRPA*. The RPD must look to the objective documentary evidence before making a no credible basis finding in respect of a refugee claim. As noted in *Behary v Canada (Citizenship and Immigration)*, 2015 FC 794, at para 53, 483 FTR 252: “Only if there is no independent or credible documentary evidence, or if any such evidence cannot support a positive decision, can the RPD make such a finding.”

[24] In *Tsikaradze*, the RPD erred by conflating credibility with a “no credible basis” finding and failed to consider documentary evidence attesting to the applicant’s membership in a political organization and reports confirming he had been assaulted. In this case, however, the RPD reasonably determined that the documentary evidence was not “capable of supporting a

positive determination of the refugee claim” (*Rahaman* at para 19). This is in contrast with cases such as *Chen v Canada (Citizenship and Immigration)*, 2015 FC 1133 at paras 14-15, [2015] FCJ No 1191, in which the applicant had a summons from the local PSB and a letter attesting to the persecution she faced; and *Pournaminivas v Canada (Citizenship and Immigration)*, 2015 FC 1099 at paras 7-9, 258 ACWS (3d) 157, in which there was uncontradicted testimony from a witness and country condition evidence attesting to the persecution of homosexuals in India.

[25] In this case, the threshold for the RPD’s determination that there was “no credible basis” for the Applicant’s claim has been met because the only objective evidence led by the Applicant were identifying documents indicating that he is an agricultural labourer, a receipt for fertilizer, and a set of photographs which show some land, but offer no indication that it is the Applicant’s land subjected to expropriation. None of this evidence is even remotely sufficient to ground a finding that he is a refugee or person in need of protection on the basis that he is wanted by the PSB following a demonstration precipitated by the government’s decision to expropriate his lands. In my view, contrary to the Applicant’s submission that the RPD was overzealous in assessing these documents for what they do not prove rather than what they do prove, these documents do not prove anything to corroborate the central aspects of the Applicant’s claim.

[26] In short, the RPD’s “no credible basis” finding, as well as its decision as a whole, was reasonable.

IV. Conclusion

[27] The RPD's reasons for rejecting the Applicant's claim for refugee protection are intelligible, transparent, and justifiable, and its decision falls within a range of possible, acceptable outcomes defensible in respect of the facts and law. The Applicant's application for judicial review is therefore dismissed.

[28] Neither party proposed a serious question of general importance to be certified under paragraph 74(d) of the *IRPA*; so, no such question is certified.

**JUDGMENT in IMM-4517-17**

**THIS COURT'S JUDGMENT is that:** the application for judicial review is dismissed,  
and no serious question of general importance is certified.

"Keith M. Boswell"

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Judge

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

**DOCKET:** IMM-4517-17

**STYLE OF CAUSE:** ZENGGUI LI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** MAY 10, 2018

**JUDGMENT AND REASONS:** BOSWELL J.

**DATED:** MAY 24, 2018

**APPEARANCES:**

John Gravel FOR THE APPLICANT

Kevin Doyle FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Lewis & Associates FOR THE APPLICANT  
Barrister and Solicitor  
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT  
Toronto, Ontario