

Federal Court



Cour fédérale

Date: 20180905

Docket: IMM-4163-17

Citation: 2018 FC 891

Toronto, Ontario, September 5, 2018

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

CHENCHEN MAO

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] Mr. Chenchen Mao (the “Applicant”) seeks judicial review of the decision of the Immigration and Refugee Board, Refugee Appeal Division (the “RAD”), dismissing his appeal from the decision of the Refugee Protection Division (the “RPD”) that he was neither a Convention refugee nor a person in need of protection pursuant to section 96 and subsection 97 (1), respectively, of the *Immigration and Refugee Protection Act*, S. C., 2001, c. 27 (the “Act”).

[2] The Applicant is a citizen of the People's Republic of China who sought protection in Canada on the basis of his status as a practitioner in China of Falun Gong who had come to the attention of the Public Security Bureau (the "PSB").

[3] The RPD denied the Applicant's claim for protection largely on the basis of a number of negative credibility findings, including inconsistencies between his Basis of Claim ("BOC") form and his application for an American visitor visa, material omissions from his BOC and his failure to seek asylum in the United States.

[4] In submitting an appeal to the RAD, the Applicant requested an oral hearing in the event that it were to conduct an independent assessment of his credibility.

[5] The RAD declined to provide an oral hearing, on the basis that in the absence of new evidence it lacked jurisdiction to proceed with an oral hearing. Otherwise, the RAD dismissed the appeal and confirmed the decision of the RPD, in spite of finding that the RPD had erred in finding that the Applicant's application for the US visitor visa contained his true identity, as opposed to other documents that had been submitted to establish the Applicant's identity.

[6] In its decision, the RAD found that the RPD had failed to conduct a proper assessment of the *chuanpiao* and proceeded to do so itself. Although the Applicant characterized this document as a summons, the RAD found that it was more like a subpoena, that is, requiring the Applicant to appear but without the consequences of detention or arrest.

[7] The RAD determined that the cumulative adverse credibility findings were enough to uphold the negative decision of the RPD. It found that the Applicant was not a genuine Falun Gong practitioner and would not be perceived, in China, to be such.

[8] The Applicant now argues that the RAD breached his rights to procedural fairness by failing to give him an oral hearing and by raising a new issue without notice to him, that is, about the credibility of the *chuanpiao*. He also submits that the RAD failed to consider the totality of the evidence and made an unreasonable decision.

[9] The first question to be addressed is the standard of review, beginning with the first standard of review, that is the standard of review to be applied by this Court to the RAD.

[10] The appropriate standard of review for this Court when reviewing a decision of the RAD is reasonableness; see *Canada (Minister of Citizenship and Immigration) v. Huruglica* (2016), 396 D.L.R. (4th) 527 (F.C.A) at paragraph 35. Accordingly, the Court should not interfere if the RAD's decision is intelligible, transparent, justifiable, and falls within a range of outcomes that are defensible in respect of the facts and the law; see the decision in *Dunsmuir v New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 47.

[11] Next, I refer to the standard of review to be applied by the RAD upon an appeal from the RPD.

[12] In judicial review of a decision of the RAD, the reviewing court must look at the standard of review applied by the RAD to the RPD's decision. The Federal Court of Appeal in *Huruglica*, *supra* at paragraph 77 said:

... I find no indication in the wording of the IRPA, read in the context of the legislative scheme and its objectives, that supports the application of a standard of reasonableness or of palpable and overriding error to RPD findings of fact or mixed fact and law.

[13] According to the decision of the Supreme Court of Canada in *Dunsmuir*, *supra*, there are generally only two standards of review, that is reasonableness and correctness. If the standard of reasonableness does not apply, only the standard of correctness remains to be applied by the RAD in its review of certain issues before the RPD.

[14] At paragraph 103, of *Huruglica*, *supra*, the Federal Court of Appeal concluded:

I conclude from my statutory analysis that with respect to findings of fact (and mixed fact and law) such as the one involved here, which raised no issue of credibility of oral evidence, the RAD is to review RPD decisions applying the correctness standard. Thus, after carefully considering the RPD decision, the RAD carries out its own analysis of the record to determine whether, as submitted by the appellant, the RPD erred. Having done this, the RAD is to provide a final determination, either by confirming the RPD decision or setting it aside and substituting its own determination of the merits of the refugee claim. ...

[15] In my opinion, the paragraph quoted above means that the RAD must apply a correctness standard when reviewing decisions of the RPD which do not raise issues of the credibility of oral evidence.

[16] The issues of procedural fairness are reviewable on the standard of correctness; see the decision in *Canada (Citizenship and Immigration) v Khosa*, [2009] 1 S.C.R. 339.

[17] I see no error by the RAD in declining to give the Applicant an oral hearing.

[18] The Applicant did not submit new evidence before the RAD. According to subsection 110(6) of the Act, an oral hearing may be available, in the discretion of the RAD, if new evidence is sought to be considered.

[19] Similarly, I am not persuaded that the RAD breached procedural fairness by considering a new issue without notice to the Applicant.

[20] The status of the *chuanpiao*, as a summons or otherwise, was clearly an issue that was before the RPD and the RAD. The document was in evidence. Although the RAD noted that the RPD had not dealt with that document, it was within the authority of the RAD to deal with it. This was not a “new issue”.

[21] However, I am not satisfied that the RAD reasonably considered the totality of the evidence, in particular the evidence of the Applicant’s adherence to the practice of Falun Gong, either in China or in Canada.

[22] In these circumstances, the decision of the RAD does not meet the applicable standard of review and the application for judicial review will be allowed.

[23] The decision of the RAD will be set aside and the matter remitted to a differently constituted panel of the RAD for re-determination, there is no question for certification arising.

JUDGMENT IN IMM-4163-17

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, the decision is set aside and the matter remitted to a differently constituted panel of the RAD for re-determination. There is no question for certification arising.

“E. Heneghan”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-4163-17

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