

Federal Court



Cour fédérale

Date: 20221019

Docket: IMM-2181-21

Citation: 2022 FC 1407

Toronto, Ontario, October 19, 2022

PRESENT: Justice Andrew D. Little

BETWEEN:

JUNYANG LI

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision by the Refugee Appeal Division (“RAD”) under section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the “*IRPA*”). Owing to a finding on the applicant’s credibility, the RAD determined that he was not a Convention refugee nor a person in need of protection.

[2] For the reasons below, the application is dismissed.

I. Facts and Events Leading to this Application

[3] The applicant is a citizen of China. He based his claim for *IRPA* protection on his fear of the Chinese Public Security Bureau (“PSB”) after he protested the government’s expropriation of his parents’ apartment without adequate compensation. The material aspects of his claim were as follows.

[4] The applicant resided with his parents in an apartment building in Huanren, Liaoning Province.

[5] On September 1, 2016, the family received notice that the building was to be demolished. The family was asked to vacate within half a month. They received a compensation offer and a proposed subsidy during the rebuild of the apartment building.

[6] The family realized that a new apartment would cost much more than the compensation offer they received. Then they discovered that the government did not propose to rebuild the building, but instead required its demolition to facilitate a highway.

[7] The local government sent representatives to get all of the building residents to sign a contract agreeing to the expropriation of their properties. They all refused because the compensation was too low. The applicant claimed that the government responded with escalating harassment tactics to induce its desired result.

[8] In November 2016, the applicant joined a protest with other local residents. Local government officials did not appear to meet with them. The police arrived and threatened the protesters with jail if they did not disperse. The applicant and others were arrested.

[9] In January 2017, the applicant joined neighbours for another protest. The police stopped them on the way to the protest location. Police warned that their names had been placed on a list and they would be arrested if they continued to protest or complain.

[10] The applicant claimed that the police came to his parents' residence several times a month to monitor him and warned him against protesting and complaining. They told him to stop making trouble and sign the expropriation contract.

[11] In May 2017, the apartment building was demolished.

[12] After these events, the applicant's family feared for his well-being and arranged his departure from China. He secured a visa from a smuggler on November 1, 2017 and landed in Canada on December 17, 2017.

[13] The applicant learned from his father that the police continued to look for him. They interrogated his father about his whereabouts and his father told them that the applicant had gone to Canada. The applicant's father also advised him that other tenants had been arrested by local police.

[14] The applicant fears that he will be arrested if he returns to China.

[15] The Refugee Protection Division ("RPD") rejected the applicant's claim for *IRPA* protection with oral reasons delivered at the end of the hearing on June 17, 2019.

[16] The applicant appealed to the RAD. By decision dated March 5, 2021, the RAD dismissed his appeal.

II. The Decision under Review

[17] The RAD concluded that the RPD's overall credibility determination was correct and that the applicant was not credible. Although it found errors in the RPD's reasons, the RAD held they were not fatal to its overall decision.

[18] The RAD found that the applicant testified that there was a summons showing that the PSB were pursuing him in China. However, the applicant's Basis of Claim did not mention a summons. At the RPD hearing, the applicant's explanation for this omission was that he wanted to keep it secret because he was afraid of getting into trouble with Canadian authorities.

[19] The RAD concluded that the applicant's fear of getting into trouble in Canada did not reasonably explain the omission in his Basis of Claim. The Basis of Claim disclosed an alleged detention by authorities in China, that he was placed on a police list, and continuing visits to his home by the PSB. The RAD found that the applicant "failed to reasonably explain why he felt safe to disclose this information but not the summons".

[20] The RAD found that the issuance of a PSB summons was a significant allegation that went to the core of the applicant's claim and his allegation that he was a person of interest for the PSB. It was "not an elaboration, a minor detail, or a peripheral allegation". The RAD noted that the applicant had the assistance of an interpreter and counsel in preparing his Basis of Claim. He confirmed under oath that his Basis of Claim was translated to him and that the information in it was complete, true and correct. The RAD noted cases from this Court in which the omission of an arrest warrant or summons was found to be a significant event that should have been mentioned and a negative inference drawn based on this omission was found to be justified.

[21] The RAD concluded that the applicant's failure to reasonably explain the omission undermined his credibility regarding the central allegations of his claim for *IRPA* protection, including the alleged PSB pursuit. Absent any other evidence to corroborate the issuance of a PSB summons for his arrest, the RAD concluded that the applicant had failed to credibly establish that a summons has been issued against him.

[22] The RAD found that the material omission in his Basis of Claim was also an independent reason for requiring corroboration of the applicant's claim. The RAD found corroborative evidence was readily available in China in the form of the PSB summons, a purchase contract for the parents' apartment and a written agreement with his father that he would sign the expropriation agreement.

[23] The RAD found the applicant's explanations for not providing these documents to be unreasonable. The RAD found, first, the applicant was represented by counsel when he completed his Basis of Claim. That form, the *IRPA* and the RPD Rules all were clear that claimants are responsible for obtaining and providing supporting documents for their claims. The RAD found the applicant was not credible to testify that he was not aware of the requirement to provide documents before his hearing and had failed to make any effort in the 18 months before the hearing to corroborate his claim. Second, the RAD did not accept that the applicant's fear of getting in trouble in Canada reasonably explained his failure to provide the summons, given that he felt safe enough to mention it in his Basis of Claim narrative. The RAD noted that the applicant did not testify that it was too dangerous to leave China without taking anything with him or that he could not request a copy from his parents in China after he arrived in Canada.

Thus, the RAD concluded that the applicant failed to corroborate the alleged land expropriation and the PSB pursuit.

[24] The RAD held that the RPD was correct to find that there was insufficient credible evidence to establish the applicant's claim. The RAD's independent assessment was that the applicant had not reasonably explained his failure to provide corroborating evidence of the central allegations of his claim, which was premised on the expropriation of his parents' apartment and the PSB pursuit arising as a result.

[25] Lastly, the RAD agreed with the applicant that the RPD had made certain errors in its analysis. The RAD set aside those findings and advised that its independent assessment of the matter did not rely on the RPD's erroneous conclusions on those issues.

[26] The RPD concluded, in summary, that the applicant's allegations were not credible. He had failed to credibly establish the central aspects of his claim, including the expropriation and the PSB pursuit. He did not face a serious possibility of persecution or a personal risk to life, a personal risk of cruel and unusual treatment or a danger of torture. His claimed failed on credibility grounds under both section 96 and subsection 97(1) of the *IRPA*.

[27] On this application for judicial review, the applicant challenges the RAD's decision.

III. Analysis

A. *Procedural Fairness*

[28] At the hearing in this Court, the applicant focused on the argument that the RAD used “entirely different” reasoning than the RPD to make a negative credibility finding against the applicant. He submitted that the RAD reached its conclusion on a different issue than the RPD, that the issue was not raised in his submissions on the appeal to the RAD, and he could not have anticipated making argument on that issue on the appeal.

[29] The applicant referred to *He v Canada (Citizenship and Immigration)*, 2019 FC 1316 and to *Canada (Citizenship and Immigration) v Alazar*, 2021 FC 637. In *Alazar*, Justice Norris stated:

[87] As I have explained above, in deciding an appeal the RAD has jurisdiction to consider issues the RPD did not address in its decision and, further, the RAD is not limited to considering the issues raised on appeal. However, when, as happened here, the case has materially shifted away from the RPD’s decision and the appeal as it was framed by the respondents, the RAD breached the requirements of procedural fairness by deciding the appeal on the basis on which it did without first giving the Minister notice that a new issue was in play and an opportunity to be heard...

[30] The applicant submitted that the RAD’s decision had “materially shifted away from the RPD’s decision and the appeal as it was framed by” the applicant. According to the applicant, the RAD could rely on the omission in his Basis of Claim to make a finding on credibility, but could do so only after giving him with notice of the issue and an opportunity to respond. Its failure to do so was a breach of procedural fairness. Put simply, the applicant argued that if he did not

challenge the RPD's credibility findings on the appeal, the RAD was required to provide notice to him before it could make a credibility finding against him on the appeal.

[31] By contrast, the respondent submitted that the RAD did not deprive the applicant of procedural fairness and made no reviewable error in its conclusions on credibility. The respondent noted that both the RPD and the RAD addressed the omission in the Basis of Claim and both made a negative credibility finding. In addition, both found that the applicant's explanation for why he did not mention the summons was unreasonable. The respondent also observed that the RAD concluded that the material omission in the Basis of Claim raised significant doubts about the applicant's credibility. According to the respondent, this was properly an independent and sufficient reason for requiring corroboration, as the RAD concluded.

[32] The Court's review of procedural fairness issues involves no deference to the decision maker. The question is whether the procedure was fair having regard to all of the circumstances: *Gordillo v Canada (Attorney General)*, 2022 FCA 23, at para 63; *Canadian Pacific Railway Company v Canada (Transportation Agency)*, 2021 FCA 69, at paras 46-47; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69, [2019] 1 FCR 121, esp. at paras 49 and 54; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.

[33] I agree with the respondent that the applicant has not shown that the RAD breached procedural fairness principles.

[34] In *Corvil v Canada (Citizenship and Immigration)*, 2019 FC 300, at para 13, Justice LeBlanc set out the following principles:

[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 [citations removed]

[35] In *Oluwaseyi Adeoye v Canada (Citizenship and Immigration)*, 2018 FC 246, Justice Favel stated:

[13] In this case, the RAD did not raise a new issue on appeal because the Applicant's credibility was already at issue before the RPD. There is no procedural fairness issue when the RAD finds an additional basis to question the Applicant's credibility using the evidentiary record before the RPD (*Sary v Canada (Citizenship and Immigration)*, 2016 FC 178 at paras 27-32). The Applicant was already on notice that credibility was a live issue based on the RPD's original decision.

[36] The principles have been regularly approved and applied: *Adekanbi v Canada (Citizenship and Immigration)*, 2022 FC 38, at para 20; *Han v Canada (Citizenship and Immigration)*, 2021 FC 1390, at para 32; *Lopez Santos v Canada (Citizenship and Immigration)*, 2021 FC 1281, at para 46; *Adefule v Canada (Citizenship and Immigration)*, 2021 FC 1227, at paras 23-27; *Farah v Canada (Citizenship and Immigration)*, 2021 FC 116, at para 16; *Koffi v Canada (Citizenship and Immigration)*, 2016 FC 4, at para 38.

[37] In this case, the applicant testified at the RPD hearing about the omission of the summons in his Basis of Claim, in response to questions from the RPD member. The RPD's oral reasons found that the applicant's explanation for the lack of disclosure of the summons "evolved". The RPD stated that at the hearing, after it noted that there was no mention of the summons in the applicant's narrative, the applicant provided an explanation that he wanted to keep it secret. The RPD found that this explanation was "simply not credible". On appeal, the RAD concluded that the omission in the Basis of Claim raised "significant doubts" about the applicant's credibility, which led the RAD to find a sufficient reason to require corroborative evidence to support the applicant's claims that he was being pursued by the PSB.

[38] In my view, the RAD was not obliged as a matter of procedural fairness to provide notice to the applicant that it would use the omission in his Basis of Claim in this manner. Credibility was a live and important issue before the RPD. It made an adverse credibility finding related to the omission in the applicant's Basis of Claim. Even characterizing the RAD's conclusion as being an "additional basis" to question the applicant's credibility as contemplated by *Oluwaseyi Adeoye*, that additional basis (i.e., the omission in the Basis of Claim) was very closely connected to the basis for the adverse credibility finding provided by the RPD (namely, the explanation for the omission in the Basis of Claim). Similarly, I find no "material shift" in the RAD's reasoning away from the RPD's reasoning. The RAD used essentially the same credibility finding made by the RPD to correct the RPD's legal reasoning on the need for and use of corroborative evidence.

[39] The concerns in Justice Elliott’s analysis in *He* were quite different. She concluded that there were “extraordinary differences” between the analyses of the RPD and the RAD in that case; they approached two issues in “vastly different ways” that were essentially opposite; and the evidence reviewed by the RAD was not central to the RPD decision. None of those circumstances applies to this case: *He*, at paras 23-33, 42-48 and 79-80.

[40] I recognize that, in his appeal submission to the RAD, the applicant did not specifically challenge the adverse finding of credibility based on the omission. The RAD’s reasons recognized that. I do not believe that this choice precluded the RAD from making its determination in the present case, given what it did – identify an error in the RPD’s reasoning and correct it. Given the case law above, the fact that the omission was raised at the RPD hearing and in the RPD’s decision, and the RAD’s dual role as an appellate and independent decision maker, I cannot conclude in this case that the Court should intervene on the basis of procedural unfairness: *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93, [2016] 4 FCR 157, at paras 56, 78-79 and 103.

[41] I therefore conclude that the RAD did not deprive the applicant of procedural fairness.

The applicant must have known the case to be met on appeal.

B. Reasonableness of the RAD's Decision

[42] The applicant's written argument also submitted that the RAD erred in assessing his reasonable explanation for not providing corroborating documents.

[43] The parties agreed that the standard of review of the RAD's substantive decision is reasonableness, as described in *Canada (Minister of Citizenship and Immigration) v Vavilov*, [2019] 4 SCR 653, 2019 SCC 65. Reasonableness review is a deferential and disciplined evaluation of whether an administrative decision is transparent, intelligible and justified: *Vavilov*, at paras 12-13 and 15. A reasonable decision is one that is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrain the decision maker: *Vavilov*, esp. at paras 85, 99, 101, 105-106 and 194.

[44] The applicant did not identify an issue with the RAD's reasoning process, nor did he contend that the RAD failed to abide by any legal or factual constraint that applied to its decision. Instead, the applicant disagreed with the RAD's conclusion and asked the Court to reverse it. This is not the role of the Court on judicial review: *Vavilov*, at paras 99-101 and 125-126. Absent a reviewable error, the applicant's position cannot be sustained.

IV. Conclusion

[45] The application is therefore dismissed. Neither party proposed a question for certification.

JUDGMENT in IMM-2181-21

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.
1. No question is certified under paragraph 74(d) of the *Immigration and Refugee Protection Act*.

"Andrew D. Little"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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