Federal Court Cour fédérale

Date: 20221025

Docket: IMM-6158-21

Citation: 2022 FC 1461

Toronto, Ontario, October 25, 2022

PRESENT: Mr. Justice Diner

BETWEEN:

RONGXIAN LI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant seeks judicial review, pursuant to s. 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of a decision of a senior immigration officer [Officer] refusing his Pre-Removal Risk Assessment [PRRA] application. For the reasons that follow, this judicial review is dismissed.

I. Background

[2] The Applicant is a citizen of China. He arrived in Canada on a temporary resident visa in June 2016.

[3] In July 2017, the Applicant, his spouse and his adult child made refugee claims on the grounds that they feared persecution in China due to their pro-democracy and anti-Communist Party of China [CCP] activism in Canada. In June 2018, the spouse and child's refugee claims were both accepted by the Refugee Protection Division [RPD].

[4] In November 2020, the Applicant was convicted of three counts of sexual assault contrary to s. 271 of the *Criminal Code*, RSC 1985, c C-46, for which the Applicant was sentenced to a jail term of six months less a day. As a result, the Applicant's refugee protection claim was deemed ineligible and withdrawn, the Applicant was found inadmissible for serious criminality, and a deportation order was issued against him.

[5] In August 2021, the Applicant submitted a PRRA application seeking protection on the basis he would be at risk of harm in China due to his anti-CCP activism in Canada.

II. Decision under Review

[6] On September 1, 2021, a senior immigration officer [Officer] refused the Applicant's PRRA application [Decision]. The Officer determined, on a balance of probabilities, that he would neither be at risk of persecution, nor subject to a danger of torture, a risk to life or risk of

cruel and unusual treatment or punishment under ss. 96-97 of IRPA, if returned to China. While the Officer found that the Applicant had engaged in anti-CCP activism in Canada some years prior, after reviewing and addressing the evidence submitted by the Applicant, determined that there was nothing to support that his activism was either publicly known or that it had come to the attention of the Chinese government.

III. Issues and Analysis

[7] The Applicant raises two issues before the Court. First, the Applicant relies on paras 63 and 64 of *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] to argue the applicable standard of review of the PRRA decision is correctness, because there is a true operational conflict between two administrative bodies in this case, namely the RPD and the Officer. Alternatively, the Applicant argues that if the standard of review is reasonableness, then the Decision is unreasonable. The Respondent, on the other hand, argues that the standard of review is reasonableness throughout, and that the Officer's Decision is reasonable.

[8] I agree with the Respondent that the Officer's decision is reviewable on the standard of reasonableness, and that there is no operational conflict between the RPD's 2018 decision to accept the spouse and the child's refugee claims [RPD decision] and the Officer's Decision. Very recently, this Court's Associate Chief Justice Gagné [AJC] held that questions regarding jurisdictional boundaries constitute "a narrower category than is being advanced by the Applicants": *Kilgour v Canada (Attorney General)*, 2022 FC 472 at para 12 [*Kilgour*].

[9] Just as the ACJ found in *Kilgour*, the "operational conflict" argument advanced in this case is misleading. Contrary to the Applicant's submissions, the RPD and the PRRA Officer did not come to conflicting decisions based on the same facts, since the RPD never heard the Applicant's refugee claim because he was not eligible for refugee protection by virtue of his sexual assault convictions. The Applicant's PRRA was based on different evidence at a different time, than his spouse and child who had both filed their claim years earlier. Indeed, the Applicant did not file with his PRRA a complete record of the 2018 refugee claim. Rather, the Applicant provided a very sparse record before the PRRA Officer, including the tribunal's oral decision, but without a transcript of the testimony, and without the basis of claim forms of the claimants, or even a list of the exhibits that had been filed before the RPD.

[10] The Applicant submits that had he not been convicted and deemed ineligible for refugee protection, his refugee claim would have been joined by the RPD to the claims of his spouse and child, resulting in the same outcome for all three claims given the similar set of facts. However, this does not account for a key point: in *Canada (Citizenship and Immigration) v Tobar Toledo*, 2013 FCA 226 at para 55 [*Tobar*], the Federal Court of Appeal [FCA] held that "each claim for refugee protection is independent of other claims made by members of a single family unit, regardless of the similarity of the facts underlying the claims." Refugee claims that are joined and heard together by the RPD will not automatically result in the same decision. Having said that, Justice Pelletier noted at paragraph of *Tobar* as follows:

> This does not mean that the similarity of the facts has no impact on the outcome of these claims. When the facts supporting several claims are the same, it is not surprising that all of the claims have the same outcome. When the facts underlying the claims are not the same, it is also to be expected that each claim will be judged on the basis of its own facts.

[11] Here, although the facts and the evidence submitted for the spouse and son are similar, they are definitely not the same. To begin with, there are important differences in the timing of the two applications. At the time of the 2018 RPD hearing, the spouse and son presented fresh evidence. This could not be said of the Applicant's PRRA application, filed several years later.

[12] In short, there was no conflict between the two decisions. First, the Officer was not bound to decide the PRRA in the same way than the RPD decided the spouse and child's claims, simply due to the relationship. Second, the facts and evidence presented in the two fora differed. Thus, without any basis to rebut the *Vavilov* presumption on the basis of "an operational conflict," the default reasonableness standard of review applies to the PRRA Decision. A reasonable decision is one which is transparent, intelligible, and justified in relation to the relevant facts and law. The Court must be satisfied that any flaw or shortcoming in the decision is more than just superficial or peripheral to the merits of the decision, but that it is sufficiently central or significant to render the decision unreasonable (*Vavilov* at paras 16-17 and 99-100).

[13] The Applicant submits the Decision is unreasonable because the Officer failed to (i) properly consider the RPD decision, (ii) mention key elements of evidence in his reasons, including country condition information that support the fact that the Chinese government is aware of the Applicant's anti-CCP activism, or his anti-CCP activism as a fundamental characteristic of his identity, and (iv) heed an earlier finding of irreparable harm.

i. *The RPD's decision is relevant but not determinative of the PRRA application.*

[14] The Applicant relies on a number of Federal Court cases to argue that the PRRA application is not an appeal from the RPD and thus that given that the evidence before the PRRA Officer was substantially similar the RPD’s, the PRRA should have been accepted, relying on a series of cases, the most recent being *Sufaj v Canada (Citizenship and Immigration)*, 2014 FC 373 at para 28-29 [*Sufaj*] and *Mehesa v Canada (Citizenship and Immigration)*, 2011 FC 338 at paras 16-18 [*Mehesa*]).

[15] However, in *Raza v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385 at para 12 [*Raza*], the Court explains that “a PRRA application by a failed refugee claimant is not an appeal or reconsideration of the decision of the RPD to reject a claim for refugee protection.” The principle on which the Applicant relies in *Sufaj* and *Mehesa*, is not applicable in this case, because the Applicant, unlike in that series of cases, is not a failed refugee claimant. Here, unlike in those, the Applicant was deemed ineligible to have his refugee claim heard before the RPD with his family\members. The RPD thus never considered his refugee claim.

[16] In the Applicant’s PRRA cover letter (see text at Annex A), the Applicant’s counsel explained that given the RPD’s findings in the Applicant’s spouse and child’s refugee protection claims, the risk to the Applicant “should be considered established.” In support of his PRRA application, the Applicant provided the decision and reasons of the RPD in his spouse and child’s refugee protection claims. It is clear from the Applicant’s PRRA cover letter that his principal argument before the Officer, and before this Court in this Application, is that the Officer was bound to follow the RPD decision for his spouse and child’s refugee protection claims.

[17] I disagree. While not bound by it, the Officer properly recognized that the RPD decision is relevant, considered it in the analysis, and addressed it in the Decision as required (*Cheema v Canada (Minister of Citizenship and Immigration)*, 2020 FC 1055 at para 26; see also *Ruszo v Canada (Citizenship and Immigration)*, 2019 FC 296 at paras 11-12). Having considered the RPD decision, the Officer reasonably came to the conclusion that the Applicant was not at risk of harm in China.

[18] Specifically, the Officer addressed the RPD decision, noting that the Applicant's PRRA assessment is a separate determination from the refugee proceeding of his spouse and child. The Officer also pointed out that most of the evidence the Applicant submitted for his PRRA application, including the RPD's reasons for the decision concerning his spouse and child's refugee protection claims, dated back to over four years prior to the PRRA assessment, and that what has been submitted was insufficient to make a positive determination under ss 96 or 97 risk.

[19] This Court has consistently recognized that a PRRA can depart from the RPD as long as the Officer explains "why a different result is being reached from earlier decisions based on the same or very similar circumstances, typically with respect to another family member" (*Fodor v Canada (Minister of Citizenship and Immigration)*, 2020 FC 218 at para 67). As the Officer pointed out in the Decision, refugee claims and PRRA applications are distinct and separate determinations. The Applicant's principal argument fails to appreciate that while a refugee claim and PRRA assessment are similar, they are not the same. Justice Norris explained in *Shaka v Canada (Minister of Citizenship and Immigration)*, 2019 FC 798 at para 46 that:

> Parliament designed the refugee determination process and the PRRA process to perform closely related but distinct functions. The

> PRRA process was adopted as a safeguard for ensuring compliance with the principle of *non-refoulement* but it is only necessary to engage it for individuals who have not been granted refugee protection, either because they did not apply for it, because they applied for it but were unsuccessful, or (like the applicant), because they could not apply for it.

[20] In sum, and considering all the circumstances, the Officer did not err by failing to simply adopt the RPD decision.

ii. *The Officer's assessment of the evidence was reasonable*

[21] The Applicant further contends that the Officer overlooked key elements of evidence and thus unreasonably concluded that it was unlikely the Applicant's anti-CCP activism had come to the attention of the Chinese government. First, the Applicant argues that the Officer's reasons did not mention the fact that the protests the Applicant participated in took place in front of the Government of China Consulate in Vancouver, and thus they must have come to the attention of the Chinese government. In this regard, the Officer found:

> While I note that the applicant's PRRA materials contain pictures of what appears to be various events, which could be protests, I note that it is unclear either what specific events these pictures are of or whether the applicant is in, or is identified in, any of these pictures. I also note that it is unclear where these pictures originate from, or if they were ever publicly available. Accordingly, I do not find that these pictures demonstrate that the applicant would face a forward-looking risk of harm in China.

[22] The Officer's conclusion that it is unlikely the Applicant's anti-CCP activism came to the attention of the Chinese government does not stem from the fact that it was unlikely the Chinese government was aware of the protests. Rather, the Officer found that it was unlikely the Chinese

government was able to identify that the Applicant had participated in the protests based on the weak, dated and unsubstantiated evidence submitted with the PRRA. I find the Officer's reasons in this instance to be transparent, intelligible, and justified, meeting each of the *Vavilov* hallmarks, and failing to mention the location of the 2016 protest does not make it otherwise.

[23] The Applicant also submits that the Officer's unreasonably failed to address country condition information showing that China has actively engaged in intelligence activity abroad since mid-2017 when China's National People's Congress Standing Committee passed a new National Intelligence Law. The Applicant argues that this information was released through the national documentation package in May 2021, and was thus available to the Officer at the time of the PRRA assessment; it was the Officer's responsibility to examine the most recent information, per *Hassaballa v Canada (Citizenship and Immigration)*, 2007 FC 489 at para 33.

[24] This is too broad an onus to place on the Officer. Rather, the onus is on the Applicant to put his best foot forward (*Iwekaeze v. Canada (Citizenship and Immigration)*, 2022 FC 815 at para 22). It is not for the Officer, who has many applications to adjudicate, to comb through all available National Documentation Package [NDP] evidence looking for something that might establish risk for the Applicant. Rather, the onus lies with the Applicant to demonstrate to the Officer the basis for the risk claimed, he must include - or at minimum point to - the relevant country condition evidence.

[25] Here the Applicant neither included nor pointed to evidence relating to the intelligence law, or any other such evidence (see Annex A). As Justice Ahmed recently held in *Idu v Canada*

(Citizenship and Immigration), 2021 FC 1081 at para 34, that "if an officer did not explicitly cite the entire NDP it cannot be inferred that they did not consider evidence contained in the NDP."

[26] Again, the determinative factor for the Officer in this case was insufficient evidence presented by the Applicant to show that his anti-CCP activism would have to come to the attention of the authorities, rather than any particular issue with country condition evidence. When I raised this issue - that from any reasonable reading of the PRRA application, the Applicant's evidence was remarkably weak - Applicant's counsel conceded so, adding that while each piece of evidence, taken individually, "suffers from weaknesses," taken as a whole, they are cumulatively sufficient to establish the risk the Applicant would face if he is sent back to China.

[27] This response, however, fails to explain how the Officer's conclusion was unreasonable. Applicant's counsel was unable to explain why the evidence taken as a whole does not suffer from the same fundamental weaknesses as each individual piece of evidence. Furthermore, I find that these weaknesses were all adequately addressed by the Officer, justifying the Decision based on the weak, dated and unsubstantiated evidence presented. Indeed, the Applicant concedes he presented little to no evidence of activism after the new intelligence law, due to his detention for the crimes for which he has since been convicted of committing in Canada.

[28] The Applicant further submits that it was unreasonable for the Officer to reject his claimed fear of political persecution, stating that he would be safe if he did not express his political opinion in China. However, the Decision does not say this. Rather, the Officer simply

explains that it is unlikely any anti-CCP activism had come to the attention of the Chinese government and therefore there would be no forward-looking risk for the Applicant to return.

iii. *This Court's Stay Order does not establish the risk of harm for the PRRA assessment.*

[29] Finally, the Applicant argues that this Court's Stay, which found that the Applicant met all elements of the *Toth v Canada (Minister of Employment and Immigration)* (1988), 86 NR 302, 6 Imm LR (2d) 123 (FCA) demonstrate that he would suffer irreparable harm if deported (the second element of the tripartite test). The Applicant argues that this is a recognition of the risk he would face if sent back to China. He submits that since the information he submitted for his motion, and the information he submitted for the PRRA application, are substantially similar. The resulting stay thus presents a compelling argument for the granting of this Application.

[30] I cannot agree. One does not follow from the other. As highlighted by the Applicant himself in his submissions, the principle of judicial comity does not apply between this Court's Stay Order and the issue to be decided in this Application (*Williams v Canada (Citizenship and Immigration)*, 2018 FC 100 at para 41). Thus, the finding of irreparable harm cannot serve as the sole basis for granting of this Application.

[31] After all, there were no reasons provided in the Stay Order, beyond a statement that the test was met: Justice Elliott neither provided an analysis of the risk the Applicant would face if sent back to China nor an analysis of whether the Decision was reasonable. Rather, that is the function of judicial review. However, the Applicant has failed to persuade me that this issue, or any of the others raised, resulted in any reviewable error.

IV. Conclusion

[32] The Officer's decision to refuse the Applicant's PRRA application was reasonable. I will dismiss this Application for judicial review. The Parties propose no question of general importance for certification, and I agree that none arises.

JUDGMENT in IMM-6158-21

THIS COURT'S JUDGMENT is that:

1. The Application is dismissed.
2. No questions for certification were argued and I agree that none arise.
3. There is no award as to costs.

"Alan S. Diner"

Judge

ANNEX A

Cover letter for the Application sent to the PRRA Unit

IRCC – Humanitarian Migration – Vancouver August 23, 2021
#300-800 Burrard Street
Vancouver, BC
V6Z 0B6

Rongxian Li

I am writing this letter in support of the pre-removal risk assessment application of Mr. Li. In this case, Mr. Li, his wife and child made refugee protection claims, all on the same grounds. Mr. Li was found ineligible to make the claim because of a criminal conviction. The ineligibility letter is attached.

The wife and child continued with the claim successfully. In the circumstances, in light of the finding of the Refugee Protection Division, the risk to Mr. Li should be considered established.

Including with the pre-removal risk assessment form are documents filed in the refugee protection claims of the family, his Basis of Claim narrative and the decision and reasons of the Refugee Protection Division. Also attached are two additional witness statements in support of the application of Mr. Li.

Mr. Li delayed in completing and filing the attached pre-removal risk assessment form because he appealed his conviction, maintains his innocence and was worried that an application for pre-removal risk assessment would be an admission of guilt. An e-mail setting out this concern is attached.

Sincerely yours,

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6158-21
STYLE OF CAUSE:	RONGXIAN LI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD VIA VIDEOCONFERENCE
DATE OF HEARING:	OCTOBER 17, 2022
JUDGMENT AND REASONS:	DINER J.
DATED:	OCTOBER 25, 2022

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