Federal Court  Cour fédérale

Date: 20240326

Docket: IMM-12632-22

Citation: 2024 FC 471

Toronto, Ontario, March 26, 2024

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

MA, YANLING

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Ma, Yanling, is a citizen of China. The Applicant claims refugee protection on the basis of fear of persecution at the hands of Chinese authorities for having protested against asserted under-compensation for land expropriation involving her pig farm business and those of her neighbours.

[2] The Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada rejected the Applicant's claim for lack of credibility. The RPD also found that, if the Chinese authorities were seeking the Applicant, then it was on the basis of prosecution for the breach of a law of general application, as opposed to persecution for political opinion.

[3] The Refugee Appeal Division [RAD], applying a correctness standard, also found a lack of credibility, as well as prosecution instead of persecution, and upheld the RPD's rejection of the claim [First RAD Decision]. The Applicant succeeded in having the First RAD Decision set aside by this Court: *Ma v Canada (Citizenship and Immigration)*, 2022 FC 1043 [*Ma 2022 FC Decision*]. Additional facts and the reasons why the Court concluded that the First RAD Decision must be set aside for unreasonableness, with the matter remitted to a different RAD panel for redetermination, can be found in the *Ma 2022 FC Decision*. For conciseness, they will not be repeated or summarized here, except to say that the determinative issue for the Court was credibility.

[4] On the redetermination, the RAD again rejected the Applicant's refugee protection claim [Second RAD Decision], finding that the Chinese Public Security Bureau [PSB] sought to prosecute the Applicant and, further, that such attention did not amount to persecution. The RAD thus held that the Applicant was neither a Convention refugee nor a person in need of protection, within the contemplation of sections 96 or 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. See Annex "A" below for applicable legislative provisions.

[5] The Applicant comes to the Court again to have the Second RAD Decision set aside; the overarching issue for determination is the reasonableness of the Second RAD Decision. I find there are no circumstances here that displace the presumptive reasonableness standard of review: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 10, 17, 25.

[6] A decision may be unreasonable, that is lacking justification, transparency and intelligibility, if the decision maker misapprehended the evidence before it. The party challenging the decision has the onus of demonstrating that the decision is unreasonable. Flaws or shortcomings must be more than superficial, peripheral to the merits of the decision, or a "minor misstep" to warrant intervention by the Court: *Vavilov*, above at paras 99-100, 125-126; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156 at para 36, rev'd on other grounds 2023 SCC 21; *Metallo v Canada (Citizenship and Immigration)*, 2021 FC 575 at para 26.

[7] The Supreme Court's guidance in *Vavilov* discourages an endless judicial review merry-go-round (para 142). That said, having considered the parties' records and submissions carefully, I am satisfied that the Applicant has met her onus and that the Second RAD Decision must be set aside for unreasonableness but, as explained below, for different reasons than those expressed by Justice Ahmed in the *Ma 2022 FC Decision*.

II. Analysis

A. *The Applicant's new evidence*

[8] Contrary to the Applicant's submissions, I am not persuaded that the RAD unreasonably rejected certain pieces of the new evidence submitted by the Applicant on the redetermination.

[9] The Applicant submitted two pieces of "new" evidence: a letter from her mother and an enforcement notice for Li, Jun, a friend arrested at the protest in which the Applicant participated challenging the expropriation compensation before leaving China.

[10] The mother's letter details the protest and the arrest of Li, Jun and other villagers, as well as a recent visit to the mother's home by the PSB. The letter also refers to the enforcement notice for Li, Jun that the mother states she received from Li, Jun's wife.

[11] The RAD did not accept the portion of the mother's letter that reiterated the Applicant's experiences in China before she arrived in Canada. The RAD accepted, however, the portions of the letter that refer to the subsequent PSB visit and to the enforcement notice.

[12] Bearing in mind that, to be accepted, new evidence must be just that, new, as well as credible and relevant, I note that the Applicant takes no issue with the RAD's acceptance of the portion of the letter it admitted: *IRPA*, s 110(4); *Singh v Canada (Citizenship and Immigration)*, 2016 FCA 96 at paras 35, 49, 64-65, 74; *Demberel v Canada (Citizenship and Immigration)*, 2016 FC 731 at para 31; *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 at para 13.

[13] The RAD also did not admit the enforcement notice itself, as contrasted with the portion of the mother's letter that refers to it. I am not convinced that the RAD's reasoning about this piece of evidence is unintelligible, non-transparent or unjustified. The reasons permit the Court to understand the RAD's rationale for not accepting it.

[14] Although the enforcement notice arose after the RPD decision, the RAD concluded that it was not credible. The notice refers to Article 300 of the Criminal Procedure. In the RAD's view, Article 300 relates to property gained unlawfully where a suspect has fled or is deceased, neither of which apply to Li, Jun, who was arrested at the protest. In addition, the notice refers to "being involved in leading the anti-government activities, sabotaging the social order," which is inconsistent with Article 300. The RAD thus determined that the notice was not genuine and did not admit it.

[15] The Applicant contends that the RAD should have enquired regarding the status of Li, Jun, given the time between his arrest and the date of the enforcement notice (about three years). I agree with the Respondent, however, that it was for the Applicant to submit this information as new evidence for consideration, were she of the view that it was important or relevant to the redetermination: *Dhillon v Canada (Citizenship and Immigration)*, 2015 FC 321 at para 20; *Abdi v Canada (Citizenship and Immigration)*, 2019 FC 54 at para 24.

B. *Prosecution versus persecution*

[16] Although the previous RAD panel determined this matter on the bases of credibility and prosecution instead of persecution, the second panel addressed only the issue of prosecution

versus persecution. I am satisfied that the second panel's consideration of the latter issue was unreasonable and warrants the Court's intervention.

[17] I recognize that it is not the role of this Court, as the reviewing court conducting a reasonableness review, to hold the RAD to a standard of perfection, nor to reweigh the evidence and thereby impermissibly stray into assessing the correctness of the Second RAD Decision: *Vavilov*, above at paras 91, 125; *Yan v Canada (Citizenship and Immigration)*, 2018 FC 781 [*Yan*] at para 23. Nonetheless, the RAD's reasons must withstand a robust evaluation against the backdrop of the particular contextual constraints—factual and legal—applicable to the matter to avoid a finding of unreasonableness: *Vavilov*, above at paras 12, 90, 126.

[18] On this issue, the RAD upheld the RPD determination to the effect that if the authorities are pursuing the Applicant, then the pursuit results from the Applicant having broken a law of general application, rather than from persecution on the basis of political opinion.

[19] This Court previously has held that shouting anti-government slogans at a protest about expropriation does not amount necessarily to political opinion: *Yan*, above at para 22; *Ye v Canada (Citizenship and Immigration)*, 2022 FC 1767 at paras 31-32. The Court also has held the converse, however, that shouting slogans at a protest, such as the "government is unfair," may be viewed as an anti-government protest involving political opinion: *Zhou v Canada (Citizenship and Immigration)*, 2013 FC 619 [*Zhou*] at para 34.

[20] Further, the Court has held that landowners who protest expropriation or the amount of compensation sometimes may be persecuted: *Lin v Canada (Citizenship and Immigration)*, 2012 FC 1454 [*Lin*] at paras 7, 9.

[21] Ultimately, whether participation in a protest and resultant police action involve the expression of political opinion met with persecution will depend on the particular facts: *Yan*, above at para 22. This includes consideration of both the protest itself and how the PSB perceives an applicant's conduct.

[22] For example, the Court previously has observed that the lack of an established leadership role in an expropriation protest is a factor that reasonably weighs against a finding of political opinion: *Ni v Canada (Citizenship and Immigration)*, 2018 FC 948 at para 25; *Yan*, above at para 22. The Court in *Yan* also noted, in the same paragraph, that the applicant ran from the protest without any confrontation with the police.

[23] In the matter presently before the Court, the Applicant's evidence is that she played a leadership role in the protest, shouting slogans denouncing the compensation for the expropriation and government corruption. While Li, Jun and others were arrested, she was able to escape with other villagers. The Applicant further asserts that, according to her parents, the police went to her house looking for her and accusing her of taking the lead in anti-government action, slandering the government officers and sabotaging social order.

[24] The RAD panel specifically acknowledges the above evidence, as well as country conditions documentation that points to the serious possibility of persecutory actions by local government and police. I find, however, that the panel unreasonably speculates that the government's interest in the Applicant likely would be limited to prosecuting her for attending an illegal gathering. The panel does not explain why this would be so, when the Applicant's evidence is that the police have accused her of taking the lead in anti-government action, slandering the government officers and sabotaging social order. Further, the Second RAD Decision does not address directly the Applicant's credibility, although the panel does not accept the enforcement notice for Li, Jun that states the case involves "anti-government activities, sabotaging the social order."

[25] In the circumstances, I find that the Second RAD Decision represents an example of an outcome that was "reverse-engineered" to align with the outcome in *Lin*, above; the Supreme Court of Canada specifically discourages such a misstep by an administrative decision maker: *Vavilov*, above at para 121.

[26] Here, the RAD draws an analogy or similarity between the facts of *Lin* that, in my view, is unintelligible and non-transparent, for several reasons. First, the RAD does not express a credibility concern with the Applicant's evidence about the PSB's accusations against her.

[27] Second, the RAD points to this Court having stated in *Yan* that shouting anti-government slogans and calling the government corrupt do not necessarily amount to political opinion. Yet, Justice O'Reilly recognizes in *Lin* that vocal opposition to expropriation "could have been

regarded as political activity" which "prompt[s] the government to retaliate in a persecutory fashion" and, further, that landowners who protest expropriation or the amount of compensation sometimes may be persecuted.

[28] Third, the facts that underpin the decision in *Lin* show that the applicant was arrested for assault, having pushed an official who fell backward, hit his head and called the police as a result of the physical altercation; hence, the Court's finding of prosecution, not persecution.

[29] Here, however, the Applicant was not arrested and there was no evidence of an arrest warrant or an enforcement order for her. Further, the Second RAD Decision seemingly focuses on the protest itself but not on the stated reasons for the PSB targeting the Applicant following the protest. This points, in my view, to veiled credibility concerns on the part of the RAD. If the RAD panel doubted the Applicant's evidence about the level of her involvement in the protest or the PSB's accusations against her, that should have been stated in clear and unmistakable terms in the Second RAD Decision: *Hilo v Canada (Minister of Employment and Immigration)* (1991), 130 NR 236 (FCA) at para 6. See also *Zhou*, above at paras 32-34.

[30] I conclude that the RAD has not explained reasonably why it is likely that the government's interest would be limited to prosecuting the Applicant for attending an illegal gathering.

III. Conclusion

[31] For the above reasons, the Applicant's judicial review application will be granted. The Second RAD Decision will be set aside, with the matter remitted to the RAD for redetermination by a different panel.

[32] Neither party proposed a serious question of general importance for certification. I find that none arises in the circumstances.

JUDGMENT in IMM-12632-22

THIS COURT'S JUDGMENT is that:

1. The Applicant's judicial review application is granted.
2. The November 24, 2022 decision of the Refugee Appeal Division is set aside and the matter will be redetermined by a different panel.
3. There is no question for certification.

"Janet M. Fuhrer"
Judge

Annex "A": Relevant Provisions

Immigration and Refugee Protection Act, SC 2001, c 27.
Loi sur l'immigration et la protection des réfugiés, LC 2001, ch 27.

Convention refugee **96** A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion, **(a)** is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or **(b)** not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	**Définition de réfugié** **96** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques : **a)** soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays; **b)** soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
Person in need of protection **97 (1)** A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally **(a)** to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or **(b)** to a risk to their life or to a risk of cruel and unusual treatment or punishment if **(i)** the person is unable or, because of that risk, unwilling to avail themself of the protection of that country, **(ii)** the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country, **(iii)** the risk is not inherent or incidental to lawful sanctions, unless imposed in	**Personne à protéger** **97 (1)** A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée : **a)** soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture; **b)** soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant : **(i)** elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays, **(ii)** elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas, **(iii)** la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles

disregard of accepted international standards, and **(iv)** the risk is not caused by the inability of that country to provide adequate health or medical care.	infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles, **(iv)** la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
Person in need of protection **(2)** A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	**Personne à protéger** **(2)** A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.
Appeal to Refugee Appeal Division …	**Appel devant la Section d'appel des réfugiés** …
Evidence that may be presented **110 (4)** On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection. …	**Éléments de preuve admissibles** **110 (4)** Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet. …
Hearing **(6)** The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3) **(a)** that raises a serious issue with respect to the credibility of the person who is the subject of the appeal; **(b)** that is central to the decision with respect to the refugee protection claim; and **(c)** that, if accepted, would justify allowing or rejecting the refugee protection claim.	**Audience** **(6)** La section peut tenir une audience si elle estime qu'il existe des éléments de preuve documentaire visés au paragraphe (3) qui, à la fois : **a)** soulèvent une question importante en ce qui concerne la crédibilité de la personne en cause; **b)** sont essentiels pour la prise de la décision relative à la demande d'asile; **c)** à supposer qu'ils soient admis, justifieraient que la demande d'asile soit accordée ou refusée, selon le cas.

FEDERAL COURT

SOLICITORS OF RECORD

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