

Federal Court



Cour fédérale

Date: 20101209

Docket: IMM-2812-10

Citation: 2010 FC 1263

Ottawa, Ontario, December 9, 2010

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

YONG QIANG YU

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant seeks to set aside the negative decision of an officer refusing his Pre-Removal Risk Assessment (PRRA) application. He submits that the officer erred in law in failing to provide adequate reasons regarding state protection in China and in failing to provide the applicant with an oral hearing. He further submits that the decision is unreasonable.

[2] I am not persuaded that the officer committed the errors alleged or that the decision is unreasonable, and therefore dismiss this application.

Background

[3] The applicant, a Chinese citizen, filed a PRRA application based on his fear of drug traffickers in China.

[4] In 2005, the applicant opened a hardware processing factory in En Ping, China. He says that he discovered that a neighbouring factory was owned by a man with connections to the government, police, and mafia. After becoming suspicious about the neighbouring factory because of the strong smell it was producing, the applicant picked up a pellet from a spilled package of goods that had fallen off a pickup truck delivering goods to the neighbouring factory. The applicant's friend conducted an analysis of the pellet and determined that it was the drug MDMA (ecstasy).

[5] Mr. Yu reported the drug manufacturing factory to the police. However, the police were colluding with its owner and allegedly told him about the applicant's report. Two days after the applicant's report, more than ten men came to the applicant's factory, beat him with wooden and metal batons, damaged his factory equipment and threatened to burn down the factory and kill the applicant's family should he report to the police again. The men who assaulted the applicant said they knew he had reported their boss to the police. The applicant recognized some of the men as employees of the neighbouring factory and observed that some of them had eagle tattoos on their left hands. As a result of the beating, the applicant was hospitalized. He submitted the medical report with his PRRA application.

[6] After this incident, Mr. Yu closed his factory and went into hiding. He made another report to the police, with no effect, and then decided to report the drug manufacturing to a higher level of police department, the Police Bureau of Jiangmen City. He stated that after two months of investigation, on December 23, 2006, the Jiangmen police raided the factory and arrested its owner. The raid was reported in the news, and the applicant submitted a news report with his PRRA application.

[7] The applicant continued to be pursued by associates of the drug dealers. They phoned him asking about his whereabouts and threatening to kill his family. On January 1, 2007, four men came to his home when he was not there. The men poured red paint on the front door, broke in and destroyed all of his furniture, killed his dog, threatened to kill his uncle who was there at the time, and told him that they had men everywhere, even overseas. The men identified themselves as members of the Big Circle gang.

[8] The uncle reported the incident to police, and three policemen came to the applicant's home to investigate and said they would investigate further. Mr. Yu did not return to his home, but his uncle told him that a police car came and "browsed around [the applicant's] home area once in a while but that after 3 to 4 days, the police car didn't come at all."

[9] The applicant moved to Jiangmen on January 4, 2007, where he worked at a factory and lived in the factory's dormitory. While the applicant was away traveling for work, men came and asked his roommate about his location. One of the men had an eagle tattoo on his hand. The men

told the roommate that if they could not find the applicant, they would go after his son. The applicant suspected that the gang members found him through their connections with police.

[10] Upon the applicant's return to Jiangmen, he did not return to the dormitory but instead went to live with relatives and took a job as a driver at a real estate company. Then, in September 2007, four men came to the company where the applicant worked while he was away at a construction site. The men threatened the applicant's employer, who disclosed that the applicant was at the construction site. The employer later phoned the applicant to warn him and to tell him that he was fired for causing so much trouble.

[11] The applicant then fled to Guangzhou where he stayed with a distant relative. The drug dealers managed to find the applicant there as well, and on October 15, 2007, three men showed up brandishing a knife and threatening Mr. Yu. The applicant escaped through a back window. Mr. Yu says that because China requires registration with police to obtain a temporary residence card, his persecutors would be able to find him anywhere in China. Accordingly, the applicant hired an agent who arranged for his travel to Canada via the US.

[12] The applicant says that since coming to Canada, the gangsters have continued to look for him in China. He believes they are collaborating with the police and still trying to exact revenge. In November 2009, the applicant's cousin discovered graffiti with threatening messages on the applicant's home.

[13] During this time, the applicant arranged for his children to live with a friend in Guangzhou. The applicant then arranged for his eldest son, Wei Bin Yu, to study in New York. On December 14, 2009, someone phoned one of the applicant's friends asking for the applicant's whereabouts and stating that they knew that the applicant's son was studying at Windsor School in New York and that they knew where he lived. On December 15, 2009, the applicant's son was informed by classmates that two men were looking for him at the school's gates, and that they had a photograph of him. The applicant's son did not go back to school and the applicant arranged for his son to travel to Canada. His son now has a separate refugee claim pending in Canada.

[14] The applicant's son's guardian in New York provided an affidavit stating that men had called looking for the applicant's son, had shown up looking for the applicant's son and had threatened him. He noticed that one of the men had an eagle tattoo on his left hand.

[15] The officer who considered the applicant's PRRA found that the PRRA failed on the basis of "improbabilities, insufficiency of evidence and the existence of state protection in China."

[16] The officer was satisfied that Mr. Yu started and ran his own business in 2005 and that he was hospitalized in 2006, reporting injuries consistent with a serious assault. However, the officer noted that the applicant had not provided evidence of his reports to police, his involvement in the drug investigation, his uncle's police report, or the fact that eagle tattoos are a sign of membership in the Big Circle gang.

[17] The officer noted that the news article describing the drug raid on December 23, 2006, appeared to have been printed from the internet but did not have “the usual headers and footers (i.e., date printed, web address, etc.)” and that it was therefore impossible to locate its original source.

[18] The officer noted that the applicant claimed he reported the drug operation in mid-October 2006 and that he was assaulted two days later, and that the applicant said he made another report to a higher level police force leading to the investigation. The officer observed that if, as the news article suggests and contrary to the applicant’s statement, the police had been investigating the factory two months prior to the applicant’s discovery of the drug operations, the applicant would have had no apparent influence on the investigation. In light of this contradiction and the absence of any police reports, the officer relied on the news article and found that there was insufficient evidence that the applicant originated or was involved in the police investigation.

[19] The officer also noted that no evidence was provided regarding the applicant’s uncle’s police report made after the incident in which the dog was killed, other than a statement that the uncle died in 2008. The officer found that the lack of evidence regarding the Big Circle gang’s use of eagle tattoos was problematic because the tattoos were what tied the men who threatened the applicant’s son in New York to the incidents in China.

[20] With respect to the incident at the applicant’s son’s school, the officer found it improbable that the presence of suspicious men, who, according to the evidence, “looked like gang members,” with a picture of the applicant’s son asking students if they knew him, would fail to raise alarms at a high school. The officer found it improbable that the son’s classmates would not tell a teacher or

other person in authority, and that it was improbable that the applicant's guardian would tell a notary, but not the police, about the death threats. In light of these concerns, the officer found that there was insufficient evidence that the applicant's son was threatened in New York.

[21] The officer considered the letter accompanying the photos of the spray-painted threats on the applicant's home in China, but noted that the letter appeared "mostly jovial." The officer found that the vandalism was difficult to assess in light of the lack of evidence with respect to other aspects of the claim.

[22] The officer found, in any case, that the applicant had failed to rebut the presumption of state protection. The officer reviewed the protection the applicant had sought from the police and the protection that had been provided, specifically noting the applicant's statement that he considered going to the police after the incident in Guangzhou, but did not because he concluded that it would be impossible for the police to protect him 24 hours a day. The officer agreed that the applicant was likely correct that the police would be unable to provide constant protection, but noted that state protection need not be perfect. The officer found that the evidence showed that Chinese authorities take corruption and organized crime seriously and specifically noted that the police were able to shut down a large drug manufacturing and trafficking operation and incarcerate ten gang members, including the leader. The officer found it improbable that police would subsequently fail to follow up on the applicant's allegations that remaining members of the organization were threatening him. The officer noted that the police offered to protect the applicant after the incident involving the applicant's uncle and the dog and indeed provided a patrol, but that the applicant fled to another area rather than avail himself of this protection.

[23] The officer noted that the media articles provided by the applicant addressed recent anti-corruption drives in China which resulted in large numbers of arrests and a “massive crackdown.” The officer acknowledged that gang infiltration of police and government is still a serious problem in China, but also noted that there is evidence that higher authorities are aware of the problem and are taking significant steps to stem the influence of organized crime.

[24] The officer determined that based on the applicant’s narrative, the applicant was a victim of crime and was not targeted based on any of the Convention grounds, and therefore did not fall within s. 96 of the *Immigration and Refugee Protection Act*. With respect to s. 97 of the Act, the officer found that there was insufficient evidence to corroborate the applicant’s claim, and also that the applicant failed to rebut the presumption of state protection. Accordingly, the application was rejected.

Analysis

[25] The applicant submits that the officer’s finding that the news report regarding the drug raid was impossible to locate, given that it lacked the usual headers and footers included on a news article printed from the internet, was unfounded and that “all of the alleged missing information was actually there.” The applicant’s submissions regarding the web site are baseless and the officer’s findings were correct. The web addresses included on the printout submitted by the applicant are general links to news websites and do not link to the news article describing the drug raid. They are in Chinese, and accordingly without a specific address it was impossible for the officer to verify the original article.

[26] The applicant submits that the officer made a negative credibility finding based on the apparently contradictory evidence and that the officer missed the main point of the applicant's allegation of risk: that he was identified by the associates of the drug ring as someone who made a report about the factory and its boss to the police. The applicant says that when the drug raid happened was irrelevant and that the officer's findings were thus made capriciously and without regard to the evidence.

[27] Contrary to the applicant's submission, his affidavit does suggest that he influenced the police investigation, and it was not unreasonable for the officer to interpret it as such. At paragraph 15 of his affidavit, the applicant affirms that:

I reported to the police again, which ended up no response at all [*sic*]. So I had to report their drug manufacturing and drug dealing activities to the higher level of police department – Police Bureau of Jiangmen City. On December 23, 2006, after over two months of full investigation and evidence collection, Jiangmen Police led by its chief of Police Bureau with over 100 police officers arrested Mr. Xu and 8 other drug manufacturing staff.

[28] It was not unreasonable for the officer to conclude, given the sequence set out in this passage, that the applicant's report led to the police investigation. Moreover, the fact that the applicant's timeline of events involves his report, then two months of investigation, and then the raid, further confirms the reasonableness of the officer's interpretation of the applicant's evidence as suggesting he caused the raid. The two months of investigation the applicant refers to clearly relates to October to December 2006, whereas the two month period referred to in the news article relates to July to September 2006. The applicant's affidavit suggests the police investigated for two months before launching the raid, whereas the news article suggests they investigated for five

months. In light of these facts, the officer's finding that there was a contradiction between the news report and the applicant's affidavit was reasonable, and given that there was no police report or other evidence, the officer's decision to favour the news article and to find that there was insufficient evidence that the applicant originated or was involved in the police investigation was reasonable.

[29] The applicant says that the officer's findings of "insufficiency of evidence" were inextricably linked to questions about the applicant's credibility, and that as such natural justice required that the applicant be given an oral hearing to address the officer's concerns.

[30] I agree with the applicant that some of the officer's findings did amount to credibility findings despite the use of the language of insufficiency of evidence, contradiction, and improbability. However, raising an issue of credibility only satisfies paragraph (a) of s. 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227. The prescribed factors in that section also include "(b) whether the evidence is central to the decision with respect to the application for protection; and (c) whether the evidence, if accepted, would justify allowing the application for protection." In my view, the impugned evidence was not sufficiently central to the decision that, if accepted, it would have justified allowing the application. This is especially true given that the officer reached a reasonable determination regarding state protection that was not affected by any credibility concerns.

[31] The applicant says that for state protection to be adequate, it must be effective, and that this requires a decision-maker to do more than simply point out what the authorities did after a

complaint was made: *Mejia v Canada (Minister of Citizenship and Immigration)*, 2010 FC 530.

The applicant submits that the officer failed to consider the evidence regarding the threats and beating he had received and the fact that country condition documentation indicates that corruption is rampant in the police and government infrastructure in China. The applicant says that the problem of corruption and police involvement with criminal elements “was not even mentioned at all” in the decision and that no consideration was given to the true effectiveness of available protection. The applicant says that the officer failed to consider his belief that the police were collaborating with his pursuers to find out where he lived, that he was pursued throughout China, that his family members were seriously threatened, and that objective country condition documentation suggests a lack of state protection. He also submits that the burden of proof on an applicant seeking to establish a lack of state protection is proportional to the level of democracy in the state in question, and that democracy is arguably non-existent in China. Accordingly, the applicant says the finding of state protection was made capriciously and without regard to the evidence.

[32] The applicant has engaged in an examination of the officer’s reasons but has failed to address one of the strongest indications of state protection in this case: that police raided the drug operation and arrested several senior figures, including the owner of the neighbouring factory, the alleged agent of persecution. I agree with the officer’s observation that if the authorities were willing to conduct a large, well-planned raid against the drug manufacturers, it would be improbable that they would not subsequently be willing to protect the applicant.

[33] Furthermore, the officer also considered that the police told the applicant's uncle that they would investigate and protect the applicant's safety and that the police sent a patrol to the applicant's home for three to four days after the incident with the uncle and the applicant's dog. However, the applicant decided to flee. The officer noted that the applicant did not pursue further complaints with police.

[34] The officer did not misapprehend the test for state protection; he or she determined that there was effective protection available in China. Contrary to the applicant's submissions, it is clear from the following passages that the officer did consider the problem of corruption, but nonetheless found that it was being dealt with and in the applicant's case had not impaired his ability to receive state protection:

[The Officer reviews the *Vancouver Sun* article provided by the applicant and then writes that] Other articles provided by the applicant, from the "Huffington Post," the Daily Telegraph, and the Wall Street Journal, report on the same massive crackdown. There is credible evidence that gang infiltration of police and government in China is a serious problem. However, there is also evidence that higher authorities are aware of the problem and are taking significant steps to stem the influence of organized crime.

[35] Contrary to the applicant's assertion that the officer failed to consider his belief that the police were collaborating with his pursuers, the officer's decision indicates that he did consider this allegation as is evident from the following passage in the decision: "Moving around, the applicant had to register with local police and this, he believes, is how the gang members were able to find him wherever he went."

[36] The applicant's complaint with respect to the officer's analysis of state protection is basically that the officer failed to assign the weight the applicant wanted to certain aspects of his evidence. The officer noted that state protection need not be perfect and determined, based on the evidence, that state protection would be available to the applicant. This determination was reasonable and did not ignore any of the issues raised by the applicant. It is not the role of the Court to reweigh the evidence.

[37] The applicant proposed the following question for certification:

In the circumstances of a PRRA decision focusing on the availability of state protection and where there has been no previous RPD decision, is there a requirement that the officer undertake a more complete and careful analysis of state protection?

[38] This question proposed is not a proper question to certify as it would not be dispositive of an appeal because there is no evidence that the officer failed to conduct a complete and careful analysis of state protection: *Zazai v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed and no question is certified.

“Russel W. Zinn”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2812-10

STYLE OF CAUSE: YONG QIANG YU v
THE MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: November 25, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT:** ZINN J.

DATED: December 9, 2010

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