

CANADA / JUDGMENT

VB4-01769

COURT

Refugee Appeal Division

DECIDED

18 December 2014

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Immigration and

Refugee Board of Canada

Refugee Appeal Division

Commission de l'immigration

et du statut de réfugié du Canada

Section d'appel des réfugiés

RAD File No. / N° de dossier de la SAR : VB4-01769/70

Private Proceeding / Huis clos

Reasons and decision ? Motifs et décision

Person(s) who is(are) XXXX XXXX Personne(s) en cause

the subject of the appeal XXXX XXXX

Appeal considered at Vancouver, BC Appel instruit à

Date of decision December 18, 2014 Date de la décision

Panel Douglas Fortney Tribunal

Counsel for the person(s) who is(are) Eric Leung Conseil(s) du (de la/des)

the subject of the appeal personne(s) en cause

Designated representative XXXX XXXX XXXX Représentant(e) désigné(e)

XXXX XXXX

Counsel for the Minister N/A Conseil du ministre

REASONS FOR DECISION

- [1] XXXX XXXX (the "principal appellant") and XXXX XXXX (the "minor appellant"), citizens of China, appeal a decision of the Refugee Protection Division (the "RPD") rejecting their claim for refugee protection.

DETERMINATION OF THE APPEAL

- [2] Pursuant to subsection 111(1)(a) of the Immigration and Refugee Protection Act (the "Act"),¹ the Refugee Appeal Division (the "RAD") confirms the determination of the RPD, namely, that the appellants are neither Convention refugees pursuant to section 96 of the Act nor persons in need of protection pursuant to section 97 of the Act. This appeal is therefore dismissed.

BACKGROUND

- [3] The principal appellant is a 30 year old mother and wife with grade nine education, who is from XXXX XXXX, China. The minor appellant is her nine year old daughter. The principal appellant fears return to China because she alleges that she fears persecution due to her religious practices and forced abortion by the government. Further, she alleges that she fears local government officials because her house was demolished, her husband protested and was threatened by local officials and she also fears arrest by the government officials. The appellants left China on XXXX XXXX, 2013 and arrived in Canada on the same day. The appellants made refugee claims on December 10, 2013.
- [4] The RPD heard the appellants' refugee protection claims on May 22, 2014. The RPD's reasons for the decision were rendered in writing with a Notice of Decision dated June 2, 2014. The RPD's reasons stated that the appellants' claims for refugee protection were rejected. The determinative issue in the claims was that the principal appellant had not established through sufficient credible and reliable evidence the well-foundedness of their fear of return to China or that they face a personal risk to their lives or cruel and unusual treatment or punishment or torture on a balance of probabilities if they return to China.
- [5] The appellants are represented for this appeal by the same immigration consultant as at their RPD hearing.

SUBMISSIONS

- [6] Counsel for the appellant has identified as the ground for this appeal that the RPD member erred in finding that the appellants had not provided sufficient evidence to link their circumstances to the objective evidence.
- [7] The appellants have requested that the RAD, under subsection 111(b) of the Act, set aside the determination of the RPD and substitute a determination that the appellants are Convention refugees or persons in need of protection.

[8] The Minister has not intervened in this appeal.

Consideration of New Evidence

[9] Subsection 110(4) of the Act provides that appellants may present only evidence that arose after the rejection of their claims or that was not reasonably available, or that they could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.

[10] The appellants have submitted the following documents as new evidence pursuant to subsection 110(4) of the Act:

* Exhibit B: An internet report dated June 6, 2014 from the US Congressional - Executive Commission on China entitled "Zhejiang Government Launches Demolition Campaign, Targets Christian Churches".

* Exhibit C: An internet report dated June 17, 2014 from the UK-based Telegraph news site entitled "Chinese church's fight back fails to stop cross removal".

* Exhibit D: Internet report dated June 11, 2014 from the UK-based Telegraph news site entitled "China's Christians fend off church demolition crew amid latest Communist Party crackdown on faith".

[11] Inasmuch as the documents above are dated after the rejection of the refugee claims, they meet the requirements of subsection 110(4) of the Act. I note that these are country documents and their relevance to the appellant's appeal will be addressed in the analysis portion of these reasons.

Application for an Oral Hearing

[12] The appellants have requested an oral hearing at the RAD.

[13] Subsection 110(3) of the Act requires that the RAD proceed without a hearing, on the basis of the RPD Record, while allowing the RAD to accept documentary evidence and submissions from the Minister and the appellant.

[14] According to subsection 110(6), the RAD may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection 110(3) that raises a serious issue with respect to the credibility of the appellant, that is central to the RPD decision, and that, if accepted, would justify allowing or rejecting the refugee protection claim.

[15] When read together, subsections 110(3), (4), and (6) establish that the RAD must not hold a hearing in an appeal such as this unless there is new evidence,² in which case the RAD may hold a hearing if that new evidence raises a serious issue with respect to the credibility of the appellant, is central to the RPD decision, and that, if accepted, would justify allowing or rejecting the refugee protection claim.

- [16] As discussed above, Exhibits B, C and D have been accepted into evidence. As these documents are country documents from what appear to be credible sources, there is no issue as to the credibility of the appellants associated with these documents. As such, the RAD must proceed without a hearing in this appeal.

Standard of Review/Role of the RAD

- [17] Although the Act sets out grounds for appeal as well as possible remedies, it does not specify the standard of review to be applied by the RAD.
- [18] Counsel has not provided any submissions as to the standard of review in this appeal. Counsel's submissions basically submit that the RPD Member erred in finding that the appellants had not established through sufficient credible and reliable evidence the well-foundedness of their fear of return to China or that they face a personal risk to their lives of serious harm or cruel and unusual treatment or punishment or torture on a balance of probabilities if they return to China.
- [19] I find that the issues raised by counsel are issues of fact and mixed law and fact.
- [20] Initially, RAD followed the Supreme Court of Canada (the "Supreme Court") case, *Dunsmuir v. New Brunswick*³ as the leading case on standard of review. In *Dunsmuir*, the Supreme Court has said that there should be only two standards when reviewing administrative decisions: reasonableness and correctness. The standard of correctness applies to questions of law, while the standard of reasonableness applies to questions of fact and mixed fact and law.
- [21] In recent months, the Federal Court has issued several somewhat differing decisions on the role of RAD when conducting an appeal of the RPD determination. These decisions include the recent Federal Court cases *Iyamuremye*,⁴ *Eng*,⁵ *Alvarez*,⁶ and *Huruglica*,⁷ among others.
- [22] In *Iyamuremye* the Federal Court found that the appropriate standard of review for questions of fact and mixed fact and law is reasonableness, and the appropriate standard of review for questions of law is correctness. "That said, the Court finds that in assessing the reasonableness of the decision, the RAD should, at the very least, have reviewed the evidence that was presented before the RPD and conducted an independent assessment of all the evidence in order to determine whether the RPD, on the basis of the facts and the conditions of the country in question, had properly considered the evidence and reasonably justified its' conclusion."⁸
- [23] In *Alvarez*, Justice Shore said that, "the Court is of the view that the RAD must be able to correct any error of law in a decision of the RPD or any palpable or overriding error in the findings of fact or the application of the law to these facts."⁹ Justice Shore also stated that, "when analyzing a decision of the RPD, the RAD must not merely determine whether it was made in a reasonable manner, but, rather, analyze whether the RPD relied on a wrong

principle of law or misassessed the facts to the point of making a palpable and overriding error."10 Justice Shore also stated that, "the RAD must perform its own assessment of all the evidence in order to determine whether the RPD relied on a wrong principle of law or misassessed the facts to the point of making a palpable and overriding error." 11

- [24] In Huruglica, Justice Phelan found that the RAD erred in reviewing the RPD's decision on the standard of reasonableness and concluded that the RAD is required to conduct a hybrid appeal. "It must review all aspects of the RPD's decision and come to an independent assessment of whether the claimant is a Convention refugee or a person in need of protection." Justice Phelan also states that, "that notion may well justify deference to a RPD's decision in a circumstance where a witness' credibility is critical or determinative." Where there is no adverse finding of credibility, the policy rationale for deference is not sustainable.
- [25] Justice Phelan found that the RAD "must review all aspects of the RPD's decision and come to an independent assessment ... Where its assessment departs from that of the RPD, the RAD must substitute its own decision." Justice Phelan also found that "In conducting its assessment, it can recognize and respect the conclusion of the RPD on such issues as credibility and/or where the RPD enjoys a particular advantage in reaching such a conclusion but it is not restricted, as an appellate court is, to intervening on facts only where there is a 'palpable and overriding error'."
- [26] In this appeal, I have conducted a review covering all aspects of the RPD's decision and have conducted my own independent assessment of all the evidence to determine whether the appellants are Convention refugees or persons in need of protection.

Analysis of the Merits of the Appeal

- [27] Counsel submits the documentary evidence provided as Exhibits B, C and D will support the appellant's credibility regarding fear and nexus issues. While counsel in his submissions has not clearly delineated issues relating to the definition of a Convention refugee and that of a person in need of protection under section 97 of the Act, for purposes of these reasons when referring to nexus I will be relating his arguments to the appellant's fear of persecution on account of their religious practices, membership in a particular social group relating to China's family planning laws and perceived political opinion of citizens protesting China's property expropriation practices. In addition, I will consider whether or not the appellants' circumstances relate to the definition of a person in need of protection under section 97 of the Act.

- [28] I also note that in respect of the refugee claim of the minor appellant, no evidence was submitted for the RPD hearing that specifically referred to the circumstances of the minor appellant in her claim against China and that her Basis of Claim (BOC) form relied on the evidence provided in the BOC of her mother, the principal appellant. In a similar fashion no evidence has been submitted for this appeal that specifically refers to the circumstances of the minor appellant in this appeal in respect of her refugee claim against China.
- [29] The documentary evidence provided as Exhibits B, C and D refers to the targeting of Christian churches for demolition and/or removal of the cross from places of worship. Counsel submits that this evidence supports the well-foundedness of the appellants' fear of persecution on account of the religious practices. Counsel also refers to the principal appellant's testimony at the RPD hearing that her husband is interested in missionary work in China. Counsel therefore concludes that persecution based on the appellant's religious practices is therefore more than just a mere possibility.
- [30] I note that at the RPD hearing the principal appellant testified that she had never encountered any problems because of her Christian religious practices at church over 10 years in China. The RPD Member found that, as the principal appellant openly practiced her faith for 10 years in China without any problems, she does not face any more than a mere possibility of persecution on the basis of religion if she returns to China.
- [31] Country documents submitted as Exhibits B, C and D do provide some evidence that government authorities in Zhejiang and elsewhere in China are taking actions against Christian churches and also in some cases against practitioners who are protesting these actions. However, there is no direct link in this new evidence to the appellants' personal circumstances. The evidence in these documents refers to events that happened while the appellants were outside of and there is no evidence that the churches targeted by Chinese authorities were those frequented by the principal appellant. The principal appellant testified at the RPD hearing that she had not encountered any problems in openly practicing her faith in China for over 10 years.
- [32] Counsel also submits that the religious activities of the principal appellant's husband will incur the "ire of the state" and thus the appellants will face a risk of persecution should they return to China. However, I note that the principal appellant's husband initially had submitted his joined claim for refugee protection with the appellants prior to the RPD hearing but withdrew his claim and voluntarily returned to China in XXXX 2014. The principal appellant testified at the RPD hearing that since his return to China, her husband has not reported any threats by government authorities against him. Based on my independent assessment of the evidence presented before the RPD and in this appeal I find the appellants have not encountered persecution on account of their religious activities while in China and that their fear of persecution by government authorities on account of their religious practices or that of the principal appellant's husband is speculative.

- [33] Counsel in his submissions also referred to the principal appellant's fear of forced abortion at the hands of Chinese authorities as part of official family planning laws. However, the principal appellant was not pregnant at the time of the RPD hearing nor was any submission provided that she was pregnant at the time of this appeal. Furthermore, no evidence was presented to indicate that she had ever been in violation of Chinese family planning laws. I find the appellant's fear of contravening Chinese family planning laws to be speculative.
- [34] Counsel in his submissions also points to evidence presented at the RPD hearing as to the expropriation of the family's home in China and subsequent demolition in XXXX 2012 without compensation. Counsel submits that the protests by the principal appellant's husband against such actions were met by threats from government officials in XXXX XXXX XXXX2013 and thus constitutes a risk of persecution due to their perceived political opinion as opponents of the government's expropriation practices or a personal risk of serious harm at the hands of government authorities. In her reasons, the RPD Member referred to the principal appellant's testimony that she herself did not protest the government's actions and that her husband has encountered no problems with Chinese authorities since his return to China in XXXX 2014. No evidence other than the actual appellant's testimony as to her fears was presented to indicate that the principal appellant or the minor appellant were targeted or threatened by Chinese authorities in any way in reference to this property expropriation.
- [35] The RPD Member also pointed to the principal appellant's voluntary return to China in 2012 as demonstrating a lack of fear of return to China. While the principal appellant and counsel at the RPD submitted that the principal appellant's re-availment was due to her desire to be compliant with Canadian and Chinese laws, I agree with the RPD Member's finding that such action demonstrates a lack of fear of government authorities and thus undermines the appellants' submission that they face a risk of persecution or a personal risk of serious harm from government authorities in connection with the expropriation of their property.
- [36] I find that, based on the totality of the evidence presented at the time of the RPD hearing together with new evidence submitted in this appeal, there is no evidence to support the contention that the principal appellant and the minor appellant had been persecuted in China on account of their religious activities or perceived political opinion as opposing China's family planning laws or the governments expropriation practices. I also find that, on a balance of probabilities, the appellants' do not face a personal risk of serious harm from such government authorities. Moreover, refugee protection must be considered on a forward-looking basis. I also find that the appellants have not provided any credible evidence in the RPD hearing nor this appeal that they would face more than a mere possibility persecution or a personal risk of serious harm from such government authorities.
- [37] Counsel's submissions as outlined above seem to suggest that a claim for refugee protection be evaluated primarily on the basis of country conditions rather than a refugee claimant testifying as to their personal circumstances and how these relate to such country conditions. No refugee protection claim can be approved simply on the basis of country

conditions. The onus is upon each individual refugee claimant to make their case based on their personal circumstances. Determination of a refugee claimant's personalized risk is key to making any determination of whether or not that person is a Convention refugee or person in need of protection. In certain circumstances, claims for refugee protection can also be determined on the basis of evidence of similarly situated individuals, as long as the claimant's circumstances fit within the profile of those individuals. However, I find that the appellants have not in this appeal provided such evidence of similarly situated individuals that correspond to the appellants' circumstances.

[38] Based on my independent assessment of the evidence presented before the RPD and for this appeal and based on the particular circumstances of the appellants, I find that the appellants are not Convention refugees as they do not have a well-founded fear of persecution for a Convention ground in China. I also find that the appellants are not persons in need of protection in that, on a balance of probabilities, their removal to China would not subject them personally to a risk of serious harm or of cruel and unusual treatment or punishment or danger of torture.

CONCLUSION

[39] For all these reasons, I confirm the determination of the RPD, namely, the appellants are neither Convention refugees nor persons in need of protection. This appeal is therefore dismissed.

(signed)

"Douglas Fortney"

Douglas Fortney

December 18, 2014

Date

1 Immigration and Refugee Protection Act (the "Act"), S.C. 2001, c. 27.

2 Subsection 110(4) of the Act.

3 *Dunsmuir v. New Brunswick*, 2008 SCC 9.

4 *Iyamuremye v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 494.

5 *Eng v. Canada (Citizenship and Immigration)*, 2014 FC 711.

6 *Alvarez v. Canada (Citizenship and Immigration)*, 2014 FC 702.

7 *Huruglica v. Canada (Citizenship and Immigration)*, 2014 FC 799.

8 *Iyamuremye v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 494; para. 41.

9 *Alvarez v. Canada (Citizenship and Immigration)*, 2014 FC 702; para. 27.

10 Alvarez v. Canada (Citizenship and Immigration), 2014 FC 702; para. 28.

11 Alvarez v. Canada (Citizenship and Immigration), 2014 FC 702; para. 33.

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