Federal Court Cour fédérale

Date: 20150715

Docket: IMM-7849-14

Citation: 2015 FC 860

Ottawa, Ontario, July 15, 2015

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

MO YEUNG CHING

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for the judicial review of a decision made by the Refugee Protection Division [RPD] on October 31, 2014. The application is made pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] This constitutes one more incident in what is becoming protracted litigation; the applicant has been a permanent resident of Canada since 1996, he sought to become a citizen of this

country in the early 2000s and he faced inadmissibility proceedings under the IRPA. These culminated with a decision of the Immigration Division [ID] on July 25, 2008 that he was not inadmissible, followed thereafter by a decision of the Immigration Appeal Division [IAD] on December 21, 2011 that reversed the ID decision to conclude that he was inadmissible. It appears that the proceedings that would involve a second phase concerning the staying or quashing of a removal order on the basis of humanitarian and compassionate considerations have been adjourned before the IAD. As is obvious, it cannot be reasonably argued that the IAD decision is in any way final. The IAD has not completed its examination and further proceedings against that decision are not precluded. However, the Court is not concerned at this stage with the proceedings before the ID and the IAD. This Court is only concerned with the RPD decision of October 31, 2014 which found that the applicant cannot avail himself of the refugee protection he sought on April 19, 2012 by operation of section 98 of the IRPA. It reads:

Exclusion — Refugee Convention	**Exclusion par application de la Convention sur les réfugiés**
98. A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.	98. La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.

[3] In the case at hand, it is section F(b) of Article 1 of the United Nations' *Convention Relating to the Status of Refugees* (UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol 189, p 137) that was under consideration and is the subject of the decision for which judicial review is sought. It reads:

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that :	F. Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser :
…	…
(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;	b) qu'elles ont commis un crime grave de droit commun en dehors du pays d'accueil avant d'y être admises comme réfugiés ;

[4] In this case, the RPD came to the conclusion that there are serious reasons for considering that the applicant has committed a serious non-political crime. That conclusion is based solely on the reasons for judgment of Chinese courts in cases involving charges against a Chinese functionary, one Wang Fuyou, for a number of transactions, and the broker in a real estate transaction involving Wang for one transaction. The applicant is referred to in the judgments but he was not before the Chinese courts. The difficulty in this case is that, following a careful review of the record before the Court, it remains unclear what those "serious reasons for considering" are. I have concluded that the judicial review application must succeed.

I. Facts

[5] The applicant is a citizen of the People's Republic of China. It appears that after being granted permanent resident status in Canada in 1996, the applicant continued to travel extensively between China and Canada. It is in the year 2000 that he opened his own company in Canada and it would appear that his travel between Canada and China was, thereafter, very much reduced, if not stopped altogether.

[6] It is in May 2002, as he was trying to cross the border between the United States and Canada, that the applicant found out that he was the subject of an "Interpol Red Notice". The notice was based on a warrant issued in China for the applicant's arrest. He is suspected of the crimes of embezzlement and harbouring and transporting illegally acquired goods, which is contrary to the *Criminal Law of the People's Republic of China*.

[7] For a reason that remains unknown, proceedings about the inadmissibility of the applicant in Canada were started only in March 2008. It is alleged that he is inadmissible in Canada by virtue of paragraph 36(1)(c) of the IRPA, that is that he is alleged to have committed an act outside of Canada that is an offence that, if committed in Canada, would constitute an offence punishable by at least ten years' imprisonment. These are the proceedings the Court has alluded to that are pending before the IAD.

[8] The applicant submits that he is in fear of false charges, imprisonment and torture in China and, thus, is a refugee pursuant to sections 96 and 97 of the IRPA. The only issue before the Court is whether or not section 98 of the IRPA applies such that the applicant cannot claim to be a Convention refugee or a person in need of protection. If the bar that constitutes section 98 were to be lifted, the applicant would still have to make a case that he qualifies as a refugee or a person in need of protection.

[9] The allegations against the applicant stem from a real estate development deal in Beijing about which the Chinese authorities claim an embezzlement of RMB ¥ 5 350 000 resulted. The

whole issue is whether or not such embezzlement took place and, if it did, was the applicant a participant who would have benefited.

[10] The allegation of embezzlement relates principally to the involvement of two Chinese nationals. Wang Fuyou [Wang] was the Deputy Secretary General of the Hebei Provincial Government involved in the transaction on behalf of the Hebei Provincial Government. The applicant's father was the Chinese Communist Party Secretary in the Province and, as such, Wang's superior. It appears that the applicant met Wang through his professional relationship with the applicant's father.

[11] The other main protagonist is a businessman who would have acted as a broker between Wang and an entity that wished to sell the right to some real estate. The businessman, acting as a broker in the transaction, was operating through a corporation by the name of Beijing Hong Deli Technology Development Corporation Limited [Hong Deli]. The applicant met the broker in 1992 and it would appear that a business relationship between the two was born and began to develop.

[12] In 1996, the broker was trying to develop property located in Beijing. It appears that the said property was detained with assignment rights by the Hong Kong Macau International Investment Corporation Limited [HK Macau].

[13] Wang, the Hebei Provincial Government official, had been tasked by the Provincial Government to find some property in Beijing, to be used for a particular purpose, for the Hebei

Provincial Government to purchase. The applicant brought Wang and the broker together and discussions about the purchase of assignment rights for the property of HK Macau followed.

[14] Looking at the record available in Canada, it is less than clear what followed. However, the RPD found that, based on the People's Republic of China's court proceedings against Wang and the broker, the matter evolved in the following fashion. The broker would have represented to Wang that his company, Hong Deli, held the assignment rights on the property to be marketed. In fact, HK Macau was the rightful owner of the assignment rights. The RPD accepted that Wang knew about the false claim by the broker but, nevertheless, he entered into some form of agreement to purchase the property at a price of RMB 2 850 per square metre.

[15] However, the said assignment rights were to be sold by the rightful owner for RMB 2 600 per square metre. The difference of RMB 250 per square metre was to be for compensation for Hong Deli. As can be seen, that represents close to 10% of the purchase price. The difference between RMB 2 600 and RMB 2 850 amounts to RMB 10.7 million, which the RPD accepted is approximately worth CAN $2 million.

[16] The RPD accepted that Wang did not disclose to his superiors the arrangement and that the excess funds were to be split in the end between Wang, the broker and the applicant. Although there appears to have been a number of agreements reduced to writing about the transaction, the RPD concluded:

> [41] On April 8, 1997, Wang, on behalf of the Hebei Provincial Government, signed an agreement on project transfer and compensation with Hong De Li Ltd. and delivered a RMB1,000,000 deposit. The approximately 10.7 million RMB

> would look as if it represented a “Finder’s Fee” for Hong De Li Ltd. when the actual plan was to split the money amongst the three conspirators who had orchestrated the scheme that resulted in the Hebei Provincial Government paying in excess of 10.7 million RMB too much for the property.

[17] However, the situation was not that simple. The agreement that was signed for the purchase of the assignment rights was in fact for RMB 2 600 per square metre. The company (Hong Kong Yanshan Development Limited [Yanshan]) retained by the Hebei Provincial Government to conclude the transaction for the assignment rights signed on April 18, 1997 an agreement on equity transfer for RMB 2 600 per square metre. It appears that Wang had not advised his superiors that the “transfer price” was RMB 2 850 per square metre and the Hebei Provincial Government would not have been advised of the existence of an agreement on project transfer and compensation that would have required a payment of RMB 10.7 million to Hong Deli Limited.

[18] The RPD accepted that Wang advised Yanshan to make the RMB 10.7 million payment. It is very much unclear, on the basis of the record before the Court, why Yanshan would have been required to make a payment of that nature and why Wang would have asked Yanshan to make that payment. Be that as it may, the payment would not have been made as Hong Deli thereafter sued the Hebei Provincial Government for the balance of the funds (it had already received RMB 1 million). For an arrangement that is alleged to be fraudulent, the details of which were at best fuzzy, it is surprising that contracts were signed and litigation initiated. The RPD accepted that the suit was eventually withdrawn and arbitration was instead considered and accepted.

[19] The Chinese courts accepted that Wang did not forcefully present the case in arbitration and, as a result, it was found that the Hebei Provincial Government was in breach of its contract with Hong Deli. It appears that Wang was removed from his position within the Hebei Provincial Government office in Beijing, yet, he was able to influence someone by the name of Zhang Jinan to finally dispose of the matter through a one-time payment of RMB 4 350 000. In support of that payment, an agreement on the execution of a conciliatory settlement was signed. With the advance of RMB 1 million, this agreement brought the total of the compensation paid to RMB 5 350 000. Wang and the broker were found guilty of the crime of embezzlement on August 29, 2002. The translated version of the judgment refers to one Cheng Muyang who, it is acknowledged, is the applicant, as a third participant in the embezzlement. However, Cheng Muyang was not on trial.

II. Decisions of the Chinese courts and the RPD decision

[20] Having read the Reasons for Sentence in the Intermediate People's Court of Shijiazhuang of the Hebei Province and the decision of the Superior People's Court of Hebei Province which was rendered a month later, on September 24, 2002, the Court is hard pressed to understand what is the evidence that was presented in support of the allegation that the applicant was a co-conspirator.

[21] The two judgments are peppered with references to the applicant (presented throughout as Cheng Muyang), but what is the evidence, including documentary evidence, implicating the applicant in the transactions other than having put in contact Wang and the broker remains shrouded in mystery. Indeed the embezzlement scheme is itself quite difficult to follow.

Assuming that a crime was actually committed by Wang and the broker, which is a matter for the Chinese courts, there is a need to establish the participation of the applicant to satisfy the requirements of Canadian law. (I note that the Panel concedes that the evidence is ambiguous. One can read at paragraph 120 of the Reasons for Decision: "I certainly acknowledge that the evidence is open to interpretation and that there appears to be a legitimate defense to present to the trier of fact. This, however, is the job of the criminal court, and is not the mandate of the panel.")

[22] The Panel relied exclusively on the findings of the two Chinese tribunals and their decisions a month apart (paragraphs 45 and 110 of the Reasons for Decision of the Panel). It was confirmed at the hearing before this Court that the evidence before the Chinese courts, whatever it may have been, was never made available to the RPD.

[23] The likelihood of participation of the applicant in the real estate transaction would probably be enhanced if it is established that he received some money. The Panel seems to accept that the applicant received RMB 2.8 million out of the RMB 5.35 million that would constitute the embezzled money. However, it has not been possible to find the evidence supporting that assertion.

[24] One can find at page 9 of 17 of the decision of the Shijiazhuang court of August 29, 2002 the statement that "of the various amounts delivered to Hong Deli Limited totalling RMB ¥ 5 350 000, Mr. Cheng Muyang took away RMB ¥ 2 800 000 and Mr. [the broker] kept RMB ¥ 2 550 000". At its highest, the Chinese court speaks of the "relevant documentary

evidence", without giving any precision as to what that may be. At paragraph 18, at page 13 of 17, one reads: "The relevant documentary evidence confirms that, of the RMB ¥ 5 350 000, Mr. Cheng Muyang took away RMB ¥ 2 800 000; the remaining RMB ¥ 2 550 000 was kept by Mr. [the broker]. After the investigation was launched the illicit money obtained by Mr. [the broker] was recovered."

[25] The same kind of generic statement is repeated in the Superior People's Court of Hebei Province judgment of September 24, 2002. The reference to money received by the applicant is found at page 6 of 11, where one can read that "Mr. Cheng Muyang took away RMB ¥ 2 800 000 and Mr. [the broker] kept RMB ¥ 2 550 000. After the investigation was launched the illicit money obtained by Mr. [the broker] was recovered." Similarly, at page 7 of 11, the following is written: "Documentary evidence confirming that Cheng Muyang took away RMB ¥ 2 800 000 and Mr. [the broker] kept RMB ¥ 2 550 000 already recovered". There is nothing that can be found to support those statements. I do not mean to suggest that the evidence does not exist. Rather it is that the record does not contain any indication of what the evidence of money transferred to the applicant on account of the transaction ruled by the Chinese courts to be fraudulent can be.

[26] The Judgment of the Superior People's Court seems to bring the applicant closer to the actual transaction. Thus, one can read at page 8 of 11 that "[t]he act of defrauding the state of public assets by Mr. [the broker] and Mr. Cheng Muyang was legalized by the execution of an 'agreement on project transfer and compensation'". Later on that same page, we can read: "Before he signed the agreement on project transfer and compensation with Mr. Cheng Muyang

and Mr. [the broker], Mr. Wang Fuyou was fully aware that Mr. [the broker] did not obtain the assignment right on Fulin Plaza but still went ahead by giving the approval of the execution." It is not clear why that would make the transaction fraudulent. The fact of the matter is that there were contracts apparently signed and that assignment rights were transferred by HK Macau. If the broker represented that he controlled the assignment rights and that was not accurate, it remains that the assignment rights were transferred by the rightful owner.

[27] Furthermore, the said agreement, which is part of the record, does not include the applicant. The said agreement is completely unambiguous as to the role to be played by the Hong Deli Technology Development Corporation Limited. There is no indication whatsoever that that company owns the rights to the property which is clearly indicated as being that of the Hong Kong Macau International Investment Company Limited.

[28] Without any support offered for the assertion, the Superior People's Court declares at page 8 of 11 that "Mr. [the broker]'s Hong Deli Limited, a company under the control of Mr. Cheng Muyang, did not obtain the assignment right on Fulin Plaza, a property owned by Hong Kong Macau Limited and that Hong Kong Macau Limited's actual selling price was RMB ¥ 2 600 per metre square." The statement that Hong Deli is under the control of the applicant is made without any support in the record before this Court and it was not repeated in either decisions.

[29] Nevertheless, the RPD was satisfied of the involvement of the applicant.

[30] Reading the Reasons for Decision of the RPD, it would appear that it was satisfied with the findings made by the Chinese courts, in spite of the fact that the applicant was not on trial and that the assertions against the applicant were made without much support. To put it another way, the name of the applicant is found in the decisions made in China but it is very much unclear what the participation was other than having introduced Wang to the broker and having recommended the assistance of legal counsel at some stage in the transaction. The question for the Court is whether or not the findings made by the RPD on the basis of the decisions of two Chinese courts satisfy the requirement of reasonableness under Canadian law.

III. Standard of review

[31] Here, the issue is whether or not the RPD's decision to be satisfied that the facts of this case satisfy the requirement that there be serious reasons for considering that the applicant has committed a serious non-political crime is appropriate. This is a question of mixed fact and law which will attract a reasonableness standard of review. In so deciding, I find myself in agreement with Justice O'Keefe, of this court, in *Notario v Canada (Citizenship and Immigration)*, 2014 FC 1159, at paragraph 29, following the Federal Court of Appeal in *Feimi v Canada (Citizenship and Immigration)*, 2012 FCA 325. It follows that deference is owed to the tribunal. As stated in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*], "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (paragraph 47).

IV. Analysis

[32] I have come to the conclusion that, in spite of the deference owed to the decision-maker, the decision that there are serious reasons for considering that the applicant committed serious non-political crimes prior to his arrival in Canada does not meet the requirements for reasonableness.

[33] It is understood that the adequacy of reasons is not a stand-alone ground for challenging a tribunal's decision on judicial review. The Supreme Court in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, could hardly have been any clearer:

> [14] Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses - one for the reasons and a separate one for the result. It is a more organic exercise - the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47). [Citations omitted.]

However, it remains that the reviewing court must assess the reasons to be satisfied that the decision is within the range of acceptable outcomes and justification, transparency and intelligibility within the decision-making process exist. Without looking for perfection, the reviewing court must read the reasons in light of the evidence for the purpose of deciding whether the decision is reasonable. Part of the difficulty in this case is the quality of the evidence on which the RPD relied to reach its conclusion. It is fuzzy and third-hand and, when considered

carefully, does not implicate the applicant other than through bald statements made in foreign judgments.

[34] The task at hand for the RPD was to be satisfied that there are serious reasons for considering that a serious non-political crime had been committed outside of Canada. As has been found by the Federal Court of Appeal in *Sing v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 125, that standard requires at least that there be more than mere suspicion, but it is not as high as the proof on the civil balance of probabilities standard (paragraph 25). I will get back later in these reasons for judgment on the articulation of the test in more recent cases. Suffice it to say at this stage that the standard of proof is situated in Canada at the "reasonable belief" on the spectrum between suspicions and balance of probabilities.

A. *No more than reasonable suspicions*

[35] The RPD does not appear to have satisfied itself that the evidence is beyond a mere suspicion. Indeed, it could not have satisfied itself because the evidence was not before the RPD. The serious reasons for considering the commission of a crime are in effect the decisions of the Chinese courts, without reference to the actual evidence that was heard. The respondent claims at paragraph 13 of his Memorandum of Argument that "[t]he RPD found that the evidence that had been before the Chinese courts in the proceedings against [the broker] and Wang constituted sufficient evidence to find serious reasons for considering that the Applicant committed a serious non-political crime in China prior to coming to Canada." I do not doubt that it is what the RPD found. But such is not the test on judicial review. The test is rather whether that conclusion is

reasonable. The Court could not find support for that statement in the RPD's decision considered with the evidence available to it.

[36] As already pointed out, *Dunsmuir*, *supra*, decides that "a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes." In this case, a tribunal has accepted the decision of foreign courts. The tribunal did not have the material that, allegedly, was before the Chinese courts. Furthermore, the evidence in this case is to the effect that the trial before the Chinese courts lasted for no more than one day (that would include hearing the evidence about the transaction involving Wang and the broker, together with the other transactions for which Wang was convicted) and only one witness testified before the judges. Other than the evidence of that one witness, which was largely inconsequential, the rest of the evidence would have been statements taken from witnesses and documents presented. However, none of the witness statements were before the RPD and the incriminating nature of the documents available is far less than persuasive. The Panel would have had to be satisfied with the decision rendered by the foreign court. To put it another way, the serious reasons for considering that the applicant has committed a serious non-political crime are in fact those of the Chinese courts. Actually, to compound the difficulty, we now understand that the evidence before the Chinese courts was not tested: statements were presented by the prosecution and seemingly accepted.

[37] In a decision of 139 paragraphs, the RPD does not go beyond what is to be found in the Chinese courts' decisions. There is no examination of what the evidence says because the evidence is not before the RPD. It notes that ten witnesses gave testimony, yet we know that

there were statements only (except for one witness). Not only was there no indication that the evidence before the Chinese courts was not tested, but there cannot be a critical examination of the evidence of witnesses because it was not available. The RPD can only state that the prosecution was complex and that "[t]he above listing of the witnesses and documents entered shows that the State entered a great deal of evidence in order to convict [the broker] and Wang and by extension implicate the claimant" (paragraph 61).

[38] I would not go so far as to suggest that there can never be reliance on findings of foreign courts. However, in order to rely on foreign findings one would expect that the foreign court's reasons rise to the level of serious reasons for considering that a crime has been committed. Here, the RPD at paragraphs 47 and 48 recognizes the limitations and the task it would be performing. The paragraphs read:

> [47] Minister's counsel concedes that the legal system in the PRC has defects that result in human rights violations. The panel notes that this is supported by country documents as well as the evidence of the Minister's expert witness at the IAD hearing Professor Vincent Yang, and by the claimant's witness Mr. Clive Ansley at the ID hearing.
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> [48] I do not conclude from this, however, that every person charged with a criminal offence in the PRC has been subjected to human rights violations or that the legal system is registering false convictions for political reasons in every case. The challenge for this panel is to examine the evidence before it and determine if this claimant is the victim of such abuses or is actually a criminal fleeing prosecution in his home country. This requires a contextual examination of the evidence before me.

Mere statements by a foreign court will fall short according to the RPD, yet that is exactly what was done in this case: there cannot have been a contextual examination of the evidence before the Panel because there was no evidence other than findings of foreign courts. Instead, the Panel looked for confirmation of findings in evidence that is, at best, peripheral.

[39] It is not that the task at hand is wrongly described by the Panel. It is possible in any given case to examine the evidence and conclude there are serious reasons for considering that a serious crime has been committed. It is rather that there is no indication from the decision that such an exercise was undertaken or, indeed, could have been conducted. The reliance on peripheral evidence does not add much in this case. As I have said, the Court has reviewed the two decisions from the Chinese courts, as well as the testimony presented before the IAD by one of the prosecutors in that case. Respectfully submitted, I could not find the existence of justification, transparency and intelligibility within the decision-making process that is required under *Dunsmuir*. It is not an exercise that goes beyond suspicions to accept the decision made by those foreign courts without any consideration of the evidence that would have been presented. The Panel was in no position to accept, even after a minimally critical examination, the "evidence" received that would have led to findings made elsewhere. I fail to see how this could constitute serious reasons for considering that a crime has been committed.

B. *Attempt to find support in the evidence of a Canadian witness*

[40] The Panel sought to find support and relied heavily on the evidence of Vincent C. Yang, the Program Director and Senior Associate at the International Centre for Criminal Law Reform and Criminal Justice Policy located in Vancouver. In essence, the evidence of Dr. Yang, presented before the IAD, deals principally with the allegation of forced confessions made by Wang and the broker. The Panel states at paragraph 81 of the Reasons for Decision that Dr. Yang "examined the evidence regarding the criminal convictions in this matter and it was his opinion that even without the confessions of [the broker] and Wang there was enough evidence to convict them."

[41] There are three problems with this. First, it is very much unclear what the basis is for this witness to confirm that there was enough evidence to convict since that evidence was never produced in Canada. He relies only on the "listed evidence" of the first instance trial judgment. He is in no better position than the Panel to make a determination concerning the quality of the evidence and its weight. Second, Dr. Yang provides an opinion concerning the legitimacy of the legal procedures to which the broker and Wang were subjected and his conclusions relate to the conviction registered against Wang and the broker. He could not have legitimately commented on the applicant's situation since he was not on trial. Finally, the RPD did not recognize him as an expert in these proceedings (paragraph 70). Nevertheless, in view of Dr. Yang's experience, education and academic credentials, the very factors that make an expert and give weight to opinions, the Panel chose to put "significant weight" on his testimony (paragraph 72). How significant weight can be put on the view taken by a non-expert of a decision involving Wang and the broker, so that it can be seen as established the involvement of the applicant, a person who is not on trial, in a complex fraudulent scheme (as alleged) is rather nebulous. When measured against the standard of justification, transparency and intelligibility within the decision-making process, one must conclude that the use of Dr. Yang's testimony as a justification for a conclusion against the applicant would have to fall short of the mark. Relying on the view of someone who is not in a better position than the Panel to make that determination does not add gravitas to the decision that is the exclusive province of the RPD.

C. *Motivation of foreign courts and the lack of evidence before the RPD*

[42] The Panel spent a good part of the Reasons for Decision discussing the motivation of the foreign courts to frame the applicant. The political motivation, which would have been to target

the applicant's father who was until 2000 a senior official in the Hebei Provincial Government, was found by the Panel to be less than believable. It remains that, first and foremost, the Panel's duty was to find whether there were serious reasons to consider that a crime had been committed. One cannot be a substitute for the other. The issue of why a prosecution was launched comes after a finding is made that there are such serious reasons for considering a crime to which the applicant participated has been committed. But the question remains: what evidence? The answer can only be the summaries offered by the Chinese courts.

[43] The RPD's decision is based on the following:

- A list of brief summaries of witness statements included in the Chinese courts' judgments that appear to have been the sole basis for the conviction of two persons. The evidence concerning the applicant is thin, yet the RPD does not analyse or comment upon it;

- The testimony before the IAD of Dr. Yang who concludes, among other conclusions, that the evidence before the Chinese courts would be sufficient to convict. Dr. Yang did not have access to anything other than what was available to the RPD, which is very little;

- A long explanation for why the motivation for the prosecution of the two persons cannot have been to frame the applicant in order to reach his father, the senior official of the Chinese Communist Party. However, concluding that there is no political motivation for a prosecution does not support the conclusion that there is evidence of a serious crime committed by the applicant who was not on trial;

- The existence of a legal opinion offered by the applicant to argue that he is not guilty, which is taken *a contrario sensu* as representing "the fact that with the evidence presented by the state there is a case to be made" (paragraph 121).

[44] There is so little to support the conclusion that there are serious reasons for considering that a serious crime has been committed that the RPD resorts to flipping the burden of proof. It is striking that the applicant is faulted for not having challenged successfully evidence that is not before the RPD and is with respect to the prosecution and conviction of persons who are not the applicant (paragraph 120).

[45] In my view, there is nowhere to be found the positive reason why there is in this case a serious non-political crime committed by the applicant. The Panel looks for confirmation of its suspicions on peripheral considerations, be they the view of Dr. Yang, the motivation of foreign court, the legal opinion which is used *a contrario* and the inability of the applicant to challenge evidence that is not even before the RPD.

[46] It is an important decision to declare, pursuant to section 98 of the IRPA, that someone cannot invoke the refugee protection regime under Canadian law. That being an exclusion clause from the application of the Refugee Convention, it should be applied with a measure of caution leading to a somewhat restrictive interpretation. Not anything could rise to the level of serious reasons for considering. In order to reach the appropriate level of persuasiveness, i.e. beyond mere suspicion but less than the balance of probabilities, one has to consider evidence and not merely accept some findings which, when examined carefully, are not clearly supported by

evidence. In effect, the decision-making power is transferred completely to that foreign court of which the RPD accepts the findings and conclusions.

D. *What evidentiary standard satisfies "more than suspicions"*

[47] Evidently, the proceedings before the foreign courts do not always take place in the context of the adversary system under which we operate. We in the Anglo-Saxon tradition see much benefit to adversary proceedings. As the Supreme Court of the United States found some 45 years ago:

> Adversary proceedings are a major aspect of our system of criminal justice. Their superiority as a means for attaining justice in a given case is nowhere more evident than in those cases, such as the ones at bar, where an issue must be decided on the basis of a large volume of factual materials, and after consideration of the many and subtle interrelationships which may exist among the facts reflected by these records. As the need for adversary inquiry is increased by the complexity of the issues presented for adjudication, and by the consequent inadequacy of ex parte procedures as a means for their accurate resolution, the displacement of well-informed advocacy necessarily becomes less justifiable.
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> (*Alderman v United States*, 394 US 165 (1969) at pp 183-184 [*Alderman*])

[48] The issue is not so much to fault court systems that do not operate like ours. It is rather that indicia of reliability should be found before accepting the findings of foreign courts "where an issue must be decided on the basis of a large volume of factual materials, and after consideration of the many and subtle interrelationships which may exist among the facts reflected by these records."

[49] This is certainly the case in the matter before the RPD and this Court. The applicant was not on trial in China. Nevertheless, the RPD accepts findings from a foreign court without identifying the indicia of reliability, especially in view of a process that is so obviously not adversarial. The qualities that make a decision reasonable, that is that there is "the existence of justification, transparency and intelligibility within the decision-making process" (*Dunsmuir*, *supra*, paragraph 47) are not present here.

[50] I reiterate that it is not mandated that the foreign judicial process be adversarial. What is required is that there be reasons to accept the reliability of the findings made to rise to the level of serious reasons for considering. In reaching that conclusion, we must look to the qualities that will make the decision reasonable. The Court cannot find the justification, transparency and intelligibility within the Panel's decision-making process when it relies on findings that it is not possible to assess. The Panel relies on the foreign courts and it is not possible, given the paucity of information, to determine what was the justification, transparency and intelligibility of the foreign courts' decision-making process.

[51] I do not lose sight of the requirement to have more than suspicions and less than the standard of balance of probabilities. But the Panel itself seems to undermine its own conclusion and leaves the matter at no more than suspicions when it states at paragraph 123 that "I find that there <u>may</u> be sufficient evidence of criminal wrongdoing that it would be necessary to place it before a trier of fact to establish the claimant's guilt or innocence" (emphasis added). The Panel goes on to opine that its standard ("may be sufficient evidence of criminal wrongdoing") exceeds the standard required of "serious reasons for considering" (in French, "raisons sérieuses de

penser”) that he has committed a serious non-political crime. I am not convinced. This misapprehends the standard.

[52] In my view, the RPD articulates a standard of suspicion. It simply suggests that there may be sufficient evidence. The reasons for the RPD decision articulate a standard that corresponds with suspicions, not a reasonable belief. The Panel is consistent. It speaks of the possible existence of evidence that could be presented to a court because it does not know what that evidence is. In such circumstances, it would be hard to have serious reasons corresponding to a reasonable belief.

[53] It is understandable that the articulation is put this way in view of the fact that no evidence was before the Panel, other than some findings made by others in a case not involving the applicant, where the Panel never saw the evidence. Here the Panel suggests no more than there may be sufficient evidence, not that it has the belief that there is enough evidence to bring to a court.

[54] There is some guidance available as to the articulation of what is the standard of proof to apply on the spectrum between suspicions and balance of probabilities. In *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 SCR 678 [*Ezokola*], the Court endorses the opinion expressed by Lord Brown of Eaton-under-Heywood on the standard of proof “serious reasons for considering” in the case of *R (JS (Sri Lanka)) v Secretary of State for the Home Department*, [2010] UKSC 15, [2011] 1 AC 184 [*JS*]:

> [101] Ultimately, the above contribution-based test for complicity is subject to the unique evidentiary standard contained in art. 1F(a)

> of the *Refugee Convention*. To recall, the Board does not make determinations of guilt. Its exclusion decisions are therefore not based on proof beyond a reasonable doubt nor on the general civil standard of the balance of probabilities. Rather, art. 1F(a) directs it to decide whether there are "serious reasons for considering" that an individual has committed war crimes, crimes against humanity or crimes against peace. For guidance on applying the evidentiary standard, we agree with Lord Brown J.S.C.'s reasons in *J.S.*, at para. 39:
>
> > It would not, I think, be helpful to expatriate upon article 1F's reference to there being "serious reasons for considering" the asylum seeker to have committed a war crime. Clearly the tribunal in *Gurung*'s case [2003] Imm AR 115 (at the end of para 109) was right to highlight "the lower standard of proof applicable in exclusion clause cases" — lower than that applicable in actual war crimes trials. That said, "serious reasons for considering" obviously imports a higher test for exclusion than would, say, an expression like "reasonable grounds for suspecting". "Considering" approximates rather to "believing" than to "suspecting"…

Serious reasons for considering translate into reasonable belief. Paragraph 123 of the Panel's Reasons for Decision confirms much hesitancy. There may be, not "is", sufficient evidence that it would be necessary, not "is", to place the matter before a trier of fact. Where is the reasonable belief? Where is the credibility based probability that is often associated with reasonable belief? The language used by the Panel suggests strongly that no reasonable belief was articulated. Nowhere do we find a "*bona fide* belief in a serious possibility based on credible evidence" (*Chiau v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 297 (FCA)).

[55] The High Court of Australia has provided a useful illustration of the difference between reasons to suspect and reasons to believe in *George v Rockett*, (1990) 93 ALR 483:

> Suspicion, as Lord Devlin said in *Hussein v Chong Fook Kam* [1970] AC 942 at 948, "in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove.'" The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis for the suspicion must be shown. In *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266, a question was raised as to whether a payee had reason to suspect that the payer, a debtor, "was unable to pay [its] debts as they became due" as that phrase was used in s 95(4) of the Bankruptcy Act 1924 (Cth). Kitto J said (at 303):
>
>> A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to 'a slight opinion, but without sufficient evidence', as *Chambers' Dictionary* expresses it. Consequently, a reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence. The notion which 'reason to suspect' expresses in sub-s (4) is, I think, of something which in all the circumstances would create in the mind of a reasonable person in the position of the payee an actual apprehension or fear that the situation of the payer is in actual fact that which the sub-section describes — a mistrust of the payer's ability to pay his debts as they become due and of the effect which acceptance of the payment would have as between the payee and the other creditors.
>
> The objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief, but that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof. Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture.

[56] Justice Barnes, of this court, put it aptly in *Canada (Citizenship and Immigration) v X*, 2010 FC 112:

> [15] Although the statutory interposition of the Minister was intended to require the Board to pay deference to the Minister's view of the evidence, that is not to say that the Minister is entitled to form a suspicion on the strength of bare intuition or pure speculation. A reasonable suspicion is one which is supported by objectively ascertainable facts that are capable of judicial assessment: see *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456 at para. 75.

In this case, the RPD articulates a standard much closer to reasonable suspicions than reasonable belief.

[57] Some argue that not only does the standard call for reasonable belief, which is certainly a higher standard than suspicion or reasonable suspicion, but it actually is calling for a more stringent standard of proof than reasonable belief. In *The Law of Refugee Status* (James C. Hathaway and Michelle Foster, *The Law of Refugee Status*, 2nd ed (Cambridge, UK: Cambridge University Press, 2014)) the authors suggest that the UKSC has since *JS* gone even further, at footnote 61, at page 533. In *Al-Sirri v Secretary of State for the Home Department*, [2013] 1 ALL ER 1267, [2013] 1 AC 745, [2012] UKSC 54 [*Al-Sirri*] , the Supreme Court of the United Kingdom concluded about the meaning of the words "serious reasons for considering":

> 75. We are, it is clear, attempting to discern the autonomous meaning of the words "serious reasons for considering". We do so in the light of the UNHCR view, with which we agree, that the exclusion clauses in the Refugee Convention must be restrictively interpreted and cautiously applied. This leads us to draw the following conclusions:
>
> (1) "Serious reasons" is stronger than "reasonable grounds".
>
> (2) The evidence from which those reasons are derived must be "clear and credible" or "strong".
>
> (3) "Considering" is stronger than "suspecting". In our view it is also stronger than "believing". It requires the considered judgment of the decision-maker.

> (4) The decision-maker need not be satisfied beyond reasonable doubt or to the standard required in criminal law.
>
> (5) It is unnecessary to import our domestic standards of proof into the question. The circumstances of refugee claims, and the nature of the evidence available, are so variable. However, if the decision-maker is satisfied that it is more likely than not that the applicant has *not* committed the crimes in question or has *not* been guilty of acts contrary to the purposes and principles of the United Nations, it is difficult to see how there could be serious reasons for considering that he had done so. The reality is that there are unlikely to be sufficiently serious reasons for considering the applicant to be guilty unless the decision-maker can be satisfied on the balance of probabilities that he is. But the task of the decision-maker is to apply the words of the Convention (and the Directive) in the particular case.

[58] It is not necessary to consider this authority and to comment further. The decision in *Ezokola* is binding as the Court endorses a pre-*Al-Sirri* standard. I would not wish to suggest that the standard is stronger than "believing", in spite of the decision of the Supreme Court of the United Kingdom that "serious reasons" in section 1F is stronger than "reasonable grounds" and that "considering" is stronger than "suspecting" and even "believing". Rather, it will suffice at this stage to decide that the RPD does not articulate a standard beyond reasonable suspicions. Given the lack of information before the RPD, it is hardly surprising that the Panel could not offer justification, transparency and intelligibility within its decision-making process because it was relying on a different decision-making process. There is no need to seek to apply *Al-Sirri* in this case.

[59] To summarize, the issue is not whether or not the findings of a foreign court are to be discarded completely. They are not. However, I fail to see how serious reasons can come solely from the findings of another court without having a clear understanding of what the evidence

against the applicant was. It must be recalled that the applicant was not on trial. Furthermore, all that is available is the summary of the evidence of witnesses who did not testify and whose evidence was not tested. As conceded by Prosecutor Zhang before the IAD, by way of an explanation for why there are only brief summaries in the China courts' judgments, statements made by witnesses could run for many pages and it would take many pages for a court to refer to them in a complete fashion. It would appear that it is sufficient for the purposes of these foreign courts. A one-day trial (there were four other transactions involving Wang before the trial Chinese court), with seemingly witness statements being presented to a court and with only one witness testifying *viva voce*, is all that happened. The RPD did not have the witness statements or the transcripts of the proceedings before the Chinese courts. The RPD did not have the "evidence" adduced before the Chinese courts. We now know that that "evidence" was not tested. Finally, the applicant was not on trial in China and his interests were not represented at the trial of Wang and the broker. In effect, the RPD had to accept the findings made abroad because it had no way of assessing the case against the applicant. On judicial review, reasonableness requires more than accepting the findings made elsewhere without a clear rationale for such acceptance. That clear rationale was not present in this case.

[60] Moreover, the RPD decision had to be based on clear and convincing evidence (*Cardenas v Canada (Minister of Employment and Immigration)* (1994), 23 Imm LR (2d) 244 (FC)). The RPD does not conclude that the evidence is convincing. Given the summary of the evidence provided in the Chinese courts' decision, it was not clear either. In effect, the RPD articulates a standard that never reaches the appropriate level, that of reasons to believe.

E. *Other arguments*

[61] There were other arguments put forth by the applicant. I shall refrain from commenting extensively given that the matter is sent back for redetermination. Counsel for the applicant took a shotgun approach to this judicial review application. The applicant argued, *inter alia*, that issue estoppel prevented the RPD from making certain findings of fact because of those made in different proceedings before the IAD. Obviously the IAD decision is not final, which is a condition precedent to the application of the doctrine (*Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44, [2001] 2 SCR 460). In *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52, [2011] 3 SCR 422, the Court finds that ""[f]inal" means that all available means of review or appeal have been exhausted" (paragraph 51). The applicant also claimed that the crime he is alleged to have committed is a political crime. In so doing, the applicant confuses political crime and the prosecution of a crime for political motivation. It is the motivation of the offender that counts, not that of the prosecutor. The applicant took issue with the RPD decision that rejected the attacks against the prosecution in China being for the purpose of taking down the applicant's father as being "illogical". The applicant's counsel also discussed at length the credibility of various witnesses. I thought that, read as a whole, the reasons of the RPD simply expressed that it appeared far-fetched that such a complex stratagem, which would involve the son of the person targeted, would have been used to target the applicant's father. It was simply a way of expressing disagreement with propositions put forward by the applicant about political motivation. Actually, it was not even clear what that motivation might have been. The test is whether or not the Panel decision is reasonable, not whether the use of a particular way of

expressing oneself is the more appropriate. In my view, nothing rides on the use of the expression "illogical" in the context of this case and the Reasons for Decision.

F. *Conclusion*

[62] As a result, it cannot be said that the decision is reasonable in that the reviewing court finds the existence of justification, transparency and intelligibility in the decision-making process; the judicial review application must succeed and the matter is to be remitted to a different panel of the RPD for reconsideration and decision.

V. Questions for Certification

[63] Counsel for the applicant did raise some questions for consideration for the purpose of certification pursuant to section 74 of IRPA. Counsel for the respondent objected to the questions proposed by the applicant and did not submit any of her own. I would not have been inclined to certify any of the questions proposed because they were not dispositive of the issues. In *Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168, the principles that govern are nicely encapsulated at paragraph 9:

> [9] It is trite law that to be certified, a question must (i) be dispositive of the appeal and (ii) transcend the interests of the immediate parties to the litigation, as well as contemplate issues of broad significance or general importance. As a corollary, the question must also have been raised and dealt with by the court below and it must arise from the case, not from the Judge's reasons (*Canada (Minister of Citizenship and Immigration) v. Liyanagamage*, 176 N.R. 4, 51 A.C.W.S. (3d) 910 (F.C.A.) at paragraph 4; *Zazai v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89, [2004] F.C.J. No. 368 (C.A.) at paragraphs 11-12; *Varela v. Canada (Minister of Citizenship and

> *Immigration)*, 2009 FCA 145, [2010] 1 F.C.R. 129 at paragraphs 28, 29 and 32).

Be that as it may, given the decision reached by this Court, there is no need to consider in detail the questions proposed by the applicant.

VI. Confidentiality

[64] At the outset of the hearing on the merits of this case, the Court heard submissions from counsel for the applicant for the material in the proceedings to be treated confidentially.

[65] In view of the importance of open hearings where the public is offered the possibility to witness what takes place before the courts, it was readily agreed that a broad order would not be appropriate (*Lukács v Canada (Transport, Infrastructure and Communities)*, 2015 FCA 140).

[66] Prothonotary Lafrenière had already issued an order in this case on June 11, 2015. The notice of motion sought a broad order with alternatives of a more limited scope being offered for consideration. Prothonotary Lafrenière issued an order of fairly limited scope. Counsel for the applicant did not appeal Prothonotary Lafrenière's order. However, as the order expired with the hearing before this Court, counsel for the applicant wished at a minimum for the order to be renewed.

[67] Because counsel for the applicant wished to address the Court for the purpose of discussing the case of a limited number of witnesses whose identity should be protected to the

extent possible and reasonable, the Court heard submissions with respect to three witnesses *in camera*.

[68] The respondent did not take a position before the Court as to whether a confidentiality order should be granted, but suggested rather that a confidentiality order ought to be limited.

[69] I agree with Prothonotary Lafrenière that steps should be taken to help minimize the risk to witnesses whenever possible. However, the effort at minimizing the risk is itself limited in that extensive information about the matter before the Court is already in the public domain.

[70] It was therefore ordered that the identity of three witnesses would be protected in that their names would not be used during the hearing. Instead, they were referred to as Person #1, Person #2 and Person #3. The parties also referred to one of the three persons as "the broker". It was resolved that the Court would use the same code in its reasons for judgment if appropriate. The order was communicated orally at the hearing of this case on June 23, 2015 in open court. I also indicated that I would include my order in the Judgment on the merits of this case.

[71] Accordingly, the Court orders that the names of three witnesses whose evidence was before the Refugee Protection Division shall be treated as confidential in that their names will not be used during the hearing on the merits of this judicial review application. These three witnesses shall be referred to during the hearing as "Person #1", "Person #2" and "Person #3", or "the broker".

[72] It goes without saying that the order of Prothonotary Lafrenière, which provided that the motion records filed before him are to be placed in a sealed envelope and treated as confidential, shall continue to be treated as per paragraph 3 of his order.

JUDGMENT

THIS COURT'S JUDGMENT is that the judicial review application must succeed and the matter is to be remitted to a different panel of the Refugee Protection Division for reconsideration and decision. There is no serious question of general importance.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

David Matas	FOR THE APPLICANT
Nalini Reddy	FOR THE RESPONDENT

SOLICITORS OF RECORD:

David Matas Barrister and Solicitor Winnipeg, Manitoba	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Winnipeg, Manitoba	FOR THE RESPONDENT