

Federal Court



Cour fédérale

**Date: 20150727**

**Docket: IMM-2693-14**

**Citation: 2015 FC 911**

**Ottawa, Ontario, July 27, 2015**

**PRESENT: The Honourable Mr. Justice O'Reilly**

**BETWEEN:**

**JIN HAN ZHUO**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] In 2013, Mr Jin Han Zhou sought refugee protection in Canada based on his fear of political persecution in China. A panel of the Immigration and Refugee Board denied his claim and, on appeal, the Refugee Appeal Division (RAD) upheld the Board's decision.

[2] Before the RAD, the Minister intervened to file new evidence in the form of US visa applications that had previously been submitted by Mr Zhou and his father. The RAD admitted the new evidence and found that it substantially contradicted Mr Zhou's evidence about his experiences in China, and negatively affected his credibility. While the RAD found that the circumstances likely justified holding an oral hearing, it chose not to convene one since neither Mr Zhou nor the Minister had requested it.

[3] Mr Zhou now argues that the RAD was obliged to hold an oral hearing, even if one was not requested, when the applicable statutory criteria were met (*Immigration and Refugee Protection Act, SC 2001, c 27 [IRPA], s 110(6)*) (see Annex for provisions cited). He asks me to quash the RAD's decision and order another panel member to reconsider his appeal.

[4] I agree with Mr Zhou that the RAD should have held an oral hearing before making adverse credibility findings against him. Therefore, I will allow this application for judicial review

[5] The sole issue is whether the RAD was obliged to hold an oral hearing.

## II. The RAD's Decision

[6] Mr Zhou claimed that he was being sought by authorities in China after he and his family protested against the proposed expropriation of their farm. He also said that he had been suspended from college for his activities. However, the new evidence tendered by the Minister

showed that the family did not own a farm, they lived in an urban apartment building, and that Mr Zhou did not attend college.

[7] The RAD acknowledged that the criteria for holding an oral hearing appeared to have been met. Subsection 110(6) of IRPA provides that the RAD may hold a hearing if there is documentary evidence before it raising a serious issue of credibility that is central to the claim and would justify allowing or rejecting it. However, the RAD concluded that it had a discretion whether to hold a hearing and decided not to do so in the absence of a specific request.

[8] Based on the new evidence, the RAD concluded that Mr Zhou's claim of persecution arising from expropriation of the family farm was not credible.

### III. Was the RAD obliged to hold an oral hearing?

[9] The legislation clearly states that the RAD "may" hold a hearing where the statutory criteria are met. In my view, however, an oral hearing will generally be required when the statutory criteria have been satisfied.

[10] In an analogous context, officers conducting a pre-removal risk assessment must generally hold an oral hearing in similar circumstances (under s 113(b) of IRPA, and s 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227). Even though the language is equally permissive ("a hearing may be held"), this Court has held that an oral hearing will usually be required where there are serious credibility issues before the officer that are central to

the decision (*Strachn v Canada (Minister of Citizenship and Immigration)*, 2012 FC 984, at para 34).

[11] I believe the same should apply here. Where the conditions for holding an oral hearing are present, the RAD should generally be required to convene one. Obviously, the RAD retains a discretion on this question but that discretion must be exercised reasonably in the circumstances. In particular, the mere fact that a party has not requested a hearing will generally not be sufficient reason to justify a refusal to convene one when the circumstances appear to require it. While the RAD rules allow an appellant to request a hearing, IRPA does not actually impose a burden either to request, or to satisfy the RAD that the circumstances merit, an oral hearing (see *Refugee Appeal Division Rules*, SOR/2012-257, Rule 5(2)(d)(iii)). The onus rests with the RAD to consider and apply the statutory criteria reasonably.

[12] Therefore, in this case, I find that the RAD should have convened an oral hearing before dismissing Mr Zhou's appeal on credibility grounds.

#### IV. Conclusion and Disposition

[13] In the circumstances, the RAD should have convened an oral hearing. I must, therefore, overturn its dismissal of Mr Zhou's appeal and order another panel of the RAD to reconsider it.

[14] Counsel for Mr Zhou proposed the following question for certification:

Is the RAD required to hold an oral hearing when the criteria set out in s 110(6) of IRPA are met?

[15] Counsel for the Minister points out that the decision whether to convene a hearing is clearly discretionary and each case should be reviewed on its own facts. Therefore, he says, the proposed question should not be stated. I agree. As discussed above, the RAD retains a discretion that must be exercised reasonably. Therefore, I would not certify a question based on a proposition that the RAD has no such discretion.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is allowed.
2. The matter is returned to the RAD for redetermination.
3. No question of general importance is stated.

“James W. O’Reilly”

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Judge

*Immigration and Refugee  
Protection Act, SC 2001, c 27*

Hearing

**110.** (6) The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3)

- (a) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal;
- (b) that is central to the decision with respect to the refugee protection claim; and
- (c) that, if accepted, would justify allowing or rejecting the refugee protection claim.

Consideration of application

**113.** Consideration of an application for protection shall be as follows:

...

- (b) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;

Hearing — prescribed factors

**167.** For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors are the following:

- (a) whether there is

ANNEX

*Loi sur l'immigration et la protection des  
réfugiés, LC 2001, ch 27*

Audience

**110.** (6) La section peut tenir une audience si elle estime qu'il existe des éléments de preuve documentaire visés au paragraphe (3) qui, à la fois :

- a) soulèvent une question importante en ce qui concerne la crédibilité de la personne en cause;
- b) sont essentiels pour la prise de la décision relative à la demande d'asile;
- c) à supposer qu'ils soient admis, justifieraient que la demande d'asile soit accordée ou refusée, selon le cas.

Examen de la demande

**113.** Il est disposé de la demande comme il suit :

[...]

- b) une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;

Facteurs pour la tenue d'une audience

**167.** Pour l'application de l'alinéa 113b) de la Loi, les facteurs ci-après servent à décider si la tenue d'une audience est requise :

- a) l'existence d'éléments de

evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;

(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.

*Refugee Appeal Division Rules,  
SOR/2012-257*

Hearing — prescribed factors

**167.** For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors are the following:

(a) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;

(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

preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur;

b) l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;

c) la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

*Règles de la Section d'appel des  
réfugiés, DORS/2012-257*

Facteurs pour la tenue d'une audience

**167.** Pour l'application de l'alinéa 113b) de la Loi, les facteurs ci-après servent à décider si la tenue d'une audience est requise :

a) l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur;

b) l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;

c) la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit



protection.

accordée la protection.

*Refugee Appeal Division Rules,  
SOR/2012-257*

*Règles de la Section d'appel des  
réfugiés, DORS/2012-257*

Content of reply record

Contenu du dossier de réplique

5. (2) The reply record must contain the following documents, on consecutively numbered pages, in the following order:

5. (2) Le dossier de réplique comporte les documents ci-après, sur des pages numérotées consécutivement, dans l'ordre qui suit :

...

[...]

(d) a memorandum that includes full and detailed submissions regarding:

d) un mémoire qui inclut des observations complètes et détaillées concernant :

...

[...]

(iii) why the Division should hold a hearing under subsection 110(6) of the Act if the appellant is requesting that a hearing be held and they did not include such a request in the appellant's record, and if the appellant is requesting a hearing, whether they are making an application under rule 66 to change the location of the hearing.

(iii) les motifs pour lesquels la Section devrait tenir l'audience visée au paragraphe 110(6) de la Loi, si l'appellant en fait la demande et qu'il n'a pas inclus cette demande dans le dossier de l'appellant, et le cas échéant, s'il fait une demande de changement de lieu de l'audience en vertu de la règle 66.

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-2693-14

**STYLE OF CAUSE:** JIN HAN ZHUO v THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** APRIL 28, 2015

**JUDGMENT AND REASONS:** O'REILLY J.

**DATED:** JULY 27, 2015

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