

Federal Court



Cour fédérale

Date: 20170119

Docket: IMM-2894-16

Citation: 2017 FC 66

Ottawa, Ontario, January 19, 2017

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

**YUXIAN SU
JIA WEI JIANG**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] Guyana has one of the higher rates of crime in the Western Hemisphere. Robbery is a serious problem, particularly for those residents engaged in business and believed to keep cash and other valuables in their commercial premises and homes. The applicants were the victims of robberies in Guyana and submit that they were targeted because of their race and that their claim for protection in Canada was erroneously dismissed by the Immigration and Refugee Board.

[2] They have brought this application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA or the Act] of a decision dated June 1, 2016 by the Refugee Appeal Division (RAD). The RAD confirmed the decision of the Refugee Protection Division (RPD) that the applicants are not Convention refugees or persons in need of protection under sections 96 and 97 of the IRPA.

[3] For the reasons that follow, the application is dismissed.

I. BACKGROUND

[4] Yuxian Su, and her son, Jia Wei Jiang, are of Chinese ethnicity and citizens of Guyana. In 2003, Ms. Su became a Guyanese citizen; in order to do so, she relinquished her Chinese citizenship. Jia Wei Jiang was born in Guyana and is, at the time of writing, 14 years of age. From 2008 until 2010, he attended school in China.

[5] From 2001 until 2011, Ms. Su and her husband opened and operated a restaurant in Georgetown, Guyana. During that period, their business was subject to five armed robberies. Ms. Su claims that they called the police after each robbery but that the police would never show up. From 2011 until 2014, Ms. Su and her husband worked in another restaurant that they did not own.

[6] In March 2014, the applicants were assaulted and robbed in their home. Ms. Su testified before the RPD that during the robbery, she was knocked unconscious and that her son was tied up while their home was robbed of valuables and money.

[7] In April 2014, Ms. Su, her husband, and their son went to China to inquire about regaining their citizenship and obtaining Chinese citizenship on behalf of their son.

Unsuccessful, they returned to Guyana in June 2014.

[8] In February 2015, when Ms. Su was escorting her son to school, two Guyanese men threw water at them and yelled “all Chinese should be kicked out of the country.” In August 2015, a close family friend, an ethnic-Chinese restaurant owner, was murdered during a robbery.

[9] As a result, the family returned to China on September 30, 2015 to see if they could acquire status there. However, the prospect was still uncertain and they did not want to risk becoming stateless by relinquishing their Guyanese citizenship. The applicants entered Canada, via the United States, on November 4, 2015 with the assistance of a smuggler. The father remained in China as they did not have the funds to pay the smuggler for him as well. The applicants made their refugee claim on December 2, 2015.

II. DECISION UNDER REVIEW

A. *The RPD decision*

[10] The RPD found that there was no nexus with a Convention ground, namely race, in the applicants’ claim. The RPD decided also that the applicants’ claim was disqualified under the “generalized risk” clause in subparagraph 97(1)(b)(ii) of the IRPA. Ms. Su was found to be credible with respect to her account of the robberies. However, her credibility was questioned

with respect to her interactions with the police after the robberies took place. The Member found that her testimony in that regard was repetitive and lacking in detail.

[11] In any event, the RPD Member noted that the determinative issue in this case was not state protection, but rather whether the applicants faced a personalized risk. The Member rejected the applicants' claim that there was a nexus to a Convention ground, namely race. Instead, the Member reasoned that Ms. Su's appearance of wealth, as the owner of a restaurant, was the underlying motivation for the robberies. She had testified that there is a perception in Guyana that Chinese Guyanese citizens are wealthy but noted that the same was true of business people in general. Between the time that they closed the restaurant in 2011, and 2014 when they were attacked in their home, the applicants had not suffered other violent incidents or robberies. The Member did not accept that the home invasion was linked to race or that the family was personally targeted.

B. *The RAD decision*

[12] On appeal, the RAD Panel began its analysis by setting out its role in relation to the RPD's decision relying on the Federal Court of Appeal's decision *in Canada (Minister of Citizenship and Immigration) v Huruglica*, 2016 FCA 93, [2016] FCJ No 313 [*Huruglica*].

[13] As the applicants contended that the RPD erred in failing to accept that race was a motivating factor in crimes committed against them, the RAD Member reviewed that finding. Upon listening to the audio recording of the RPD hearing, the RAD found that Ms. Su had acknowledged in her testimony that business owners were targeted, as they were perceived to

have money. The RAD concluded that as deplorable as these robberies were, they were not motivated by race.

[14] In reaching this conclusion, the RAD was guided by this Court's decision in *Bacchus v Canada (Minister of Citizenship and Immigration)*, 2004 FC 821, [2004] FCJ No 1023, at paragraph 11, where I noted that "although the applicant has been the victim of violent crime, all Guyanese are at risk for these sorts of crimes." In that case, the applicant was Indo-Guyanese.

[15] The RAD also reviewed the RPD's "generalized risk" analysis and confirmed its findings. The RAD Member concluded that the applicants were not personally targeted and that their risk is one that is generally faced by other persons in Guyana who are perceived to be wealthy. The RAD reiterated the applicants' acknowledgment that business owners were targeted in Guyana due to the perception that they are affluent. The RAD noted Ms. Su's testimony that the perpetrators of the robberies were unknown to her, and did not appear to be the same individuals.

[16] The RAD also considered the documentary evidence and specifically noted a report from the United Nations Office on Drugs and Crime, which lists Guyana's 2012 homicide rate as 17 per 100,000 people – the fourth highest murder rate in South America. The Member also acknowledged that armed robberies reportedly occur regularly, especially in businesses and shopping districts. As such, the RAD found that the documentary evidence supported the conclusion that these robberies are not motivated by ethnicity, but rather, they are common criminal acts carried out against persons perceived to have money.

[17] The RAD considered “state protection” as an alternative ground, noting that per *Huruglica*, above, it is mandated to conduct its own independent assessment of the entire record. While the RPD had not made a determination on this ground, it was raised in the applicants’ appeal record.

[18] The RAD Member cited the presumption that the state is capable of protecting its citizens, except in cases where the state is in complete breakdown: *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 709 and 725. As such, a claimant who alleges that state protection is inadequate must provide “clear and convincing” evidence of the state’s inability to protect its citizens: *Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, [2008] 4 FCR 636.

[19] With respect to Ms. Su’s interactions with the police, the RAD concurred with the RPD’s finding that her testimony provided little detail. Moreover, the RAD noted that there is no evidence that she had personally gone to the police station to file a complaint, nor had she taken any further action to complain about the police themselves.

[20] The RAD acknowledged that there is evidence of police corruption in Guyana, but also noted some evidence of avenues where such abuses can be reported. It ultimately concluded that there was no evidence that corruption has led to a complete breakdown of the social order, or has resulted in the police and the judiciary failing to perform their duties adequately or effectively in all cases. As such, the RAD found that the probability of corruption leading to inadequate and

ineffective state protection must be assessed on a case by case basis. In this case, the RAD found that it was unreasonable for Ms. Su to not pursue state protection because of potential corruption.

[21] In the result, the RAD concluded that there was insufficient evidence to support a nexus with race. In the alternative, after conducting an independent assessment of the record before it, the RAD found that the applicants failed to rebut the presumption of state protection.

III. ISSUES

[22] Having considered the issues identified by the parties, I would describe them as follows:

- A. What is the standard of review?
- B. Was the RAD's assessment of the evidence reasonable?
- C. Was the RAD's nexus finding unreasonable?
- D. Was the RAD's finding of state protection unreasonable?

IV. ANALYSIS

A. *Standard of review*

[23] There was no disagreement between the parties that the application raises issues of mixed fact and law calling for the application of the reasonableness standard: *Huruglica* at paras 30 and 35. This applies in particular to credibility findings as well as to findings regarding the existence of a nexus to a Convention ground or state protection: *Cheema v Canada (Minister of Citizenship and Immigration)*, 2015 FC 441, [2015] FCJ No 494 at para 6 [*Cheema*].

[24] Application of the reasonableness standard means that the Court shall not interfere with the RAD's decision unless it lacks justification, transparency and intelligibility and falls outside a range of possible, acceptable outcomes, defensible in fact and in law: *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47 [*Dunsmuir*].

[25] At the hearing, the applicants argued that the RAD erred in law when it considered the state protection issue even though the RPD did not make a finding on that issue in its decision. He argued that this constitutes an error in law and attracts a correctness standard. As determined in *Huruglica* at para 78, the role of the RAD is to intervene when the RPD is wrong in law, in fact or in fact and law. That translates into an application of the correctness standard of review.

[26] In this instance, and based on its review of subsection 111 (1) (a) of the IRPA and the Court of Appeal's decision in *Huruglica*, the RAD concluded that it was its role to conduct an independent assessment of the record on appeal. Therefore, the RAD found that it was open to it to examine the issue of state protection as well.

[27] The RAD's assessment and defining of the scope of its appellate function is a question of law which falls within the RAD's expertise, and therefore, attracts the reasonableness standard of review: *Huruglica*, above, at paras 31-32.

B. *Was the RAD's assessment of the evidence reasonable?*

[28] The applicants submit that the RPD engaged in a selective reading of the evidence and committed a reviewable error by emphasizing evidence that supported a determinative finding

while disregarding evidence that contradicted or challenged that finding: *Ragunathan v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 253 [*Ragunathan*]; *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 [*Cepeda-Gutierrez*]; *Zheng v Canada (Minister of Citizenship and Immigration)*, [1995] FCJ No 140 [*Zheng*]. The applicants submit that the RAD should have set aside the RPD decision on that basis alone.

[29] The applicants cite three news articles that they claim were ignored by the RPD and RAD:

- “Two Chinese nationals shot”, April 30, 2014, Demerara Waves Online News;
- “‘Chinee’ beaten, wounded at Canaan Garden on Saturday night – up to yesterday police had not visited him in hospital” , August 26, 2015, Guyana Chronicle; and,
- “Chinese restaurant murder...Cameras record gunman killing waitress”, August 25, 2014, KNews.

[30] The applicants claim that these documents directly challenge the finding that the common thread in the RPD and RAD conclusions that the victims were targeted for economic reasons rather than race. These articles refer to concerns among the Chinese community in Guyana about the level of violence being experienced by their community; which makes up only 1% of the overall population, and the lack of a prompt and effective police response.

[31] It is, as the respondent submits, trite law that decision makers are presumed to have considered all the evidence before them: *Simpson v Canada (Attorney General)*, 2012 FCA 82, [2012] FCJ No 334 at para 10. They are not required to refer to every piece of evidence and to explain how they deal with it. A failure to mention a particular piece of evidence does not mean that it was ignored: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] SCJ No 62 at para 16.

[32] It is only when a tribunal is silent on evidence clearly pointing to an opposite conclusion that the Court may intervene and infer that the tribunal overlooked the contradictory evidence when making its finding of fact: *Cepeda-Gutierrez*, above, at paras 16-17.

[33] In this instance, the RAD was detailed in its analysis and thoroughly canvassed the record before it. Although the RAD did not explicitly cite each and every piece of evidence, it is clear from its reasons that important pieces of evidence were not ignored. The RAD explicitly considered contradictory evidence in the record but concurred with the RPD that the increase in attacks on Chinese businesses had not risen to the point of becoming a trend. At paragraph 33 of the decision, the RAD refers to documentation indicating “two murders and two assaults reported in August 2015.” This corresponds with the news articles cited by the applicants which, they assert, the RAD ignored.

[34] Accordingly, I am not persuaded that the RAD committed a reviewable error in its consideration of the evidence.

C. *Was the RAD's nexus finding unreasonable?*

[35] The applicants submit that the RPD and the RAD erred by misconstruing the evidence; disregarding evidence revealing racial motives as well as the persecution of Chinese nationals in Guyana.

[36] Included in the documentary evidence is a news article dated March 6, 2013 reporting a statement by the Ministry of Home Affairs acknowledging that there had been an increase in the level of violence against Chinese residents. The statement associated the violence with a reaction to political developments including decisions by the government to encourage Chinese investment in Guyana. It includes these comments.

The Ministry wishes to bring to the attention of the public that it has not gone unnoticed that this sudden surge in criminal attacks against members of the Chinese community in Guyana originated from and coincides with a politically inspired and orchestrated campaign by known opposition elements. This campaign is characterized by sustained and systematic efforts of vilification, criminalization and xenophobic in character aimed primarily against the Chinese community. [emphasis added]

[37] This response, the article states, appears to have been in relation to the government allowing Chinese-only labour on the construction of a new hotel in Kingston funded by Chinese investment. That may indicate that the sudden surge of violence against the Chinese community may be temporary in nature and not sustained. A contributing factor mentioned in the article is that the attacks have been directed against businesses that conduct cash transactions as opposed to those involving credit or debit cards.

[38] A 2015 United States Department of State report included in the record notes that “[w]hile incidents of violent crime appear not to be racially motivated, political differences tend to run along racial divisions”. This is a reference to the continuing tensions between the Afro-Guyanese and Indo-Guyanese communities.

[39] The applicants contend that this evidence establishes persistent attacks on the Chinese community. Therefore, there is a “reasonable chance” or “more than a mere possibility” that the applicants would be persecuted based on their race if they returned to Guyana. However it was conceded on behalf of the applicants at the hearing that the record does not disclose what the crime rate is involving the Chinese community in Guyana as opposed to that of the larger communities. As noted above, the Chinese community makes up only 1% of the overall population of Guyana. Evidence that demonstrates that they experience a disproportionate level of violence may have led to an alternate conclusion by the RPD and RAD.

[40] The statement issued by the Home Affairs Ministry is the strongest piece of evidence supporting the applicants’ position. However, it does not, in my view, contradict the conclusion drawn by the RPD and RAD about the motivation for the attacks on Chinese-Guyanese business people being economic.

[41] The applicants acknowledged that business owners in Guyana were targets of crime, as they were perceived to have money. This is reflected in the fact that, with one exception, the news articles relied on by the applicants refer to attacks on businesses which could be expected to have large quantities of cash on their premises such as restaurants and supermarkets.

[42] The one exception reported in the articles is an attack on a man of apparent Chinese ethnicity. In that instance, the victim had become involved in a street dispute with a woman who then engaged the services of her brothers to administer a beating. There is nothing in the article that indicates that the attack was motivated by the victim's ethnicity.

[43] The only other evidence of race-based discrimination is the principal applicant's account of having water thrown upon her and her son by two individuals who shouted racial slurs at them. While that behaviour was deplorable, it does not amount to persecution.

[44] The documentary evidence as a whole provides ample examples of perpetrators targeting Indo-Guyanese as well as Chinese businesses because of the general perception that the proprietors are wealthy. The evidence reviewed by the RAD suggested that serious crimes, including murder and armed robbery, are common occurrences in Guyana.

[45] Based on the evidence in the record it was open to the RAD to find that the crimes suffered by the applicants were economically rather than racially motivated. It was not unreasonable for the RAD to conclude that the risk faced by the applicants is one that is generally faced by others in Guyana. That conclusion fell within the range of possible and acceptable outcomes.

D. *Was the RAD's finding of state protection unreasonable?*

[46] The applicants briefly mention in their written argument that the RAD's finding on state protection was not an issue that was determined by the RPD. They submit that it is a reviewable

error for the RAD to make a finding on issues not raised by the RPD, unless it gives the appellant an opportunity to respond with submissions or evidence: *Ojarikre v Canada (Minister of Citizenship and Immigration)*, 2015 FC 896, [2015] FCJ No 909 [*Ojarikre*].

[47] This argument was not pressed at the hearing, as counsel preferred to focus on the substantive merits of the issue. As noted above, the issue had been raised in the applicants' Appeal Memorandum. Unlike *Ojarikre*, the RAD did not confirm the decision of the RPD on another basis. I would add, although it was not argued by the applicants, that this is not a case where the RAD chose to confirm the RPD's decision on another basis without making an express finding that the RPD had erred as in *Angwah v Canada (Minister of Citizenship and Immigration)*, 2016 FC 654.

[48] Here the RAD Member confirmed the RPD's findings on the nexus with race issue, but added that, in the alternative, the presumption of state protection was not successfully rebutted by the applicants. The RAD's independent assessment of the record remained properly within the parameters discussed by the Federal Court of Appeal in *Huruglica*, above, at paragraphs 78 and 103.

[49] The applicants do not question the RAD's finding that Guyana is a relatively functional democratic state. They agree that the presumption of state protection applies and must be rebutted. They submit, however, that the objective country condition evidence suggests that there is inadequate state protection in Guyana: *EB v Canada (Minister of Citizenship and*

Immigration), 2011 FC 11, [2011] FCJ No 135 at paras 9-10 [EB]; *Persaud v Canada (Minister of Citizenship and Immigration)*, 2010 FC 850; [2010] FCJ No 1057 at para 23.

[50] The applicants submit that the RAD ignored relevant evidence suggesting that police corruption in Guyana is extensive and that their response to crime is largely ineffective. They also suggest that the RAD failed to consider whether Chinese citizens would receive lesser service and protection by the police because of racism. The applicants contend that the evidence supports a finding that they would not receive adequate state protection upon their return to Guyana.

[51] The RPD readily acknowledged that the evidence of state protection in Guyana is mixed at best. The RAD discussed at some length the various problems relating to police corruption and evidence indicating the existence of widespread violence in Guyana. However, the key issue for the RAD, as well as the RPD, was the lack of detail in Ms. Su's testimony about calling the police coupled with the lack of any evidence that the applicants had made any further efforts to access state protection.

[52] The five robberies occurred over a ten year period. There was no evidence that would suggest that attempts were made by the applicants during that time period to exhaust all possible avenues of protection available to them. Moreover, there is no evidence to suggest that the police response to the robberies, or lack thereof, was motivated by racism.

[53] On the facts of this case, the applicants failed to discharge their onus in seeking state protection. It was, therefore, open to the RAD to conclude that the applicants failed to rebut the presumption.

[54] As the parties agreed that this matter turned on its facts, no serious questions of general importance were proposed for certification and none will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed. No questions are certified.

“Richard G. Mosley”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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