

Federal Court



Cour fédérale

Date: 20190731

Docket: IMM-5631-18

Citation: 2019 FC 1028

Ottawa, Ontario, July 31, 2019

PRESENT: Mr. Justice Boswell

BETWEEN:

SHENG TENG

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Sheng Teng, is a 46-year-old citizen of China who arrived in Canada in May 2012 and claimed refugee protection. He feared return to China because he would be arrested and persecuted by the police for refusing to leave his home when his land was expropriated by the government. The Refugee Protection Division [RPD] of the Immigration and Refugee Board determined in a decision dated October 24, 2018, that the Applicant was neither a Convention refugee nor a person in need of protection.

[2] The Applicant has now applied under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [IRPA], for judicial review of the RPD's decision. He asks the Court to set aside the decision and return the matter for redetermination by another member of the RPD.

I. The RPD's Decision

[3] After summarizing the Applicant's allegations, the RPD found that he had not satisfied the burden of establishing a serious possibility of persecution on a Convention ground, or that, on a balance of probabilities, he would personally be subjected to a risk to life or a risk of cruel and unusual treatment or punishment or a danger of torture upon return to China.

[4] The RPD noted that, while there is a presumption that the Applicant's sworn allegations are true, it had reason to doubt the truthfulness of his allegations. In the RPD's view, the Applicant's testimony was at times vague, lacking in detail, and inconsistent with material before it. The RPD accepted that the Applicant wanted higher compensation for his expropriated land but found key details of his claim were not credible; namely, that he faced violence, or that he was a leader in opposing the expropriation of his and other villagers' land or a leader in the quest for higher compensation.

[5] In particular, the RPD highlighted how the Applicant was unable to provide details of an alleged attack by 20 gangsters, especially when compared to his other testimony which was spontaneous and forthcoming. This incident was material to his claim as it was the only occasion when physical violence occurred. Because the Applicant was not forthcoming about details of

this incident, the RPD found that the incident did not occur. It also found that an alleged conversation between the Applicant and a district government official did not occur.

[6] The RPD determined that the Applicant's activities did not rise to the level of being those of an activist or leader regarding the expropriated property owners' dispute with the government. In the RPD's view, the Applicant stated he was a leader to embellish his allegation that the police wanted him for inciting other property owners to make trouble for the government. The RPD therefore found that the police did not want to arrest or charge the Applicant on any matter.

[7] The RPD noted that the Applicant had attempted to come to Canada three times prior to his arrival in 2012. His applications in 2008 and in 2010 for a temporary resident visa to come to Canada to develop a fur business were refused. In 2011, the Applicant attempted to depart Korea's Incheon International Airport to travel to Vancouver, but Canadian immigration authorities intercepted and refused his boarding. After reviewing the Applicant's previous attempts to immigrate to Canada, the RPD concluded it was more likely than not that he had traveled to Canada for economic reasons and not because the police wanted him.

[8] The RPD further noted that, while individuals in China who oppose expropriation of their land have faced imprisonment or violence at the hands of police or hired thugs, the Applicant would not face a risk of harm if returned to China because he was not a leader in the property dispute and not wanted by the police for any matter. The RPD concluded its reasons by remarking that it had been more than six years since the Applicant left China.

II. Standard of Review

[9] The standard of review for the RPD's assessment of the evidence and a claimant's credibility is that of reasonableness, with considerable deference owed to the advantageous position of the trier of fact (*Cambara v Canada (Citizenship and Immigration)*, 2017 FC 1019 at para 13, and *Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 at para 4).

[10] The reasonableness standard tasks the Court with reviewing an administrative decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determining "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16). It is "not open to a reviewing court to substitute its own view of a preferable outcome"; nor is it "the function of the reviewing court to reweigh the evidence" (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61 [*Khosa*]).

[11] The standard of review for an allegation of procedural unfairness is correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Khosa* at para 43). The Court must determine whether the process followed in arriving at the decision under review achieved the level of

fairness required by the circumstances of the matter (*Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 115).

[12] An issue of procedural fairness “requires no assessment of the appropriate standard of judicial review. Evaluating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation” (*Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11 at para 74). As the Federal Court of Appeal has observed: “even though there is awkwardness in the use of the terminology, this reviewing exercise is ‘best reflected in the correctness standard’ even though, strictly speaking, no standard of review is being applied” (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54).

III. The Applicant’s Submissions

[13] The Applicant says the RPD’s assessment of his credibility was unreasonable. In his view, the RPD unreasonably impugned his credibility due to his short answers about the attack by gangsters and failed to identify specific aspects of his testimony which were inconsistent or otherwise not credible. According to the Applicant, the RPD had the opportunity to ask any questions it deemed relevant but did not do so, and he cannot be faulted for not providing details which were not asked of him.

[14] The Applicant notes that an applicant is presumed to be telling the truth unless there is a valid reason to doubt their truthfulness and, in his case, there was no reason to doubt the truthfulness of his testimony. Even if he was not a leader or perceived to be a leader regarding

the expropriation dispute, the Applicant says this is not fatal to his claim that he is wanted by the police; nor is the attack by gangsters critical to his claim. According to the Applicant, if something is not critical to a claim, even if the RPD finds it was fabricated, it is unreasonable for an applicant's claim to be dismissed.

[15] The Applicant says the documentary evidence shows that the Chinese government persecutes those who protest against politically sensitive issues, such as land expropriation, regardless of whether they are leaders or perceived to be leaders. The Applicant claims the RPD erred in making an implausibility finding that he would not be perceived to be a leader.

[16] According to the Applicant, the RPD applied an incorrect legal test for assessing risk of persecution because it applied an overly narrow interpretation of "political opinion" and failed to consider the broad interpretation as established by the jurisprudence. In the Applicant's view, the RPD's conclusion that he was not perceived to be an activist or a leader was unreasonable and it completely failed to assess his risks under section 96 of the *IRPA*.

[17] The Applicant says the RPD also failed to assess his risk of torture, risk to life or risk of cruel and unusual treatment or punishment under section 97 of the *IRPA*. According to the Applicant, the RPD was required to conduct a separate section 97 analysis even if it found that he did not meet the profile of a leader of political opinion.

IV. The Respondent's Submissions

[18] In the Respondent's view, the RPD's decision is justified, transparent, and intelligible. The Respondent says the RPD's assessment of the Applicant's credibility was reasonable and it provided several detailed and cogent reasons for finding that the Applicant was not credible. According to the Respondent, the Applicant's submissions amount to a disagreement with the weight the RPD placed on the evidence.

[19] The Respondent maintains that the RPD applied the correct test for assessing risk of persecution under section 96 of the *IRPA*. Contrary to the Applicant's submissions, the RPD did not apply a narrow interpretation of "political opinion". In the Respondent's view, the RPD's decision was not based on interpreting political opinion but based on the fact it found the Applicant's allegations concerning his political activities were not credible and lacked sufficiency of evidence.

[20] According to the Respondent, the RPD did not err in assessing the Applicant's risk under section 97 of the *IRPA*. It is trite law, the Respondent says, that the RPD was not required to separately assess the risks under section 97 of the *IRPA* since it found the Applicant's allegations were not credible.

V. Analysis

[21] The onus rests on a refugee claimant to establish the essential elements of his or her claim for protection. When a refugee claimant swears that certain allegations are true, this creates a

presumption that they are true unless there is reason to doubt their truthfulness (*Maldonado v Canada (Minister of Employment & Immigration)*, [1979] FCJ No 248 at para 5). This presumption can be rebutted though, when there are grounds to find that a claimant's testimony lacks credibility (*Ismaili v Canada (Citizenship and Immigration)*, 2014 FC 84 at para 36 and *Guyen v Canada (Citizenship and Immigration)*, 2018 FC 38 at paras 35 to 38).

[22] In this case, the RPD raised three concerns that caused it to doubt the Applicant's credibility and the truthfulness of his allegations. First, it found the Applicant had not provided sufficient credible and trustworthy evidence regarding the attack by gangsters, nor was he forthcoming about the incident. Second, it found the Applicant's conversation with a government official did not occur because the incident where the Applicant was allegedly beaten by gangsters did not happen. And third, the RPD found the Applicant had not provided sufficient credible and reliable evidence that he was a leader, or would be perceived to be a leader, with respect to the expropriation dispute.

[23] In view of these concerns, it was reasonable, in my view, for the RPD to doubt the Applicant's credibility and the truthfulness of his allegations. The RPD's assessment of the Applicant's credibility was reasonable and it provided clear reasons for finding the Applicant was not credible. I agree with the Respondent that the Applicant's submissions boil down to a disagreement with the weight the RPD placed on the evidence.

[24] I disagree with the Applicant that the RPD applied an incorrect legal test for assessing his risk of persecution based on his political opinion opposing the expropriation and the amount of

compensation. In my view, the RPD reasonably found the Applicant's allegations concerning his political activities were not credible and lacked sufficiency of evidence.

[25] I also disagree with the Applicant that the RPD was required to conduct a separate analysis under section 97 of the *IRPA*. It is apparent from the RPD's reasons that it considered this section and the potential risk even if it found that he did not meet the profile of a leader of political opinion (*Arreaga v Canada (Citizenship and Immigration)*, 2013 FC 977 at para 47).

VI. Conclusion

[26] The RPD's reasons for its determination that the Applicant was neither a Convention refugee, nor a person in need of protection, are intelligible, transparent, and justifiable, and the decision falls within a range of possible, acceptable outcomes defensible in respect of the facts and law. The Applicant's application for judicial review is, therefore, dismissed.

[27] Neither party proposed a question under paragraph 74(d) of the *IRPA*.

JUDGMENT in IMM-5631-18

THIS COURT'S JUDGMENT is that: the application for judicial review is dismissed, and no serious question of general importance is certified.

"Keith M. Boswell"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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APPEARANCES:

Vanessa Leigh FOR THE APPLICANT

Nadine Silverman FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lewis & Associates FOR THE APPLICANT
Barristers and Solicitors
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT
Toronto, Ontario