

Federal Court



Cour fédérale

**Date: 20200123**

**Docket: IMM-3335-19**

**Citation: 2020 FC 116**

**Ottawa, Ontario, January 23, 2020**

**PRESENT: Mr. Justice Russell**

**BETWEEN:**

**GUIMEI LIANG**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. INTRODUCTION**

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], for judicial review of the decision of the Refugee Appeal Division [RAD], dated May 6, 2019 [Decision], which dismissed the Applicant's appeal and confirmed the decision of the Refugee Protection Division [RPD] dated January 31, 2018, that the

Applicant is neither a Convention refugee or a person in need of protection pursuant to s 111(1)(a) of the *IRPA*.

## II. BACKGROUND

[2] The Applicant is a citizen of the People's Republic of China and of no other country. Born in 1981, she was married in March 2013, but she and her husband agreed to separate later that year. In 2014, she was negotiating with two municipal officials in her village in Guangdong Province to secure fair compensation for a parcel of land expropriated from her husband. The Applicant believed that the village's offer did not reflect the value of a business her parents-in-law operated on the land. At one meeting on Sunday March 9, 2014, when only she and the two officials were present in the municipal building, the officials drugged and sexually assaulted her.

[3] Afterwards, when the Applicant threatened to report the officials to the police, they showed her a video recording of the sexual assault. They threatened to post it online if she complained, and used it to coerce the Applicant into signing an acceptance of their initial compensation offer.

[4] In May 2014, the Applicant moved to a village about 20 km away. The officials called her five times between July 2014 and February 2015, asking her to come to the municipal building on a weekend to collect her compensation in person. The Applicant did not meet the officials, and they did not approach her or any of her relatives at home or work. The Applicant continued to work as a manager at a company in Guangzhou.

[5] Meanwhile, the Applicant told her cousin who lived in Toronto about what had happened to her, and the cousin urged her to flee China for Canada. After the Canadian authorities rejected her application for a visitor's visa in July 2014, she contacted a human smuggler through whom she obtained an American visitor's visa. Her second application for a Canadian visa was again denied. The smuggler arranged for the Applicant to leave China for the United States on February 18, 2015, and facilitated her irregular entry into Canada on March 1, 2015 across the British Columbia border.

[6] The Applicant settled in Toronto and made her refugee claim on April 1, 2015. As part of the claim process she met with a clinical psychologist in May 2015 and June 2017, whose written psychological assessment reports the Applicant submitted as evidence in the claim determination process. The psychologist diagnosed the Applicant with post-traumatic stress disorder [PTSD] and depression.

[7] The RPD heard her claim in two separate sessions in 2017, at which she was represented by counsel. When the panel member asked the Applicant what motive the officials would have to harm her again, she said the officials had threatened after the sexual assault to release the video if she did not enter into a sexual relationship with them. She had not included this demand for a relationship in her basis of claim [BOC] or amended BOC, and neither of the psychological reports mentioned it.

[8] The RPD issued its written decision denying her claim on January 31, 2018. The RPD found the Applicant's allegations were not credible, drawing a negative inference particularly

from her silence about the officials' demand for a sexual relationship until she was challenged at the hearing. The RPD wrote that she had not established a forward-looking risk of persecution in China. The Applicant appealed to the RAD on March 22, 2018. The RAD issued written reasons dismissing her appeal on May 6, 2019.

### III. DECISION UNDER REVIEW

[9] The RAD's reasons review the evidence, the RPD's decision and the Applicant's submissions. The RAD decided the appeal based on two issues: the forward-looking risk of persecution and the danger of torture or cruel and unusual treatment or punishment, in accordance with ss 96 and 97 of the *IRPA*. The RAD found the Applicant had made out neither issue and dismissed the appeal.

[10] The RAD writes that it

has conducted its own assessment of the evidence. The RAD finds that the Appellant has not established that there is a serious possibility that she would be persecuted by the village officials who raped her in March 2014, should she return to China.

[11] The reasons consider the information in the record about the officials' conduct towards the Applicant and her relatives after the sexual assault, including that the officials did not approach anyone in person and that the Applicant never mentioned their demand for an ongoing sexual relationship until the RPD member asked her about their motives. The RAD concludes that "the preponderance of the evidence in the record shows that the village officials have made no attempts to locate or harm the Appellant after the sexual assault in March 2014."

[12] The reasons also consider the two psychological reports from 2015 and 2017. The RAD finds that the psychologist's opinion that the Applicant would suffer serious psychological harm if she returned to China was speculative and unsupported by specific reasons. The RAD gives the assessment reports "little weight in assessing the impact that returning to China would have on the Appellant's mental health."

[13] The RAD's overall conclusion is that the Applicant did not establish a forward-looking risk of persecution from the officials if she were to return to China, and that the psychological risk she might face in returning does not amount to serious harm. The RAD dismissed the appeal.

#### IV. ISSUES

[14] The Applicant has raised the following issues in this application:

1. Did the RAD err in its assessment of the Applicant's forward-looking risk and in doing so fail to meaningfully apply the *Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution* [Gender Guidelines]?
2. Did the RAD err in its assessment of state protection and the psychological evidence tendered?

#### V. STANDARD OF REVIEW

[15] This application was argued prior to the Supreme Court of Canada's recent decisions in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov] and *Bell Canada v Canada (Attorney General)*, 2019 SCC 66. This Court's judgment was taken under

reserve. The parties' submissions on the standard of review were therefore made under the *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] framework. However, given the circumstances in this matter, and the Supreme Court of Canada's instructions in *Vavilov* at para 144, this Court found that it was not necessary to ask the parties to make additional submissions on the standard of review. I have applied the *Vavilov* framework in my consideration of the application and it does not change the applicable standards of review in this case nor my conclusions.

[16] In *Vavilov*, at paras 23-32, the majority sought to simplify how a court selects the standard of review applicable to the issues before it. The majority did away with the contextual and categorical approach taken in *Dunsmuir* in favour of instating a presumption that the reasonableness standard applies. However, the majority noted that this presumption can be set aside on the basis of (1) clear legislative intent to prescribe a different standard of review (*Vavilov*, at paras 33-52), and (2) certain scenarios where the rule of law requires the application of the standard of correctness, such as constitutional questions, general questions of law of central importance to the legal system as a whole and questions regarding the jurisdictional boundaries between two or more administrative bodies (*Vavilov*, at paras 53-64).

[17] The parties agreed that a standard of reasonableness applies. Moreover, there is nothing to rebut the presumption that the standard of reasonableness applies in this case. The application of the standard of reasonableness to these issues is also consistent with the existing jurisprudence prior to the Supreme Court of Canada's decision in *Vavilov*.

[18] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with whether it “bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision” (*Vavilov*, at para 99). Reasonableness is a single standard of review that varies and “takes its colour from the context” (*Vavilov*, at para 89 citing *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59). These contextual constraints “dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt” (*Vavilov*, at para 90). Put in another way, the Court should intervene only when “there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency” (*Vavilov*, para 100). The Supreme Court of Canada lists two types of fundamental flaws that make a decision unreasonable: (1) a failure of rationality internal to the decision-maker’s reasoning process; and (2) untenability “in light of the relevant factual and legal constraints that bear on it” (*Vavilov*, at para 101).

## VI. STATUTORY PROVISIONS

[19] The following statutory provisions of the *IRPA* are relevant to this application for judicial review:

### **Convention refugee**

96 A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political

### **Définition de réfugié**

96 A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d’être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe

opinion,

social ou de ses opinions politiques :

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays ;

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

### **Person in need of protection**

### **Personne à protéger**

97 (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

97 (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture ;

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that

(ii) elle y est exposée en tout lieu de ce pays alors que



country and is not faced generally by other individuals in or from that country,

d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

## VII. ANALYSIS

### A. *Credibility*

[20] The Applicant spends a great deal of time in her written submissions attempting to fault the RPD for its negative credibility finding and ignoring the *Gender Guidelines* and the psychological evidence when assessing her subjective fear.

[21] The fact is, however, that the Decision is mostly an assessment of objective factors and future risk. Where subjective fear and credibility do arise, the RAD demonstrates that it is fully aware of the Applicant's vulnerable status as a rape victim as well as the psychological reports that she submitted. Most of the evidence for the RAD's conclusions is based upon the actions, or inactions, of the officials the Applicant fears and her own failure to move herself away from where they might harm her to somewhere else in China.

[22] The RAD makes this abundantly clear in its Decision when it explains the “Determinative Issue”:

[8] The Appellant has argued that the RPD erred in its finding that she was not credible in her allegations regarding the sexual assault by village officials, and in its assessment of the risk the Appellant would face from her persecutors should she return to China. **The RAD finds that the determinative issue in this claim is the prospective risk the Appellant would face should she return to China. The RAD will therefore not address the credibility arguments relating to corroborative documentation, the delay in leaving China, and issues relating to her Canadian visa applications and interactions with the smuggler.**

[Emphasis added.]

[23] In other words, for the most part, the RAD accepts what the Applicant says occurred, and accepts her subjective fear in its assessment of forward-looking risk. When the RAD says that the Applicant has not established prospective risk, it is not saying that it does not believe the Applicant, it is saying that, even accepting her evidence and her fears she has not, objectively speaking, established that there is more than a mere possibility of persecution if she is returned to China. There is a negative credibility finding with regard to the Applicant’s assertion that the village officials had threatened that they would release the video if she did not have a continuing sexual relationship with them which was contained in an amendment to her BOC, but the RAD reasonably explains why her explanation that she didn’t want to think about it is not convincing. However, this finding does not impact the determinative issue in the Decision that the Applicant did not establish forward-looking risk based upon objective evidence.

[24] At the hearing of this application in Toronto on December 12, 2019, counsel for the Applicant argued strongly that, in para 20 of the Decision, the RAD does not meaningfully

acknowledge and apply the *Gender Guidelines* when considering the Applicant's late amendment to her BOC to include the threat that the village officials would release the video of the rape if she did not have a continuing sexual relationship with them. The RAD found that the Applicant had not established, on a balance of probabilities that such a threat had been made.

[25] However, the RAD also finds that, even if the threat had been made

... the Appellant's refusal to respond to the officials' telephone calls and therefore not have a continuing sexual relationship with them, did not result in the village officials acting on their threat to release the video of the sexual assault. It is now five years since the sexual assault occurred and there is no credible evidence in the record of in the present appeal that the village officials have acted on any of their threats or that they have seriously sought out the Appellant with a view to harming her.

[26] As this finding makes clear, it is the inaction of the village officials that is the basis for the RAD's finding that the Applicant has not established prospective risk.

[27] In any event, when para 20 is read as a whole, it reveals that the RAD does have the *Gender Guidelines* in mind. The Applicant's explanation for not mentioning the threat to release the video until she made her late BOC amendment was that she did not want to think about it. Obviously, this is a direct submission to the RAD to consider her psychological condition and the trauma she suffered when considering the omission and late amendment. The RAD considers this submission and gives full reasons why it is not convincing. The Applicant says that the RAD would have accepted her explanation if it had fully applied the *Gender Guidelines*. This is no more than a disagreement with the RAD's finding and the weight that the Applicant gave to the

explanation. This is not a ground for reviewable error. And, in any event, the RAD finds that, even if the calls were made, this does not establish prospective risk.

[28] After addressing the RPD's treatment of forward-looking risk, the RAD then turns to its own analysis.

[16] The RAD has reviewed the record and has conducted its own assessment of the evidence. The RAD finds that the Appellant has not established that there is a serious possibility that she would be persecuted by the village officials who raped her in March 2014, should she return to China. The RAD has considered that the Appellant remained in China for approximately one year after she was raped and that she was never approached or threatened by the government officials who had sexually assaulted her. Although she was telephoned several times beginning in May 2014, this was about picking up the compensation money. There is no evidence that these telephone calls were of a threatening nature or that the Appellant suffered any consequences by not appearing to collect the money as requested. The RAD has additionally considered that the Appellant continued to work at the same job as a manager of an automobile trading company in the same location in Guangzhou until she left China, and was never approached by the village officials at this location. The RAD has considered that the Appellant testified at the hearing that she feared that the village officials would locate her should she return to China through her identification number which she would have to give in order to obtain employment. However, the RAD finds, given that the village officials did not approach her at her place of employment while she remained in China for a year after the sexual assault, it is unlikely that they would seek her out in this way should she return to China.

[29] When the RAD points out that the Applicant remained in China "for approximately one year after she was raped," it does not do so in order to question whether the rape occurred. The point is that, when she remained in China "she was never threatened by the government officials who has sexually assaulted her." The same point is made about the telephone calls, and the Applicant's continuing to work at her job. The point is that she was never threatened by

telephone, and she was never approached at work, so that “it is unlikely that they would seek her out in this way should she return to China.”

[30] The RAD does question the Applicant’s stated reasons for not changing her telephone number, but there is nothing to suggest that in exploring this issue with the Applicant that the RAD was not “sensitive to the factors which may influence the testimony” of someone who had been raped, and the Applicant does not demonstrate how her answer could have been impacted in this way.

[31] The Applicant again raises the *Gender Guidelines* in relation to the RAD’s findings on her failure to change her telephone number:

[17] The RAD has further considered that, despite allegedly being fearful about the telephone calls from the village officials she received while still in China, she still continued to maintain the same telephone number. The Appellant was asked about this at the hearing and her reason for not changing her telephone number was that she used that number for business and would have needed a long period of time to inform all the work-related people of the change of number. The RAD does not find this explanation to be reasonable given that the Appellant has alleged that the phone calls caused her to be afraid and changing her telephone number and notifying people would have been insignificant as compared to fleeing China.

[32] The Applicant argues that the RAD failed to consider that, if she had changed her telephone number, she would have had to reveal the reason for doing so and she could not do so because of the sense of shame she felt at what had happened. She says the RAD should have considered this.

[33] The difficulty with this explanation was that the Applicant gave an entirely different explanation at the hearing. There is nothing unreasonable or contrary to the *Gender Guidelines* in this finding. The Applicant does not explain how her psychological condition prevented her from putting shame forward as an explanation when she was questioned on this matter. She was represented by counsel. The *Gender Guidelines* cannot be used to set aside findings that are reasonable and based upon the evidence provided.

B. *Misconstruing Evidence*

[34] The Applicant says that the RAD erred by misconstruing evidence about the threats she received from the officials who had raped her.

[35] Specifically, she says that the RAD erred by finding that the telephone calls were not threatening in nature.

[36] The RAD dealt with the telephone calls as follows:

Although she was telephoned several times beginning in May 2014, this was about picking up the compensation money. There is no evidence that these telephone calls were of a threatening nature or that the Appellant suffered any consequences by not appearing to collect the money as requested.

[37] The Applicant asserts in arguments that the officials who made the calls were attempting to lure her to the office under the same pretense that led to her victimization in the first place.

[38] In my view, the Applicant misses the point of what the RAD is saying. The RAD is simply commenting that there was nothing in the telephone calls to suggest that the officials would seek her to harm her if she did not attend to pick up the compensation. And there was nothing compelling the Applicant to attend. In fact, she did not attend and was not harmed. The Applicant says that the officials were attempting to lure her into danger; but this is speculation, and this piece of evidence (the content of the telephone calls) cannot be looked at in isolation. As the Decision makes clear, it is merely one aspect of the Applicant's evidence that does not contain any overt threat to harm her.

[39] The Applicant also argues that the calls were – quite apart from content – threatening *per se* and an obvious attempt to frighten and intimidate her so that, should she return to China, she will again, at the very least, be subjected to this kind of intimidation. However what the Applicant has failed to explain is why she has to be in Canada in order to place herself beyond the reach of telephone calls or any such intimidating behaviours. China is a large country, and there is no suggestion that the officials she fears have any more than a local reach or interest in her.

[40] The Applicant attempts to make the same point when she argues that the RAD erred by not finding a forward-looking risk in the telephone calls. She says “the RAD is stepping into the shoes of the persecutor and impermissibly speculating about their behaviour as perpetrators of sexual violence.” It is, in fact, the Applicant who is speculating. She provided no evidence that they would harm her if she did not attend at their office, and she is now speculating that it is their intention to do so, even though there have been no threats for 5 years.

[41] The Applicant repeatedly accuses the RAD of speculating about forward-looking risk in a way that attempts to reverse the onus of proof, or asks the Court to reweigh the evidence. The RAD's point is that the Applicant presented no evidence to suggest that the officials would harm her if she returned to China. She says that, in making this finding, the RAD was simply speculating that the officials would not harm her. This is not the case. The Applicant did not provide sufficient evidence to establish a forward-looking risk, and she is the one who, in the absence of such evidence, is speculating. This is understandable, given her fears, but subjective fear is not enough to establish s 96 persecution or s 97 risk of harm.

C. *The Psychological Evidence*

[42] The Applicant says that the RAD erred in its assessment of the psychological evidence.

[43] The Applicant says that the RAD unreasonably discounted the psychological reports and their fundamental assessment that the Applicant would be re-traumatized if she is returned to China.

[44] The psychological reports had no evidentiary value in establishing that the officials she fears would harm the Applicant if she returns to China, and this is the basis of her refugee claim. The reports can only speak to her subjective fears.

[45] Psychological trauma on return may have some relevance in a humanitarian and compassionate application, but it is not, *per se*, sufficient grounds for refugee protection.



[46] Secondly, the RAD's objections to the reports are all reasonable and valid grounds to discount them. In particular the reports do not establish that whatever the Applicant suffers from cannot be treated in China.

[47] The Applicant also says that, as with the *Gender Guidelines*, the RAD failed to consider the psychological reports in conjunction with its credibility assessment. However, para 20 of the Decision specifically refers to and deals with the psychological report.

[48] As the RAD points out, the determinative issue in this Decision was not the Applicant's credibility but the "prospective risk the Appellant would face should she return to China." In addressing this risk, the RAD examines objective factors in a way that the Applicant has not persuasively challenged. Some of these important factors are listed by the Respondent and it is notable that the Applicant does not address them directly but attempts to divert the Court to psychological issues and the *Gender Guidelines*. But the following are a clear basis for the Decision on the lack of forward-looking risk:

- The Applicant was never approached or threatened by the government officials who had sexually assaulted her.
- Although the Applicant was telephoned many times in May 2014, this was about picking up the compensation money.
- There is no evidence that the telephone calls were of a threatening nature or that she suffered any consequences by not appearing to collect the money as requested.

- The Applicant continued to work at the same job in the same location until she left China and was never approached by the village officials. It is unlikely that they would seek her out should she return.
- Despite being fearful about the telephone calls, the Applicant maintained the same telephone number. Changing her telephone number and notifying people would have been insignificant as compared to fleeing China.
- Her family members were not approached by the village officials at any time after the assault.
- The Applicant's in-laws were never directly approached by the village officials seeking her whereabouts prior to her exit from China.
- The preponderance of the evidence shows that the village officials have made no attempts to locate or harm the Applicant after the sexual assault.
- She did not establish that she was threatened and that the video of the rape would be released unless she had a continuing sexual relationship with the village officials.

D. *State Protection*

[49] The Applicant says that the RAD failed to consider the operational adequacy of state protection.

[50] The RAD, in fact, makes no state protection findings in this Decision because the Applicant did not establish that she is at risk from the officials who she claims to fear.

VIII. CERTIFICATION

[51] Counsel agree there is no question for certification and the Court concurs.

**JUDGMENT IN IMM-3335-19**

**THIS COURT'S JUDGMENT is that**

1. The application is dismissed.
2. There is no question for certification.

“James Russell”

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Judge

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

**DOCKET:** IMM-3335-19

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**PLACE OF HEARING:** TORONTO, ONTARIO

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**DATED:** JANUARY 23, 2020

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