

Federal Court



Cour fédérale

Date: 20210525

Docket: IMM-2106-20

Citation: 2021 FC 475

Ottawa, Ontario, May 25, 2021

PRESENT: Madam Justice Simpson

BETWEEN:

**SHUNMING WU
YUEPING PENG**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This application is for judicial review of a decision of the Refugee Appeal Division [the RAD] of the Immigration and Refugee Board [the Board] dated March 4, 2020 [the Decision], in which it dismissed the Applicants' appeal from a decision of the Refugee Protection Division [the RPD] of the Board refusing their refugee claim.

[2] The Applicants are husband and wife who are citizens of China. They claimed to fear persecution for publicly opposing the amount of compensation offered following the expropriation of their home. The RAD Member dismissed the appeal on the basis of credibility, finding that the Applicants had omitted a key event from the narrative in their Basis of Claim form [BOC Narrative]. As well, they failed to provide reasonably available corroborating evidence about how their passports were returned to them. Lastly, their evidence that two unrelated smugglers used identical fraudulent information was not found to be credible.

[3] In July 2016, the Chinese government sent written expropriation notices to the Applicants informing them that their home would be one of 40 to be demolished to make way for the construction of new condominiums. The Applicants were offered compensation equal to approximately half the appraised value of their home. Unsatisfied with that compensation, they wrote petition letters to the government, along with many other affected homeowners.

[4] The government held a town meeting in September 2016 and offered the Applicants a discount on the purchase of a new home or a slight increase in the compensation offered for their expropriated home.

[5] The Applicants, along with three others, organized protests attended by approximately fifty villagers. At the first protest, they had an argument with a government employee and at the second protest, they did not interact with any government personnel.

[6] In addition to these protests, the Applicants say they attempted to take legal action. Their BOC Narrative on this topic reads as follows:

In China, a country with dictatorship government management, people's legitimate rights and interests are arbitrarily trampled. We found a lawyer to have a consultation, however the lawyer dared not to take our case. We also went to Jiangyan City People's Court, but the court could not put the case on record.

[7] On October 23, one of the protest organizers was arrested by the Public Security Bureau [the PSB] and this prompted the Applicants to go into hiding at a home of a cousin. While they were in hiding, PSB officials went to the home of the female Applicant's parents trying to find them.

[8] The Applicants obtained US visas through a smuggler. They were later cancelled. Through the services of a second smuggler, they obtained Canadian visas and traveled to Canada in April 2017.

[9] The RPD dismissed the Applicants' claim on the basis of credibility. This decision was appealed to the RAD and dismissed at that level. The Member found that the determinative issue was credibility. Four issues relating to credibility were identified and the first related to an omission from the BOC Narrative.

[10] Before the RPD, the male Applicant testified that the Applicants had taken the dispute about their compensation to the People's Court. The RPD Member asked why the People's Court was not mentioned in the BOC Narrative [the Omission]. The male Applicant explained that he

did not know that so much detail was required. In making this explanation, the male Applicant appeared to accept that he had not mentioned the People's Court in his BOC Narrative.

[11] The RPD made a negative credibility finding based on the Omission and the RAD upheld this finding, saying that testimony about taking the dispute to the People's Court was added in an effort to bolster the claim. As well, because they mentioned the People's Court, the RAD also disregarded the petition letters the Applicants had sent to the government.

[12] Neither the RPD nor the RAD appreciated that the People's Court had in fact been mentioned in the BOC Narrative [the Factual Error]. In other words, there was no Omission.

[13] The fact that the People's Court was, in fact, mentioned in the BOC Narrative was raised for the first time on judicial review. The Respondent says this Factual Error cannot be considered on judicial review because the reasonableness of a RAD decision cannot be impugned on the basis of an issue that was not before it. In this regard, the Respondent relies on a decision of the Federal Court of Appeal in *Canada (Citizenship and Immigration) v. R.K.*, 2016 FCA 272.

[14] In that decision, the Federal Court of Appeal referred to a decision of the Supreme Court of Canada in *(Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, in which it held that judges have discretion to consider new matters on judicial review unless it would be improper to do so.

[15] I am exercising my discretion to consider the Factual Error as a basis for finding that the Decision was unreasonable in part because of the unusual nature of the RAD's mandate. It is to perform an independent review of the RPD's Decision and, in my view, in that context, it was required to read the BOC Narrative. Had it done so it would have discovered the Factual Error. In the alternative, the Decision was unreasonable because it was unfair due to the RAD's reliance on the Factual Error.

[16] In this context, I am mindful of the decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, which says that decisions must be justifiable to be reasonable. In my view, a decision based on a BOC Omission that did not occur cannot be justified.

[17] The next issue is whether the Factual Error was material. The RAD described the People's Court as a relevant matter, but the Respondent says it was not because the core issue is whether or not the Applicants came to the attention of the PSB. She submits, and I agree, that there was no evidence that the PSB would be aware of a case that was not accepted for hearing by the People's Court.

[18] However, the finding that the male Applicant was bolstering his claim also caused the RPD to reject the three petition letters which were written to various government officials. These letters were given little weight because they referred to the People's Court. It is not known whether they would have come to the attention of the PSB. Accordingly, I cannot conclude that the BOC Omission was immaterial. Further, it certainly colored the RPD's and the RAD's view

of the male Applicant's honesty when, in fact, his testimony was consistent with his BOC and he was not bolstering his claim by referring to the People's Court.

[19] For all these reasons, judicial review will be allowed and the RAD decision will be set aside.

[20] A question for certification for appeal was posed by counsel for the Respondent. It reads:

Does the decision of the *Federal Court of Appeal in Canada (Minister of Citizenship and Immigration) v R. K.*, 2016 FCA 272 mean that there is no discretion on Judicial Review to consider an issue not raised on appeal to the Refugee Appeal Division?

[21] In my view, this question is appropriate for certification since it arises from the case. Further, the answer would be dispositive of the appeal; and, it transcends the interests of the parties.

[22] The answer to the question will allow judges to understand whether discretion exists so that errors, and matters which were overlooked, can be considered and, if appropriate, corrected.

[23] The *Immigration and Refugee Protection Act*, S.C. 2001, c. 27), lists the following objective in section 3:

(2) The objectives of this Act with respect to refugees are [...]

(e) to establish fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system, while upholding Canada's respect for the human rights and fundamental freedoms of all human beings;

In my view, whether discretion exists as a means of achieving this objective is a question of general importance.

I. **CONCLUSION**

[24] The application for judicial review will be allowed.

JUDGMENT IN IMM-2106-20

THIS COURT’S JUDGMENT is that

1. the judicial review is allowed, the Decision is set aside, and the matter is to be reconsidered by another Member of the RAD; and
2. the following question is hereby certified for appeal:

Does the decision of the *Federal Court of Appeal in Canada (Minister of Citizenship and Immigration) v R. K.*, 2016 FCA 272 mean that there is no discretion on Judicial Review to consider an issue not raised on appeal to the Refugee Appeal Division?

“Sandra J. Simpson”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2106-20

STYLE OF CAUSE: SHUNMING WU et al. v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: BY VIDEOCONFERENCE USING ZOOM AND BY
TELECONFERENCE

DATE OF HEARING: MAY 5, 2021, MAY 7, 2021

JUDGMENT AND REASONS: SIMPSON J.

DATED: MAY 25, 2021

APPEARANCES:

Hart Kaminker FOR THE APPLICANTS

Maria Burgos FOR THE RESPONDENT

SOLICITORS OF RECORD:

Kaminker & Associates FOR THE APPLICANTS
Barrister and Solicitor
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT
Department of Justice Canada
Toronto, Ontario