Federal Court Cour fédérale

Date: 20211004

Docket: IMM-3852-20

Citation: 2021 FC 1025

Ottawa, Ontario, October 4, 2021

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

LIANDONG YE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant is a national of China. He claims that he fears persecution in China due to his political opinion concerning land expropriation. The Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada refused the Applicant's claim for refugee protection. The RPD found that the Applicant had not provided credible or trustworthy evidence and had not established on a balance of probabilities that he is wanted by the Public Security Board [PSB] or Chinese authorities. The Applicant appealed the RPD's decision to the Refugee

Appeal Division [RAD]. By a decision dated April 5, 2020, the RAD dismissed the Applicant's appeal and, pursuant to s. 111(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], confirmed the RPD's decision that the Applicant is neither a Convention refugee nor person in need of protection pursuant to ss. 96 and 97 of IRPA, respectively. This this the judicial review of the RAD's decision.

Decision under review

[2] The RAD accepted new evidence submitted by the Applicant that was not before the RPD. This was comprised of two handwritten letters from the Applicant's wife, Shen [Shen Letters], and a letter from the United States Citizenship and Immigration Services [USCIS Letter]. Having accepted the new evidence, and although the Applicant had not requested an oral hearing, the RAD considered whether an oral hearing was required. The RAD concluded that it was not, as the criteria set out in s. 110(6) of the IRPA had not been met.

[3] The RAD agreed with the Applicant that the RPD's failure to hear his wife's testimony by teleconference constituted a breach of procedural fairness. However, because the RAD found that the breach did not affect the overall outcome or core of the claim, it rejected the Applicant's request to send the claim back to the RPD for re-determination referencing *Marin v Canada (Citizenship and Immigration)*, 2018 FC 243 at paragraphs 38 to 42 [*Marin*]. The RAD also found that the breach of procedural fairness was remedied by the RAD's acceptance of the Shen Letters as new evidence. The RAD assessed these letters and found that they lacked probative value and gave them little weight in corroborating the Applicant's testimony about how and when the PSB continues to look for him. The RAD also found that the Applicant's testimony that

he had previously applied for but had been refused United States visas was not corroborated by the USCIS Letter and that this inconsistency adversely affected the Applicant's overall credibility.

[4] The RAD accepted the Applicant's argument that, when assisted by a smuggler, exiting China on one's own passport is not necessarily implausible. However, based on its review of the evidence, the RAD agreed with the RPD that the Applicant was able to leave China undetected because he was not a person of interest to the PSB for any reason.

[5] The RAD noted that the Applicant had omitted to include an alleged September 30, 2017 visit by the PSB in his Basis of Claim narrative [BOC]. The RAD found that the Applicant had embellished this and that the PSB had not visited his home on that date. Further, the Applicant had provided conflicting evidence to the RPD regarding whether he was wanted for arrest before or after he left China. The RAD found that this contradictory testimony undermined the Applicant's credibility regarding whether he was a person of interest to the PSB at the time he left China thereby requiring the assistance of a smuggler. The RAD also found that the Applicant was being purposefully evasive about the role of the smuggler and the truthfulness of his visa information. Based on its assessment of the summons allegedly issued to the Applicant and information contained in the National Documentation Package [NDP], the RAD found that the Applicant's summons does not conform to the objective sample summons in the documentary evidence. The RAD also noted the prevalence of fraudulent documents in China and found that, on the balance of probabilities, the summons is fraudulent. The RAD also found that the Applicant's other supporting documents are not credible.

[6] The RAD concluded that the RPD did not err in finding that the Applicant is not credible in his allegations and that the Applicant is not wanted by the PSB for opposing land expropriation policy. The RAD therefore upheld the RPD's decision.

Issues and standard of review

[7] In my view, the issues raised by the Applicant can be best addressed when reframed as follows:

i. Did the RAD err in finding that the RPD's breach of procedural fairness was remedied and by not remitting the claim back to the RPD for redetermination?

ii. Did the RAD misapprehend the evidence rendering the decision unreasonable?

[8] Questions of procedural fairness are reviewable on the standard of correctness (see *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; and *Mission Institution v Khela*, 2014 SCC 24 at para 79). Owing no deference to the administrative decision maker, the court must consider "whether the procedure was fair having regard to all the circumstances" (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 54-56).

[9] With respect to the first issue, the Applicant submits that the RAD erred in its application of the *Marin* exception and that this error is reviewable by this Court on the correctness standard because it is related to the duty of procedural fairness. As discussed below, whether or not the RAD erred in applying *Marin* is not determinative. The determinative issue is whether the RAD erred in determining that the RPD's breach of procedural fairness was remedied. This Court has

previously held that such issues are to be determined on the correctness standard (*McBain v Attorney General of Canada*, 2016 FC 829 at paras 38-40 [*McBain FC*] aff'd 2017 FCA 204]).

[10] As to the second issue, as established by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] there is a presumption that reasonableness is the applicable standard whenever a Court reviews an administrative decision (*Vavilov* at paras 16, 23, 25). That presumption can be rebutted in two types of situations, neither of which are asserted by the Applicant or arise in this case (*Vavilov* at paras 17, 69). A decision is reasonable if it is justified, transparent and intelligible (*Vavilov* at paras 15, 99). When a decision is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and the law that constrain the decision maker, it is reasonable and is to be afforded deference by a reviewing court (*Vavilov* at para 85).

Analysis

Issue 1: Did the RAD err in finding that the RPD's breach of procedural fairness was remedied and by not remitting the claim back to the RPD for redetermination?

[11] The Applicant notes that the RAD found that the RPD had breached its duty of procedural fairness by refusing to permit the Applicant's wife to testify by teleconference. The Applicant submits that, having made that finding, the RAD erred by rejecting the Applicant's request that the matter be sent back to the RPD for redetermination. This error arose from the RAD's finding that the *Marin* exception to the general rule that a breach of procedural fairness will require the decision to be remitted back for reconsideration applies in this case (I note that while the RAD and the Applicant rely on *Marin*, the limited exception actually derives from

Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board, [1994] 1 SCR 202)). The Applicant submits that his wife's testimony could have led to a different understanding of the alleged September 30, 2017 visit by the PSB and that the RAD erred in finding that the breach of procedural fairness in disallowing her to testify did not go to the core of his claim.

[12] The Applicant also submits that, contrary to the RAD's finding, the purported remedy does not actually cure the breach. The RAD's decision that the breach has been remedied is incorrect, or at least unreasonable, because the RAD's reasons lacks justification and transparency.

[13] Conversely, the Respondent submits that a breach of procedural fairness may be overlooked if it is beyond doubt that it had no material effect on the decision. Further, the RAD has the power to make credibility findings of its own on the basis of the record and without requiring a hearing to be held.

[14] In its reasons, the RAD found that the RPD procedural fairness breach did not affect the "overall outcome of the Applicant's claim". It stated that it was guided by *Marin* and that the claim fit within its limited exception rule as the breach did not "affect the core of the claim". The RAD stated that its following analysis provided its reasons for upholding the RPD's decision, in spite of the breach. That analysis pertained to the breach of fairness being remedied by the RAD's acceptance of the Shen Letters into evidence.

[15] In *Marin*, when considering whether the RAD had breached procedural fairness by raising a new issue and not giving the applicant an opportunity to respond, the Court reviewed the jurisprudence on point and concluded that the RAD's finding did not meet the definition of a new issue as it was not to be legally and factually distinct from the grounds of appeal raised by the parties. The Court then continued, finding that:

> [37] The RAD can make independent credibility findings, without putting them to the Applicant and giving him an opportunity to make submissions: *Koffi*, above at para 38; see also *Ortiz*, above at para 22. In other words, the failure to give an applicant an opportunity to respond to a credibility finding does not necessarily constitute a breach of procedural fairness.
>
> [38] In any event, I agree with the Respondent that the Applicant's credibility was the determinative issue before the RPD and the RAD and that there were sufficient reasons to dismiss his appeal apart from the inconsistencies in the documents identified by the RAD.
>
> [39] As a general rule, a breach of procedural fairness will render a decision void and the matter will be remitted for reconsideration. However, there is a limited exception to this rule. A reviewing court may disregard a breach of procedural fairness "where the demerits of the claim are such that it would in any case be hopeless": *Mobil Oil Canada Ltd et al v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202 at 228, [1994] SCJ No. 14 (QL) [*Mobil Oil*] citing W Wade, Administrative Law (6th ed. 1988) at 535; see also *Yassine v Canada (Minister of Employment and Immigration)*, (1994) 172 NR 308, 27 Imm LR (2d) 135 at para 9 (FCA) [*Yassine*]. In other words, the limited exception applies in instances where the outcome is legally inevitable: *Canada (AG) v McBain*, 2017 FCA 204 at para 10 [*McBain*].
>
> [40] This limited exception, first set out in *Mobil Oil*, above, has been applied by the Federal Court and the Federal Court of Appeal: see for example *Canada (Minister of Transport, Infrastructure and Communities) v Farwaha*, 2014 FCA 56 at para 117 [*Farwaha*]; *Ilaslan v Hospitality & Service Trades Union, Locale 261*, 2013 FCA 150 at para 28 [*Ilaslan*]; *Yassine*, above; *McBain,* above; *Canada (Human Rights Commission) v Canada (Attorney General)*, 2012 FC 445 at para 203; *Dhaliwal v*

> *Canada (MCI)*, 2011 FC 201 at paras 25-26; *Singh v Canada (MCI)*, 2013 FC 807 at para 1.
>
> [41] In the circumstances, even if I had been satisfied that the time stamps constituted a "new issue" requiring that the Applicant be given an opportunity to respond, this is not a case in which I would have found it necessary to return the matter for reconsideration before a different RAD. The alleged breach was not of such a material nature that it would have justified quashing of the RAD's decision and remitting it for a third determination by a different officer: see for example *Farwaha*, above at para 117; *Ilaslan*, above at para 28.
>
> [42] It is apparent that the decision maker would have reached the same decision notwithstanding the time stamp differences and no purpose would be achieved by remitting the appeal for reconsideration. Although it may have been preferable for the RAD to have given the Applicant notice of the inconsistencies and to have provided him with an opportunity to offer an explanation of the time stamp differences, the result was inevitable given the RAD's other findings.

[16] In essence, in *Marin* the ultimate conclusion was that, even if there had been a breach of procedural fairness arising from the raising of a new issue on appeal, given the RAD's other findings, the alleged breach was not of such a material nature that it would have justified the quashing of the RAD's decision and remitting it for determination. In my view, in effect, this was the point the RAD was making in this case in stating that the RPD's breach of procedural fairness did not affect the overall outcome of the claim.

[17] In any event, even if the RAD erred in finding that the *Marin* exception applied, if the breach was satisfactorily remedied then it would not warrant re-determination. As stated by the Federal Court of Appeal in *Canada (Attorney General) v McBain,* 2017 FCA 204 [*McBain FCA*]:

> [9] Breaches of procedural fairness will ordinarily render a decision invalid, and the usual remedy is to order a new hearing (*Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, [1985] S.C.J. No. 78 (QL)).
>
> [10] **Exceptions to this rule exist where the outcome is legally inevitable** (*Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202 at pp. 227-228; 1994 CarswellNfld 211 at paras. 51-54) [*Mobil Oil*] **or where the breach of procedural fairness has been cured in the appellate proceeding** (*Taiga Works Wilderness Equipment Ltd. v. British Columbia (Director of Employment Standards)*, 2010 BCCA 97, [2010] B.C.J. No. 316 (QL) at para. 38 [*Taiga Works*]).
>
> (emphasis added)

[18] The Applicant also refers this Court to *Ayele v Canada (Citizenship and Immigration),* 2007 FC 126, quoting paras 9-13 [*Ayele*]. There the IAD refused to hear a witness that the applicant wished to call on the basis that the applicant was not credible and, even if the witness corroborated his testimony, it would not affect the outcome of the matter. It was argued by the respondent that any breach of procedural fairness was not material to the IAD's decision. This Court found that the IAD had breached procedural fairness by refusing to hear a witness who was expected to give relevant evidence that would have supported the applicant's appeal. I note, however, that unlike this matter, there was no suggestion that the breach had been remedied on appeal.

[19] The Respondent refers to *Han v Canada (Citizenship and Immigration)* 2019 FC 449 [*Han*]. In *Han* the RAD rendered its decision without the benefit of written representations and original birth certificates. The applicants claimed that this was a breach of procedural fairness. Justice Fothergill held that a breach of procedural fairness may be overlooked if it is beyond doubt that it had no material effect on the decision (citing *Nagulesan v Canada (Minister of*

Citizenship and Immigration), 2004 FC 1382 at para 17). He found that even if the RAD had been provided with the original documents this would not have been sufficient to outweigh the many defects that were enumerated in the RAD's decision.

[20] Thus, in my view, the real question in this matter is whether or not the RPD's breach of procedural fairness had a material effect. That is, in these circumstances, whether the RAD's acceptance of the Shen Letters remedied the breach.

[21] To make this determination it is necessary to first review the content of the Shen Letters. The first of these letters [Shen Letter #1] states the Applicant's wife's name and that she had been willing and ready to testify on behalf of the Applicant at the March 16, 2018 RPD hearing. Presumably, it was submitted to the RAD to support the Applicant's appeal submission that the RPD's refusal to allow his wife to testify was a breach of procedural fairness. In my view, the content of this letter has no relevance to the Applicant's submission that the RAD erred with respect to the remedying of the RPD procedural fairness breach.

[22] The second letter [Shen Letter #2] states "incident happened on September 30th, 2017 and November 17th, 2017". It is addressed to whom it may concern and states that the letter is to elaborate incidents that happened on "both September 30, 2017 and November, 17, 2017". The letter states that "on September 30, 2017 three PSB came to" her home looking for her husband. When she told then she did not know her husband's whereabouts, the PSB members asked her to tell him to go to the police office when he was back. The letter then states that "[o]n November 17, 2017, PSB came back again" to her home and asked if her husband had been home since

September 30, 2017. When she told them that he had not, they gave her a summons and asked her to give it to her husband if he came back.

[23] The RAD accurately described the content of both Shen Letters. As to Shen Letter #2, the RAD found that the Applicant's wife provided very little detail about the alleged incidents of persecution, although the letter indicates that its purpose was to elaborate on incidents that happened on September 30, 2017 and November 17, 2017. Further, the Applicant had testified that the PSB had come looking for him on November 10, 2017 to issue him a summons. However, Shen Letter #2 states that the PSB delivered the summons on November 17, 2017. The RAD also pointed out that the September 30, 2017 incident described in Shen Letter #2 was not found in the Applicant's BOC or his BOC amendments. Given this, the RAD found that the Applicant's wife's evidence lacked probative value and afforded it little weight in corroborating the Applicant's testimony about when and how the PSB were looking for him.

[24] In a written statement accompanying his appeal to the RAD, the Applicant stated that he sought to admit new evidence under s. 110(4) of the IRPA but that he did not request that an oral hearing be held pursuant to s. 110(6). In its reasons, the RAD noted this but stated that because the new evidence had been accepted, the RAD was required to assess whether or not an oral hearing required. It noted that for an oral hearing to be granted all three of the criteria set out in s. 110(6) had to be met. The new evidence must raise a serious issue with respect to the credibility of the Applicant, it must be central to the decision, and, if accepted, would justify allowing or rejecting the claim. With respect to the Shen Letters, the RAD found that whether or not that new evidence corroborates the Applicant's allegations did not, in and of itself, justify allowing the

Applicant refugee protection. The RAD found that it must assess the rest of the evidence before deciding the Applicant's credibility. As the new evidence did not meet all three s. 110(6) criteria, an oral hearing was not granted.

[25] Shen Letter #2 states its purpose – which was to elaborate on the two incidents that it describes. The Applicant knew from the RPD hearing and its decision that his credibility was at issue, in particular when and how he became aware that the PSB were looking for him. Although the remedy sought by the Applicant was that the RAD remit the matter back to the RPD for redetermination because his wife was denied the opportunity to testify, nothing precluded the Applicant's wife from providing any further details in the new evidence in support of that request.

[26] Further, as the RAD pointed out, in his BOC the Applicant made no mention of the September 30, 2017 visit by the PSB. I note that in his BOC the Applicant states that on July 17, 2017, he and others visited a petition bureau in Hebel province but their concerns were not received. The next event he mentions is that when they realized they would get no help from the Hebei office, the Applicant travelled with others to Beijing "in October 2017" but, due to the presence of PSB officers at a train station, on the same day, he went into hiding at a friend's house. His amended BOC also does not mention a visit by the PSB to his home on September 30, 2017, which predates his trip to Beijing.

[27] That said, from the partial transcript excerpts provided by the Applicant it appears that in his testimony he stated that he had phoned his wife on September 30 and she told him that the

PSB had been to their home looking for him, although it is unclear from the excerpts provided if the PSB had attended on that date or on an earlier occasion.

[28] In any event, the RAD dealt with the omission from the Applicant's BOC of the September 30, 2017 visit later in its reasons. There the RAD noted that when confronted with this at the RPD hearing the Applicant testified that he did not know if the BOC content had been translated properly and that the RPD had rejected this explanation. The RAD also noted that the Applicant had not made any submissions as to the omission in his memorandum. The RAD stated that, having conducted its own independent analysis, it agreed with the RPD. The RAD noted that, prior to the RPD hearing, the Applicant submitted a BOC amendment which did not address the omission. And, in post hearing submissions, the Applicant submitted fresh translations of various documents because translation errors had been noted at the hearing. However, no new translation for that particular BOC paragraph had been provided. The RAD also stated that it was uncertain how the omission of an entire incident could be the result of poor translation. The RAD accordingly found that the Applicant had embellished his claim and, on a balance of probabilities, that the PSB did not visit his home on September 30, 2017.

[29] Moreover, the Applicant's submissions as to why the proposed remedy of the breach of procedural fairness is inadequate are not compelling.

[30] The Applicant states that the decision to remedy the breach was incorrect and that it was unreasonable as it lacked justification and transparency, having failed to reference the *Taiga* factors in its analysis of its proposed remedy. Further, that paragraph 30 of the RAD's reasons

demonstrate the inadequacy of the remedy. The Applicant submits that the RAD considered the content of Shen Letter #2, which states that the PSB came looking for the Applicant on September 30, 2017 and November 17, 2017. However, his documentary evidence (presumably the summons which is dated November 10, 2017 and which the RAD found to be fraudulent) and his testimony before the RPD was that the second incident occurred on November 10, 2017. The Applicant suggests that there is only a “one character difference” in the date given in his wife’s letter (November 17, 2017) and in his evidence (November 10, 2017) and this may well have been a typographic error which could have been addressed if the RAD had allowed her to testify.

[31] In my view, this submission is speculative and is of no merit. Shen Letter #2 refers to the date “November 17, 2017” at three separate places in the very short letter. This is not explained by a possible typographical error. The Shen Letter #2 is therefore inconsistent with the Applicant’s testimony and his documentary evidence as to when the summons was delivered. I also note that the Applicant’s BOC is dated November 13, 2017 and, as the RAD noted, it makes no mention of the PSB looking for the Applicant on November 10, 2017. Further, the Applicant elected not to file a personal affidavit in support of his application for judicial review. While this is not fatal in and of itself, where there is no evidence based on personal knowledge filed in support of an application for judicial review, any error asserted by an applicant must appear on the face of the record (see *Ebrahimshani v Canada (Citizenship and Immigration)*, 2020 FC 89, at para 20). In this case, there is no evidence before me supporting the suggestion that Shen Letter #2 contains relevant typographical errors or providing any other explanation as to why the letter is inconsistent with the Applicant’s testimony with respect to the date of the PSB’s alleged second visit. More significantly, there is no evidence before me that, had she been permitted to

testify, that the Applicant's wife would have provided more information as to the alleged September 30 and November 17, 2017 visits by the PSB than contained in Shen Letter #2.

[32] Here, because the RAD admitted the new evidence it was entitled to assess it, including its probative value, credibility and the weight to be afforded to it. The RAD's assessment of Shen Letter #2 did not raise any new credibility concerns not already known to the Applicant. Shen Letter #2 was inconsistent with and did not corroborate the Applicants' evidence as to the date of the second PSB visit. While Shen Letter #2 did corroborate the Applicant's testimony before the RPD that there had been a visit by the PSB on October 30, 2017, it did not overcome the RAD's concerns with the Applicant's omission of this alleged event from his BOC and his amended BOC, nor did it support his prior explanation that the omission was due to a translation error – which explanation was rejected by the RPD and the RAD. The RAD also assessed the Shen Letters in the context of the requirements to be met to hold an oral hearing under s. 110(6) and found that whether or not the Shen Letter #2 corroborated the Applicant's allegations, it did not in and of itself, justify allowing the Applicant refugee protection and, therefore, an oral hearing was not warranted. That is, it Shen Letter #2 did not overcome the RAD's other credibility concerns. Based on its assessment of the other evidence, the RAD upheld the RPD's decision.

[33] As stated in *McBain FC (aff'd* 2017 FCA 204*)* procedural fairness breaches can be cured by appeal tribunals in appropriate circumstances:

> [46] Upon review of the pertinent case law, I agree with the Respondent that in certain circumstances, administrative appellate tribunals have been found to have the power to cure procedural lapses or unfairness arising in a subordinate adjudication (*Schmidt*, at para 16; *Taiga Works*, above, at para 17). In *Taiga Works*, the British Columbia Court of Appeal thoroughly canvassed the

relevant jurisprudence regarding an appellate tribunal's power to cure breaches of procedural fairness. At paragraphs 36 to 38, the Court wrote:

> 36 The fact that the Supreme Court of Canada mentioned both *Harelkin* and *Cardinal* with approval means that *Cardinal* cannot be taken to have overruled the proposition established by *Harelkin* (and *King*) that a breach of the rules of natural justice or procedural fairness can be cured by an appellate tribunal in appropriate circumstances.
>
> 37 I think it is fair to say that *Cardinal* stands for the proposition that a breach of the rules of natural justice or procedural fairness cannot be overlooked on the basis that the reviewing court or appellate tribunal is of the view the result would have been the same had no breach occurred. As demonstrated by the post-*Cardinal* authorities to which I have referred, *Harelkin* and *King* continue to stand for the proposition that appellate tribunals can, in appropriate circumstances, cure breaches of natural justice or procedural fairness by an underlying tribunal. The question then becomes how one should determine whether such breaches have been properly cured.
>
> 38 As did Huddart J.A. in *International Union of Operating Engineers* and Berger J.A. in *Stewart*, I prefer the approach advocated by de Smith, Woolf and Jowell in *Judicial Review of Administrative Action*. One should review the proceedings before the initial tribunal and the appellate tribunal, and determine whether the procedure as a whole satisfies the requirements of fairness. One should consider all of the circumstances, including the factors listed by de Smith, Woolf and Jowell.
>
> [Emphasis added]

[47] The factors a court should consider in deciding whether the curative capacity of the appeal has ensured that the proceedings as a whole have reached an acceptable level of fairness are:

> a) the gravity of the error committed at first instance;

> b) the likelihood that the prejudicial effects of the error may also have permeated the rehearing;
>
> c) the seriousness of the consequences for the individual;
>
> d) the width of the powers of the appellate body; and
>
> e) whether the appellate decision is reached only on the basis of the material before the original tribunal or by way of rehearing *de novo*.
>
> *Taiga Works*, at para 28, citing de Smith, Woolf & Jowell, *Judicial Review of Administrative Action*, 5th ed (London: Sweet & Maxwell, 1995) at 489-90; *Schmidt*, at para 16.

[34] In this matter, the refusal of the RPD to permit the Applicant's wife to testify was a significant breach of procedural fairness as recognized by the RAD. However, I am not persuaded that the prejudicial effects of the error permeated the RAD's hearing of the appeal. The RAD considered the content of and weighed Shen Letter #2, the purpose of which was "to elaborate on the events of September 30 and November 17, 2017". Having done so, the RAD reached the view that an oral hearing was not required. Significantly, as noted above, there is no evidence before this Court suggesting that, had the Applicant's wife given testimony, it would have expanded upon or differed from the content of Shen Letter #2. The Applicant merely speculates as to a typographical error.

[35] In my view, this is not a situation like *McBain FC* where there were multiple procedural breaches in the initial hearing, including the extensive reliance upon immaterial, irrelevant and thus inadmissible evidence that was prejudicial to Applicant. Despite recognizing this, at the appeal level inadmissible evidence was considered, thereby breaching procedural fairness. This Court held that the nature of the procedural breaches at the initial level and their apparent

pervasiveness through the record relied upon at the appeal level were not easily remedied in the absence of a *de novo* hearing. Conversely, in this matter, the breach was discrete and the evidence that the Applicant's wife would have testified to was considered by the RAD by way of the new evidence.

[36] However, the consequences to the Applicant are serious as the RPD's refusal of his claim for protection was upheld by the RAD.

[37] As to the last two *Taiga* factors, in my view these are tied to the Applicant's submission that the RAD erred in not remitting the matter back to the RPD for redetermination.

[38] This is because there are statutory constraints applicable to when the RAD can remit a decision back to the RPD for re-determination.

[39] Section 111 of the IRPA details the available remedies once the RAD has considered an appeal. The RAD can only remit a matter back to the RPD for redetermination where the RAD forms the view that RPD was wrong in law, in fact, or in mixed fact in law, *and* the RAD is of the opinion that it cannot confirm or set aside the RPD's decision and make a final determination without hearing the oral evidence presented at the RPD. This interpretation of s. 111 was confirmed by the Federal Court of Appeal in *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 103. And, although concerned with errors of fact, *Liao v Canada (Citizenship and Immigration)*, 2017 FC 1163 at paras 31-32 demonstrates that the RAD is not compelled to remit a matter back to the RPD for redetermination when it identifies an error.

[40] Here the RAD agreed that the RPD had breached procedural fairness by failing to permit the Applicant's wife to testify by teleconference. Thus, there is no question that the RPD erred in law (*Newfoundland and Labrador Nurses's Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 22), thereby satisfying s. 111(2)(a). However, under s. 111(2)(b), to remit the matter back, the RAD also had to be of the opinion that it could not confirm the RPD's decision without hearing evidence "that was presented to the RPD". The difficulty in this case is that there was no evidence from of the Applicant's wife before the RPD because of the RPD's breach of procedural fairness. Thus, this does not fit within situation described within s. 111(2)(b) where the RAD could have formed the opinion that it could not confirm the RPD's decision without hearing evidence "that was presented to the RPD" (s 111(2)(b)).

[41] Thus, there is a live issue, not addressed by the parties, as to whether the RAD even had the authority to remit the matter back to the RPD in light of the prevailing statutory constraints and factual circumstances.

[42] As to the final *Taiga* factor, whether the appellate decision is reached only on the basis of the material before the original tribunal or by way of rehearing *de novo*, an appeal before the RAD is not a true *de novo* proceeding (*Huruglica* at para 79). Rather, RAD hearings are intended to be conducted on the record that was before the RPD, "except in limited cases where new evidence would be admitted and the requirements of subsection 110(6) were fulfilled" (*Huruglica* at para 97). Viewed in this context, the route that was clearly open to the Applicant and to the RAD to facilitate the testimony of the Applicant's wife was an oral hearing pursuant

to s. 110(6). As acknowledged by the Applicant when appearing before me, by doing so, the RPD's procedural breach could have been remedied.

[43] However, to get to that point the s. 110(6) threshold had to be met. In that regard, the RAD considered the new evidence as described in Shen Letter #2. The RAD found that whether or not that new evidence corroborates the Applicant's allegations did not, in and of itself, justify allowing the Applicant refugee protection and therefore did not meet the requirements of s. 110(6) for an oral hearing. Further, for the reasons that it set out, the RAD afforded the Shen Letters little weight in corroborating the Applicant's testimony about when and how the PSB were looking for him. The RAD's decision sets out its other adverse credibility findings including with respect to the USCIS Letter, whether the Applicant was a person of interest to the PSB when he left China necessitating the assistance of a smuggler and the authenticity of his summons.

[44] Given these findings, and considering the RAD's role on appeal and the relevant statutory constraints, as well as the absence of any evidence that the Applicant's wife would have provided testimony beyond what she stated in Shen Letter #2, in my view the RPD's breach of procedural fairness was remedied by the RAD because the failure to permit the Applicant's wife to give oral testimony had no material effect on the overall fairness of the process.

[45] As in *Marin*, the Applicant's credibility was the determinative issue before the RPD and the RAD, and there were sufficient reasons to dismiss his appeal even without testimony from

his wife – which testimony would have to overcome the statements in Shen Letter #2 which were inconsistent with the Applicant's evidence.

Issue 2: Did the RAD misapprehend the evidence rendering the decision unreasonable?

[46] The Applicant submits that the RAD misapprehended evidence on at least three occasions rendering its decision unreasonable.

[47] First, at paragraph 30 of its reasons, the RAD says the Applicant "did not mention" the PSB coming to his home on September 30, 2017. The Applicant acknowledges that this was not mentioned in his BOC but states that he did testify at the oral hearing about the September 30, 2017 incident. In my view, reading the RAD's reasons in whole, it is clear that the RAD considered the Applicant's testimony about September 30 but afforded it little weight as it was omitted from his BOC and from his amended BOC, and the omissions were not satisfactorily explained by the Applicant. The RAD did not misapprehend this evidence.

[48] Second, the Applicant submits that, at paragraph 41 of its reasons, the RAD states that the Applicant provided conflicting evidence as to whether he was wanted for arrest prior to or after his departure from China. This led the RAD to make an adverse credibility finding regarding whether or not he is a person of interest to the PSB at the time of his departure. The Applicant points to several transcript excerpts of his testimony before the RPB to demonstrate that the Applicant was consistent in his testimony about the PSB's efforts to find and arrest him.

[49] Having reviewed this evidence in whole, I agree with the Applicant that the information that he conveyed – despite imprecise questions and answers, some confusion and some clarification – was that prior to leaving China, he was only wanted for questioning and that it was only after he left China that the PSB sought to arrest him. Accordingly, to the extent that the RAD's finding that the Applicant's contradictory testimony on this point undermines his credibility regarding whether or not he was a person of interest to the PSB at the time of his departure from China, it is unreasonable. However, the RAD also found that this undermined the Applicant's credibility as to why he required assistance from a smuggler to leave China. That is, if the PSB did not seek to arrest the Applicant, then it was unclear why he would need the help of smuggler. On this issue, the RAD also found that the Applicant was being purposefully evasive about the role of the smuggler and the truthfulness of his information.

[50] Third, the Applicant submits that the RAD referred the NDP for China, dated October 31, 2017 [NDP 2017], which contains as item 9.10, RIR, CHN104458.E, dated October 18, 2013, to find that there has been no variation in the format of summonses in China since 2003. The RAD then compared the summons submitted by the Applicant to a sample found in the NDP 2017, item 9.3, RIR, CHN105217.E, October 20, 2015.

[51] The Applicant asserts that there was no evidence in the record to establish that the format of the summons did not change from October 2015 to when the Applicant's summons was issued in November 2017. Referencing *Ma v Canada (Citizenship and Immigration)*, 2018 FC 163 at paras 20-23 [*Ma*], the Applicant submits that this Court has held that outdated samples of foreign documents cannot reasonably be relied upon as probative evidence.

[52] The Respondent submits that despite the sample summons and the Applicant's summons being very similar the RAD identified several significant differences between the documents. Given this, and that the documentary evidence indicates that there should be no variations, the RAD reasonably concluded that the Applicant's summons is fraudulent. Further, the Applicant raises only the mere possibility of error in the RAD's assessment of the summons and that *Ma* was distinguished in *Lin v Canada (Citizenship and Immigration)*, 2019 FC 450 at paras 23-25 [*Lin*].

[53] The Applicant's argument is on all fours with the argument made in *Lin*. There the applicants noted that the subject RIR had not been updated since 2003 (citing *Ma*), and asserted that the general availability of fraudulent documents in China was not sufficient to support the conclusion that a particular document is fraudulent. Justice Fothergill agreed with the Minister that applicants must specify, with a reasonable degree of precision, the errors they say the RAD committed in its assessment of the documents and found that thy had not done so. And, significantly:

> [26] The RIR discussed in *Ma* was included in the National Document Package [NDP] for China that was issued in 2013, but here the RAD cited the RIR included in the NDP for China dated March 31, 2017. **While the RIR was unchanged, its inclusion in the 2017 NDP was a strong indication that it remained current, and it was therefore reasonable for the RAD to rely on it.**
>
> (emphasis added)

[54] Here the Applicant submits that the sample summons is outdated, but with no evidence to support this. Indeed, the uncontested documentary evidence was that there had been no variation in the format of summons in China for the 12-year period from 2003 to 2013. It was therefore

not implausible that there was also no change for the two-year period from the October 2015 RIR – found in the 2017 NDP – to November 10, 2017 when the Applicant alleges that his summons was issued. More significantly, and as indicated in *Lin*, the inclusion of the 2015 RIR in the 2017 NDP is a strong indication that it remained current. It was therefore reasonable for the RAD to rely on it.

[55] Finally, although I agree with the Applicant's submission that the RAD incorrectly states that the Applicant testified at the hearing that his summons was delivered to him online, this alone does not amount to a reviewable error. Having assessed the authenticity of the summons based on a comparison to the sample summons, the RAD stated that the Applicant's testimony was that his summons was delivered to him online. The RAD then noted that the documentary evidence does not indicate that forcible summons are delivered online, although some court documents may be. The RAD found that there was nothing on the face of the Applicant's summons to indicate that it was delivered electronically. The RAD did not make a related specific negative credibility finding. And, in the following paragraph, the RAD concluded that the Applicant's summons did not conform to the objective sample in the documentary evidence, noted the prevalence of fraudulent documents in China, found on a balance of probability that the Applicant's summons is fraudulent and, confirmed the RPD's assessment as correct.

[56] In sum, for the reasons above I do not agree with the Applicant that the combined impact of the alleged misapprehensions of the evidence renders the RAD's decision unreasonable.

JUDGMENT IN IMM-3852-20

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed;

2. There shall be no order as to costs; and

3. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3852-20
STYLE OF CAUSE:	LIANDONG YE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	BY VIDEOCONFERENCE USING ZOOM
DATE OF HEARING:	SEPTEMBER 21, 2021
JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	OCTOBER 4, 2021

APPEARANCES:

Alison Pridham	FOR THE APPLICANT
Neeta Logsetty	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lewis & Associates Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Department of Justice Canada Toronto, Ontario	FOR THE RESPONDENT