Federal Court  Cour fédérale

Date: 20220330

Docket: IMM-6168-20

Citation: 2022 FC 437

Ottawa, Ontario, March 30, 2022

PRESENT: Mr. Justice Gascon

BETWEEN:

KARMA RINCHEN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Karma Rinchen, is seeking judicial review of a Pre-Removal Risk Assessment [PRRA] decision rendered on July 24, 2020 [Decision] by a senior immigration officer [Officer] pursuant to subsection 112(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The Decision followed a decision by the Refugee Protection Board

[RPD] which had dismissed Mr. Rinchen's claim for refugee protection. The PRRA Officer determined that Mr. Rinchen would not be at risk of persecution, be in danger of torture, or face a risk to his life or a risk of cruel and unusual treatment or punishment if he was removed to either China or India. In sum, the Officer found insufficient evidence to show that Mr. Rinchen would face more than a mere possibility of harm or persecution if removed to either of these two countries.

[2] Mr. Rinchen seeks to have the Decision set aside and asks the Court to send the matter back for redetermination by a different PRRA officer. He claims that the PRRA Officer committed a material error by failing to assess the risk he would face if removed to China. By doing so, says Mr. Rinchen, the Officer vitiated its analysis of the risk of persecution, torture, risk to life or risk of cruel and unusual treatment or punishment if he was removed to India. The Minister of Citizenship and Immigration [Minister] concedes that the Decision was flawed with respect to China as it omitted to assess Mr. Rinchen's risk of removal to that country. However, the Minister maintains that this error was immaterial to the Officer's overall conclusion and that it did not taint the Officer's separate and distinct analysis with respect to Mr. Rinchen's risk of return to India.

[3] For the reasons stated below, I will allow Mr. Rinchen's application. After considering the Officer's findings, the evidence presented and the applicable law, I am not satisfied that the Officer's analysis of the risk in India was reasonable or that it can be isolated from the erroneous assessment of Mr. Rinchen's risk if removed to China. In my opinion, the Officer's conclusion that Mr. Rinchen could be safely removed to India is not justified in light of the evidence

available to the Officer, and the reasons do not allow me to understand the rationale for the Decision. This is sufficient to justify the intervention of this Court, and I must therefore remit the case for reconsideration by a different PRRA officer.

II. Background

A. *The factual context*

[4] Mr. Rinchen is a Buddhist monk of Tibetan ethnicity, who claims to be born in Tibet, China, on May 14, 1978. Given the impossibility to determine his citizenship, his nationality is deemed to be unknown by the Canadian immigration authorities.

[5] Mr. Rinchen became a monk at 13 years old, and was an active member of a Buddhist monastery in Tibet. Mr. Rinchen alleges to have been approached a number of times by agents of the Public Security Bureau [PSB], a branch of the Chinese government. The PSB agents allegedly sought to make him sign a declaration vilifying the Dalai Lama, the spiritual leader of Tibetan Buddhism. As Mr. Rinchen refused to sign the declaration, he was expelled from the monastery in consequence.

[6] Due to his fear of persecution, Mr. Rinchen fled China for India in 1998. He has not gone back to China ever since.

[7] Mr. Rinchen continued practising his religion as a monk in India. He obtained a temporary residency certificate in India [RC], which allowed him to stay in the country for a

limited period. Mr. Rinchen allegedly lived in fear of being deported to China by the Indian authorities.

[8] In June 2017, Mr. Rinchen left India and made a refugee claim in Canada upon his arrival. The RPD dismissed his claim on January 15, 2018. This Court subsequently dismissed his application for judicial review in June 2018. In November 2019, Mr. Rinchen was informed that he was eligible for a PRRA.

B. *The PRRA Decision*

[9] In the Decision subject to this application for judicial review, the PRRA Officer began by surveying the key points of the January 2018 RPD decision. Before the RPD, Mr. Rinchen had made a refugee claim solely against China. The RPD dismissed the claim on the basis that Mr. Rinchen's narrative was not credible and that he was unable to prove his identity or establish his Chinese citizenship. The RPD found that Mr. Rinchen was not born in China and was not a citizen of China, and thus dismissed his claim against that country. The RPD further noted that Mr. Rinchen had not made a refugee claim against India, where he had resided prior to his arrival in Canada.

[10] The PRRA Officer continued by looking at the new evidence filed before it by Mr. Rinchen. In the PRRA Officer's understanding, Mr. Rinchen submitted this new evidence in order to make claims for protection against both China and India, arguing that he was at risk in China as a Buddhist monk, and that he was also at risk in India given the risk that India could deport him to China.

[11] The PRRA Officer first conducted a detailed analysis of the new evidence as it applied to the China claim. The Officer found that each new piece of evidence contained information that: (i) had already been considered by the RPD; (ii) could have been provided at the time of the hearing before the RPD; and (iii) had low probative value. The PRRA Officer concluded that the new evidence was not sufficient to challenge the RPD's finding about Mr. Rinchen's failure to establish his Chinese citizenship, and therefore determined that Mr. Rinchen had not demonstrated he faced persecution or personal harm in China.

[12] Turning to the India claim, the PRRA Officer noted that Mr. Rinchen feared he would be deported to China if forced to return to India, because he detains no status nor valid documentation allowing him to reside in that country. Moreover, Mr. Rinchen maintained that China and India collaborate more than what they used to and that he is thus at risk of being deported to China.

[13] The PRRA Officer reviewed the evidence submitted by Mr. Rinchen in support of his India claim, and determined that such evidence had low probative value. Furthermore, nothing in the objective country condition documents indicated that the Indian authorities systematically deport Tibetans, or that the expiration of a RC leads to deportation. The PRRA Officer finally determined that Mr. Rinchen had also not satisfactorily established that he would face possible persecution or personal harm if deported to India, and that there was no serious possibility of him being deported to China by the Indian authorities due to India's closer relationship with China.

C. *The standard of review*

[14] The parties do not dispute that the presumptive standard of reasonableness applies to this case. Since *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the analytical framework for judicial review of the merits of an administrative decision is now based on a presumption that the standard of reasonableness is applicable in all cases (*Vavilov* at para 16). This presumption can only be rebutted in two types of situations. The first is where the legislature has prescribed the applicable standard of review or provided a mechanism for appealing the administrative decision to a court of law; the second is where the issue under review falls into one of the categories of issues for which the rule of law requires review on the standard of correctness (*Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 [*Canada Post*] at para 27; *Vavilov* at paras 10, 17). None of the situations justifying a departure from the presumption of applying the standard of reasonableness applies in this case.

[15] Case law has indeed recognized, prior to and after *Vavilov*, that PRRA applications involve issues of mixed fact and law and that the standard of review applicable to the assessment of evidence by PRRA officers is reasonableness (*Flores Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at para 36; *Ashkir v Canada (Citizenship and Immigration)*, 2020 FC 861 at paras 10–12; *Garces Canga v Canada (Citizenship and Immigration)*, 2020 FC 749 at paras 19–20; *Benko v Canada (Citizenship and Immigration)*, 2017 FC 1032 at para 15; *Fares v Canada (Citizenship and Immigration)*, 2017 FC 797 at para 19). Therefore, there is no doubt that the standard of reasonableness continues to apply to this issue.

[16] Where the applicable standard of review is reasonableness, the role of a reviewing court is to examine the reasons given by the administrative decision maker and determine whether the decision is based on "an internally coherent and rational chain of analysis" and "is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85; *Canada Post* at paras 2, 31). The reviewing court must consider "the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified" (*Vavilov* at para 15). The reviewing court must therefore consider "whether the decision 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, referring to *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47, 74 and Catalyst *Paper Corp v North Cowichan (District)*, 2012 SCC 2 at para 13).

III. Analysis

[17] As indicated above, the Minister concedes that the PRRA Officer's assessment of Mr. Rinchen's risk in China was erroneous. In sum, the PRRA Officer erred in adopting the RPD's findings with respect to identity and citizenship, without conducting its own assessment of whether Mr. Rinchen would effectively be at risk in China as an ethnic Tibetan and practising Buddhist monk. The Minister acknowledges that the PRRA Officer should not have been solely concerned with the matter of Mr. Rinchen's citizenship status. It is therefore not disputed that this part of the Decision cannot stand, and that it could not be used to support a removal of Mr. Rinchen to China. The PRRA Officer's erroneous finding that Mr. Rinchen could be

removed to China could, on its own, be sufficient to set aside the Decision and grant Mr. Rinchen's application for judicial review.

[18] That said, the main issue to be determined is whether the PRRA Officer's Decision may nonetheless be upheld on the basis that the findings with respect to Mr. Rinchen's risk in India are defensible, despite the admitted error on the risk assessment in China. For the following reasons, I find that the PRRA Officer's conclusions on Mr. Rinchen's risk in India are also not reasonable in the circumstances, and that the Decision cannot be upheld.

[19] The Minister maintains that the PRRA Officer's error with respect to the China risk was immaterial to the rest of the Officer's analysis, and that the Court should affirm the Decision, notwithstanding this error. The Minister relies on several cases to make his point that an imperfect decision which contains immaterial errors can still be found reasonable (*Bratchuli v Canada (Citizenship and Immigration)*, 2017 FC 32 at para 21; *Canada (Citizenship and Immigration) v Suleiman*, 2015 FC 891 at para 31; *Dosanjh v Canada (Citizenship and Immigration)*, 2015 FC 193 at para 22; *Boston v Canada (Citizenship and Immigration)*, 2007 FC 1271 at paras 5, 29).

[20] With respect, I am not convinced by the Minister's submissions.

[21] I accept that administrative decisions need not be perfect and that an imperfect decision with immaterial errors can still be reasonable, if other parts of a decision maker's analysis are sound and the errors are not determinative of the final outcome. It is also true that a reviewing

court has the discretion to refuse to grant the relief sought by an applicant on the ground that an error allegedly made by the administrative decision maker is immaterial (*MiningWatch Canada v Canada (Fisheries and Oceans)*, 2010 SCC 2 [*MiningWatch*] at para 52; *Canada (Minister of Citizenship and Immigration) v Patel*, 2002 FCA 55 at paras 3–6; *Sutherland v Canada (Citizenship and Immigration)*, 2016 FC 1212 at para 31). However, in analyzing the materiality of an error, a reviewing court is concerned with the result of the administrative decision and must assess whether an applicant could expect a different outcome in the absence of the error. The reviewing court's discretion is constrained by its duty to take into account the "balance of convenience considerations" involved in the case at bar (*MiningWatch* at para 52). Moreover, these assessments are case-specific and they will vary with the particular factual matrix of each case.

[22] Here, I am not persuaded that the PRRA Officer's error on the risk in China was immaterial to the outcome of the Decision. In my view, the Officer's analysis of the China claim cannot be separated or isolated from its analysis of the India claim. I instead agree with Mr. Rinchen that this error tainted the way the PRRA Officer assessed the evidence regarding India. Because of its error on the assessment of the China claim, the PRRA Officer failed to properly review the entirety of the evidence submitted before the RPD as well as the new evidence submitted at the PRRA level. Additionally, there was evidence suggesting that Mr. Rinchen had in fact the Chinese citizenship and that he was thus entitled to make a claim against China before the RPD, something that the PRRA Officer should have taken into account. If Mr. Rinchen's citizenship had been considered, a decision maker could have determined that he could not be removed to China. This is indicative of materiality.

[23] I am not convinced that the PRRA Officer would have necessarily reached the conclusion that Mr. Rinchen could be safely removed to India in the absence of its error on the China claim. In fact, the Officer's analysis revolves around its concern with whether Mr. Rinchen would be deported from India to China. Since the PRRA Officer identified no risk for Mr. Rinchen in China, I do not see how it can be said that this had no effect on his analysis of the risk of deportation from India to China.

[24] With respect to the India claim itself, the PRRA Officer inferred that Mr. Rinchen could be safely removed to India given that he does not have Chinese citizenship. The evidence, however, does not establish that Mr. Rinchen has status in India. Mr. Rinchen's RC in India expired in 2018 and he detains no further documentation currently allowing him to settle in India. I concede that the country conditions evidence submitted on the warmer relations between India and China may be considered as speculative and that it does not establish a personal risk of deportation to China if Mr. Rinchen is removed to India. I also note that it was open to the PRRA Officer to find that the evidence did not support that Tibetans are systematically or regularly deported to China. The evidence, however, establishes that Mr. Rinchen has at best a precarious status in India, and this provides no support to a finding that he can be safely removed to India.

[25] In my view, further to my review of the Decision as a whole, the Officer failed to reasonably consider the evidence that, in addition to a potential deportation to China, the Tibetans unable to obtain or renew a RC – as was the case for Mr. Rinchen – also face fines and detention in India if they are removed there. In other words, the precarious status of Mr. Rinchen in India meant that he was facing a risk of persecution in that country. This risk was not part of

the PRRA analysis. On the contrary, the Decision obscured the fact that Mr. Rinchen had no legal right to reside permanently in India.

[26] I agree with Mr. Rinchen that sending back an applicant to a country where he does not have the right to remain permanently and where he could be sent back to China at the discretion of the Indian authorities is unreasonable. Furthermore, it was unreasonable for the PRRA Officer to conclude that an applicant could be removed to a country without there being any real assessment of the risk he or she would face in such country.

[27] I recognize that reviewing courts must show deference and pay respectful attention to the conclusions reached by administrative decision makers. In the same vein, I am aware that the reasons given in support of a decision do not have to be perfect or exhaustive. Indeed, the reasonableness standard of review is not concerned with the decision's degree of perfection but rather with its reasonableness (*Vavilov* at para 91). However, the reasons must be understandable and justified. An administrative decision maker has a duty to articulate its rationale in its reasons (*Farrier v Canada (Attorney General)*, 2020 FCA 25 at para 32). Admittedly, the lack of detail given in a decision does not necessarily make it unreasonable, but the reasons must enable the Court to understand the basis of the contested decision and to determine whether the conclusion holds water. In the case of Mr. Rinchen, I cannot conclude that the PRRA Officer's finding on the risk in India has the attributes of a reasonable analysis.

IV. Certification question

[28] At the end of the hearing before this Court, Mr. Rinchen expressed his intention to submit a question for certification. Further to the submissions made by Mr. Rinchen and by the Minister (who opposes the request), the amended question for certification submitted by Mr. Rinchen reads as follows:

> Can a PRRA officer determine that a failed refugee claimant can return to a former country of residence, other than the country against which the initial refugee claim was made, without engaging in an analysis of whether that claimant is able to acquire rights equal to a national, in particular the right of permanent residence or citizenship in the former country of residence?

[29] For the reasons that follow, I decline to certify the proposed question as I find it does not meet the requirements for certification developed by the Federal Court of Appeal.

[30] According to paragraph 74(d) of the IRPA, a question can be certified by the Court if "a serious question of general importance is involved." To be certified, a question must be a serious one that: (i) is dispositive of the appeal; (ii) transcends the interests of the immediate parties to the litigation; and (iii) contemplates issues of broad significance or general importance (*Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at para 46; *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 36; *Mudrak v Canada (Citizenship and Immigration)*, 2016 FCA 178 [*Mudrak*] at paras 15–16; *Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168 [*Zhang*] at para 9). Furthermore, the question must not have already been determined and settled in another appeal (*Rrotaj v Canada (Citizenship and Immigration)* 2016 FCA 292 at para 6; *Mudrak* at para

36; *Krishan v Canada (Citizenship and Immigration)* 2018 FC 1203 at para 98; *Halilaj v Canada (Public Safety and Emergency Preparedness),* 2017 FC 1062 at para 37). As a corollary, the question must have been dealt with by the Court and it must arise from the case (*Mudrak* at para 16; *Zhang* at para 9; *Varela v Canada (Citizenship and Immigration),* 2009 FCA 145 at para 29).

[31] I agree with the Minister that the proposed question does not arise on the facts of this case and is not dispositive of the appeal.

[32] I do not dispute that the question formulated by Mr. Rinchen may appear to raise an issue of broad significance or general application, as it transcends the interests of the immediate parties of this case, in light of evidence showing that a significant number of Tibetan "refugees" appear to be in the same situation as Mr. Rinchen. That said, the PRRA Officer's Decision amounts to sending Mr. Rinchen back to a country, India, where he has no status. The PRRA Officer reached this conclusion on the assumption that Mr. Rinchen was not a citizen of China, but did not reasonably analyze whether Mr. Rinchen could effectively secure rights that are equal to nationals in India.

[33] During the hearing, Mr. Rinchen asserted that the PRRA Officer was required to assess whether he had a right to permanent residence or citizenship in India. However, Mr. Rinchen had requested the PRRA Officer to assess his risk of discrimination amounting to persecution, but not whether he had a right of permanent residence or citizenship in India. Consequently, I agree with the Minister that the Officer's findings were responsive to Mr. Rinchen's claim that he faced a risk of discrimination amounting to persecution. As Mr. Rinchen did not ask the PRRA

Officer to assess his right to permanent residence or citizenship in India, it cannot be said that Mr. Rinchen's proposed question arises on the facts of this case.

[34] Furthermore, the proposed question would not be determinative of the issues in this case. The primary arguments put forward by Mr. Rinchen before this Court relate to the reasonableness of the PRRA Officer's findings on the assessment of country conditions for Tibetans in India, and the likelihood of deportation to China. The proposed question relates to a peripheral issue which is not determinative of the appeal.

V. Conclusion

[35] For the reasons detailed above, Mr. Rinchen's application for judicial review is allowed. Under the reasonableness standard, the reasons for the Decision must demonstrate that the decision maker's findings were based on an inherently coherent and rational analysis and were justified in light of legal and factual constraints to which the administrative decision maker is subject. That is not the case here.

[36] There is no question of general importance to be certified.

JUDGMENT in IMM-6168-20

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed, without costs.

2. The decision of the PRRA Officer dated July 24, 2020 is set aside and the matter is referred back to a different officer for redetermination.

3. No question of general importance is certified.

"Denis Gascon"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Phillip J.L. Trotter	FOR THE APPLICANT
Nicole Rahaman	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Phil Trotter Lawyer Services Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT