Federal Court  Cour fédérale

**Date: 20221025**

**Docket: IMM-5318-20**

**Citation: 2022 FC 1456**

**Ottawa, Ontario, October 25, 2022**

**PRESENT: The Honourable Mr. Justice Ahmed**

**BETWEEN:**

**JIAHONG SHEN**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. Overview

[1] The Applicant seeks judicial review of a decision by the Refugee Appeal Division ("RAD") rendered on September 30, 2020, confirming the Refugee Protection Division ("RPD") finding that the Applicant is neither a Convention refugee nor a person in need of protection pursuant to section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act*, SC

2001, c 27 ("*IRPA*"). The basis of the Applicant's claim was that he feared persecution in China because of his adherence to the Church of Almighty God ("CAG").

[2] The Applicant submits that the RAD erred when it refused to hold a hearing pursuant to subsection 110(6) of *IRPA*, and erred in its assessment of the allegation of reasonable apprehension of bias.

[3] For the reasons that follow, I find the RAD's decision is reasonable. This application for judicial review is dismissed.

## II. Facts

### A. *The Applicant*

[4] The Applicant is a 25-year-old citizen of China. He claims that his mother left the home after his parents' divorce in 2011 and on April 6, 2012, his father died by suicide. The Applicant was placed under the care of his grandparents and shared a special relationship with his grandfather. In December 2014, the Applicant's grandfather became paralyzed due to a cerebral hemorrhage and eventually passed away on January 5, 2015. His grandfather's death was a big blow to him, after which the Applicant claims he was anxious and overcome with grief.

[5] The Applicant claims he became increasingly interested in the CAG around that time, after being introduced to the faith by a friend. In February 2015, the Applicant allegedly joined the CAG and began attending services and praying at home.

[6] On March 6, 2016, the Applicant alleges that his church was raided, but that he was able to flee to hide at a cousin's home. On March 7, 2016, the Public Security Bureau ("PSB") allegedly came to his home, conducted a search, and interrogated his grandmother about his religious activities, stating they had evidence against the Applicant because they had arrested three members of his church. The police returned that same day with a summons for his arrest. His grandmother connected him to a smuggler who obtained a visa to help the Applicant exist in China using his own passport. On June 23, 2016, the Applicant left China and arrived in Canada. In December 2016, he made a claim for refugee protection.

B. *RPD Decision*

[7] In a decision dated June 1, 2018, the RPD found that the Applicant lacked credibility and dismissed the claim. The RPD found that the Applicant exited China using his own identity documents, confirming that the authorities were not concerned with him and undermining the Applicant's identity as a person wanted by the PSB.

[8] The RPD took issue with the credibility of his religious identity, finding that if the Applicant cannot comprehend the tenets of his faith, it is because he is not a true practitioner and not because he is incapable of understanding them. The RPD also doubted the veracity of the Applicant's evidence of the Chinese authorities' interest in him, concluding that the Applicant did not provide evidence that Chinese authorities are aware of his CAG activities in Canada.

[9] The Applicant appealed the RPD's decision. The RAD dismissed the appeal in a decision dated September 30, 2020.

C. *Decision Under Review*

[10] The RAD ultimately dismissed the appeal, finding that the Applicant did not credibly establish that he is a genuine practitioner of the CAG.

[11] Before rendering a decision, the RAD reviewed the record and notified the Applicant that they would consider additional credibility concerns. The Applicant subsequently submitted an affidavit and further submissions. The RAD accepted the affidavit, but refused the Applicant's request for an oral hearing, finding that the test for an oral hearing was not met. The RAD found the affidavit spoke only to the Applicant's exits from China and delay in claiming protection, while the determinative issue was the genuineness of the Applicant's religion.

[12] On the Applicant's argument that the same test for calling a hearing in a Pre-Removal Risk Assessment ("PRRA") application applies in the case of hearings before the RAD, the decision-maker disagreed on the basis that a hearing before the RAD requires new evidence. The RAD did not find the Applicant's new affidavit to be determinative of the main issue and therefore did not find grounds to hold a hearing.

[13] While the RAD did not agree with all of the RPD's findings, it agreed with the RPD's overall conclusion. On the Applicant's exit from China, the RAD agreed in part with the Applicant, that the RPD placed insufficient weight on the evidence about corruption in China and ignored evidence that shows that some wanted individuals are able to exit China. The RAD found no error with the RPD's country documents and agreed with the Applicant that it is not

clear why the RPD preferred the National Documentation Package ("NDP") evidence over the Applicant's testimony of how he exited. The RPD's analysis was found insufficient on its own to conclude that the Applicant's exit shows he is not wanted by the PSB. The RAD therefore did not rely on the RPD's assessment of the country conditions in the Applicant's case. Instead, the RAD based its conclusions on the following credibility issues.

[14] The RAD found that the Applicant's three letters mentioning his admission into Seneca College, dated March 16 and 17, 2016, were genuine and therefore undermined his evidence that he had the smuggler facilitate his exit *after* March 7, 2016. Since the application for admission to Seneca would likely take longer than ten days to complete and be granted, the RAD found that the Applicant did not begin planning to exit China after March 7, 2016, undermining his evidence that he fled China because he was wanted.

[15] The RAD found that the Applicant gave inconsistent evidence about his passport. In his Basis of Claim ("BOC") form, the Applicant stated that his passport and national identification ("ID") card were taken away in lieu of payment to the smuggler, and the ID card was given back to his grandmother when she paid the balance in September 2016. However, the Applicant later told the immigration officer that the BOC was wrong and that the agent had taken his passport and still had it, but never took his ID card. At the time of his refugee hearing, the Applicant stated that his passport was lost in October 2016. When confronted about this inconsistency, he testified that the smuggler returned his ID first, but did not return his passport until August 2016. The RAD found this evidence was important because it went to the issue of the Applicant's exit

from China and the inconsistency undermined his allegation that he used a smuggler to exit China at all, therefore undermining the allegation that he is wanted.

[16] The RAD also found that information on the Applicant's United States ("US") visa applications undermined his credibility generally. The Applicant applied for a US visa twice in 2015 and admitted to falsifying the application information because he would not qualify for the visa if he used his genuine information. The RAD explained that since the applications were made before the Church was raided in March 2016, the Applicant would have no need to falsify information as he would not be putting false information in a visa application to flee from danger. This shows a history of providing false information to immigration officials.

[17] Given these factors, the RAD found that the Applicant did not establish that he was wanted in China and used a smuggler to escape. The RAD found that he was able to exit China using his own passport because he is not wanted by the PSB.

[18] The RAD found that the delay in claiming protection further undermines the Applicant's allegation that he was forced to flee China. The Applicant arrived in Canada in June 2016 and brought his refugee claim in December 2016. While the Applicant explained that he thought he needed his identity documents to apply, the RAD did not find this explanation reasonable. The RAD also found the summons was not a reliable document, due to credibility concerns with the timing of the summons and when it was issued.

[19] The RAD found that the Applicant's allegations of what occurred in China undermined the credibility of his genuineness of his practice in Canada. The RAD disagreed that the RPD held the Applicant to an unreasonably high standard of knowledge. The Applicant was expected to be aware of the general and core principles of the faith and failed to meet this standard based on his answers, which were vague, failed to reflect core doctrine of the faith, and were not commensurate with his stated experience.

[20] The RAD also found that the RPD correctly assessed a letter from the CAG in Canada, when it found that the Applicant has attended some CAG services but the letter was insufficient to establish that he was a genuine practitioner of the CAG. The RAD noted that the letter is not clear about the Applicant's attendance; it is not clear what activities of the church he is involved in; and it does not explain how it reached the conclusion that the Applicant is "real and faithful."

[21] The RAD agreed that there is evidence of persecution of religious practitioners in China, but that the Applicant had not established that he was such a practitioner. The RAD agreed with the RPD that the Applicant did not establish his religious identity as a member of the CAG. The Applicant also failed to establish that his involvement in the CAG in Canada would come to the attention of Chinese authorities and he would be perceived as a member of the CAG in China.

[22] The Applicant argued before the RAD that the RPD's reasons raised a reasonable apprehension of bias. The RAD conducted an independent assessment and reached their own conclusions in each area where the Applicant alleged bias. It is therefore not necessary to determine if the RPD's decision raises a reasonable apprehension of bias.

[23] The RAD ultimately dismissed the appeal and confirmed the decision of the RPD that the Applicant is neither a Convention refugee nor a person in need of protection.

[24] See Annex "A" below for relevant legislative provisions.

## III. Issues and Standard of Review

[25] The Applicant raises two issues on this application for judicial review:

A. *Whether the RAD erred in refusing to hold a hearing pursuant to section 110(6) of the IRPA.*

B. *Whether the RAD erred in its decision regarding the allegation of bias.*

[26] The Respondent submits that the RAD's decision is reviewable under the reasonableness standard. I agree. While the presumption of reasonableness is rebuttable, I agree with the Respondent that none of the situations identified as warranting a different standard are present in this application (*Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*") at paras 16 and 17).

[27] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker (*Vavilov* at para 85).

Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[28] For a decision to be unreasonable, the applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). Not all errors or concerns about a decision will warrant intervention. A reviewing court must refrain from reweighing evidence before the decision maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125). Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep" (*Vavilov* at para 100; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156, at para 36).

[29] On the issue of the procedural fairness, the Respondent submits that when assessing such an argument, a court is required to ask whether the adopted procedure satisfied the duty of fairness, having regard to the circumstances, and in consideration of the factors set out in *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 SCC 699 ("*Baker*").

[30] The procedural fairness matter is reviewable under the correctness standard (*Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35). Correctness, in contrast, is a non-deferential standard of review. The central question for issues of procedural fairness is whether the procedure was fair, having regard to all of the circumstances, including the factors enumerated in *Baker* at paras 21-28 (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54).

## IV. Analysis

### A. *Whether the RAD erred in refusing to hold a hearing*

[31] The Applicant submits that the RAD erred in refusing to hold a hearing, stating that the wording of subsection 110(6) (which applies to the RAD), and subsection 113(b) (which applies to PRRAs) are identical. Specifically, the prescribed factors referred to in subsection 113(b) and listed in section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 ("*IRPR*") are the same as those listed in subsection 110(6). The Applicant submits that this Court's jurisprudence under subsection 113(b) of *IRPA* is also applicable to subsection 110(6) of *IRPA*. In the case of subsection 113(b), this Court has held that failing to hold a hearing when the prescribed factors are met and there are credibility concerns has been found to be a breach of procedural fairness, citing *Tekie v Canada (Minister of Citizenship and Immigration)*, 2005 FC 27. The Applicant states that the same was found in *Tchangoue v Canada (Citizenship and Immigration)*, 2016 FC 334 ("*Tchangoue*"), relating to the RAD under subsection 110(6).

[32] The Applicant maintains that the factors set out in subsection 110(6) were met because both the RPD and RAD decisions were based on questions of credibility, and while the RAD requested that the Applicant provide additional materials with answers to certain credibility questions prior to making its decision, no hearing was held. The Applicant submits that if the issue was not central to the decision, the RAD would not have made further specific inquiries about credibility. The Applicant argues that even if the determinative issue was the genuineness of the Applicant's religion, this is still a finding of credibility.

[33] The Respondent submits that the jurisprudence is clear that the RAD is not required to hold a hearing just because it accepted new evidence or because the Applicant was found not credible. The Respondent maintains that the RAD reasonably found that the test for an oral hearing was not met because the new evidence only spoke to his exit from China and delay in claiming protection and did not make up for the shortcomings in the Applicant's evidence about the genuineness of his religious practice. It was open to the RAD to conclude that the new evidence would not justify allowing or rejecting the refugee claim because the determining issue was the genuineness of the Applicant's religion.

[34] I find merit in the Applicant's submission that on a plain reading of the "prescribed factors" in both the PRRA and RAD contexts, the nearly identical factors appear to indicate Parliament's intention that similar analyses should be applied in each case. That being said, the similarity of the provisions does not automatically lead to the conclusion that the Court's jurisprudence under each provision is interchangeable. The RAD is required to follow the provisions and jurisprudence specifically prescribed for it.

[35] The RAD did not err in assessing the factors set out in subsection 110(6). The Applicant's affidavit submitted as new evidence was not determinative of the issue because it did not address the genuineness of the Applicant's religion, focusing only and briefly on his exit from China and the delay in making his claim. The determinative issue was the Applicant's adherence to the CAG and whether he was forced to leave China because of his involvement with the CAG. Without evidence bolstering the credibility of this claim, the Applicant's narrative explaining his exit from China or the delay in applying for status would not necessarily

change the outcome of the case. The fact that these were considerations in arriving at the conclusion does mean that they were determinative.

[36] More importantly, the Applicant fails to identify an error in this assessment. The Applicant submits that the additional evidence address his credibility, which is inherently central to the decision because all major findings of credibility assist in the ultimate finding and, consequently, a hearing must have been held. However, the jurisprudence is clear that these must be serious issues relating to credibility and these must be central to the decision. That is simply not the case here.

[37] In *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96, the Federal Court of Appeal confirmed that holding a hearing is not required simply because new evidence is admitted (at para 71). The Court of Appeal found that the Applicant's new evidence failed to make up for several shortcomings in his testimony and there was no attempt to show how it was determinative in establishing his credibility. Similarly, the Applicant's narrative in this case was deficient in several aspects and the new evidence did little to respond to these deficiencies. Therefore, the new affidavit was not essential in deciding the Applicant's refugee claim.

[38] The Applicant relied on *Tchangoue* to submit that under subsection 110(6), a hearing must be held if there are credibility concerns and the prescribed factors have been met, and that there is a breach of procedural fairness if this does not occur. However, *Tchangoue* can be distinguished from the Applicant's case. In *Tchangoue,* the RAD had concerns regarding the authenticity of the new documents the Applicant provided, which was a serious issue

undermining the Applicant's credibility and which was not before the RPD. This new evidence was central to the decision because the absence of documentary evidence was determinative in the RPD's decision and would have justified allowing the refugee protection claim (*Tchangoue* at para 17). In the present case, while the new affidavit addressed issues that further undermined the Applicant's credibility, these factors were unrelated to the true determinative issue of the Applicant's involvement and belief in the CAG.

B. *Whether the RAD erred in its decision regarding the allegation of bias*

[39] The Applicant contests the RAD's reliance on *Mobil Oil Canada Ltd. v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202 to support its conclusion that "a breach of procedural fairness is not determinative where the outcome of the case would have been the same." The Applicant submits that this decision by the Supreme Court does not stand for this proposition and gives a very specific reason as to why the matter should not be returned, which is not applicable to the case at bar. The Applicant maintains that a decision that does not accord with the principles of natural justice must be quashed, as was established in *Canada (Minister of Citizenship and Immigration) v Patel*, 27 Imm LR (2d) 4.

[40] The Respondent submits that the reasonable apprehension of bias argument does not raise a reviewable error because administrative appellate tribunals may cure bias arising in previous decisions on the matter. In this case, the RAD conducted an independent assessment and reached its own conclusions and the issues of bias are now moot. The Respondent further submits that all the factors laid out by this Court to determine whether the curative capacity of the appeal has ensured an acceptable level of fairness have been met (*Ye v Canada (Citizenship*

*and Immigration)*, 2021 FC 1025 at para 33). The Respondent submits that the Applicant failed to show that the RPD was biased or how the RAD did not correct any alleged error.

[41] The RAD did not err in its assessment of the allegation of bias. Even if the RPD was biased in its assessments and was pre-disposed toward refusing the claim, the RAD conducted an independent assessment of each of these matters and reached their own conclusions. For instance, in the Applicant's submissions before the RAD, the Applicant raised the fact that the same RPD member appeared in three other decisions, all of which concerned Chinese applicants' exit from China, with one being a CAG practitioner, and examples of the RPD member's misstatement of the Applicant's testimony.

[42] The RAD's reasons clearly sets out its own review of the record, did not blindly adopt the RPD's reasons, and made sure to cure any possible procedural fairness issue in this regard. On the misstatement of the evidence stated above, the RAD stated:

> [56] I agree with the Appellant that the RPD misstated the evidence. However, I do not find this error to be determinative because I agree with the RPD that the Appellant's testimony about what books he read lacks credibility, as it is not in line with the objective documentation on what members of the CAG read.
>
> [57] The Appellant testified that he was reading The Eternal Gospel and that he was considered a newcomer to the church and that, when he was not a newcomer, he would read *The Word Became Flesh Manifested*. Therefore, the RPD was incorrect to state that the Appellant was not able to name the book. However, the RPD also found that, based upon the objective documentation, it was not credible that the Appellant had not read the book The Word Appears in the Flesh. I agree with this conclusion.

[43] This is one of the many examples of the curative capacity of the RAD's appeal. In my view, the Applicant did not show how the RAD was prevented from correcting the RPD's alleged error or that it erred in its own credibility findings. Rather, any bias by the RPD was cured by the RAD and therefore does not warrant this Court's intervention.

## V. Conclusion

[44] The RAD satisfied the duty of fairness, having regard to the circumstances, and bears the hallmarks of reasonableness. I therefore dismiss this application for judicial review. No questions for certification were raised, and I agree that none arise.

**JUDGMENT in IMM-5318-20**

**THIS COURT'S JUDGMENT is that**:

1. This application for judicial review is dismissed.

2. No question is certified.

"Shirzad A."
Judge

## Annex A: Legislative Scheme

[45] Sections 110(6) and 113 of the *IRPA* state:

| | |
|---|---|
| **Hearing** | **Audience** |
| **110(6)** The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3) | **110(6)** La section peut tenir une audience si elle estime qu'il existe des éléments de preuve documentaire visés au paragraphe (3) qui, à la fois : |
| **(a)** that raises a serious issue with respect to the credibility of the person who is the subject of the appeal; | **a)** soulèvent une question importante en ce qui concerne la crédibilité de la personne en cause; |
| **(b)** that is central to the decision with respect to the refugee protection claim; and | **b)** sont essentiels pour la prise de la décision relative à la demande d'asile; |
| **(c)** that, if accepted, would justify allowing or rejecting the refugee protection claim. | **c)** à supposer qu'ils soient admis, justifieraient que la demande d'asile soit accordée ou refusée, selon le cas. |
| **Consideration of application** | **Examen de la demande** |
| **113** Consideration of an application for protection shall be as follows: | **113** Il est disposé de la demande comme il suit : |
| **(a)** an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the | **a)** le demandeur d'asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'il n'était pas raisonnable, dans les circonstances, de s'attendre à ce qu'il |

| | |
|---|---|
| circumstances to have presented, at the time of the rejection;<br><br>**(b)** a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required; | les ait présentés au moment du rejet;<br><br>**b)** une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires; |

[46] Section 167 of *IRPR*, which lists the "prescribed factors" referred to in subsection 113(b) of *IRPA*, states:

| | |
|---|---|
| **Hearing — prescribed factors**<br><br>**167** For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors are the following:<br><br>**(a)** whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;<br><br>**(b)** whether the evidence is central to the decision with respect to the application for protection; and<br><br>**(c)** whether the evidence, if accepted, would justify allowing the application for protection. | **Facteurs pour la tenue d'une audience**<br><br>**167** Pour l'application de l'alinéa 113b) de la Loi, les facteurs ci-après servent à décider si la tenue d'une audience est requise :<br><br>**a)** l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur;<br><br>**b)** l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;<br><br>**c)** la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection. |

**FEDERAL COURT**

**SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | IMM-5318-20 |
| **STYLE OF CAUSE:** | JIAHONG SHEN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | BY VIDEOCONFERENCE |
| **DATE OF HEARING:** | AUGUST 23, 2022 |
| **JUDGMENT AND REASONS:** | AHMED J. |
| **DATED:** | OCTOBER 25, 2022 |

**APPEARANCES:**

| | |
|---|---|
| Wennie Lee | FOR THE APPLICANT |
| Emma Arenson | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Lee & Company<br>Barristers and Solicitors<br>Toronto, Ontario | FOR THE APPLICANT |
| Attorney General of Canada<br>Toronto, Ontario | FOR THE RESPONDENT |