Federal Court  Cour fédérale

Date: 20150831

Docket: IMM-8099-14

Citation: 2015 FC 1031

Ottawa, Ontario, August 31, 2015

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

SHUYUAN ZHANG AND ZHISHAN ZHU

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act], of a decision of the Refugee Appeal Division of the Immigration and Refugee Board [RAD], made on November 20, 2014, which confirmed the decision of the Refugee Protection Division [RPD] that the applicants were not Convention refugees or a persons in need of protection pursuant to sections 96 and 97 of the Act.

[2] The application for judicial review is allowed for two reasons: the RAD's determination that the RPD did not breach procedural fairness by identifying the issues, yet basing its decision on an issue not identified, is not reasonable; and, the RAD breached its duty of procedural fairness by relying on more recent evidence of country conditions included in the National Documentation Package [NDP] which was not available at the time the applicants perfected their appeal to the RAD and which included additional information, which the applicants should have had an opportunity to address. As a result, the RAD must reconsider the appeal.

Background

[3] The applicants, a husband and wife from Guangxi province in China, claimed that they would be persecuted in China due to their Christianity, that the one-child policy had violated the female applicant's right to reproduce and that the male applicant, a former police officer, feared retaliation from corrupt police and criminals he had apprehended.

The RPD Decision

[4] The RPD found that the applicants had established their practice of Christianity in Canada, but did not find their other claims to be credible, noting their other travel, failure to seek protection in other countries and re-availment to China.

[5] The RPD accepted that the applicants are Christians and considered the possibility that the applicants would be persecuted if they returned to China and practiced Christianity in an

unregistered church. The RPD referred to the country condition documentary evidence, particularly with respect to Guangxi province, noting that the applicants last resided there.

[6] The RPD reviewed the documentary evidence and concluded that the applicants would not incur punishment for participating in religious activities and attending a house church in Guangxi province if they chose to do so.

[7] The applicants appealed to the RAD and argued that: the RPD breached procedural fairness because it did not identify the issue of whether the applicants face risk in Guangxi as an issue to be addressed and, therefore, the applicants did not adduce evidence of the risk they would face; that new evidence about the risk to the applicants in Guangxi should be accepted pursuant to paragraph110(4)(c) of the Act because they could not reasonably have been expected to provide this evidence to the RPD; and, on the basis of the new evidence, the RAD should find an objective basis for their subjective fear of persecution based on religion.

The RAD Decision Under Review

[8] The RAD first reviewed the jurisprudence regarding the standard of review and indicated it would apply *Huruglica v Canada (Minister of Citizenship and Immigration)*, 2014 FC 799, [2014] 4 FCR 811, review all aspects of the RPD's decision and come to an independent assessment of the applicants' refugee claims, but would defer to the RPD where the RPD enjoyed a particular advantage in reaching a conclusion.

[9] The RAD found that there was no breach of procedural fairness by the RPD in assessing the applicants' risk of persecution in Guangxi where they had previously resided. The RAD explained that it is fair to presume that, should the claim fail, the applicants would return to the place from which they departed and that the RPD had analyzed the possible risk of the applicants' return in accordance with section 97 of the Act.

[10] The RAD also rejected the applicants' argument that that RPD breached procedural fairness by assessing the risk to the applicants upon their return because the RPD did not identify objective risk as an issue to be determined. The RAD noted that the applicants had ample opportunity to object to this line of questioning and could have requested to make written post-hearing submissions or asked for an adjournment to prepare to address the issue.

[11] Regardless, the RAD reiterated that the RPD simply assessed the safety of the applicants last known residence in China, looking forward, as it was a reasonable assumption that this is where they would return.

[12] The RAD then assessed the admissibility of new evidence submitted on appeal noting the requirements of subsection 110(4) of the Act and the factors identified in *Raza Syed Masood v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385 at paras 13-14, 289 DLR (4th) 675 which are credibility, relevance, newness and materiality. The RAD found that none of the new documents met the test under subsection 110(4), because the majority were readily and easily available prior to the hearing, two had been provided to the RAD and one had no verifiable source.

[13] The RAD then assessed the applicants' claim of persecution in China as practicing Christians on the basis of the testimony and documentary evidence from the RPD.

[14] The RAD reviewed the applicants' evidence and testimony regarding their Christianity. The Board noted that there are between 40 and 90 million practicing Christians in China, between 20 and 40 million practice at state-sanctioned churches, and the remainder practice in sanctioned or house churches. The Board acknowledged that some leaders of house churches face persecution and possible imprisonment and that members of house churches may be harassed by the Public Security Bureau [PSB]. The Board noted that the applicants were not interested in attending a house church.

[15] The RAD acknowledged that the RPD had found that the applicants were practicing Christians in Canada. The RAD noted that the evidence from the NDP indicates that simple worshipers at house churches in China do not generally face persecution. The RAD noted that there is variation in the treatment of unregistered religious groups by the authorities; unregistered church groups face sporadic police harassment, which usually does not extend beyond fines, brief detentions or orders to disband, but there are local variations in implementing regulations. The RAD also noted that several factors affect the treatment of house churches and their members. The RAD concluded that there was insufficient evidence to show that the applicants would face persecution in China as Christians.

The Issues

[16] On judicial review the applicants argue: the RAD erred in determining that the RPD did not breach procedural fairness by considering the risk upon return to Guangxi and the country condition documents; the RAD erred in not admitting new evidence given that the evidence addressed the country conditions in Guangxi and the applicants had no previous indication this would be an issue and had, therefore, not provided this evidence to the RAD; the RAD breached procedural fairness by relying on the most recent NDP, which was not available at the time the applicants perfected their appeal to the RAD and which the RAD did not bring to their attention to permit submissions to be made; and, the RAD erred in its assessment of the persecution of Christians in China.

Did the RAD err in finding that the RPD did not breach procedural fairness?

The Applicants' Submissions

[17] The applicants submit that the RAD misunderstood their submissions. The RPD had not, at any point in the hearing, indicated that the treatment of Christians in China and Guangxi province was an issue to be addressed. The RPD stated that the issues were credibility, identity, religious identity and subjective fear.

[18] The applicants note that they identified these issues as the relevant issues in their post-hearing submissions to the RPD. In addition, in their submissions to the RAD they stated that the RPD had identified these particular issues.

[19] The applicants point out that there was no opportunity for them to address the issue of objective risk and the country condition evidence regarding Guangxi province, contrary to the RAD's suggestion, because the RPD did not pose any questions to the applicants on this issue. Nor did the RPD indicate that other issues would be considered upon receipt of the applicants post-hearing submissions. The applicants submit that they did not know the issue was "on the table".

[20] The applicants note that, customarily, the RPD will identify the relevant issues to be addressed to permit the submissions to be focussed. Alternatively, as the hearing progresses, the RPD will indicate that certain issues no longer need to be addressed. Neither occurred in the present case.

[21] The applicants note that, although the definition of refugee protection must be met and there are fundamental issues to be addressed in most refugee claims, not every issue needs to be addressed in every claim. For example, credibility is not an issue in every refugee claim. The applicants submit that in *Velauthar v Canada (Minister of Employment and Immigration)* (1992), 141 NR 239, 141 NR 239 (FCA) [*Velauthar*], the Court of Appeal found that it was a breach of natural justice to decide the case on the basis of credibility where the RPD had not indicated credibility was an issue. In other cases, an applicant need only establish that they meet a particular profile and need not establish with objective evidence that they will be persecuted. For example, where the persecution of a particular social group in a country is widely documented and acknowledged, a refugee claimant need only establish that they are a member of the persecuted group.

[22] In the present case, the applicants focused on the issues identified by the RPD, including their personal religious identity and presumed that because the Board did not identify the risk to Christians in Guangxi, this did not need to be addressed – in other words, it was presumed that if the applicants established they were Christians, their risk would be accepted.

The Respondent's Submissions

[23] The respondent submits that the objective risk faced by refugee claimants is always an issue and the country conditions are the context to determine the risk. The NDP is always disclosed prior to a refugee hearing and this puts the issue of objective country conditions "on the table".

[24] The applicants received the NDP and were represented by counsel, who was aware of the relevance of country conditions to the determination of their claims. The NDP reveals that the treatment of Christians in China varies by region.

[25] The respondent argues that unless an issue is "taken off the table" it cannot be assumed that the issue will not be considered. In the present case, the applicants alleged that they were Christians and they would be persecuted as a result of practicing their religion. This requires the RPD to first determine if they are Christians and then to determine whether this will put them at risk. In other words, the country conditions are "part and parcel" of the assessment of their risk.

[26] The onus is on the applicants to prove that they are at risk in China because of their identity as Christians – the onus is not on the RAD or the RPD to prove that the applicants are

not refugees. The applicants did not provide any objective evidence to establish that they would be at risk upon return to Guangxi.

The RAD's finding that the RPD did not breach procedural fairness is not reasonable

[27] The recording of the RPD hearing reveals that at the outset of the hearing, the member explained that she would address: the applicants' personal and religious identities; the applicants' credibility; and, the applicants' subjective fear, including their delay in leaving, re-availment and delay in making their claims for refugee protection. The RPD did not indicate that it would also address the objective evidence regarding persecution of Christians in China, more particularly Guangxi.

[28] The RAD found that the issue of objective risk was a given in any claim of persecution and that the RPD was not required to identify the issue.

[29] I agree that in some circumstances the RPD would not need to state an issue that would be otherwise obvious due to the nature of the claim. However, the question is whether it was obvious that the objective risk to Christians in China, particularly Guangxi, would be an issue in this case, where several specific issues were identified, but objective risk was not.

[30] In this case, the RAD erred in not considering whether the RPD's identification of specific issues and silence on the issue of objective risk led the applicants to reasonably presume or expect that objective risk would not be addressed. The RAD's conclusion that the applicants could have objected to questions, asked for an adjournment to prepare to make submissions or

address the issue in post hearing submissions is based on a misapprehension of the applicants' submissions to the RAD. As the applicants point out, the RPD identified particular issues and there was no line of questioning to alert them to the issue of objective risk. The applicants reiterated the issues that the RPD had identified in their post-hearing submissions and focussed only on those specific issues. Again, the RPD did not let the applicants know that objective risk was also an issue.

[31] In *Velauthar*, the RPD had indicated that the only issue was whether the claimants were persecuted on a Convention ground, invited submissions on that issue, and then decided the claim on the basis of credibility. The Court of Appeal found "a gross denial of natural justice "and noted that "the Appellants were denied the opportunity to know and answer the case against them by a deliberate decision of the presiding member in which his colleague acquiesced."

[32] In other cases cited by the applicants, the Board had not indicated that credibility was an issue and this denied the claimant the opportunity to make submissions (for example, *Butt v Canada (Minister of Citizenship and Immigration)*, 145 FTR 122, [1998] FCJ No 325 (QL), (FCTD); *Rodriguez v Canada (Minister of Citizenship and Immigration)*, [1995] FCJ No 77 (QL), 52 ACWS (3d) 1307 (FCTD); *Chitravelu v Canada (Minister of Citizenship and Immigration)*, 2005 FC 331, 137 ACWS (3d) 1202).

[33] In *Kaldeen v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 1033 (QL), 64 ACWS (3d) 1190 (FCTD) [*Kaldeen*], a claimant was advised at the outset of the

hearing that the only issue was the existence of an internal flight alternative, but the Board decided on the basis of state protection. The Court found a breach of procedural fairness noting:

> [7] The Federal Court of Appeal has stated that when a tribunal makes an undertaking or gives instructions to an applicant with respect to the issues before it, it is bound by those undertakings [*Velauthar v. M.E.I.* (1992), 141 N.R. 239 (F.C.A.)]. Further, in *Diljeet Kaur v. Canada (M.E.I.).*, Noël J. determined that once the tribunal indicated to the applicant that certain evidence was not necessary, "it was no longer open to the Board to rule against the Applicant on the basis that her evidence was not supported by corroborative testimony". Two other Federal Court Trial decisions followed *Velauthar* [*Rodriguez v. Canada (Minister of Citizenship and Immigration)* (January 19, 1995) Action No. IMM-2770-94 (F.C.T.D.), [1995] F.C.J. No. 77, and *Perera v. Canada (Minister of Employment and Immigration)* (1994), 82 F.T.R. 318 (F.C.T.D.)]. In both of those cases, it was found that it was not open to the Board to give an Applicant the impression that only certain issues would be dealt with and then make a ruling on a different issue.

[34] In *Okwagbe v Canada (Minister of Citizenship and Immigration)*, 2012 FC 792, [2012] FCJ No 816 (QL) [*Okwagbe*], the RPD indicated that internal flight alternative was an issue at the hearing, but later indicated, in response to a question from the claimant's counsel, that delay in claiming protection was the "only thing [the claimant] had to get past":

> [7] When the applicant has not made submissions on an issue because the tribunal directly indicates that no such submissions are required, or where the tribunal indirectly indicates that no such submissions are required, then the applicant is denied natural justice if the tribunal makes its ruling based on that issue: *Velauthar v Canada (Minister of Employment and Immigration)*, [1992] FCJ No 425; *Rodriguez v Canada (Minister of Citizenship and Immigration)*, [1995] FCJ No 77; *Butt v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 325.

[35] The jurisprudence establishes that where the RPD indicates that an issue does not need to be addressed, it is a breach of procedural fairness for the RPD to rely on that issue as a basis for

its decision. This would extend to where the RPD directly or indirectly provides such an indication (*Okwagbe*) and where the RPD gives the impression that only particular issues will be dealt with (*Kaldeen*).

[36] In the present case, the RPD specifically or directly identified several issues and did not directly indicate that objective evidence of risk was not an issue. As noted above, the RPD identified the applicants' personal and religious identities, credibility and subjective fear, including their delay in leaving, re-availment and delay in making their claims for refugee protection as the issues to be addressed.

[37] Although the NDP was disclosed to the applicants, which could be argued to have put the country conditions "on the table," the NDP may be relied on for other purposes beyond assessing objective risk.

[38] The RAD did not consider the jurisprudence and did not consider, in the circumstances of this case, whether the RPD gave the impression that only particular issues would need to be addressed and, by implication, that other issues would not need to be addressed.

Did the RAD err in not admitting new evidence?

[39] The applicants argue that the RAD erred in rejecting their new evidence on the basis that it could have been provided to the RPD. They argue that they could not reasonably have been expected to provide evidence of the risk they would face upon return as Christians to Guangxi because this issue was not identified by the RPD. The applicants note that the RAD's failure to

recognize the breach of procedural fairness by the RPD is linked to its rejection of the new evidence.

[40] The applicants describe the new evidence as including reports of the detention of Christian kindergarten teachers, expulsion of pastors, ransacking of homes looking for Bibles, and the arrest and detention of three house church members. The applicants submit that their testimony before the RPD indicated that they wanted to practice their religion free of state control and this new evidence established a basis for their fear.

[41] The admission of the new evidence is linked to the RAD's finding that the RPD did not breach procedural fairness. Due to the finding that the RAD erred in its consideration of whether the RPD breached procedural fairness, the admission of new evidence will also need to be reconsidered.

Did the RAD breach procedural fairness by considering evidence in the October 2014 NDP that was not available at the time the applicants perfected their appeal and which was not brought to the attention of the applicants?

The Applicants' Submissions

[42] The applicants submit that the RAD made findings based on the NDP on China dated October 2014 and which was not available at the time the applicants perfected their appeal. In particular, the RAD relied on document 12.6 of the NDP on China. As a result, the applicants were prevented from making submissions on this information.

[43] The applicants acknowledge that they did not have an opportunity to compare the previously available document. Although the previous document, dated June 2007, is listed in the previous NDP, it was not included in that package. The applicants submit that because the recent version provides adverse information relating to their claim of risk of persecution, there was a duty on the RAD to give notice that it would consider the more recent version. The updated information was relied on by the Board in its decision to dismiss the appeal and, as a result, the applicants were prejudiced.

[44] The applicants point to the jurisprudence which has found that it is a breach of procedural fairness for the RPD to rely on earlier or later versions of a NDP. In *Roy v Canada (Minister of Citizenship and Immigration)*, 2013 FC 768, [2013] FCJ No 815 (QL) [*Roy*] and *Zheng v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1359, [2011] FCJ No 1659 (QL) [*Zheng*], the RPD relied on an older NDP. In *Buri v Canada (Minister of Citizenship and Immigration)*, 2014 FC 45, [2014] FCJ No 47 (QL), the RPD relied on the 2011 version rather than the 2010 version of the NDP regarding country conditions for Roma in Hungary. The Court noted that while not significantly different, the more recent version included initiatives not previously mentioned.

The Respondent's Submissions

[45] The respondent submits that the applicants have not identified how the information in the updated NDP varies from that available in the NDP at the time they filed the appeal or how they have been prejudiced.

[46] The respondent also submits that because the RAD provides a written appeal in most cases, not a rehearing, publicly available information on country conditions that post-dated the filing of the appeal does not need to be disclosed to an appellant unless it is novel, significant or discloses a change in general country conditions that may affect the decision (*Mancia v Canada (Minister of Citizenship and Immigration)*, [1998] 3 FC 461 (FCA) [*Mancia*]).

[47] The respondent adds that although the RAD considered the updated NDP, this package includes documents that were previously available. However, the respondent agrees that the predecessor of document 12.6 regarding, "Treatment of "ordinary" Christian house church members by the Public Safety Bureau (PSB) (2005-2007)" was not on the record for comparison purposes.

The RAD breached its duty of procedural fairness

[48] Document 12.6 of the NDP on China was updated extensively between the March 14, 2014 version, available when the appeal was perfected, and the October 31, 2014 version, relied on by the RAD. Although the October 31, 2014 version refers to reports published between 2010 and 2013, it also refers to reports published after July 2014, the date at which the applicants perfected their appeal.

[49] In *Zheng*, the RPD relied on an older version of the NDP, when an updated version, less favourable to the Board's position, existed, but was not disclosed to the applicant. Justice Mosley found that document disclosure is important for procedural fairness as it gives the applicant an opportunity to properly respond to the Board's concerns (at para 10) and concluded:

> [13] In the circumstances, I find that the Board's reliance on the earlier document constituted a breach of procedural fairness. I am unable to agree with the respondent that the 2010 changes to the document are so trivial that I should find that the decision maker would have reached the same conclusion notwithstanding the breach.

[50] In *Mancia*, the Court of Appeal considered whether a post-claims determination officer was required to disclose the documents that he relied on that were published after the appellant had filed his written submissions, all of which were in the public domain. The Court of Appeal noted that the considerations in determining whether documentary evidence available in the public domain must be disclosed to a claimant include: the nature of the proceeding and the rules under which the decision-maker is acting, the context of the proceeding, and the nature of the documents at issue in such proceedings.

[51] The Court of Appeal answered the certified question noting that each case should be decided according to its own circumstances and:

> (a) with respect to documents relied upon from public sources in relation to general country conditions which were available and accessible when the applicant made his submissions, fairness does not require disclosure in advance of a determination;
>
> (b) where the documents became available and accessible after the applicant filed his submissions, fairness requires disclosure where they are novel, significant and evidence changes in the general country conditions that may affect the decision.

[52] In *Roy*, Justice Scott referred to *Mancia* and *Zheng* and found that the RPD's reliance on a document that was not disclosed to the applicant and not included in the most recent version of the NDP constituted a breach of procedural fairness:

> [43] Applying the principles outlined above, the Court finds that that Board's reliance on the non-disclosed 2009 UK Operational Guidance Note constituted a breach of procedural fairness. Furthermore, the Applicant had a right to expect the Board to limit its analysis to the more recent UK Operational Guidance Note. The Applicant should not have expected the Board to reference an older, outdated version of the Note.

[53] The NDP relied on by the RAD was not publicly available and accessible when the applicants made their submissions.

[54] The RAD should consider the most recent information, given that it is assessing risk on a forward looking basis. However, where that recent information arises after an applicant has perfected their appeal and made their submissions and that information is different and shows a change in the general country conditions, the RAD has a duty to advise the applicant that it is relying on that information. The issue in the present case is whether the RAD should have disclosed the October 2014 NDP to the applicants.

[55] The RAD relied on and quoted document 12.6 of the October 31, 2014 NDP to reach its conclusion. In particular, it noted that members of house churches (as opposed to leaders) do not generally face persecution, that the majority of unregistered churches are tolerated by the government and that there is variation in the treatment of unregistered churches. It noted the factors that influence the treatment of house churches and their members, which include the province or locality of the church, the size of the congregation, its activism, and attitudes and preferences of local officials or the relationship with local officials.

[56] The comparable section in the earlier March 14, 2014 NDP, document 12.6, is dated June 13, 2007 and titled "Treatment of "ordinary" Christian house church members by the Public Security Bureau (PSB) (2005-2007)". As noted above, it was not included as part of the record of the applicants or respondent, nor was it physically reproduced as part of the Certified Tribunal Record, although it is referred to in the list of documents of the NDP dated March 2014.

[57] Document 12.6 dated June 2007 is one and a half pages in length compared to the document 12.6 dated October 2014 with a similar title ("Treatment of "ordinary" Christian house church members by the Public Security Bureau (PSB), including treatment of children of house church members (2009-2014)"), which is more comprehensive at six pages in length.

[58] The June 2007 document 12.6 indicates that there were reports of both church leaders and members facing imprisonment, torture, humiliating treatment, fines withholding of medical treatment and confiscation of religious materials. In addition, during house church raids both church leaders and members have been detained. It notes that leaders may be detained for extended periods while members are released shortly after interrogation. It also indicates that "[o]rdinary underground church members can also easily become targets of official crackdowns." Once a person has been rounded up in a raid, that person will be known to local officials and will be considered a recidivist in future raids. It notes that arrests of house church members were reported in 17 provinces, with the greatest number in Henan province, Zhejiang province and Xinjiang Autonomous Region.

[59] The March 2014 NDP included several Response to Information Requests and other reports that were accessible to the applicants and were similar in their overall conclusion to the October 2014 document 12.6, including that members of house churches are not exposed to the same treatment as their leaders and that the situation varies by region. However, the October 2014 document 12.6, which is specifically quoted by the RAD, is more detailed – in particular, in setting out the factors that will influence the treatment of house church members.

[60] Whether the more recent information is sufficiently different, novel and significant is a question of degree. As noted in *Mancia*, this requires a case by case assessment. In the present case, the recent information does show some change in the country condition documents which appears to minimize the risk the applicants would face, depending on the application of the factors.

[61] In the present case, the applicants should have been provided with an opportunity to make submissions in response to the information in the October 2014 document 12.6, for example, about how the various factors influencing the treatment of house church members related to their own circumstances upon return to Guangxi.

[62] The RAD's failure to do so amounted to a breach of procedural fairness. As a result, the appeal must be remitted to the RAD for redetermination.

[63] There is no need to consider the issue of whether the RAD erred in its assessment of the persecution of Christians in Guangxi as this will require reconsideration based on the reception of the submissions in response to the recent country condition documents.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed and the matter be remitted to the RAD for redetermination.

"Catherine M. Kane"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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