

Federal Court



Cour fédérale

Date: 20200917

Docket: IMM-2954-19

Citation: 2020 FC 907

Ottawa, Ontario, September 17, 2020

PRESENT: Mr. Justice McHaffie

BETWEEN:

LI HUI CHEN

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Refugee Appeal Division (RAD) did not conduct a reasonable analysis of the risk of persecution Mr. Li Hui Chen would face as a practising Pentecostal Christian should he return to China. The RAD undertook only limited substantive analysis of the evidence regarding that issue, and that analysis appeared to consider that harassment and mistreatment could only amount to persecution if it involved arrest and detention. I therefore agree with Mr. Chen that the

RAD's reasons with respect to his *sur place* claim do not demonstrate a rational chain of analysis and are unreasonable.

[2] The application for judicial review is therefore granted.

II. Issues and Standard of Review

[3] Mr. Chen raises two issues with the RAD's analysis of his *sur place* claim:

- A. Did the RAD apply the wrong test for a *sur place* claim?
- B. Was the RAD's analysis of the persecution Mr. Chen would face unreasonable?

[4] There is no dispute that the standard to be applied in reviewing the merits of the RAD's refusal of Mr. Chen's *sur place* claim is that of reasonableness: *Thanabalasingam v Canada (Citizenship and Immigration)*, 2015 FC 397 at para 9; *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25.

[5] In conducting a reasonableness review, this Court must determine whether the decision is both reasonable in outcome and process: *Vavilov* at para 87. As the Minister notes, this is not a microscopic analysis, nor a “line-by-line treasure hunt for error”: *Pillai v Canada (Citizenship and Immigration)*, 2008 FC 1312 at paras 33-35; *Vavilov* at para 102. Rather, a reasonable decision is one that is justified, transparent, and intelligible, reflecting “an internally coherent and rational chain of analysis” when read as a whole and taking into account the record before the decision maker: *Vavilov* at paras 81, 85, 91, 96, 99.

[6] The reasonableness of an administrative decision must be assessed in relation to the factual and legal constraints that bear on it: *Vavilov* at para 99. The “legal constraints” include the governing statutory scheme and binding precedent regarding the interpretation of that scheme: *Vavilov* at paras 108–114. The “factual constraints” include the evidence before the decision maker, which must have been reasonably reviewed and considered: *Vavilov* at paras 125–126.

III. Analysis

A. *The RAD’s application of the test for sur place claims was reasonable*

[7] A refugee *sur place* is a person who was not a refugee when they left their country, but who becomes a refugee at a later date: *Thanabalasingam* at para 6, quoting the United Nations *Handbook on Procedures and Criteria for Determining Refugee Status* at paras 94–96. A person may become a refugee *sur place* owing to a change in circumstances in their home country, or as a result of their own actions. As with other claims for refugee protection, the assessment of a *sur place* claim is prospective, assessing whether the claimant has a “well-founded fear of persecution” or is a person in need of protection from a future harm: *Pour-Shariati v Canada (Minister of Employment and Immigration)*, [1995] 1 FC 767 at para 17; *Henry v Canada (Citizenship and Immigration)*, 2013 FC 1084 at para 47; *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], ss 96, 97.

[8] The Refugee Protection Division (RPD) rejected Mr. Chen’s claim for refugee protection based on religious persecution, citing serious credibility concerns regarding his claim that

China's Public Safety Bureau tried to arrest him in 2017. Mr. Chen did not challenge these credibility findings in his appeal to the RAD. Rather, he focused on his *sur place* claim, alleging his activities with the Pentecostal Christian church in Canada, which were accepted as credible, would put him at risk of persecution in China.

[9] The RAD concluded that Mr. Chen's religious activities in Canada would not come to the attention of Chinese authorities, as he was not of a high profile, but simply an "ordinary church-going man." The RAD then made the following statement:

As there is, on a balance of probabilities, little chance that the Chinese authorities will ever know about the Appellant's church habits in Canada, whether truly motivated or otherwise motivated, there is no valid *sur place* claim.

[Emphasis added.]

[10] Mr. Chen argues this passage showed the RAD improperly applied the test for determining a *sur place* claim, by limiting its analysis to whether it was likely the Chinese authorities would ever know about his church habits in Canada. Mr. Chen alleges the RAD failed to consider a material element of his *sur place* claim: whether he would face a serious possibility of persecution or risk to his life or of cruel and unusual treatment or punishment if he were returned to China.

[11] The Minister accepts that assessing a *sur place* claim is not limited to whether authorities in the home country will find out about the claimant's activities abroad. The RAD must also consider whether or not the claimant would face religious persecution if returned to their home country: *Chen v Canada (Citizenship and Immigration)*, 2012 FC 565 at paras 9–11; *Chen v*

Canada (Minister of Citizenship and Immigration), 2002 FCT 480 at paras 19–21. The likelihood of authorities in the home country finding out about activities abroad may be largely determinative of the issue of prospective risk where the claim is based exclusively on, for example, political activities abroad: see, *e.g.*, *Gebremedhin v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 497 at paras 23–29. However, where the *sur place* claim relates to a condition that will continue upon return, such as religion, the risk of persecution upon return based on this condition must be assessed regardless of whether authorities would find out about activities in Canada.

[12] The RAD’s statement that since Mr. Chen’s activities in Canada would not come to the attention of Chinese authorities “there is no valid *sur place* claim” is therefore, on its face, incorrect at law. If this were the extent of the RAD’s analysis, it would have been unreasonable, as being contrary to binding authority without reasonable justification: *Vavilov* at paras 112–114.

[13] However, having made this statement, the RAD’s reasons then go on to consider and assess Mr. Chen’s prospective risk of persecution if he returned to China. Thus while the RAD misstated the test for a *sur place* claim in the foregoing passage, it in fact did address the analysis required. The Supreme Court of Canada in *Vavilov* affirmed that decisions must be reviewed contextually and that reasons should be read as a whole: *Vavilov* at para 99. Since the RAD did undertake the requisite assessment, I find that its misstatement is not a flaw that is sufficiently central or significant to render the decision unreasonable: *Vavilov* at para 100.

B. *The RAD erroneously equated persecution with arrest*

[14] Mr. Chen claimed that as a Pentecostal Christian, he would face religious persecution in China. His submission to the RAD, while brief, pointed to country condition evidence illustrating a variety of conduct by Chinese authorities toward Christians that he argued showed a serious possibility of religious persecution.

[15] After summarizing the RPD's decision and Mr. Chen's arguments, the RAD's analysis of this issue is set out in the following four paragraphs:

[24] I have read the documents adduced into evidence. Although it is true that more recent documents indicate a higher level of harassment by the Chinese authorities aimed at Christians and followers of other religions as well, it is not clear in my mind that this harassment of some members of some religious communities rises to the level of persecution of all Christians. What is clear from the documents is that some members are being harassed, but not all members are being harassed.

[25] It would appear from the documents that "normal" Christian denominations are accepted by the Chinese authorities, and "normal" includes, among fifty Protestant denominations, Pentecostals.

[26] The International Religious Freedom Report for 2017 indicates that there are as many as eighty million practicing Christians, including Pentecostals, in China. At year's end (2017), there were a total of 594 Christians, across all of China, incarcerated for various illegal, but faith-related, actions. That number amounts to about 0.00075% of Christians being harassed, enough to be considered as persecuted. That percentage is so infinitely small that it makes it less than a mere possibility that any individual practicing adherent Pentecostal would be persecuted in China.

[27] I must disagree with Counsel. Having read the more recent documents regarding religion in China, I cannot help but find that there is less than a mere possibility that a Pentecostal person would

face persecution for religious reasons, should he return to China and continue to practice his religion.

[Emphasis added; footnotes omitted.]

[16] I agree with Mr. Chen that the RAD's reasons on this issue are unreasonable, as they show an improper approach to the assessment of religious persecution.

[17] This Court recognized in *Fosu* that religious persecution may take various forms, such as “prohibition on worshipping in public or private, giving or receiving religious instruction or, the implementation of serious discriminatory policies against persons on account of the practice of their religion.”: *Fosu v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 1813 at para 5; *Zhang v Canada (Citizenship and Immigration)*, 2009 FC 1198 at paras 19-20.

[18] While the RAD arguably set out the inquiry it ought to have embarked upon—whether the evidence of harassment and other discrimination showed that there was a serious possibility of persecution—its analysis did not address this point. Instead, it first observed that “some members are being harassed, but not all members are being harassed.” While the extent of harassment may be relevant to the ultimate issue, the question is not whether all members of a religious group are being harassed. The RAD then noted that religions described as “normal,” including Pentecostal Christians, are accepted by Chinese authorities, without any analysis of what this meant in light of the other evidence of harassment and discrimination.

[19] The RAD then considered the specific evidence relating to incarceration, performing a calculation based on the number of Christians incarcerated at the end of 2017, and the total

number of practising Christians. I note that the placement of the comma in the sentence “[t]hat number amounts to about 0.00075% of Christians being harassed, enough to be considered as persecuted” is such that it could be read to mean that the harassment of 0.00075% of Christians is a high enough percentage for that harassment to be considered persecution. However, given the RAD’s conclusion that persecution was not established, it is clear that the RAD meant that only 0.00075% of Christians have been “harassed enough to be considered as persecuted.” The RAD thus concludes that this low percentage of incarcerated Christians is so small that it makes it less than a mere possibility that any individual practising Pentecostal Christian would be persecuted.

[20] This analysis is fundamentally flawed, as it equates the possibility of facing religious persecution with the possibility of being arrested. That this is the nature of the analysis is confirmed by the RAD’s reference to only those who were incarcerated having been “harassed enough to be considered as persecuted.”

[21] As Mr. Chen notes, this Court has confirmed that restricting the analysis of religious persecution to arrest and incarceration is unreasonable: *Zhang* at paras 19-20; *Dong v Canada (Citizenship and Immigration)*, 2010 FC 575 at para 17. Here, the reliance on incarceration rates formed effectively all of the analysis conducted by the RAD. This flaw is so central and significant to the RAD’s conclusion that it renders the decision unreasonable: *Vavilov* at para 100.

[22] The Minister argues that reading the RAD's discussion of incarceration rates in isolation amounts to a microscopic analysis of the reasons in a manner inconsistent with the reasonableness standard: *Pillai* at paras 33–35; *Vavilov* at para 102. I agree that the RAD's reasons must be read globally, and that it would be improper to focus on one error to the exclusion of the remainder of the analysis. However, in the present case, the only analysis the RAD conducted with respect to applying the standard of a "serious possibility of persecution" to their findings of fact was its analysis based on incarceration rates. The rest of the RAD's reasons summarize the evidence before it and acknowledge that harassment and persecution of Christians in China does occur. Contrary to the Minister's arguments, no material analysis of the documentary evidence and the likelihood of persecution can be found in the RAD's summary of Mr. Chen's arguments, or its reference to some but not all Christians being harassed.

[23] Nor do I consider that the RAD's final statement—that based on its review of the more recent documents, it finds there is less than a mere possibility of religious persecution—can be read in isolation from the analysis of incarceration rates. Rather, it appears to flow directly from, and be based on, the incarceration analysis. In any event, if it were read separately, it would simply be a conclusory statement without any rational chain of analysis, which does not satisfy the requirements of justification, transparency and intelligibility: *Vavilov* at para 103; *Williams v Canada (Citizenship and Immigration)*, 2020 FC 8 at para 61. Although the RAD does summarize Mr. Chen's submissions and references to the documentary evidence, even on a generous reading of the RAD's decision, I cannot see any other analysis of whether this evidence points to a serious possibility of persecution, or any explanation of the conclusion that it does not, other than the mathematical analysis of incarceration rates.

[24] I therefore conclude that the RAD's analysis of Mr. Chen's *sur place* claim was unreasonable and must be set aside.

IV. Conclusion

[25] This application for judicial review is allowed and Mr. Chen's appeal remitted to a different panel of the RAD for redetermination.

[26] Neither party proposed a question for certification. I agree that no certifiable question arises in the matter.

JUDGMENT IN IMM-2954-19

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed. Mr. Chen's appeal of the dismissal of his application for refugee protection is remitted to a different panel of the Refugee Appeal Division for redetermination.

"Nicholas McHaffie"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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