

Federal Court



Cour fédérale

Date: 20230614

Docket: IMM-8909-21

Citation: 2023 FC 845

Ottawa, Ontario, June 14, 2022

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

HUY TRUNG NGUYEN

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision of the Refugee Appeal Division [RAD], dated September 27, 2021 [the Decision]. In the Decision, the RAD upheld the decision of the Refugee Protection Division [RPD], which found that the Applicant is neither a

Convention refugee nor a person in need of protection under sections 96 and 97(1) of the *Immigration and Refugee Protection Act, SC 2001, c 27 [IRPA]*.

[2] As explained in greater detail below, this application is granted, because the RAD relied on an unreasonable analysis in concluding that a warrant of arrest, presented by the Applicant as documentary evidence corroborating his claim, was not authentic.

II. Background

[3] The Applicant is a citizen of Vietnam who claims fear of persecution due to his support for human rights organizations, including the Coalition of Self-Determined Vietnamese People [the Coalition].

[4] The Applicant claims that, while studying at university in Vietnam from 1999 to 2002, he participated in a ceremony commemorating the sacrifice of 64 Vietnamese soldiers who perished in battle. After completing his studies in Multimedia in 2002, he started a business, through which he developed a close relationship with a friend, who became a human rights defender.

[5] The Applicant's friend asked the Applicant to join him and his friends in the ceremony commemorating the 64 Vietnamese soldiers, which the Applicant agreed to do as he had previously participated in the ceremony during his time at university. After meeting with this group, all of whom were human rights activists peacefully speaking out against the violation of human rights of Vietnamese people, the Applicant told them that he had graduated university in Multimedia and that he could provide them with media support.

[6] The Applicant claims that, in March 2011, he was arrested and beaten by plainclothes police officers after he gathered with his friend and their human rights partners at the Vietnam Veterans Memorial. He claims that the police told him that he was alleged to have disrupted the public order and engaged with others in spreading information against the government and propaganda against the state. He alleges that he was released after the police took his identity information and he agreed to assist them in their investigation.

[7] The Applicant claims that the day after his release the police attended his home and badly beat him. He claims that he was coerced to confess that he participated in an unregistered human rights organization that aims to overthrow the government. He was subsequently arrested and released two days later, after he was threatened with 10 years imprisonment if he continued to work with human rights organizations. In the weeks following his release, police officers and investigation agents attended his home on numerous occasions. As a result, the Applicant's parents encouraged him to apply for a visitor's visa to visit Canada. He left Vietnam on December 17, 2012.

[8] The Applicant asserts that, from Canada, he used his savings in Vietnam to support his friend and his partners to establish the Coalition. The Applicant claims that he highlighted his friend's human rights activities online for his followers until his friend was arrested on November 6, 2016. He claims that his friend was charged with making and disseminating information against the Socialist Republic of Vietnam and activities aimed at overthrowing the people's administration. He further claims that his friend was subsequently sentenced to 11 years in prison.

[9] The Applicant's status in Canada expired in 2016. He did not return to Vietnam at that time, because his parents discouraged him from doing so after reading the news of the arrest and imprisonment of the Applicant's friend.

[10] The Applicant claims that, on October 8, 2018, the Investigation Security Agency in Vietnam decided to prosecute him on charges of making and spreading information against the state. He claims that, on January 11, 2019, he was issued a summons to appear in court on January 21, 2019 and, after not appearing, a warrant for his arrest was issued on January 28, 2019. On May 29, 2019, he filed a claim for refugee protection, which was rejected by the RPD on February 11, 2021. The Applicant appealed the RPD's decision to the RAD.

III. Decision under Review

[11] In the Decision that is the subject of this application for judicial review, the RAD dismissed the Applicant's appeal. The determinative issue before the RAD was credibility.

[12] With respect to the Applicant's political profile, the RAD found that his evidence about his role with his friend and human rights partners, who eventually formed the Coalition, was inconsistent. The RAD noted that, in the Applicant's Basis of Claim [BOC] form, he claimed he was accused of posting and sharing articles critical of the government. In his immigration form, the Applicant stated that he read and wrote articles on the website showing support for the Coalition. In his BOC narrative, the Applicant claims that he told the Coalition he could help support them with all media and started working for them in the fields of online propaganda, Facebook, website, etc. Finally, in his RPD hearing, the Applicant testified that in addition to

posting photographs and information to the group's website, he prepared banners and protest uniforms. The RAD found that the Applicant's evidence about his communications role with the group was not consistent.

[13] Related to the Applicant's political profile, he claimed that he sent money to the Coalition through Hai Van, a company that performs money transfers, with his last transfer occurring in 2016. The Applicant submitted a letter from B&T Food Centre, which stated that they are an authorized agent for Hai Van but that, as they only keep records for one year, they could not provide records for money sent by the Applicant to Vietnam from before 2016. The RAD noted that the letter did not confirm that any transfers were made by the Applicant and therefore found it had little probative value.

[14] Finally, the RAD analysed the summons and warrant tendered by the Applicant to demonstrate that he is wanted by the police, along with a copy of the Criminal Procedure Code of Vietnam [Code] presented by the Applicant. The RAD found that neither the manner in which the summons was allegedly delivered nor the form of the summons complied with the Code. As such, the RAD found the summons to be inauthentic.

[15] With respect to the warrant, the RAD noted the RPD's analysis and concluded that the RPD had erred when it found that the Applicant did not provide country condition evidence [CCE] demonstrating the conditions under which a court can hold a trial for an accused *in absentia*. The RAD accepted that the copy of the Code submitted by the Applicant represented such evidence. However, the RAD did not find this error determinative.

[16] Rather, the RAD considered the Applicant's submissions on appeal surrounding typical prosecution processes in Vietnam. The Applicant argued that normally the process of the court to prosecute someone starts by issuing a summons to call the person to appear in the court to respond to allegations. If the person does not appear, a warrant is issued for the person's arrest. The RAD found that the Applicant's submissions were not consistent with the warrant, which did not reference the summons or the Applicant's failure to appear or that he was tried *in absentia*. The RAD also noted that the court file numbers on each of the summons, warrant, and decision to prosecute were different.

[17] Based on these issues on the face of the warrant, the RAD concluded on a balance of probabilities that it was not authentic.

[18] Finally, the RAD noted that the Applicant delayed over two years, after learning in November 2016 that members of the Coalition had been arrested, before he claimed refugee protection. The RAD found that the Applicant's decision to remain in Canada illegally and his delay in claiming protection were not determinative but were factors that supported its negative conclusion as to his credibility.

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

IV. Issues and Standard of Review

[20] Based on the Applicant's submissions, the sole issue raised in this application for judicial review is whether the RAD erred in its assessment of the Applicant's credibility.

[21] The applicable standard of review is reasonableness (see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65).

V. Analysis

[22] The Applicant challenges only some of the RAD's adverse credibility findings, advancing arguments related to the RAD's assessment of documentation submitted by the Applicant to corroborate his claim. In my view, one of those arguments is sufficient to undermine the reasonableness of the Decision.

[23] The Applicant notes that the RAD's finding that the warrant was not authentic turned significantly on its conclusion that the Applicant's submissions on appeal were not consistent with the warrant, because the warrant did not reference the summons, the Applicant's failure to appear in court, or the trial of the Applicant *in absentia*. He argues that the record before the RAD included no CCE or other evidentiary support for the RAD's proposition that the warrant should have been expected to reference any of this information. The Applicant argues that the RAD's analysis therefore turned on unsupported speculation and is unreasonable.

[24] I agree with this submission, as I find this portion of the Decision lacking in both logic and evidentiary support. First, I agree with the Applicant's argument that the RAD does not identify any evidence supporting its reasoning as to the information that a warrant should be

expected to include. The Respondent identified in argument various articles of the Code that the Applicant had submitted into evidence. However, none of this evidence supports the RAD's reasoning. To the extent the RAD's observation, that the Court file number in the summons was different from that of the warrant and the decision to prosecute, is to be read as an additional reason for rejecting the warrant as inauthentic, again I find nothing in the CCE that supports this reasoning.

[25] Moreover, the RAD's reasoning that the warrant's failure to reference the Applicant having been tried *in absentia* was inconsistent with his submissions appears to misunderstand the Applicant's submissions and the CCE. As I read the Applicant's submissions, he argued not that the warrant was issued as a result of him being tried *in absentia* but rather that it resulted from his failure to appear in court on the date required under the summons.

[26] This argument was consistent with Article 290(1) of the Code, which states that if a defendant absconds (which I interpret to mean failing to appear in court on the appointed date), he can be compelled by force to attend. This compulsion is consistent with the issuance of a warrant. Article 290(2) then explains the circumstances in which the court can hold a trial *in absentia*, which includes the defendant having absconded and remaining elusive. However, I find no evidentiary support for the RAD's conclusion that a trial *in absentia* should have preceded the issuance of the warrant and therefore should have been referenced in the warrant.

[27] In my view, the analysis underlying the RAD's finding that the warrant was not authentic is flawed. The remaining question is whether this error undermines the reasonableness of the Decision as a whole.

[28] The Applicant refers the Court to *Qalawi v Canada (Citizenship and Immigration)*, 2007 FC 662 [*Qalawi*], in support of the principle that, where a decision-maker states that it was the cumulative effect of all negative findings that led to its adverse credibility conclusion, impugning just some of those findings on judicial review can undermine the reasonableness of the overall conclusion. In such circumstances, it cannot be safely found that the decision-maker would have arrived at the same conclusion in the absence of the impugned findings (at paras 17-18).

[29] On this point, I agree with the Respondent's position that the Decision at hand does not involve a cumulative negative credibility finding of the sort that was at issue in *Qalawi*. I am also conscious that the RAD expressly stated that it considered certain of its credibility findings to be determinative (*i.e.*, resulting from the inconsistencies in the Applicant's evidence about his communications role with the Coalition) and other credibility findings not determinative (*i.e.*, resulting from the Applicant's decision to remain in Canada illegally and his delay in claiming protection in Canada). On the other hand, I note the RAD's statement at the end of its analysis of the warrant that its finding that the warrant was not authentic supported its negative credibility finding. Given the potential probative value of the warrant for the Applicant's arrest had it not been rejected as inauthentic, it is not safe for the Court to conclude that the RAD would have rejected the Applicant's claim for lack of credibility had it not made the error identified by the Court.

[30] Based on this analysis, I will allow this application for judicial review, set aside the Decision, and return the matter to a differently constituted panel of the RAD for re-determination. It is therefore unnecessary for the Court to consider the Applicant's other arguments challenging the reasonableness of the Decision.

[31] Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-8909-21

THIS COURT'S JUDGMENT is that this application for judicial review is allowed, the Decision is set aside, and the matter is returned to a differently constituted panel of the RAD for re-determination. No question is certified for appeal.

"Richard F. Southcott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-8909-21

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CITIZENSHIP AND IMMIGRATION

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