

Federal Court



Cour fédérale

Date: 20240726

Docket: IMM-4041-23

Citation: 2024 FC 1192

Toronto, Ontario, July 26, 2024

PRESENT: Madam Justice Whyte Nowak

BETWEEN:

THI THAO LY DAO

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Thi Thao Ly Dao [the Applicant] is a citizen of Vietnam who has been practicing as a Hoa Hao [HH] Buddhist since October 2018. She was involved in an act of protest, which led the Vietnamese police to detain, interrogate and assault her, after which she arranged to leave Vietnam and seek refugee protection in Canada. She fears persecution in Vietnam based on her religious practice if she were to return to Vietnam.

[2] The Refugee Protection Division of the Immigration and Refugee Board [RPD] found that the Applicant did not meet the definition of a convention refugee under section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] nor was she a person in need of protection under subsection 97(1) IRPA. The determinative issue for the RPD was that the Applicant had not demonstrated that there is a serious possibility of persecution if she were to return to Vietnam. On March 7, 2023, the Refugee Appeal Division [RAD] dismissed an appeal of the RPD Decision brought by the Applicant [RAD Decision].

[3] This is an application for judicial review of the RAD Decision brought pursuant to subsection 72(1) of IRPA.

[4] For the reasons that follow, I find the RAD's decision was unreasonable. As such, this application for judicial review is granted.

II. The Legal Framework

[5] To obtain refugee status in Canada, a person must be either a convention refugee or a person in need of protection.

[6] The definition of convention refugee is set out in section 96 of the IRPA. According to well-established judicial authority, refugee claimants must demonstrate on a balance of probabilities that they have a subjective fear and an objective basis for that fear (*Sierra v Canada (Citizenship and Immigration)*, 2023 FC 881 [*Sierra*] at para 32 and *Adjei v Canada (Minister of Employment and Immigration)*, [1989] 2 FC 680 (FCA) at pp. 682-683). The claimant must

establish that there is a “reasonable chance,” or “more than a mere possibility” or “good grounds for believing” that they will face persecution if they return (*Ramanathy v Canada (Citizenship and Immigration)*, 2014 FC 511 at paras 15–17).

[7] The definition of a person in need of protection is set out in subsection 97(1) of the *IRPA*. Under section 97, claimants must establish on an objective basis that there are “substantial grounds to believe” or that it is “more likely than not” that they will be subjected to a danger of torture, a “risk of cruel and unusual treatment or punishment,” or a threat of death, should they return (*Sierra* at para 46). This risk must be shown to be a personalized risk that is different from that faced by others (*Paramananthalingam v Canada (Citizenship and Immigration)*, 2017 FC 236 at paras 13-17).

III. Facts

[8] The events that form the basis of the Applicant’s fear of persecution started in February 2019, when the Applicant, along with fellow HH Buddhist temple members, distributed flyers in order to protest the imprisonment of six HH Buddhists in the city of An Giang.

[9] On February 15, 2019, two members of the Applicant’s Temple were arrested and interrogated about the flyers and their alleged accomplices at the house temple. Five days later, the Applicant and her fellow practitioner, Pham, were taken to the police station and interrogated about their connection with the flyer activity. The police threatened and assaulted the Applicant in some manner (whether by pinching or hitting her in the ribs). Upon release, the Applicant

fearing she could be detained again, hired a smuggler to flee the country. On June 6, 2019, the Applicant arrived in Canada and made an inland claim for refugee protection.

A. *The RPD Decision*

[10] On February 28, 2022, the RPD rejected the Applicant's refugee claim [RPD Decision]. The determinative issue for the RPD was the credibility of the Applicant's fear that she faced a forward-looking risk of persecution if she were to return to Vietnam as a practicing HH Buddhist.

[11] Two key findings supported the RPD's conclusion. First, the RPD found that the Applicant lacked credibility in her allegations of past police interest which undermined her allegation of future persecution. Second, the RPD considered that the Applicant had not established that Vietnamese authorities would seek to detain her if she returned. This was based on objective country documentation which supported a finding that practitioners of HH Buddhism do not face persecution or harm in the absence of individualized factors including a high political profile, a profile the RPD did not consider the Applicant to have.

[12] The Applicant appealed the RPD Decision to the RAD.

B. *The New Evidence*

[13] After the Applicant's appeal had been perfected, the Applicant disclosed new evidence in the form of two affidavits, one from the Applicant and one from the Applicant's mother [the

New Affidavit Evidence]. According to the New Affidavit Evidence, in early March 2022, the Applicant's fellow practitioner Pham, was arrested as part of a police raid of an HH house temple she had been attending. One week after Pham's arrest, the police went to the Applicant's home and made inquiries about the Applicant and warned against the Applicant engaging in further illegal religious activities. As of the date of the New Affidavit Evidence, Pham remained in detention.

C. *The RAD Decision*

[14] The RAD found the New Affidavit Evidence admissible, but confirmed the RPD Decision based on its independent assessment of the two determinative issues.

- (1) No serious possibility of future persecution based on allegations of past persecution

[15] The RAD determined that the Applicant had failed to establish she faced a forward-looking risk of persecution for two reasons. The RAD considered that the Applicant had not credibly established that Vietnamese authorities came inquiring about her after she left Vietnam in either 2019 or in March 2022 and that the Vietnamese authorities would therefore have an interest in persecuting the Applicant if she returns to Vietnam. The key to this finding was the RAD's rejection of the New Affidavit Evidence related to the police inquiries in March 2022. The RAD stated there was no explanation provided as to why the police came to inquire about the Applicant's whereabouts in March 2022, even accepting that the Applicant was given a warning in 2019. The RAD highlighted the almost 3-year gap in police visits, which was

coincidental to the timing of the RPD Decision rejecting the Applicant's claim in mid-February, 2022.

- (2) No serious possibility of persecution for the Applicant on the ground of her political opinion or the practice of her religion

[16] The RAD also considered information in National Documentation Package-related sources [NDP] which highlighted the actions Vietnamese authorities take when a person whose political profile (imputed or otherwise) is of interest to them. While the RAD accepted that the Applicant had been brought in for police questioning in 2019, it held that the Applicant did not credibly establish with sufficient evidence, including corroborative evidence (in the form of an arrest warrant, detention order or other report), that she was the subject of an investigation by Vietnamese police for a particularly serious crime or a national security case, including disrupting public order, which would support her fear of persecution on a forward-looking basis if she returns to Vietnam. It found the New Affidavit evidence related to the March 2022 police inquiry to be implausible.

[17] The RAD further considered the RPD to have correctly found no serious possibility of persecution if the Applicant returned to Vietnam as a practicing HH Buddhist. This finding was based on the Applicant's lack of high political profile and the objective country evidence that HH practitioners who are persecuted by Vietnamese authorities have "other individualized elements of risk about their profile which the [Applicant] did not, such as involvement in political activities."

IV. Issues and Standard of Review

[18] The Applicant has raised the following errors in the RAD's analysis of future risk, which she says render the RAD Decision unreasonable:

- A. The RAD erred in rejecting the credibility of the New Affidavit Evidence on the basis that it was implausible;
- B. The RAD erred in its assessment of the Applicant's activities as non-political which led the RAD to conclude, based on the NDP evidence before it, that the Applicant did not fit the profile for the type of dissident who is at risk for harassment and persecution by the government; and
- C. The RAD erred in finding that the Applicant can freely practice her faith in Vietnam.

[19] The parties do not dispute, and I agree, that reasonableness is the appropriate standard of review for the merits of the RAD decision (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 25).

[20] 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” (*Vavilov* at para 85), and where the reasons for the decision are justifiable, intelligible, and transparent (*Vavilov* at para 95).

Reviewing courts must refrain from reweighing and reassessing the evidence before the decision-maker (*Vavilov* at para 125, citing *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 55).

V. Analysis

A. *Improper Implausibility Finding*

[21] In assessing the New Evidence, the RAD found the timing of the March 2022 police inquiry implausible considering that it came: (i) more than three years after the 2019 police warning; and (ii) one month after the RPD Decision had rejected the Applicant's refugee claim on the basis that there was a lack of police interest in her.

[22] While plausibility findings may form the basis of a negative credibility finding, they may only be drawn in the "clearest of cases" where the facts as presented fall "outside the realm of what could reasonably be expected" or where "the events could not have happened in the manner asserted by the claimant" (*Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 [*Valtchev*] at para 7; and *Barekzai v Canada (Minister of Citizenship and Immigration)*, 2021 FC 199 at paras 27-28).

[23] I find that the RAD's implausibility finding does not meet this standard. The RAD focused on the RPD Decision as the triggering event for the New Affidavit Evidence, however, it is equally plausible that the triggering event was the arrest of the Applicant's friend, Pham with whom the Applicant had a strong connection: they worshipped together, distributed flyers together, and were questioned at the police station in February 2019 at the same time. It cannot be said that this alternative triggering event for the police's renewed interest in the Applicant is "outside the realm of what reasonably could be expected" (*Valtchev* at para 7).

[24] The RAD had a duty to grapple with this alternative explanation, but failed to do so (*Valtchev* at para 8 citing *Leung v MEI* (1994), 81 FTR 303 (TD) at p. 307). This error warrants intervention by this Court since it undermines the RAD Decision in a significant way given that it goes to the Applicant's central claim that she would be persecuted by Vietnamese police if she returns to Vietnam based on past incidents of persecution and fits the profile for those HH Buddhists who are targeted by authorities.

B. *Improper Assessment of the Applicant's Profile and NDP Evidence*

[25] The RAD found based on the objective country evidence that the Applicant failed to establish that she faces a serious possibility of persecution because of her political opinion or the practice of her faith. I am of the view that the RAD erred in both its assessment of the Applicant's profile and its related assessment of the objective country evidence, which was unduly selective and which the RAD failed to reconcile with the Applicant's circumstances.

(1) *The RAD's error in assessing the Applicant's profile*

[26] I agree with the Applicant who submits that the Applicant is "not just any HH practitioner," but a practitioner who was interrogated by police about her involvement not only in relation to her religion, but in connection with her act of protest. In assessing whether the Applicant had a political profile, the RAD erred by focusing exclusively on the Applicant's answer to the following question at the Applicant's RPD Hearing:

MEMBER: So have you ever been politically active against the government?

CLAIMANT: So, your question is like if I joined any politics or activity against the government?

MEMBER: Yeah. Were you a member of, like yeah participated in protests for example?

CLAIMANT: No, never.

[27] At the same time, the RAD ignored the evidence which followed:

MEMBER: Okay. And, tell me about the flyers? Tell me about the process of making the flyers?

CLAIMANT: The contents of the flyer that we did not agree with the treatment from the government to all the persons who were put in the jails. And, we really wanted the government to change the way of treating the people. This is why we decided to make the flyers.

MEMBER: Okay, so what did the flyers say?

CLAIMANT: The flyer says we protest the mistreatment from the government to ...on the practitioners.

[28] The RAD erred in characterizing the Applicant's profile. Whereas the RPD found the Applicant had *no* political profile, the RAD subtly elevated the standard to that of a *high* political profile in order to match its use of the NDP evidence related to serious crimes and cases of national security. The Applicant most certainly had a political profile. The flyers she helped distribute criticized the government and were the subject of two of three topics about which she was questioned in her police interrogation. The question is whether it was appropriate for the RAD to have focused on serious crimes and cases of national security when assessing the Applicant's forward-facing risk.

(2) *The RAD's related error in assessing the objective country evidence*

[29] Despite acknowledging that the country documents were “mixed,” the RAD focused exclusively on NDP information related to arrest and serious crimes, neither of which were relevant to the Applicant’s circumstances.

[30] At the same time, the RAD ignored NDP information that actually matched the very treatment that the Applicant was subjected to stemming from her participation in her act of protest. That information stated that HH Buddhists who are politically active (or are perceived to be) are deemed to pose a threat and have faced “harassment, arrest and detention.” According to one report, HH Buddhists may be taken to police stations for questioning, released after 3-4 hours, and invited back for further questioning. The source states that this can eventually lead to charges and some unofficial HH Buddhists have been arrested, prosecuted, and imprisoned for dissent. This is in fact consistent with the New Affidavit Evidence that the Applicant’s fellow practitioner was detained in March 2022 and has not been seen since. This NDP evidence constitutes clear support for the very risk feared by the Applicant and the RAD’s failure to reconcile the country condition evidence against the Applicants’ circumstances constitutes an error (*Cruz Salazar v Canada (Minister of Citizenship and Immigration)*, 2024 FC 1149 at para 19).

[31] I find that both these errors as well as the RAD’s improper implausibility finding significantly undermine the RAD’s finding that the Applicant had failed to demonstrate a well-

founded fear of persecution if she were to return to Vietnam. These errors render the RAD Decision unreasonable and are sufficient to dispose of this application.

VI. Conclusion

[32] For the above reasons, the Applicant's judicial review application is granted. The RAD Decision is set aside. The matter will be remitted to a different RAD panel for redetermination.

[33] Neither party proposed a question for certification, and I agree that none arises in the circumstances.

JUDGMENT in IMM-4041-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.
2. The decision dated March 7, 2023 is hereby quashed and set aside.
3. The matter is remitted back for reconsideration by a different panel.
4. There is no question of general importance for certification.

"Allyson Whyte Nowak"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4041-23

STYLE OF CAUSE: THI THAO LY DAO v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: HELD BY WAY OF ZOOM VIDEOCONFERENCE

DATE OF HEARING: JULY 24, 2024

JUDGMENT AND REASONS: WHYTE NOWAK J.

DATED: JULY 26, 2024

APPEARANCES:

Elnaz Dast Parvardeh FOR THE APPLICANT

Sarah Merredew FOR THE RESPONDENT

SOLICITORS OF RECORD:

Korman & Korman LLP FOR THE APPLICANT
Barristers and Solicitors
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT
Toronto, Ontario