

Federal Court



Cour fédérale

Date: 20210824

Docket: IMM-4202-20

Citation: 2021 FC 869

Ottawa, Ontario, August 24, 2021

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

RUITING YANG

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] of the Immigration and Refugee Board of Canada, dated July 27, 2020. In that decision, the RAD dismissed the appeal and confirmed the decision of the Refugee Protection Division [RPD], dated August 8, 2018, which rejected the Applicant's claim for protection under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] As explained in more detail below, this application is dismissed, because the Applicant's arguments have identified no reviewable error by the RAD.

II. Background

[3] The Applicant is a citizen of the People's Republic of China [China]. He filed a refugee claim in Canada based on an alleged risk to his life or cruel or unusual punishment or treatment resulting from a loan shark. He also sought refugee protection on the basis that he faces persecution in China due to his association with an illegal religious group, the Shouters.

[4] The Applicant obtained a Canadian Temporary Resident Visa [TRV] on November 13, 2012, with the assistance of a smuggler. He used the TRV to enter Canada on December 29, 2013. In Canada, he worked at a restaurant without authorization or immigration status until April 21, 2016, when he was detained by the Canada Border Services Agency. He filed his refugee claim in Canada on April 22, 2016.

[5] In his Basis of Claim [BOC] narrative, signed on April 22, 2016, the Applicant indicated that he was seeking protection in Canada because he borrowed money to come to Canada and, if he returned to China without paying back the loan, he would be at risk of harm by the people who had lent him the money. The Applicant completed this initial BOC narrative without the assistance of a lawyer.

[6] The Applicant subsequently retained counsel and filed an amendment to his BOC narrative on June 6, 2016. The amended BOC narrative indicated that he was seeking refugee

protection in Canada because Public Security Bureau [PSB] officials in China were seeking him as a result of his association with a Christian church known as the Shouters.

A. *First RPD Decision*

[7] The Applicant's refugee claim was initially heard by the RPD on June 17, 2016. The RPD issued a decision on August 10, 2016, determining that the Applicant was not a Convention refugee under s 96 of *IRPA* or a person in need of protection under s 97 of *IRPA* [First RPD Decision]. The RPD made a number of findings, based on which it determined that the Applicant's allegation that he was being sought by the PSB for his connection with the Shouters church was not credible. These findings included consideration of a summons that the Applicant had submitted to corroborate his allegation that he is being persecuted due to his connection to the Shouter religion [the Summons]. The RPD assigned no weight to the Summons because of its prior negative credibility findings and because fraudulent documents are prevalent in China.

[8] The RPD also dismissed the Applicant's s 97(1) claim that he faces risk to his life or cruel and unusual treatment or punishment from loan sharks for being unable to repay his high-interest loan. The RPD found that in order for a claim to be allowed under s 97(1)(b), risk must not be generally faced by the majority of the population. The RPD found that fear of retribution from loan sharks in China is a generalized risk faced by members of the population who decide to borrow money from loan sharks and is therefore excluded from s 97(1)(b). In the alternative, the RPD rejected the Applicant's s 97 claim on the basis that the Applicant had not rebutted the presumption that that he could access state protection in China.

B. *First RAD Decision*

[9] The Applicant appealed the First RPD Decision to the RAD. In a decision dated December 19, 2016, the RAD allowed the appeal in part [First RAD Decision]. The RAD upheld the RPD's determination that the Applicant's allegation that he was pursued by the PSB was not credible. The RAD deferred to, or agreed with, most of the RPD's adverse credibility findings. However, the RAD determined that the RPD had erred in assigning no weight to the Summons because of previous credibility findings and the availability of fraudulent documents in China. The RAD explained that there must be some reason or evidence to rebut the presumption that government-issued documents are valid.

[10] After independently reviewing the Summons and comparing it to samples in the National Documentation Package [NDP], the RAD found that the grounds for summoning the Applicant had not been clearly indicated and that the Summons was missing an approval that should have appeared on a summons "by the person in charge at the local police station". The RAD therefore assigned the document little weight.

[11] However, the RAD found that the RPD had failed to make a finding as to whether it was credible that the Applicant would be at risk to his life or cruel and unusual treatment or punishment from a loan shark if he returned to China. The RAD found that the RPD erred in concluding that the Applicant's risk was of a generalized nature and was therefore excluded from s 97(1)(b) of *IRPA*. Rather, the RAD reasoned that the Applicant's allegation concerned a risk specific to him and his family because he borrowed from a loan shark. With respect to the issue

of whether the Applicant could access state protection from the danger posed by the loan shark, the RAD held that the RPD had not provided an adequate analysis.

[12] Therefore, the RAD confirmed the RPD's decision that the Applicant is not a Convention refugee under s 96 of *IRPA*. However, the RAD returned the claim under s 97(1) of *IRPA* back to the RPD for redetermination by a differently constituted panel.

C. *Second RPD Decision*

[13] On August 3, 2018, the RPD held a hearing for the matter that had been sent back for redetermination. The RPD member provided an oral decision on August 8, 2018, determining that the Applicant is not a person in need of protection within the meaning of s 97 of *IRPA* [Second RPD Decision].

[14] In its analysis, the RPD explained that a person seeking protection in Canada, because they believe they would be at risk to their life or of cruel and unusual treatment or punishment or of a danger of torture, must establish that risk on a balance of probabilities. The evidence must establish a specific individualized risk of harm. The RPD found that, while the risk from the loan shark is personal to the Applicant, he had not demonstrated that it was more likely than not to occur.

[15] At the hearing, the Applicant testified that he borrowed 430,000 Renminbi at a high interest rate from a loan shark, that he never met the loan shark and does not know his or her name, and that his wife delivers payments to this person's house monthly. The Applicant also

testified that, on one occasion when his wife failed to make a payment, the loan shark threatened that the Applicant's children would have a problem if he failed to pay. The Applicant had paid all but 70,000 Renminbi as of the August 3, 2018 hearing before the RPD.

[16] Based on this testimony, the RPD found that the person that the Applicant fears is a moneylender, who has not directly threatened the Applicant, and that the Applicant's fear of this person is purely speculative. The RPD found that there was no reason or evidence that the Applicant would be unable to repay the moneylender. The RPD concluded that there was insufficient evidence for it to find on a balance of probabilities that the Applicant would face risk to his life or cruel and unusual treatment or punishment if he returned to China. That is, the Applicant had not established an objective basis for his claim.

[17] The RPD then indicated that, because it had found that the Applicant's risk is not well-founded, it was unnecessary for it to perform an in-depth analysis of state protection. However, the RPD proceeded to provide a brief state protection analysis. The RPD remarked that analysis of state protection in the Applicant's case is difficult because neither he nor his family had tested the availability or adequacy of such protection. The RPD also noted the Applicant's testimony that moneylenders are not legal organizations and the Applicant's counsel's submission that the police are corrupt. However, the RPD found no evidence that the police would be unable or unwilling to protect the Applicant should he fear violence from the moneylender in China. It also noted certain documents in the record, which indicate that China has control of its police and that intentional assault is a crime that carries sanctions.

D. *Second RAD Decision*

[18] The Applicant appealed the Second RPD Decision to the RAD. The RAD dismissed the appeal in a Decision dated July 27, 2020 [Second RAD Decision], which is the subject of this application for judicial review.

[19] The RAD considered the Applicant's submission on appeal that the RPD erred by failing to assess his risk under section 97. In making this argument, the Applicant referenced a portion of the Second RPD Decision in which the RPD incorrectly stated that it was engaging in a s 96 analysis of the Applicant's risk from loan sharks or moneylenders. The RAD dismissed the argument that this mistake was an error, holding that the reference to s 96 was a slip of the tongue and that it was clear from the totality of the decision that the RPD had in fact conducted its assessment under s 97.

[20] The Applicant also argued that the RPD erred by finding that the risk that the Applicant faced was speculative in nature. The RAD disagreed, noting that the RPD conducted its analysis on the assumption that the Applicant's evidence was true. It explained that the RPD's reference to the speculative nature of the risk concerned the unknown variables related to the nature of the risk that the Applicant faced. In particular, the Applicant had not established that he likely could not repay the debt. Also, he had not been personally threatened and his wife, who allegedly was threatened, did not provide a statement.

[21] The Applicant also challenged the RPD's state protection assessment, arguing that the RPD failed to account for documentary evidence in the NDP, describing police corruption and weak oversight, and failed to consider whether police protection in China is operationally

adequate. The RAD noted that, as a result of the RPD's conclusion as to the Applicant's ability to repay his debt, a state protection analysis was not required. However, the RAD also stated that the RPD correctly engaged in such an analysis in accordance with the direction in the First RAD Decision.

[22] While the RAD acknowledged that the documentary evidence indicates that corruption exists in Chinese administration, including the police, it concluded that the Applicant had failed to show that adequate protection would not likely be available to him. The RAD agreed with the RPD's assessment that the documentary evidence shows that unlicensed moneylenders are common in China and that use of threatening messages is not unusual. However, it found that the documentary evidence does not suggest that moneylenders are free to assault debtors with impunity, noting an example in the NDP of a creditor being sentenced to almost eight years in jail for engaging in such behavior.

[23] The Applicant's counsel also submitted that the RPD erred by failing to engage in a s 97 assessment of risk based on the Applicant's association with the Shouters. The RAD stated that this submission was without merit, because the First RPD Decision had concluded that the allegation of risk based on association with the Shouter church was not credible. Given this finding, there was no factual basis upon which a s 97 assessment could be made. The RAD also commented that this line of argument was an impermissible collateral attack on a final determination of the risk by the RAD, which is subject to the principle of *res judicata*. The RAD, therefore, dismissed the appeal.

III. Issues and Standard of Review

[24] The Applicant raises the following as issues for the Court's consideration:

1. Whether, in the First RAD Decision, the RAD erred in its assessment of the Summons;
2. Whether, in the First RAD Decision, the RAD erred in its plausibility finding of the Applicant's ability to exit China using his own documents;
3. Whether, in the First RAD Decision, the RAD erred in failing to conduct an independent credibility assessment;
4. Whether, in the Second RAD Decision, the RAD erred by failing to consider the religious context of the Applicant's s 97 claim; and
5. Whether, in the Second RAD Decision, the RAD erred in its assessment of risk of the Applicant's s 97 claim.

[25] Among other arguments, the Respondent takes issue with the Applicant's efforts to challenge the First RAD Decision in this application for judicial review.

[26] The parties agree, and I concur, that the issues raised in this application are subject to the reasonableness standard of review.

IV. Analysis

A. *First Three Issues*

[27] As the first three issues raised by the Applicant impugn the reasonableness of the First RAD Decision, asserting arguments surrounding the RAD's analysis of the Applicant's claim arising from his involvement with the Shouters, I will first consider the merits of the Respondent's position that it is not available to the Applicant to challenge that decision. The Respondent's arguments on this issue, and those of the Applicant in response, canvas various administrative law principles. These include principles of *res judicata* and issue estoppel, the prematurity principle (also referred to as the doctrine of exhaustion), and the requirement under Rule 302 of the *Federal Courts Rules*, SOR/98-106, that an application for judicial review (unless the Court orders otherwise) be limited to challenging a single decision.

[28] In my view, the requisite analysis must begin with consideration of the scope of the Application for Leave and for Judicial Review, filed by the Applicant on September 10, 2020 [ALJR], and the Order of the Court, dated May 17, 2021, granting leave in this matter [the Leave Order]. The ALJR seeks leave to commence an application for judicial review of the decision of the RAD dated July 27, 2020, i.e., the Second RAD Decision. Similarly, the Leave Order grants leave to commence an application for judicial review of the Second RAD Decision. Therefore, it is clear that only the Second RAD Decision is under review in this matter.

[29] It is also, therefore, clear that Rule 302 is not engaged, as the ALJR is limited to a single decision.

[30] However, before arriving at a conclusion on the Applicant's ability to assert the arguments underlying the first three issues raised in this application, I must consider a submission he advances in support of that ability. The Applicant submits that the Second RAD Decision can be construed as adopting the findings of the First RAD decision, such that those findings remain subject to judicial review in this application.

[31] To assess the merits of that submission, I turn to the reasoning in the Second RAD Decision. The RAD considered the Applicant's argument that the RPD erred by failing to engage in a s 97 assessment of risk based on his association with the Shouters. The Applicant argued that, notwithstanding the RPD's finding in its s 96 assessment that the Applicant was not credible in alleging fear of the PSB based on attending an illegal church, the RAD had not assessed his credibility in an independent s 97 analysis. The Applicant therefore advanced submissions as to the risk in China faced by members of illegal house churches.

[32] In the Second RAD Decision, the RAD found these submissions to be without merit. It reasoned that, because of the adverse credibility conclusion surrounding the Applicant's allegations of risk based on involvement with an illegal church, there was no credible factual basis upon which to conduct a s 97 assessment. The RAD explained that, if the Applicant was of the view that the First RAD Decision erred by upholding the RPD's adverse credibility conclusion, the appropriate remedy was to seek judicial review of the First RAD Decision. The RAD characterized the Applicant's argument as an impermissible collateral attack on a final determination of the risk related to his religious claim, which was subject to the principle of *res judicata*.

[33] The RAD added that, after performing a contextual reading of the First RAD Decision, it concluded the s 97 claim that was sent back to the RPD for redetermination concerned solely the risk from moneylenders, and not the risk arising from the Applicant's religious claim.

[34] Based on this portion of the Second RAD Decision, it is clear that the decision cannot be read as an adoption of the findings of the First RAD Decision. Rather, the Second RAD Decision concluded that the credibility findings related to the Applicant's allegations about the Shouter church, and the determination of the religious risk based thereon, were final when made by the RAD in 2016, such that the principle of *res judicata* applied.

[35] It remains necessary to consider whether the RAD's reliance on the principle of *res judicata* in this analysis was reasonable, as the Applicant disputes the application of this principle. He relies on *Qiu v Canada (Citizenship and Immigration)*, 2019 FC 389 at para 39 [Qiu], which explains that the related doctrines of *res judicata* and issue estoppel apply only in relation to a "final" decision, i.e., a decision which conclusively determines the question between the parties. As the Applicant submits, *Qiu* also states that the test of finality for issue estoppel is that a decision is final when the decision-making forum pronouncing it has no further jurisdiction to rehear the question or to vary or rescind the finding (at para 39).

[36] The Applicant takes the position that this test is not met in the case at hand, because the RAD (when making the Second RAD Decision) remained empowered to make an independent assessment of the case that was not limited to issues raised by the RPD. I do not find this argument compelling. It must be recalled that it was the RAD itself, in the First RAD Decision,

that either deferred to or agreed with most of the RPD's adverse credibility findings related to the religious risk and then made its own adverse finding concerning the Summons. I therefore find no basis to conclude that the RAD retained jurisdiction to revisit those findings after the First RAD Decision. Certainly, bearing in mind that the Court is conducting a reasonableness review, I find no basis to conclude that the RAD's *res judicata* analysis was unreasonable.

[37] In so concluding, I have also considered the RAD's finding, as noted above, that the s 97 claim which First RAD Decision sent back to the RPD for redetermination concerned solely the risk from moneylenders and not the risk related to the Applicant's religious claim. The RAD based this conclusion on a contextual reading of the First RAD Decision. That decision does not state expressly that the s 97 claim referred back to the RPD was restricted in this manner. However, the RAD's reasons in the First RAD Decision make it clear that the referral back resulted from the RAD's conclusion that the RPD had erred in its assessment of the risk from moneylenders, by treating this as a generalized risk. Again applying the reasonableness standard, the conclusion in the Second RAD Decision, as to the interpretation of the First RAD Decision, is eminently reasonable.

[38] I have also considered the Applicant's argument that the administrative law principle of prematurity, also referred to as the doctrine of exhaustion, would have prevented him from challenging the First RAD Decision through Federal Court judicial review. As explained in *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 at para 31, absent exceptional circumstances, parties cannot seek judicial intervention in an administrative process until that process has run its course. This doctrine is consistent with the principles of *res judicata*

and issue estoppel, as the latter serves to ensure the finality of decision-making, where there is no further recourse to challenge a decision, while the former applies to decisions that are not yet final. As described in *Lessard-Gauvin v Canada (Attorney General)*, 2016 FC 227, a case raised by the Applicant in support of his Rule 302 arguments, the doctrine of exhaustion can preclude access to judicial review where the impugned decision is subject to an administrative remedy that has not yet been exhausted (at para 9).

[39] In my view, it is clear that the doctrine of exhaustion would not have precluded the Applicant from seeking judicial review of the First RAD Decision, in relation to its rejection of his claim based on involvement with the Shouters. Following that Decision, the RAD had no further jurisdiction to consider that claim, and the administrative process in relation thereto had run its course. The Applicant's only remaining recourse in relation to that claim was judicial review.

[40] Finally, I have considered the Applicant's argument that, even if the principle of *res judicata* applied in the circumstances of this case, it did not necessarily bar the admission of new evidence of the religious risk. In advancing this argument, the Applicant relies on a document entitled "Confirmation of Release from the prison", dated September 30, 2017, which the Applicant sought to introduce as new evidence before the RPD in the hearing leading to the Second RPD Decision. This document purports to confirm that an individual, who the Applicant says is his cousin, had served a four-year prison term for violating the law by joining illegal group church activities. The Applicant sought to argue before the RPD and the RAD, following the First RAD Decision, that this new evidence supported his religious claim.

[41] The Applicant seeks to invoke an exception to the principle of *res judicata* that can apply where new evidence, that was previously unavailable, has been identified. However, as explained in the authority upon which the Applicant relies, this exception applies where the new evidence “conclusively impeaches the original results” (see *Ping v Canada (Citizenship and Immigration)*, 2013 FC 1121 at para 12). While the Second RAD Decision does not include an analysis of whether the evidence of the cousin’s imprisonment supported application of this exception, it would not be possible to find that this particular evidence conclusively impeached the First RAD Decision’s rejection of the Applicant’s religious claim. Evidence of the cousin’s imprisonment could not have undermined the adverse credibility findings and established that that Applicant himself is at risk. Therefore, the Applicant’s argument based on this evidence does not undermine the reasonableness of the RAD’s reliance on the principle of *res judicata*.

[42] In conclusion, the first three issues raised by the Applicant do not represent a basis for the Court to grant judicial review in this application.

B. *Fourth Issue*

[43] The fourth issue raised by the Applicant (whether, in the Second RAD Decision, the RAD erred by failing to consider the religious context of the Applicant’s s 97 claim) has already been addressed in the analysis above. The RAD reasonably found that:

1. The s 97 claim, which the First RAD Decision sent back to the RPD for redetermination, concerned solely the risk from moneylenders, not the risk related to the Applicant’s religious claim; and

2. The First RAD Decision conclusively determined the risk related to the Applicant's religious claim.

C. *Fifth Issue*

[44] Finally, in arguing that the Second RAD Decision erred in its assessment of the Applicant's s 97 claim, the Applicant challenges the state protection analysis in that decision. He submits that the RAD unreasonably analyzed the country condition evidence in concluding that he had not rebutted the presumption that the police would offer effective protection from violence by loan sharks.

[45] This argument cannot represent a reviewable error because, as the Respondent notes, the state protection finding in the Second RAD Decision was an alternative finding. Before embarking on its state protection analysis, the RAD upheld the findings in the Second RPD Decision that the Applicant failed to establish that he would still be in debt by the time he returned to China or that, if he was still in debt, he would be unable to work and pay any outstanding debt. The Applicant has not challenged this conclusion and, as the RAD noted, as a result of this conclusion, no state protection analysis was required.

V. Conclusion

[46] As the Applicant's arguments have identified no reviewable error by the RAD, this application for judicial review must be dismissed. Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-4202-20

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

No question is certified for appeal.

"Richard F. Southcott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4202-20

STYLE OF CAUSE: RUITING YANG v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: HEARD BY VIDEOCONFERNECE VIA TORONTO,
ONTARIO

DATE OF HEARING: AUGUST 12, 2021

JUDGMENT AND REASONS: SOUTHCOTT J.

DATED: AUGUST 24, 2021

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