

Federal Court



Cour fédérale

Date: 20230220

Docket: IMM-8820-21

Citation: 2023 FC 251

Ottawa, Ontario, February 20, 2023

PRESENT: The Honourable Mr. Justice Henry S. Brown

BETWEEN:

VAN NGOC NGUYEN

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision by the Refugee Appeal Division [“RAD”], dated October 8, 2021, dismissing the Applicant’s appeal and confirming the decision of the Refugee Protection Division [“RPD”], which found the Applicant was not 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].

II. Facts

[2] The Applicant is a 39-year-old citizen of Vietnam. He was born and raised in a Catholic Christian family. He is claiming refugee protection because he fears the Vietnamese authorities due to his participation in protests and political activism in Vietnam. The following are his allegations.

[3] In April 2016, as a result of an environmental disaster caused by a plastic plant, the plant agreed to pay compensation to the communities. However, several communities, including the Catholic parishes were denied payments. Consequently, on February 14, 2017, thousands of people marched 200 kilometres to file a lawsuit under the guidance of a parish priest in Vietnam. The Applicant, as leader of his parish's Justice and Peace Committee, helped to organize the march along with other parish members. The police stopped and beat many protesters, including the Applicant who was hospitalized.

[4] In March 2017, he fled to Laos when his friends told him the local police were looking for him. He made several trips back and forth to Laos and returned on May 15, 2017 to join another protest against the government for failing to compensate the Catholic community. On the morning of May 15, 2017, the Applicant went to get his ill mother who was being discharged from the hospital where she was not given proper care. On his way to his mother's house, the police stopped the Applicant and his mother, laid his mother on the ground, and beat the Applicant. The police let him go but threatened they would charge him for his activities on February 14, 2017.

[5] In July 2017, the Applicant's mother passed away. Other marches and protests occurred throughout 2017 that the Applicant did not attend and resulted in people being harassed, beaten, arrested and imprisoned. The Applicant claims most of the members of his parish have been arrested and imprisoned.

[6] The Applicant remained in hiding until September 2018. He arrived in Canada on October 10, 2018 and was given multiple work visas. On November 27, 2019, the Applicant filed his refugee claim. The Applicant claims his son was not allowed to study in any public school of Do Thanh commune due to the Applicant's political activities.

[7] The RPD rejected the Applicant's claim finding him not credible. It made the following findings in support of this conclusion:

- Although claiming to be the leader of the February 14, 2017 protest, the Applicant provided vague and non-specific details of how he organized and led the protest
- It is not reasonable that the Applicant travelled to Laos on multiple occasions and returned to Vietnam with no trouble even though the police were supposedly looking for him and he feared arrest and torture
- The Applicant's explanation for delaying to make a refugee claim for over a year after coming to Canada was not reasonable
- The letters of support from Vietnam do not overcome the Applicant's lack of credibility
- There is insufficient evidence to establish that the Applicant's son was not allowed to attend school because of the Applicant's political activities

III. Decision under review

[8] On October 8, 2021, the RAD dismissed the Applicant's appeal. The RAD agreed with the RPD's assessment of the Applicant's lack of credibility and found that despite being active in two protests, there is insufficient credible evidence that he was at the forefront as a leader or organizer or wanted by police.

A. *Credibility*

[9] The RAD agreed with the RPD's assessment of the Applicant's lack of credibility because he was unable to describe or elaborate on any details of his leadership of the protests or provide credible evidence he is wanted by Vietnamese police.

(1) Testimony

[10] The RAD reviewed the core evidence and found nothing in the parish priest from Vietnam's letter that "even makes a passing reference to [the Applicant's] role in planning or coordinating the protests." The RAD also found the parish priest in Canada's letter says nothing about the Applicant's alleged political activities in Vietnam or being wanted by the police.

[11] The RAD also reviewed the Applicant's testimony and found him to be vague and non-responsive. It noted the Applicant said he recorded six videos of the February protest but none were entered into evidence. The RAD gleaned the Applicant was involved with the protests by making a few phone calls to small groups of parishioners.

[12] The RAD found the Applicant's testimony to be inconsistent and evolving particularly pertaining to whether the Applicant had been arrested by the police. He testified he was arrested by the police because he "...used to be the leader of a group related to Peaceful and Freedom" and then he answered "No, never" to questions of whether he'd been arrested. He also confirmed there was no warrant for his arrest. Based on his credibility issues, the RAD concluded the Applicant's assertions that others have told him the police are looking for him are insufficient to establish this fact on a balance of probabilities.

[13] The RAD found the Applicant was making up various facts in his testimony including the fact the hospital did not keep a record of his visit because the police would come and investigate. It found the Applicant's testimony that things were quieting down before the May protest contradicted his Basis of Claim ["BOC"] where he states most members of his parish were imprisoned.

[14] The RAD also found the Applicant was speculating the reason why his son was not allowed to go to public school is connected to his political activities. Nevertheless, the RAD determined the issue of the Applicant's son's schooling provides no probative value on whether the Applicant is at risk of being arrested in Vietnam due to his political opinion.

(2) Support letter from the chairman of parish and Confirmation Letter

[15] The RAD found the RPD was obliged to consider the Applicant's support letters before assigning them no weight because witnesses were not available and due to general findings of

the Applicant's negative credibility. It conducted an independent assessment of the support letters.

[16] The RAD disagreed with the RPD stating it should have given more weight to the letter from the chairman of his parish in Vietnam because it contained substantive content on the Applicant's narrative. The chairman of his parish in Vietnam's letter alleges the Applicant is wanted by the police for crimes of disrupting public order and assisting reactionaries. It also confirms the Applicant participated in the protests for compensation, but it does not cast him in the role of a leader or organizer. Furthermore, the letter outlines the Applicant's mother was tortured by the police. However, the Applicant's testimony asserts the police mistreated her. Based on the chairman of his parish in Vietnam's exaggeration of the treatment of the Applicant's mother, the RAD found his letter less trustworthy. The RAD found the chairman of his parish in Vietnam's assertion the Applicant is wanted by the police to be speculation because "he provides no explanation for how he has first-hand knowledge of their interest or the specific charges he sets out." The RAD concludes that minimal weight should be given to his letter on the question of whether the Applicant is wanted by the police.

[17] The Applicant placed his own Confirmation Letter dated August 27, 2019 into evidence, which was endorsed by the parish priest in Vietnam. It duplicates his narrative but does not mention the Applicant's role in leading the march on February 14, 2017, his role in leading the protest of May 15, 2017, that his mother was mistreated in any way, or that the police were looking for him. The RAD found the omission of a leading role, the torture of his mother and the unproven allegation he is wanted by the police detracts from the Applicant's credibility. The

RAD concluded, on a balance of probabilities, the Applicant's Confirmation Letter was a true account of what occurred and additional details of leading the protests, being sought by the police and the mistreatment of his mother were added to bolster his claim. It concluded there is insufficient evidence to support allegations by the Applicant and the chairman of the Parish in Vietnam's letter that he is wanted by the police or he will be arrested upon his return.

(3) Multiple departures and re-availments detracts from credibility

[18] The RAD agreed with the RPD that the Applicant's leaving and return to Vietnam from trips to Laos on multiple occasions and Japan on one occasion detracted from the credibility of his allegations of subjective risk. They called into question his subjective fear of persecution in Vietnam. The RAD also agreed with the RPD in doubting the credibility of the allegation the Applicant is being sought by police, stating it is inconsistent for the parish priest in Vietnam who was concerned for the Applicant's well-being to ask the Applicant to risk arrest and possible torture by helping him with the second protest. On a balance of probabilities, the RAD found the Applicant's numerous re-availments to Vietnam indicated he was not wanted by the police.

(4) One-year delay in claiming asylum in Canada

[19] The RAD agreed with the RPD that the Applicant's delay in submitting the claim coupled with his repeated returns to Laos while he was supposedly hiding, also casts doubt on his allegation police were actively pursuing him. The RAD found the Applicant's actions on re-availments and his delay were inconsistent with a subjective fear of being arrested and detracted from his credibility.

(5) Well-founded fear of persecution

[20] The RAD found the RPD erred in not making a finding on the application of Vietnam's treatment of protesters to the Applicant's situation. The RAD conducted an independent assessment of all the evidence and found the Applicant was a participant in two protests suppressed by the police. It found authorities did not view the Applicant as an organizer for either protest, some of whom were identified for punishment. The RAD concluded the Applicant's subjective fear of persecution is questionable given his actions, and even if he does fear arrest, there is no objective basis for this because he hasn't been identified by the police for any sort of sanction.

IV. Issues

[21] Respectfully, the issue is whether the RAD's decision is reasonable.

V. Standard of Review

[22] The parties agree and so do I, that the applicable standard of review is reasonableness. In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, issued at the same time as the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the majority per Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

[31] 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 that constrain the decision maker” (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review “[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with ‘respectful attention’ and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion” (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand “the basis on which a decision was made” (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).

[32] A reviewing court should consider whether the decision as a whole is reasonable: “what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review” (*Vavilov*, at para. 90). The reviewing court must ask “whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision” (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).

[33] Under reasonableness review, “[t]he burden is on the party challenging the decision to show that it is unreasonable” (*Vavilov*, at para. 100). The challenging party must satisfy the court “that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable” (*Vavilov*, at para. 100).

[Emphasis added]

[23] That said, the Supreme Court of Canada in *Vavilov* makes it clear the role of this Court is not to reweigh and reassess the evidence unless there are “exceptional circumstances”. No such circumstances exist in the case at bar. The Supreme Court of Canada instructs as follows:

[125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from “reweighing and reassessing the evidence considered by the decision maker”: *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court’s deferring to a

lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.

[Emphasis added]

[24] In addition, the Federal Court of Appeal recently held in *Doyle v Canada (Attorney General)*, 2021 FCA 237 that the role of this Court is not to reweigh and reassess the evidence:

[3] In doing that, the Federal Court was quite right. Under this legislative scheme, the administrative decision-maker, here the Director, alone considers the evidence, decides on issues of admissibility and weight, assesses whether inferences should be drawn, and makes a decision. In conducting reasonableness review of the Director's decision, the reviewing court, here the Federal Court, can interfere only where the Director has committed fundamental errors in fact-finding that undermine the acceptability of the decision. Reweighing and second-guessing the evidence is no part of its role. Sticking to its role, the Federal Court did not find any fundamental errors.

[4] On appeal, in essence, the appellant invites us in his written and oral submissions to reweigh and second-guess the evidence. We decline the invitation.

[Emphasis added]

VI. Analysis

A. *Was the RAD's Decision reasonable?*

[25] The determinative issue is whether the RAD erred in its credibility findings and in finding insufficient evidence of subjective fear.

[26] Credibility findings “command a high degree of judicial deference upon judicial review, considering the role of trier of fact conferred to the administrative tribunal”: *Lawani v Canada (Citizenship and Immigration)*, 2018 FC 924 [*Lawani*] at paras 15-16 [Gascon J]; *Singh v Canada (Citizenship and Immigration)*, 2021 FC 612 at para 22 [Diner J].

[27] The Applicant does not challenge the inadmissibility of new evidence at the RAD. Nor does the Applicant challenge the RAD’s finding on his numerous re-availments to Vietnam.

(1) Credibility

[28] The Applicant argues a decision cannot be reasonable if it is made without regard to the evidence submitted relying on *Katwaru v Canada (Citizenship and Immigration)*, 2007 FC 612 at paras 18, 22 [Teitelbaum J]. The Applicant contests the RAD’s cumulative credibility findings and relies on Justice Mactavish’s decision, as she then was, *Qalawi v Canada (Citizenship and Immigration)*, 2007 FC 662 [*Qalawi*] for the proposition that where the board makes cumulative negative credibility findings, and the Court finds some of those findings were made in error, the Board’s decision must be overturned where:

[17] [...] it is not possible to ascertain what effect the findings that I have found to have been made in error would have had on the Board’s analysis and on its ultimate conclusion.

[29] First, the Applicant asserts the RAD erred because the Applicant’s testimony in conjunction with the corroborative letters sufficiently described his particular involvement in the protests. However, the Applicant does not go into detail as to what was his particular involvement in the protests or how the letters sufficiently describe this.

[30] Second, the Applicant submits the RAD erred by not properly analyzing and discussing the issue of the delayed claim before concluding it detracts from the Applicant's credibility.

[31] I disagree with the proposition these assertions result in reviewable error. They all call for review and reassessment of evidence in a manner more favourable to the Applicant, but that is not the role of this Court on judicial review per *Vavilov* and *Doyle* cited above. I agree with the Respondent that the RAD systemically canvassed the Applicant's testimony and supporting documents and found the Applicant's alleged profile of being a protest organizer not credible. That finding was open to it on the record.

[32] The RAD found the Applicant's testimony "inconsistent and evolving" in that for example he testified he was arrested by the police but when further questioned about his arrest he denied it. This finding was open to the RAD.

[33] There is no doubt the RAD was entitled to consider the Applicant's delay in filing a refugee claim as a factor in its credibility analysis per *Zhuang v Canada (Citizenship and Immigration)*, 2019 FC 263 [*Zhang*] at para 23 [Strickland J].

[34] The RAD was also entitled to consider delay and re-availment together. As the Respondent submits this was unobjectionably and reasonable given both factors "are inconsistent with a subjective fear of being arrested and detract from his credibility." The RAD also confirmed delay is not determinative and weighed this cumulatively with the Applicant's re-availment evidence. I agree. The RAD's adverse credibility findings based on the vagueness and

inconsistencies in the evidence were reasonable as they were supported by the record. It is well established the RAD is entitled to make a negative finding of credibility based on the accumulation of inconsistencies and omissions regarding crucial elements of a refugee claim. The RAD concluded the Applicant lacked credibility due to inconsistencies in crucial elements of his claim, including the fact the Applicant is not wanted by the police, may never have been arrested, and the Applicant's role in the protests as a participant, not leader or activist.

[35] I see no reviewable error in the RAD's analysis of credibility.

(2) Well-founded fear of persecution

[36] The Applicant submits the RAD's finding that the Applicant's fear of persecution is not well-founded is unreasonable and contradicts its own findings. The Applicant argues the RAD found the government of Vietnam "restricts public assemblies that criticize the government and reacts in various ways depending on the perceived threat" and "activists have been mistreated and imprisoned and those who organize protests receive the harshest punishments." It also found the Applicant was "one of the numerous participants in the two protests who were suppressed by the police." However, the RAD concluded the Applicant's fear of persecution is not well-founded.

[37] The Applicant asserts the RAD erred by equating the word "leader" to "activist" and as a result, came to an unreasonable conclusion that since the Applicant was not an "organizer," he would not face persecution or his fear is not well-founded.

[38] The Applicant also argues that the RAD erred by not conducting a forward-looking analysis on the issue of persecution for past protests and issue of any future threats. He asserts there is more than a mere possibility of persecution for the Applicant given his activist profile and his past activist involvement in protests.

[39] I disagree. In my respectful view, as the Respondent submits, the RAD independently assessed the evidence before finding insufficient basis to fear persecution. The RAD reasonably confirms the burden of proving fear of persecution is on the Applicant not the RAD given constraining law in this respect as set out in *Zhu v Canada (Citizenship and Immigration)*, 2020 FC 318 [*Zhu*] at para 16 [Ahmed J]), and that “both subjective and objective elements” are “crucial elements to establishing well-founded fear in a refugee case” (*Akinyemi-Oguntunde v Canada (Citizenship and Immigration)*, 2020 FC 666 [*Akinyemi-Oguntunde*] at para 20 [Ahmed J]). In my view, the RAD reasonably found the Applicant’s profile did not reflect his being a political activist, or leader. The RAD’s findings were not contradictory because it noted the Applicant was “one of the numerous participants...who were suppressed by police” but “was not viewed by authorities as one of the organizers” and was not “identified for punishment.”

[40] This Applicant failed to present evidence establishing a “personal nexus between the claimant and the alleged persecution” which is necessary to establish forward-looking risk: *Iraqi v Canada (Citizenship and Immigration)*, 2019 FC 1049 at para 29 [Gascon J]. I also agree the “more than mere possibility” standard only applies after the Applicant establishes the facts of his claim on a balance of probabilities: *Jayasinghe Arachchige v Canada (Citizenship and Immigration)*, 2020 FC 509 [*Jayasinghe*] at paras 51-63 [Russell J].

[41] In this case, in my respectful view, the RAD made a finding based on objective evidence of Vietnam's treatment of protesters to the Applicant's situation. It determined the Applicant was one of the many participants in "two protests who were suppressed by police" and he "was not viewed by authorities as one of the organizers of either protest" and therefore not "identified for punishment." These are all factually suffused determinations that are not open to dispute on judicial review, although I am exploring the allegations of the Applicant notwithstanding. In my view, the RAD reasonably found the Applicant's "subjective fear of persecution is questionable given his actions, and even if he does fear arrests there is no objective basis for it because he has not been identified by police for any sort of sanction."

[42] I see no reviewable error in the RAD's analysis of the evidence regarding the Applicant's well-founded fear of persecution.

[43] In this case, I also conclude that the Applicant failed to adduce sufficient credible evidence to demonstrate forward-looking risk of persecution. Neither did the RAD err in applying the wrong standard of proof to its analysis. As indicated by the Respondents, the "more than mere possibility" standard only applies after the Applicant establishes the facts of his claim on a balance of probabilities: *Jayasinghe* at paras 51-63. The RAD's references to the balance of probabilities standard speaks to whether the Applicant has established a factual basis to support a possibility of persecution finding:

[24] [...] I determine that his assertions that others have told him that police are looking for him are insufficient to establish that as fact on a balance of probabilities.

[...]

[33] I determine on a balance of probabilities that the narrative [the Applicant] provided dated August 27, 2019, provides a true picture of what occurred [...]

[...]

[35] [...] I find it likely on a balance of probabilities, that [the Applicant's] numerous re-availments to Vietnam indicate that he was not wanted by police for his role in the earlier event.

VII. Conclusion

[44] With respect, I am not persuaded the RAD's Decision is unreasonable. Therefore, this application for judicial review will be dismissed.

VIII. Certified Question

[45] Neither party proposed a question of general importance, and none arises.

JUDGMENT in IMM-8820-21

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed,
no question of general importance is certified and there is no Order as to costs.

“Henry S. Brown”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-8820-21

STYLE OF CAUSE: VAN NGOC NGUYEN v THE MINISTER OF
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APPEARANCES:

Aleksei Grachev FOR THE APPLICANT

Nick Continelli FOR THE RESPONDENT

SOLICITORS OF RECORD:

Aleksei Grachev FOR THE APPLICANT
Barrister and Solicitor
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT
Toronto, Ontario