

Immigration and
Refugee Board of Canada

Refugee Appeal Division



Commission de l'immigration
et du statut de réfugié du Canada

Section d'appel des réfugiés

RAD File No. / N° de dossier de la SAR : VB3-03153

Private Proceeding / Huis clos

Reasons and decision – Motifs et décision

2014 CanLII 19386 (CA IRB)

**Person(s) who is(are)
the subject of the appeal**

XXXXX XXXXX XXXXX

Personne(s) en cause

Appeal considered / heard at

Vancouver, BC

Appel instruit à

Date of decision

February 27, 2014

Date de la décision

Panel

Douglas Fortney

Tribunal

**Counsel for the person(s) who is(are)
the subject of the appeal**

Nikoletta Read
Barrister and Solicitor

**Conseil(s) du (de la/des)
personne(s) en cause**

Designated representative

N/A

Représentant(e) désigné(e)

Counsel for the Minister

N/A

Conseil du ministre

REASONS FOR DECISION

[1] XXXXX XXXXX XXXXX (the “appellant”), a citizen of China, appeals a decision of the Refugee Protection Division (the “RPD”) rejecting her claim for refugee protection.

DETERMINATION OF THE APPEAL

[2] Pursuant to paragraph 111(1)(a) of the *Immigration and Refugee Protection Act* (the “Act”),¹ the Refugee Appeal Division (the “RAD”) confirms the determination of the RPD, namely, that the appellant is neither a Convention refugee pursuant to section 96 of the *Act* nor a person in need of protection pursuant to section 97 of the *Act*. This appeal is therefore dismissed.

BACKGROUND

[3] The RPD heard the appellant’s refugee protection claim on October 28, 2013. The RPD’s reasons for the decision were delivered orally with written reasons and a Notice of Decision dated November 14, 2013.

[4] The appellant is a 47 year old citizen of China. She arrived in Canada in 2006 on a visitor’s visa and remained in Canada after her visa expired. She has remained continuously in Canada since her arrival in 2006.

[5] The appellant came forward and made a refugee claim in August 2013. The appellant alleges that her problems in China are two-fold. The appellant stated that she has two boys in China that were born in 1989 and 1991. Her second child was born in violation of the one-child policy in China. As a result of this violation, the appellant was sterilized in 1991 and also fined 20,000 renminbi. The appellant’s mother has paid a portion of the fine but there is 10,000 renminbi that remain outstanding. As a result, the appellant fears the Family Planning authorities in China.

¹ *Immigration and Refugee Protection Act* (the “Act”), S.C. 2001, c. 27.

[6] The appellant allegedly stated that she was in an abusive relationship with her boyfriend in China. The appellant alleged that her boyfriend physically assaulted her on numerous occasions and that he has also assaulted her children and parents. The appellant continues to fear her boyfriend as he has told her parents that he would kill her if she returns to China.

[7] The RPD's written reasons dated November 14, 2013, stated that the appellant's case for refugee protection was rejected. The determinative issue in this claim was identity. The appellant is represented for this appeal by the same immigration consultant as at her RPD hearing.

SUBMISSIONS

[8] As grounds for this appeal, counsel for the appellant submits that:

- the RPD Member failed to recognize the difficulty the claimants often encounter in being able to furnish documentation (and translations where required) to establish their claim within the tight timelines required;
- the RPD had not notified counsel prior to the hearing that identity was an issue;
- the RPD Member erred in finding the appellant's testimony that she had not been issued a birth certificate in China to be unreasonable;
- the RPD Member erred in finding that the appellant's *houkou* issued in 2010 would not contain the names of the appellant's two sons who are living with the appellant's parents in China;
- the RPD Member erred in giving no weight to the certificate of sterilization as it had been prepared in 2013 and the medical letter provided by the appellant's father;
- the RPD Member erred in stating that counsel for the appellant had submitted that the RPD Member should not consider credibility but rather should focus on whether or not the appellant has a well-founded fear of persecution;
- the RPD Member erred in drawing a negative inference from the seven-year delay in the appellant's application for refugee protection; and
- the RPD Member erred in preferring documentary evidence to the appellant's testimony.

[9] In counsel's memorandum of argument, her third submission appeared to identify an error when the RPD Member referred to documentary evidence that authorities issue a notice for fines for violation of the one child policy. Counsel appears to be suggesting that it would be unreasonable to suggest the authorities in China adhere to guidelines and policies. She stated that "We would like to submit evidence contrary to the board's findings". However, no further reference to such evidence was submitted. Consequently, this issue will not be addressed further in these reasons.

[10] While counsel for the appellant has not expressed the remedy sought in this appeal, for purposes of this appeal it is deemed that the appellant has requested that the RAD, under subsection 111(b) of the *Act*, set aside the determination of the RPD and substitute a determination that the appellant is a Convention refugee or persons in need of protection, or in the alternative, refer the matter back to a different Member of the RPD for redetermination.

[11] Counsel for the appellant has not made any submissions as to the standard of review in this appeal.

[12] The Minister has not intervened in this appeal.

CONSIDERATION OF THE SUBMITTED EVIDENCE

[13] Counsel for the appellant has submitted the following documents as evidence that the RPD refused or failed to consider:

- Exhibit 1: Copy of the appellant's passport;
- Exhibit 2: Royal Canadian Mounted Police Identification Number for stolen passport;
- Exhibit 3: Certificate of Village Committee (sterilization);
- Exhibit 4: Certificate of XXXXX XXXXX Health Centre;
- Exhibit 5: *Hukou* page of XXXXX XXXXX (appellant's father); and
- Exhibit 6: *Hukou* page of appellant.

[14] I note that documents and Exhibits 1 to 6 were entered into the record at the time of the RPD hearing and thus constitute evidence in the RPD Record on file. These documents therefore do not constitute new evidence pursuant to subsection 110(4) of the *Act*. Counsel for the appellant in her submissions indicates that she disagrees with how the RPD Member considered some of these documents in his reasons. Counsel's arguments will be considered later in these reasons as they pertain to these documents.

[15] The appellant has submitted various documents as new evidence pursuant to subsection 110(4) of the *Act* that was not reasonably available to the appellant or that the person could not reasonably have been presented at the time of the rejection of her claim:

- Exhibit 7: Translated *hukou* page for XXXXX XXXXX XXXXX (the appellant's father);
- Exhibit 8: Translated *hukou* page for the appellant;
- Exhibit 9: Translated *hukou* page for XXXXX XXXXX (the appellant's son); and
- Exhibit 10: Translated *hukou* page for XXXXX XXXXX (the appellant's son).

[16] Subsection 110(4) of the *Act* provides that appellants may present only evidence that arose after the rejection of their claims or that was not reasonably available, or that they could not reasonably have been expected in the circumstances to have presented, at the time of the rejection. In *Raza*,² the Federal Court of Appeal (the "Court") set out factors to be considered in assessing "new" evidence. While *Raza* predates the introduction of *Act* subsection 110(4), it is based on the very similar wording of subsection 113(a). The Court held that new evidence should be considered for its credibility, relevance, newness, and materiality, in addition to any express statutory provisions.³

[17] I note that documents submitted as Exhibits 7 and 8 are pages of the appellant's *houkou*. These documents were actually submitted, without translation, as evidence to the RPD and are marked as Exhibit 7 in the RPD Record. The interpreter at the RPD hearing assisted in

² *Raza v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385.

³ *Raza*, *Ibid.*, paras. 13-15.

understanding the contents of the untranslated *houkou*. Counsel for the appellant has submitted that the appellant was unable to obtain translations for the documents given the short timelines required prior to the RPD hearing. However, I find this explanation to be inadequate to explain why important identity developments had not been submitted and translated as clearly required and explained to refugee claimants in the appendix to the Basis of Claim form. Furthermore, as the *houkou* had been entered into evidence at the time of the RPD hearing, I find that Exhibits 7 and 8 do not constitute new evidence pursuant to subsection 110(4) of the *Act*. Since the documents are part of the Record and were translated at the RPD hearing, while I do not accept them as new evidence, I will consider them when dealing with the merits of the appeal.

[18] Exhibits 9 and 10 appear to be pages of the *houkou* in the name of the appellant's father as head of household that refer to the appellant's sons. These documents appear problematic in that at the time of the RPD hearing, when the appellant presented her *houkou*, the RPD reasons indicate that the *houkou* presented to the RPD Member did not have these pages. The appellant at the RPD hearing was unable to explain why her sons were not registered in her father's *houkou*. Exhibits 9 and 10 have been submitted to the RAD with no further explanation as to their provenance or why they were not presented at the time of the RPD hearing. I therefore decline to accept these documents as evidence.

APPLICATION FOR AN ORAL HEARING

[19] Subsection 110(3) of the *Act* requires that the RAD proceed without a hearing, on the basis of the RPD Record, while allowing the RAD to accept documentary evidence and submissions from the Minister and the appellant.

[20] According to subsection 110(6), the RAD may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection 110(3) that raises a serious issue with respect to the credibility of the appellant, that is central to the RPD decision, and that, if accepted, would justify allowing or rejecting the refugee protection claim.

[21] When read together, subsections 110(3), (4), and (6) establish that the RAD must not hold a hearing in an appeal such as this unless there is new evidence,⁴ in which case the RAD may hold a hearing if that new evidence raises a serious issue with respect to the credibility of the appellant, is central to the RPD decision, and that, if accepted, would justify allowing or rejecting the refugee protection claim.

[22] As discussed above, since the submitted evidence has not been accepted as new evidence under subsection 110(4), the RAD must proceed without a hearing in this appeal.

STANDARD OF REVIEW

[23] Although the *Act* sets out grounds for appeal as well as possible remedies, it does not specify the standard of review to be applied by the RAD.

[24] In *Dunsmuir*,⁵ the Supreme Court of Canada (the “Supreme Court”) considered the foundations of judicial review and the applicable standards of review, concluding that there are two standards of review: correctness and reasonableness. *Dunsmuir* has limited applicability to the RAD, however, which is not a reviewing court but rather an administrative appellate body. In *Khosa*,⁶ the Supreme Court gave broad deference to a tribunal’s interpretation of its own statute but again, this was not specifically in the context of an appeals tribunal reviewing the decision of a tribunal of first instance. As the RAD is a statutory creation, the standard of review must be extracted from the legislation.

[25] I find that the issues raised in this appeal relating to the RPD Member’s identity and credibility findings are issues of fact.

[26] In *Newton*,⁷ the Alberta Court of Appeal (the “Alberta Court”), having considered *Dunsmuir* and other jurisprudence, considered the standard of review to be applied by an

⁴ Subsection 110(4) of the *Act*.

⁵ *Dunsmuir v. New Brunswick*, 2008 SCC 9.

⁶ *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12.

⁷ *Newton v. Criminal Trial Lawyers’ Association*, 2010 ABCA 399, at para. 43.

appellate administrative tribunal to a decision of a lower tribunal. The Alberta Court's analysis is therefore relevant in the context of the RAD, which has considered the factors set out in *Newton*.

[27] The *Newton*⁸ factors deal with the standard of review to be applied by an appellate administrative tribunal to the decision of an administrative tribunal of first instance, such as is the case with the RPD and RAD. Based on the guidance in *Newton*, the RAD focused on the factors listed below to determine the standard of review. The contextual approach to assessing which factors are most appropriate in setting the standard of review has been established in *Khosa*.⁹ The most significant factors to consider in establishing the standard of review of a decision by a tribunal of first instance by an appellate tribunal are:

- the respective roles of the RPD and RAD in the context of the *Act*;
- the expertise and advantageous position of the RPD Member compared to that of the RAD; and
- the nature of the question in issue.

[28] Both the RPD and the RAD derive their jurisdiction from and interpret the same home statute: the *Immigration and Refugee Protection Act*. Subsection 162(1) of the *Act* gives each Division, including the RPD, “in respect of proceedings brought before it under this *Act*, sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction.” The RAD has been given the supervisory jurisdiction to decide appeals of RPD decisions related to refugee protection on questions of law, of fact, or of mixed law and fact.¹⁰ The level of deference which the RAD provides to the RPD depends on the questions at issue as addressed above.

[29] The presence of a right of appeal does not warrant a correctness standard of review given the prescribed relationship between the RPD and RAD, and the limits imposed on the RAD in the *Act*.

⁸ *Ibid.*, at para. 44.

⁹ *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12.

¹⁰ Subsection 110(1) of the *Act*.

[30] The RAD finds that the RPD is to be provided with deference on questions of fact as it relates to the assessment of the claim for protection. The RPD is a tribunal of first instance which has been given the authority in the *Act* to make a decision to accept or reject a claim for protection.¹¹ RPD Members have expertise in interpreting and applying the *Act*, as well as are experts in assessing claims based on country conditions. The RPD must conduct a hearing¹² and assesses the totality of the evidence, including evidence related to the credibility of the appellant and witnesses, after it has had an opportunity to see the appellant, hear his testimony and question him.

[31] In contrast to the RPD's authority to assess a claim for protection, the *Act* limits the RAD's ability to gather and consider evidence. The RAD is not a tribunal of first instance but exists to review the decision made by the RPD. The RAD must proceed without a hearing on the basis of the Record, submissions by the parties, and new evidence.¹³ Appeals to the RAD are party-driven and do not provide appellants an opportunity to have their claims *heard de novo*. The RAD's authority to hold hearings is limited to evidence that arose after the rejection of the claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.¹⁴ Hearings are also limited to only specific issues (serious credibility issues) which are directed by the RAD.¹⁵

[32] Given that the RPD has held a hearing on the totality of the evidence and given that the RPD has heard from the appellant directly at a hearing, the RPD is in the best position to assess the credibility of the appellant and to make findings on issues of fact related to the claim. This position is consistent with *Newton* at paragraph 82 where it indicates:

The [Refugee Appeal Division] is not a tribunal of first instance, and cannot simply ignore the proceedings before the presiding officer and the conclusions reached by him.¹⁶

¹¹ Section 107 of the *Act*.

¹² Section 170 of the *Act*.

¹³ Subsection 110(3) of the *Act*.

¹⁴ Subsection 110(4) of the *Act*.

¹⁵ *Refugee Appeal Division Rules*, SOR/2012-257; *Rule 57*.

¹⁶ *Newton v. Criminal Trial Lawyers' Association*, 2010 ABCA 399, para. 82.

[33] *Newton* concludes that: “a decision on such questions of fact by the presiding officer, as the tribunal of first instance, are entitled to deference. Unless the findings of fact are unreasonable, the [Refugee Appeal Division] should not interfere”.¹⁷ *Newton* adopts the definition of “reasonableness” in *Dunsmuir*. Reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process of the RPD; and that the RPD decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.¹⁸

[34] For the reasons outlined above, the RAD has afforded a considerable level of deference to RPD findings on questions of fact in this claim and will consider whether the findings of fact raised in this appeal relating to the RPD Member’s identity and credibility findings meet the reasonableness test.

ANALYSIS OF THE MERITS OF THE APPEAL

[35] I will now turn to the specific submissions by the appellant as to errors allegedly made by the RPD.

[36] Counsel for the appellant submits that the RPD Member failed to recognize the difficulty refugee claimants often encounter in being able to furnish documentation (and translations where required) to establish their claim within the tight timelines required. Considering that the appellant had already been in Canada for some seven years, I find it would be reasonable to expect that the appellant would be in a position to provide adequate documentation as to identity with translations as necessary in the timeframe preceding her RPD hearing.

[37] Counsel for the appellant submits that the RPD had not notified counsel prior to the hearing that identity was an issue. Under the *RPD Rules*¹⁹ and except for issues of exclusion, integrity, inadmissibility and intelligibility, there is no requirement that the RPD provide any notice to refugee claimants as to the issues that may be addressed at the RPD hearing. Having

¹⁷ *Newton*, *ibid*, at para. 95.

¹⁸ *Dunsmuir v. New Brunswick*, 2008 SCC 9, at para. 47.

¹⁹ *Refugee Protection Division Rules*, SOR/2012-256.

said that, identity and credibility are issues in every refugee protection case. The RPD Member addressed this at the beginning of the hearing. I also note that *RPD Rule* 11 and section 106 of the *Act* specifically address the need to provide acceptable documents to establish the claimant's identity and other elements of the claim:

11. The claimant must provide acceptable documents establishing their identity and other elements of the claim. A claimant who does not provide acceptable documents must explain why they did not provide the documents and what steps they took to obtain them.

[38] Counsel for the appellant submits that the RPD Member erred in finding the appellant's testimony that she had never been issued a birth certificate in China to be unreasonable. Counsel points to a document in the Immigration and Refugee Board's National Documentation Package for China that indicates: "For Chinese citizens born before 1996, there is no standard official birth certificate and birth records may be difficult to obtain." As noted in the RPD reasons, the appellant testified that she has been never issued a birth certificate in China. The country document does not indicate that the birth certificates were not issued in China when the appellant was born but that that there was no standard form and they may be difficult to obtain. Therefore, the appellant's assertion that birth certificates were not issued at the time of her birth is not accurate. The RPD Member found the claimant's explanation to be unreasonable. The RPD Member's finding may be overstating the case as the referenced country document suggests that the appellant may or may not be in a position to produce a birth certificate. In any event, this finding by the RPD Member does not represent a key credibility finding that is in itself determinative of the appellant's identity or credibility.

[39] Counsel for the appellant submits that the RPD Member erred in rejecting the appellant's *houkou* as it appeared illogical to the RPD Member of this document issued in 2010 would not contain the names of the appellant's two sons who are living with the appellant's parents in China. A review of the RPD reasons indicates that the *houkou* was not rejected but rather that this document was given no weight. This does indicate that the RPD Member considered the document rather than simply rejecting it. Counsel for the appellant also refers to the *houkou* pages for the appellant's two sons that have been discussed earlier in the new evidence section of these reasons. As stated earlier, I have not accepted these documents into evidence as no explanation has been provided for why they are being submitted at this time. Based on the RPD

Record, it appears that the *houkou* submitted at the RPD hearing did not have these pages. Given the concerns expressed by the RPD Member, I find that his assigning no weight to the *houkou* was reasonable.

[40] Counsel for the appellant submits that the RPD Member erred in giving no weight to the certificate of sterilization and the medical letter provided by the appellant's father.

[41] In reference to the certificate of sterilization, the RPD Member noted that this document was prepared in XXXXX 2013 in reference to the sterilization that according to the appellant's testimony occurred in 1991 in a small office in the village community. The document further states that no records were kept of the procedure at the time. The appellant explained that this information is available as there is a person in the village committee that had been there for many years. The RPD Member found that the appellant's explanation as to the provenance of this document was not reasonable. The RPD Member also found it not reasonable that a procedure of this nature not having been performed in a hospital would result in the village committee producing such a document. The RPD Member assigned no weight to the certificate of sterilization. Given the considerable passage of time and the circumstances as testified by the appellant, I find the Member's decision to give the certificate of sterilization no weight to be reasonable.

[42] In reference to the medical letter from the appellant's father regarding an injury that she suffered to her nose, the RPD Member gave little weight to this document as this document was vague, provided no details, and was prepared on a form used for medical prescriptions. The RPD Member also found that this document provided little or no assistance in establishing the appellant's identity. Given the concerns expressed by the RPD Member, I find that his assigning little weight to the medical certificate was reasonable. As the medical certificate is not an identity document issued by any authority in China, I also find that the RPD Member's conclusion that this document was of little or no assistance in establishing the appellant's identity was reasonable.

[43] Counsel for the appellant submits that the RPD Member erred in stating that counsel for the appellant had submitted at the hearing that the RPD Member should not consider credibility

but rather should focus on whether or not the appellant has a well-founded fear of persecution. It is difficult to understand counsel's submission as she seems to be suggesting that a claim for refugee protection be evaluated primarily on the basis of country conditions rather than a refugee claimant relating their personal circumstances to such country conditions. As stated by the RPD Member at the beginning of the hearing, credibility and identity are issues in every refugee protection case. No refugee protection claim can be approved simply on the basis of country conditions. The onus is upon each individual refugee claimant to make their case based on their personal circumstances. Determination of a refugee claimant's credibility and identity is key to making any determination of whether or not that person is a convention refugee or person in need of protection.

[44] Counsel submits that the RPD Member erred in drawing a negative inference from the seven-year delay in the appellant's application for refugee protection. The appellant testified that her lack of knowledge of the English language and mistrust towards Chinese authorities made it impossible for her to make a claim. The appellant decided to make a claim when she met her current counsel who is of non-Chinese origin. The RPD Member found this explanation not to be reasonable as the appellant is an educated woman and that her fear of being returned to China was not a reasonable explanation for such a lengthy delay. The appellant instead remained in Canada without status which made her at risk of removal from Canada at any time. The RPD Member drew a further negative inference from this very lengthy delay. Based on the factors outlined by the RPD Member, I find his conclusion as to the appellant's seven-year delay in making her claim for refugee protection to be reasonable.

[45] Finally, counsel submits that the RPD Member erred in preferring documentary evidence to the appellant's testimony. It is difficult to understand counsel's concern in this respect as counsel has not provided any examples of where she identifies the RPD Member preferring documentary evidence to the claimant's testimony. Rather, she seems to be returning to her earlier submission that suggested that a refugee claim should be determined primarily upon country conditions rather than any credibility analysis conducted as to the personal circumstances as alleged by the refugee claimant. As stated above, determination of a refugee claimant's credibility is key to making any determination of whether or not that person is a Convention refugee or person in need of protection.

[46] Based on the totality of the evidence, I find that the RPD Member's findings of fact as it related to credibility and identity were reasonable. The RPD Member did not misstate or misconstrue the evidence in coming to his clear and supported credibility findings. Where an applicant has not established identity, a negative conclusion as to credibility will almost inevitably also be drawn, and in and of itself can be determinative of the claim. Given the lack of acceptable identity documentation, it was open to the RPD to reject the applicant's explanations and to impugn her credibility. Having considered all the evidence, I find that these reasons do fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

REMEDY

[47] For all these reasons, I confirm the determination of the RPD, namely, that the appellant is neither a Convention refugee pursuant to section 96 of the *Act* nor a person in need of protection pursuant to section 97 of the *Act*. This appeal is therefore dismissed.

(signed)

“Douglas Fortney”

Douglas Fortney

February 27, 2014

Date