Federal Court  Cour fédérale

Date: 20250428

Docket: IMM-11973-23

Citation: 2025 FC 756

Ottawa, Ontario, April 28, 2025

PRESENT: Madam Justice McDonald

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

SHIYUAN SHEN

Respondent

JUDGMENT AND REASONS

[1] The Applicant, the Minister of Citizenship and Immigration, seeks judicial review of a decision of the Refugee Protection Division (RPD) dated September 7, 2023, where the RPD found that the Respondent, Mr. Shen, is a person in need of protection under paragraph 97(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. Mr. Shen made a refugee

claim in 2011 claiming that he was charged with financial crimes in China and that he would be tortured if he returned to China.

[2] On this judicial review, the Applicant Minister argues that the RPD decision was reached in a manner that was procedurally unfair and was "significantly tainted" by two interlocutory decisions of the RPD on the issues of abuse of process and the exclusion of evidence. The Applicant Minister argues that a full *de novo* hearing was not held.

[3] For the reasons below, this judicial review is dismissed. I have concluded that when considered against the full contextual background, the RPD decision was procedurally fair, and the decision is reasonable.

I. Background

[4] This matter has a lengthy background which is summarized at paragraphs 9 through 13 of the RPD decision and will not be repeated here other than as necessary. For clarity, references to the "Minister" throughout these reasons are largely references to the Minister of Public Safety and Emergency Preparedness who intervened in Mr. Shen's refugee claim, and they are the Ministry who regulate the Canada Border Services Agency (CBSA). This ministerial portfolio is distinct from the Minister of Citizenship and Immigration who is the Applicant in this matter and who I will refer to as the "Applicant Minister".

[5] In 2011, Mr. Shen applied for refugee protection. The Minister, through the CBSA intervened in his claim, alleged that Mr. Shen was excluded from refugee protection because he

committed a serious non-political crime in China. Prior to the RPD hearing, the Minister advised Mr. Shen that it did not disclose all the information received from China but that the information had been reviewed and the Minister was not aware of any exculpatory evidence that had been withheld. At the relevant times, the Minister was represented by CBSA Hearings Officers, Becky Chan and Renée Wyslouzil.

[6] In a decision dated May 6, 2013, RPD Member McCrae determined that Mr. Shen was excluded from refugee protection, relying heavily on the evidence the Minister received from China.

[7] The 2013 RPD decision was judicially reviewed to the Federal Court and in a decision of September 15, 2014, Mr. Justice Beaudry (IMM-3740-13) quashed the RPD decision and ordered a re-determination directing the Minister "to provide to the Applicant [Mr. Shen] full disclosure of all materials relating to the Applicant's matter which are in the Respondent's possession, in particular full disclosure of all documents received from the Public Security Bureau (PSB) in China relating to the charges against the Applicant."

[8] On January 8, 2015, the Minister provided Mr. Shen's legal counsel with 1,109 pages of documents received from the PSB in China. Mr. Shen argued that much of the PSB evidence withheld during the original RPD hearing was highly relevant to the allegations against him and many of the documents were exculpatory in nature. Mr. Shen also argued that the information in this evidence was the product of torture.

[9] Relevant to the current matter under review are two motions filed in 2015 by Mr. Shen. One, Mr. Shen sought an order for the evidence from China to be excluded on the basis that it was the product of torture; and two, Mr. Shen sought to stay the Minister's participation in his refugee claim on the basis that the Minister's conduct in withholding the PSB documents was an abuse of process.

[10] These Motions were dismissed by the RPD. In a decision of June 24, 2015, RPD Member Cryer found that although the Minister conceded that it breached its duty to disclose and that there had been a breach of natural justice, the circumstances did not amount to an abuse of process.

[11] Mr. Shen sought judicial review of these dismissed motions in this Court and in *Shen v Canada (Citizenship and Immigration)*, 2016 FC 70 [*Shen 2016*], Justice Fothergill sent the matter back to the RPD for re-determination as follows:

> [38] This matter must be returned to the RPD member to determine whether the duty of candour was breached; whether this amounted to an abuse of process; and, if so, the appropriate remedy. The Crown must be given a clear opportunity to provide an explanation for its failure to disclose relevant and exculpatory evidence. This will likely require the involvement of counsel who did not participate in decisions respecting disclosure that were made during the first hearing before the RPD.
>
> [39] The RPD must then consider the adequacy of the Crown's explanation. If no explanation is forthcoming, then the RPD may draw an adverse inference and must state clearly what that inference is. If the evidence establishes, or an inference is drawn, that the Crown's withholding of relevant and exculpatory documents was deliberate, then this will amount to a breach of the duty of candour and the RPD must consider whether it also constitutes an abuse of process. If the answer is yes, then the RPD

> must fashion an appropriate remedy, bearing in mind that a stay of proceedings or equivalent remedy will be justified only in the "clearest of cases" *(Fabbiano v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1219 at para 9).

II. Decisions under review

[12] The issues raised by the Applicant Minister on this judicial review relate to the RPD decision of September 7, 2023, and two interlocutory decisions that preceded the RPD decision, as described below.

A. *August 4, 2017 interlocutory decision - abuse of process*

[13] In an interlocutory decision of August 4, 2017, the RPD refused the Minister's motion to have a summons issued to witness, Becky Chan. The RPD Member determined that the Minister had not made adequate efforts to produce the alternate witness, Renée Wyslouzil, and failed to sufficiently explain why Ms. Wyslouzil could not testify. Ms. Chan and Ms. Wyslouzil were the CBSA hearings officers involved in the earlier RPD proceedings.

B. *October 31, 2017 interlocutory decision – exclusion*

[14] In the interlocutory decision of October 31, 2017, RPD Member Cryer determined that certain documents from the exhibit list were "tainted" because of the finding of abuse of process and must be excluded.

[15] The Minister sought judicial review of this decision. In *Canada (Public Safety and Emergency Preparedness) v Shen*, 2018 FC 636 [*Shen 2018*], Justice MacTavish (then of the Federal Court) dismissed the judicial review on the basis that it was premature. At paragraph 59 the Court found that, if the Minister was ultimately unsuccessful, "he will have the opportunity to raise all of his concerns with respect to the abuse of process decisions in the context of an application for judicial review of the Board's final decision with respect to the exclusion issue."

C. *September 7, 2023 RPD decision*

[16] The RPD hearing was held over 9 days between November–December 2021. In a lengthy decision dated September 7, 2023, the RPD concluded that Mr. Shen was not excluded from refugee protection under section 98 of the *IRPA* by virtue of Article 1F(b) of the *Convention Relating to the Status of Refugees* of the United Nations. The RPD found that if Mr. Shen were returned to China, he would face a danger of torture; that adequate state protection would not be forthcoming; and that no viable internal flight alternative existed. Mr. Shen was found to be in need of protection pursuant to paragraph 97(1)(a) of the *IRPA*.

[17] The RPD noted that the Minister disputed the enforceability of the interlocutory decisions, but ruled that it would follow the October 31, 2017 interlocutory decision excluding certain documents.

[18] Overall, the RPD concluded that the Minister failed to meet its burden of establishing that there are serious reasons for considering if Mr. Shen committed the alleged crimes.

III. Issues

[19] The Minister raises the following issues:

A. Did the RPD err in the conduct of the *de novo* hearing?

B. Was it a breach of procedural fairness for the RPD to refuse to issue a summons and the remedy?

C. Is the RPD abuse of process analysis unreasonable?

IV. Standard of review

[20] Procedural fairness issues are considered on a correctness-like standard (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 54-56). In assessing procedural fairness, the Court asks if the procedure was fair, having regard to all of the circumstances. The ultimate consideration in assessing the fairness of an administrative tribunal's procedure is whether the applicant knew the case to meet and had a full and fair chance to respond. The answer to what fairness requires in any particular circumstance is highly variable and contextual (*Knight v Indian Head School Division No. 19*, 1990 CanLII 138 (SCC)).

[21] On the reasonableness of the RPD decision, the Court must take a "reasons first" approach and determine whether the decision under review—including both its rationale and outcome—is transparent, intelligible and justified (*Mason v Canada (Citizenship and Immigration*), 2023 SCC 21 at paras 8, 59). 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 (*Canada (Minister of Citizenship and Immigration) v*

Vavilov, 2019 SCC 65 at paras 15, 85 [*Vavilov*]). The Court will intervene only if it is satisfied there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency (*Vavilov* at para 100).

V. Analysis

A. *Did the RPD err in the conduct of the de novo hearing?*

[22] The Applicant Minister argues that in the RPD decision of September 2023, RPD Member Carens-Nedelsky erred by following the interlocutory decisions of Member Cryer, because, they argue, this approach was not in keeping with the conduct of a true *de novo* hearing. The Applicant Minister says this was an error of law that rendered the decision unreasonable.

[23] A true *de novo* hearing, according to the Applicant Minister, should have been a new hearing with a fresh evidentiary record that was not constrained by the August 2017 and October 2017 interlocutory decisions of Member Cryer. In support of this position, they rely upon *Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2004 FCA 4 [*Thanabalasingham*], where at paragraph 6 Justice Rothstein states "[s]trictly speaking, a *de novo* review is a review in which an entirely fresh record is developed and no regard at all is had to a prior decision".

[24] I acknowledge that this statement in *Thanabalasingham* would suggest that the RPD should have undertaken a full new hearing without regard to any of the previous rulings. However, such an approach in this case would fail to appreciate the background and the

circumstances under which this matter was before the RPD. That background starts with the decision of Justice Fothergill in *Shen 2016* where he directed that "[t]his matter must be returned to the RPD member to determine whether the duty of candour was breached; whether this amounted to an abuse of process; and, if so, the appropriate remedy...".

[25] As directed in *Shen 2016,* RPD Member Cryer considered the abuse of process issue and the appropriate remedy. Member Cryer ordered that the new hearing proceed "*de novo"*. I am satisfied that Member Cryer's use of the phrase "*de novo*" was not intended to override his previous interlocutory decisions, including the decision regarding the exclusion of evidence that was clearly meant to bind the parties at the subsequent hearing. Rather it is clear from the words used by Member Cryer that the subsequent Member would be bound by the October 31, 2017 interlocutory decision in relation to the exclusion of evidence (emphasis in original):

> …I order a full hearing *de novo* <u>in which some exhibits and all testimony from the transcripts are removed from the record and the proceeding begins anew before a differently constituted panel.</u>

[26] In keeping with this interlocutory decision, RPD Member Carens-Nedelsky assumed carriage of this matter and worked with the parties to schedule the new hearing. At a September 6, 2019, Pre-Hearing Conference (PHC) with Member Carens-Nedelsky, the Minister raised the issue of whether the *de novo* hearing wiped the slate clean so that all evidence could be considered. Member Carens-Nedelsky indicated that he thought he was bound by Member Cryer's interlocutory decisions. The Minister was given the opportunity to make written submissions on this issue but failed to do so and the RPD issued a ruling noting that the Minister

did not make submissions on this issue. At a PHC on April 30, 2021, the Minister confirmed that they were no longer bringing forward the concern about the nature of the *de novo* hearing.

[27] In the RPD decision of September 7, 2023, Member Carens-Nedelsky states the following regarding Member Cryer's interlocutory decision:

> [13] Following Member Cryer's order there was some initial dispute as to the enforceability of his ability to bind future members, as well as which documents should be excluded by his order. After a review his order and the parties' submissions, I ruled I would follow his order and sent the parties a draft consolidated list of documents with my understanding of how to operationalize his order. The parties agreed to proceed with this list of documents and further agreed to resubmit key documents for ease of reference during the hearing.

[28] It is illogical to argue that the *de novo* RPD hearing ordered by Member Cryer in his October 31, 2017 interlocutory decision should have proceeded without being bound by previous interlocutory decisions on the exclusion of evidence. To do so would create an absurdity where the Minister would face no sanction for the findings that they had breached the duty of candour in the course of the proceedings.

[29] In my view there is no merit to the Applicant Minister's argument that the RPD erred by following the interlocutory decisions while conducting a *de novo* hearing in these circumstances.

B. *Was it a breach of procedural fairness for the RPD to refuse to issue a summons and the remedy*

[30] The Applicant Minister argues that the October 31, 2017 interlocutory decision (which arose as a result of the finding in the August 4, 2017 interlocutory decision) excluding evidence and refusing to issue a summons to witness for Ms. Chan, was a breach of procedural fairness. According to the Applicant Minister, Ms. Chan was the witness who could explain the Minister's failure to disclose relevant and exculpatory evidence.

[31] To put this submission in context, it is necessary to review some of the factual and procedural background that predated the October 31, 2017 interlocutory decision:

- On March 30, 2016 in compliance with *Shen 2016*, Member Cryer notified the parties by letter that a hearing would be convened to "give the Minister an opportunity to provide an explanation for its failure to disclose relevant and exculpatory evidence in the previous proceedings".
- In a June 29, 2016 teleconference, the Minister advised they planned to call Becky Chan as a witness, but she had been appointed to the RPD, so they had decided to call Renée Wyslouzil as their witness. Ms. Chan and Ms. Wyslouzil were the lead CBSA Hearing Officers on the Shen file during the 2012 and 2015 RPD hearings.
- In October 2016, the Minister advised they could not bring Ms. Wyslouzil as a witness because she was in Germany and had physical ailments making travel inconvenient and was only able to appear in person. The parties also exchanged

submissions regarding the issuance of a summons for Ms. Chan. The Respondent, Mr. Shen objected because of the potential apprehension of bias.

- On October 28, 2016, Member Cryer issued a Direction as follows: (a) the Minister shall call Renée Wyslouzil as a witness for next week; (b) after Ms. Wyslouzil has given testimony, I will entertain submissions as to whether another witness needs to be called. In this Direction Member Cryer also notes:

> [7] In making my direction to the Minister to call Ms. Wyslouzil and to not issue a summons for Ms. Chan at this point, I am choosing a procedure that I deem fair to both parties. The Minister gets his opportunity to explain disclosure decisions, which were made in the last hearing before a different Board Member, through a witness whom the Minister had previously intended to call as the witness, until he notified the Board on October 12, 2016 otherwise. The calling of this witness, Ms. Wyslouzil raises no issues of apprehension of bias, thus ensuring a fair hearing, in compliance with natural justice

- On January 20, 2017 the Minister advised that Ms. Wyslouzil was not willing to testify by telephone and requested that the hearing be rescheduled to allow Ms. Wyslouzil to travel to Vancouver and give evidence in person. The hearing was rescheduled for January 31, 2017.
- At a PHC on January 26, 2017, the Minister advised that Ms. Wyslouzil was not able to travel for medical reasons. Following this PHC, the RPD ordered as follows:

    1) The Minister produce further particulars and evidence, including medical evidence, regarding Ms. Wyslouzil's inability to testify;

2) The Minister produces confirmation on Ms. Wyslouzil's present employment status, together with a record of her duties and whether she performs those duties;

3) All of the documents provided by the Minister on the particulars of Ms. Wyslouzil's medical and employment history will be subject to a confidentiality order. These documents are not to be disclosed to anyone other than the parties and the Presiding Member;

4) Should the Minister be unable to provide documents on the particulars of Ms. Wyslouzil's medical and employment history, as outlined above, the Minister must provide evidence of the reasonable efforts they have taken;

5) The Minister has until February 28, 2017 to provide the above noted documents to the claimant and the Board.

- On February 28, 2017 the Minister responded to the RPD advising that Ms. Wyslouzil has refused to testify for medical reasons citing a disability. The Minister also provided a letter dated February 24, 2017 from a doctor in Berlin stating, in one word answers, that Ms. Wyslouzil has a medical condition that prevents her from testifying in person, by video or by phone. The medical letter states that she can give evidence in writing.
- In written submissions on March 13, 2017, Mr. Shen's legal counsel argued that the Minister had not provided an adequate explanation as to why Ms. Wyslouzil, an employee of the Minister, has not been made available to testify. They urged

> the RPD to "…draw the inference that Ms. Wyslouzil's unwillingness to testify is because the information she would give during her testimony would be damaging to the Minister or reflect badly on her own conduct during Mr. Shen's hearing." Mr. Shen's lawyers also argued that allowing Ms. Wyslouzil to testify in writing was not appropriate as it would deprive him of any meaningful opportunity to conduct cross examination. Mr. Shen urged the RPD to summons Ms. Wyslouzil.

[32] In the August 4, 2017 interlocutory decision, the RPD addressed whether the Minister demonstrated that Ms. Chan was a necessary witness to comply with Justice Fothergill's order in *Shen 2016*. In this decision, the RPD reviews the chronology of events, some of which are outlined above. In its detailed consideration of the facts and circumstances, the RPD found that the Minister did not make sufficient efforts to produce Ms. Wyslouzil as a witness despite two orders from the RPD that the Minister produce her as a witness. The RPD noted that the medical notes presented as an explanation for why she could not give evidence were entirely bereft of any information as to why she was unable to testify before the RPD yet maintain her employment duties in a "high stress job". The RPD ultimately found as follows:

> [39] The Minister's lack of diligence and conduct, and their efforts since October 2016 to not call a witness who can provide an explanation for withholding of relevant and exculpatory evidence, is leading me to make an adverse inference on the Minister being in breach of their duty of candour. This also constitutes an abuse of process. I am left to fashion an appropriate remedy, bearing in mind that a stay of proceedings or equivalent remedy will be justified only in the "clearest of cases". Since the Federal Court has previously ruled that the withholding of the so-called "section 38" documents did not amount to circumstances to warrant a stay of proceedings, or that the Minister should be prevented from intervening in Mr. Shen's claim for refugee status, I invite the parties to either re-iterate earlier submissions on this particular

> point or to produce other remedies not yet considered within 30 days of receipt of this decision.

[33] The interlocutory decision of October 31, 2017, was issued after the RPD received submissions from the parties regarding the appropriate remedy. In this decision the RPD provides a thorough and thoughtful discussion on the appropriate path forward. Ultimately, the RPD determined at paragraph 18 as follows (emphasis in original):

> [18] … I agree that some information must be excluded from any future hearing of Mr. Shen's claim for refugee protection and the minister's intervention in this case. Since the minister has been found to have breached the duty of candour, some past evidence has become tainted. Therefore, for the sake of natural justice and to ensure that the administration of justice is not brought into disrepute regarding this Tribunal, I order a full hearing *de novo* in which some exhibits and all testimony from the transcripts are removed from the record and the proceeding begins anew before a differently constituted panel. There have been consequences against Mr. Shen resulting from the previous hearing, for which the minister must bear responsibility. To ensure that these consequences against Mr. Shen are not propagated in the future, since some evidence and the previous transcripts will be removed from the record, in the future hearing, […]

[34] Generally, the choice of witnesses to give evidence is a decision that rests with the party calling the witness. The choice of a witness is informed by the evidence required to be advanced, and is informed by considerations of witness availability and legal strategy. Courts and tribunals routinely accommodate witnesses through scheduling or alternate arrangements, such as remote testimony. However, such accommodations are not without limits. A proceeding must not be unduly delayed or disrupted due to a party's inability or unwillingness to secure witness testimony. In the present matter, the Minister's conduct had precisely that effect.

[35] While the Minister argues they were "prevented" from calling witnesses, the record indicates otherwise. In fact, the record demonstrates that it was the Minister's own actions that resulted in their witnesses not being heard. Both Ms. Chan and Ms. Wyslouzil, who were the lead CBSA Hearing Officers on this matter during the 2012 and 2015 RPD hearings, had been involved in this matter for many years and were well-positioned to provide relevant evidence. They were treated by the Minister as interchangeable witnesses as presumably their evidence would be consistent. The Minister initially declined to call Ms. Chan and when Ms. Wyslouzil subsequently became unavailable, the Minister then asked to call Ms. Chan—but only after the passage of many months and the rescheduling of the hearing to accommodate Ms. Wyslouzil. In the circumstances, the RPD was not satisfied that the Minister adequately justified the unnecessary delay to accommodate Ms. Wyslouzil.

[36] Upon reviewing the record, the reasons for Ms. Wyslouzil's inability to give evidence are not entirely clear. I agree with the RPD that it is difficult to reconcile the Minister's claim that she was incapable of giving evidence with the fact that she remained employed by the CBSA. Furthermore, the medical documentation provided to support her inability to give evidence was limited to brief affirmative or negative responses to questions posed by the CBSA, with no elaboration on her condition or any indication of when, if ever, she might be available to testify.

[37] In these circumstances, the RPD reasonably declined to issue a summons for the Minister's substitute witness, Ms. Chan. It was reasonable for the RPD to draw an adverse inference from the Minister's failure to provide a satisfactory explanation regarding Ms. Wyslouzil's inability to testify, concluding that the Minister had intentionally withheld

relevant and exculpatory evidence and had misrepresented its existence. The RPD found this conduct breached the Minister's duty of candour to the RPD and constituted an abuse of process.

[38] On this judicial review, the Applicant Minister has not offered any evidence or explanation as to how the evidence of Ms. Chan or Ms. Wyslouzil would have affected the outcome before the RPD. It was open to the Minister to explain, even in general terms, the anticipated substance of their testimony and to explain how the RPD's findings were rendered unfair in their absence. As it stands, the Minister simply argues that the process was unfair. A bare assertion of procedural unfairness, particularly where the alleged unfairness arises from the Minister's own conduct, is insufficient.

[39] Considering the lengthy history of these proceedings, I am satisfied that the Minister had a full and fair opportunity to call evidence from witnesses. It was not procedurally unfair for the RPD decision to censure the Minister for its conduct.

C. *Is the RPD abuse of process analysis unreasonable?*

[40] The Applicant Minister submits that the RPD's abuse of process finding is unreasonable. In particular, the Minister argues that the RPD failed to apply the "overwhelming and conspicuous evidence" standard set out in *R v Power*, 1994 CanLII 126 (SCC) [*Power*]. In *Power*, the Supreme Court of Canada held that an abuse of process finding "requires overwhelming evidence that the proceedings under scrutiny are unfair to the point that they are contrary to the interest of justice" and there must be "conspicuous evidence of improper motives

or of bad faith or of an act so wrong that it violates the conscience of the community, such that it would genuinely be unfair and indecent to proceed".

[41] As outlined above, the RPD found an abuse of process based on an adverse inference drawn from the Minister's conduct, specifically the Minister's lack of diligence and efforts to avoid calling a witness who could explain the withholding of relevant and exculpatory evidence, which breached their duty of candour.

[42] The drawing of an adverse inference based on the Minister's litigation conduct is a matter fully within the RPD's discretion. While the Applicant Minister focuses on the wording of a singular paragraph of Member Cryer's decision, I am satisfied that the RPD's finding is both supported and justified when read in the broader context of a matter that had been ongoing for years.

[43] The RPD refused to summons Ms. Chan after the Minister failed to provide a timely or credible explanation for Ms. Wyslouzil's unavailability—despite previously rescheduling the hearing to accommodate her testimony. Considering that the delay in this matter was prejudicial to Mr. Shen, it was reasonable for the RPD to draw an adverse inference to the Minister's conduct which was deliberate and intended to impair Mr. Shen's ability to defend himself.

[44] Further, I am satisfied that the RPD's findings were sufficiently serious for the RPD to conclude that the Minister breached their duty of candour to the RPD and that this breach rose to the level of an abuse of process. When the Minister failed to provide an explanation, the RPD

drew an adverse inference that the Minister intentionally withheld relevant and exculpatory evidence and misrepresented that there was no such evidence. I am satisfied that Member Cryer's reasons reflect a holistic and context-sensitive consideration of the abuse of process doctrine. There is no reviewable error here that leads to the decision to be unreasonable.

[45] The Applicant Minister also argues that the remedy ordered by the RPD in its October 31, 2017 interlocutory decision was unreasonable, as it excluded significant portions of the Minister's evidence. They argue that the RPD failed to provide intelligible and transparent reasons for how the evidence was "tainted" or why particular items were to be excluded. These arguments relate directly to the Minister's challenge of the RPD decision refusing the request for a summons. I have addressed that issue above. The decision of the RPD to exclude certain evidence as being "tainted" is as follows (emphasis in original):

> [18] … There have been consequences against Mr. Shen resulting from the previous hearing, for which the minister must bear responsibility. To ensure that these consequences against Mr. Shen are not propagated in the future, since some evidence and the previous transcripts will be removed from the record, in the future hearing, I specifically order the following:
>
> i. The transcript from the previous hearings will be excluded. As demonstrated, some evidence arising out of the first hearings is tainted and it would not be helpful to the hearing process for the future member to be exposed to tainted evidence. Furthermore, the claimant testified without the benefit of knowledge of <u>all of</u> the relevant and exculpatory evidence, which should have been before him.
>
> ii. Particularly, the evidence arising from the witnesses Officer Huang and Ms. Ho is to be excluded. Since the transcript of the original hearing will not be before the future member, and since the Minister

> has indicated he will not be recalling Officer Huang, there would be no opportunity for the Mr. Shen's counsel to cross-examine the evidence relating to these witnesses. In addition, there is still the matter of the section 38 letter, which seems to me, has not been fully resolved, but it is likely to be important information, which should have been before Mr. Shen at the previous hearings.
>
> iii. The minister will not adduce any further evidence from the PSB directly related to this case, because the evidence emanating from the previous PSB witness must now be considered tainted, a taint which might possibly remain if further evidence is disclosed. As indicated in the minister's submissions, there is other evidence which the minister is able to rely on to make his case involving this intervention in this claim.
>
> [19] Mr. Shen's counsel submits that evidence emanating from China should be excluded. This criteria is too broad. There is evidence pertaining to both parties that needs to be brought forward for a full and proper hearing of the case. …

[46] The RPD determined that certain evidence from the PSB was the product of torture and could not be given any weight. This includes the same category of evidence—namely interrogation records, testimony of Officer Huang—that was excluded as part of the abuse of process remedy. This is precisely the evidence which was the product of torture and would have been given no weight if it were before the RPD in rendering the final decision.

[47] I am satisfied that the decision sufficiently and reasonably addresses why the excluded evidence is "tainted" particularly when situated within the broader context of the matter. In sum, the abuse of process analysis is reasonable.

VI. Conclusion

[48] This judicial review is dismissed as the RPD decision is both reasonable and procedurally fair.

VII. Costs

[49] The Respondent seeks costs. Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, provides that costs can be awarded in immigration proceedings for special reasons. The threshold for establishing such circumstances is high, and each decision will turn on its own particular circumstances (*Singh Dhaliwal v Canada (Citizenship and Immigration*), 2011 FC 201 at para 30).

[50] In *Ndungu v Canada (Citizenship and Immigration)*, 2011 FCA 208 at paragraph 7, 6) the potential circumstances giving rise to "special reasons" were outlined as follows:

> "Special reasons" justifying costs against the Minister may be found where:
>
> i) the Minister causes an applicant to suffer a significant waste of time and resources by taking inconsistent positions in the Federal Court and the Federal Court of Appeal.
>
> ii) an immigration official circumvents an order of the Court.
>
> iii) an immigration official engages in conduct that is misleading or abusive.
>
> iv) an immigration official issues a decision only after an unreasonable and unjustified delay.

> v) the Minister unreasonably opposes an obviously meritorious application for judicial review (citations omitted).

[51] I am satisfied that there are special reasons in this case meriting an award of costs in favour of the Respondent. The conduct of the Minister has been found to be an abuse of process and has unduly delayed this matter. If the parties cannot agree on costs, they can make written submissions. The Respondent can provide submissions by May 5, 2025. The Applicant can provide submissions by May 12, 2025. Written submissions are not to exceed five (5) pages.

JUDGMENT IN IMM-11973-23

THIS COURT'S JUDGMENT is that:

1. This judicial review is dismissed.

2. The Respondent is entitled to costs.

3. If the parties cannot agree on costs, they can make written submissions. The Respondent is to provide submissions by May 5, 2025. The Applicant is to provide submissions by May 12, 2025. Written submissions are not to exceed 5 pages.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-11973-23
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION V HIYUAN SHEN
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	NOVEMBER 5, 2024
JUDGMENT AND REASONS:	MCDONALD J.
DATED:	APRIL 28, 2025

APPEARANCES:

Ely-Anna Hidalgo-Simpson Robert Gibson	FOR THE APPLICANT
Lorne Waldman C.M. Tara McElroy	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Vancouver, British Columbia	FOR THE APPLICANT
Waldman & Associates Toronto, Ontario	FOR THE RESPONDENT