Federal Court  Cour fédérale

Date: 20120315

Docket: IMM-5083-11

Citation: 2012 FC 311

Ottawa, Ontario, March 15, 2012

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

YANPING LU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This judicial review is in respect of a failed refugee claim. The basis for the refusal of the claim was that the Applicant was excluded from refugee protection under Article 1E of the *United Nations Convention Relating to the Status of Refugees* and pursuant to s. 98 of the *Immigration and Refugee Protection Act* (IRPA). The Immigration and Refugee Board (IRB) made an alternative

finding that the Applicant would not be persecuted for practising Christianity in China's Fujian province.

[2] The IRB's decision on both issues turns on its conclusion that the Applicant was resident in Chile and it is this aspect of the decision that must be the centre of this judicial review.

II. BACKGROUND

[3] The Applicant is a citizen of China, married with two daughters. His wife and daughters remain in China.

[4] The Applicant claimed that he had been introduced to Christianity in May 2006 and began its practice in early 2007.

[5] In one incident in January of 2008, while he was at work, the Applicant's wife informed him that the Public Service Bureau (PSB) had visited their home looking for him and had told her that he was a member of an illegal church. The Applicant went into hiding. Later that day the PSB raided the Applicant's church and arrested four members.

[6] In the second incident in February of 2008, the PSB visited the Applicant's home to charge him for violating religious regulations. However, he was in hiding and remained in hiding until he left China.

[7] The Applicant claimed that he arranged with a smuggler to escape to Canada. He said that he left China on March 14, 2008 and travelled through Hong Kong, Malaysia, Argentina and Chile. He said that he arrived in Chile on March 16, 2008.

[8] The Applicant's story is that, to secure a Canadian visa, the smuggler obtained two fraudulent documents, which indicated that he was a permanent resident of Chile. The Chilean Certificate of Permanent Residence was issued December 31, 2007 and the Chilean Foreign Resident Identity Card was issued January 28, 2008.

[9] The Applicant finally arrived in Canada on July 14, 2008 and filed a refugee claim based on his participation in an underground church in China. He claimed that during his absence from China, the PSB had visited his home on numerous occasions and those church members that were previously arrested were either sentenced to labour camps or to prison terms of three years. The Applicant also claimed that he continued practising his faith in Canada.

[10] Prior to the first IRB hearing day, the CBSA contacted the Chilean Consulate to confirm the Applicant's status in Chile. This initial request was refused because of strict Chilean privacy laws which required the Applicant's consent. At the first hearing the Applicant gave his consent. The Applicant said that the Chilean documents had been arranged by the smuggler and that he had no real knowledge of their content.

[11] The Minister's representative, and subsequently the IRB, was informed by the Chilean Consulate that the Applicant did have Chilean permanent residence status when he entered Canada but that status had been lost because he remained outside of Chile for more than one year.

[12] In the IRB's decision, it was noted that the Applicant's counsel had been given time to contact the Chilean Consulate to request further information on his client's status in Chile. Counsel informed the IRB that he had received no response to his inquiries.

[13] On the issue of the Applicant's status in Chile, the IRB made several critical findings:

- The Applicant was a permanent resident of Chile from October 2007;
- Chilean and Canadian laws in respect to loss of permanent residence are similar in that permanent residence is not unconditional and can be lost due to absences (in Canada such status can be revoked if the person was abroad for six months); and
- Based on *Zeng v Canada (Minister of Citizenship and Immigration)*, 2010 FCA 118, the Applicant's loss of permanent residence status was due to his own volition. The IRB then concluded that the Applicant was excluded under Article 1E of the *United Nations Convention*.

> Article 1: Definition of the term "refugee"
>
> E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

[14] The IRB, on the basis of the Chilean documents, which were accepted as true, concluded that the Applicant had resided in Chile from at least October 2005 to July 2008. Given this time frame, the Applicant's introduction to Christianity and the PSB's attempts to pursue him were not credible or trustworthy.

[15] The IRB then rejected the Applicant's Chinese residency documents as proof that he was in Fujian province at all relevant times because a) the documents could have been obtained when he visited sometime between 2005 and 2008 and b) because of the prevalence of fraudulent documents in China.

[16] Following the logic that the Applicant was in Chile rather than China at the time of his joining the church, the IRB held that his faith practice in Toronto was an effort to bolster his refugee claim. The Board cites the Applicant's failure to recite the Lord's Prayer and Apostle's Creed as evidence that his faith was suspect.

[17] The IRB cites the absence of persecutions of Christians in Fujian province as evidence which undermines a claim based on religious persecution.

[18] In summary, the Board held that there were too many inconsistencies in the circumstances to find the Applicant's claim to be credible.

III. ANALYSIS

[19] As noted, the overarching issue is the authenticity of the Chilean residency documents. If they were indeed fraudulent, then the Applicant's story has a level of consistency from which a reasonable person could conclude that his fear of religious persecution was both subjectively and objectively well founded. If, on the other hand, those documents are legitimate, then the Applicant's story collapses because it is inconsistent with the timelines.

[20] As to the standard of review, in *Zeng*, above, the Federal Court of Appeal held that where the issue is the test for exclusion, the applicable standard is correctness (at para 11). Conversely, whether the facts give rise to exclusion under Article 1E is a matter of mixed law and fact that attracts a reasonableness standard, as does an issue of fact alone (see *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 51 and 53; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 46).

[21] The purpose of the Article 1E exclusion is to preclude refugee protection for those who do not need it. The test for Article 1E exclusion was laid out in paragraph 28 of *Zeng*, above:

> **28** Considering all relevant factors to the date of the hearing, does the claimant have status, substantially similar to that of its nationals, in the third country? If the answer is yes, the claimant is excluded. If the answer is no, the next question is whether the claimant previously had such status and lost it, or had access to such status and failed to acquire it. If the answer is no, the claimant is not excluded under Article 1E. If the answer is yes, the RPD must consider and balance various factors. These include, but are not limited to, the reason for the loss of status (voluntary or involuntary), whether the claimant could return to the third country, the risk the claimant would face in the home country, Canada's international obligations, and any other relevant facts.

[22] The Applicant does not challenge the test for exclusion but simply the IRB's finding that the facts give rise to exclusion. However, this finding warrants deference and will stand if it falls within the range of acceptable outcomes based on the evidence before it.

[23] The Respondent had raised a *prime facie* case that the exclusion applied to the Applicant. The Chilean documents and the confirmation from the Consulate that the Applicant had permanent resident status are sufficient to raise the *prime facie* case.

[24] The Respondent having raised a *prime facie* exclusion case, the burden is on the Applicant to rebut that case. That is the legal regime imposed on the parties.

[25] The only evidence produced to rebut the Chilean evidence was the Chinese residency documents. There is a clear conflict in the evidence; both cannot be legitimate.

[26] The Board's suggestion that the Chinese residency documents could have been obtained when the Applicant went back to China was simply a comment on the plausibility of these documents. There was no evidence of any such return. The comments must be read in light of explaining how such documents come about including the evidence that fraudulent documents were prevalent in China.

[27] It was reasonable for the Board to conclude that the Chilean documents were legitimate and from that finding to conclude that the Applicant's story was not credible because it was inconsistent with the facts underlying those documents.

[28] It was the Applicant's burden to show that he was not in Chile at the relevant times and to show the Chilean documents to be fraudulent. Simply saying that they were fraudulent, in these circumstances, would not be sufficient.

[29] The Board's conclusion that the Applicant was not persecuted for his religious beliefs is coloured by the finding that he was in Chile at the relevant times. While the evidence of his knowledge of Christian tenets of religion was equivocal (he knew such things as the Trinity and original sin but could not recite core prayers), it was open to the Board to find the Applicant's evidence to be insufficient.

IV. CONCLUSION

[30] For these reasons, this judicial review will be dismissed. There is no question for certification.

JUDGMENT

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

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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