Federal Court  Cour fédérale

Date: 20150619

Docket: IMM-5796-14

Citation: 2015 FC 771

Ottawa, Ontario, June 19, 2015

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

ZHAOHUI CHEN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

JUDGMENT AND REASONS

[1] At the conclusion of the hearing of this application, it was indicated to the parties that notwithstanding the submissions made by counsel for the respondent, the application would be granted.

[2] The applicant, Zhaohui Chen, is a citizen of China. He arrived in Canada in 2007, as a dependent on his father's permanent residence application.

[3] In January 2012, the applicant was convicted of manslaughter was sentenced to five years imprisonment. The applicant was found inadmissible under section 36(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001 c 27 on November 13, 2012, and a deportation order was issued on January 27, 2014.

[4] The applicant submitted a request for a Pre-removal Risk Assessment [PRRA] claiming a fear of persecution in China on account of being a Baptist and retribution by the manslaughter victim's family, and the fact that Chinese criminal law allows further criminal responsibility for those convicted of crimes abroad [the Double Jeopardy Risk]. The PRRA was rejected as the officer found that the applicant would not face a personalized risk to life or cruel and unusual treatment or punishment in China.

[5] The applicant submits that the officer erred in (1) assessing his risk based on a profile as a Protestant, and not on his actual religious profile as a Baptist, (2) in failing to consider that proselytizing is a fundamental part of the applicant's religious practice, and (3) in relying on evidence obtained by the officer through an internet search he conducted to assess the Double Jeopardy Risk without advising the applicant and providing him with an opportunity to respond to it.

[6] The court has concerns with respect to the officer's assessment of the applicant's risk based on his religion. In particular, the court is troubled by the officer's finding that the applicant would not be at risk of persecution based on his religion if he attended a registered Protestant church. The officer, who found the applicant credible, failed to properly and adequately consider his affidavit statement that he does not accept such state sponsored churches:

> I fear that I will no longer be able to practice my faith and my beliefs openly. Not only do I not believe that the government and God are equals but I do not agree with state sponsored churches. I do not believe that I would be able to receive God's message through a church that is censored by the government. I would also not be able to engage in activities, such as proselytizing, which I believe are fundamental to the faith.

[7] In the court's view, the officer was required to justify why a state sponsored church was an avenue open to this applicant in light of his uncontradicted evidence to the contrary.

[8] In any event, the material difficulty with the decision is that the applicant's right to procedural fairness was breached when the officer independently accessed and relied upon information which affected the outcome of the decision, without giving the applicant an opportunity to address it.

[9] On the basis of his own research on the internet, the officer finds that it is unlikely that the Double Jeopardy Risk would apply to the applicant. The officer cites as a source consulted the decision of the Upper Tribunal in England, *YF*, [2011] UKUT 32(IAC) [*YF*] and states that "among its findings" the court determined that it is more likely that an individual would be punished in China again for a crime for which he has already been convicted elsewhere if "the

crime received a lot of publicity in China, if the victims were well-connected in China, if there were a political angle to the original crime or if the crimes were of a particular type that the authorities wanted to make an example of." Based on this test, the officer conducted a search of the internet using the applicant's name, "Zhaohui Chen" and could not find any websites mentioning his conviction. He concluded that the Double Jeopardy Risk was unlikely.

[10] The applicant correctly points out that a search using the correct spelling of his name, "Zhoa-hui Chen" would have disclosed that "almost every major news outlet in Canada covered the story". He also notes that had the officer conducted a search of the victim's name in Chinese characters he would have also seen numerous articles that he asserts would have been available to the Chinese authorities.

[11] The test the officer relies and on which he says was a finding in *YF* is not what the court in that case stated was the proper test to be used. The test the officer cites is one referenced in *YK* that comes from a UK document setting out the view of a Dr. Dillon as to the practice of the Chinese authorities; however, at paragraph 80 of the decision, the court lists "a wider number [i.e. 10] of factors as being potentially relevant."

[12] The respondent, relying on *Hassaballa v Canada (Minister of Citizenship and Immigration)*, 2007 FC 499 [*Hassaballa*]; and *Nadarajah v Canada (Solicitor General)*, 2005 FC 713 [*Nadarajah*], argues that "a simple internet search reveals the decision" and "it cannot be said that this decision is one that is 'not normally found', nor is it 'novel'."

[13] These authorities, in my view, are unhelpful in assessing the present circumstances. In *Hassaballa* the applicant complained that the PRRA officer looked at updated versions of the US DOS Report and the US Religious Freedom Report. The applicant in that case had cited and relied on earlier versions of both reports. The officer examined the most current version of each report. The court noted that "these updated reports are in the public domain, that they originate from well-known sources, that they are general in nature, and that they are frequently quoted by counsel involved in immigration cases on both sides." Importantly, it was noted that both are in the country condition packages relied upon by immigration officers and the IRB. Moreover, counsel for the applicant was aware of them, as they were referenced and relied upon in the submissions made on behalf of his or her client. The court in finding that there was no breach of procedural fairness when the officer relied on these updated reports observes that counsel should have known, in light of her experience, that the PRRA officer would rely on these updated documents. The same cannot be said of the information relied upon by the officer in this case.

[14] In *Nadarajah* the court considered whether the officer's reliance on the extensive review of country conditions in Sri Lanka detailed in a decision of the European Court of Human Rights meant that he was obliged to put the decision to the applicant. The court found that there was no breach of procedural fairness in failing to do so because the country conditions outlined in the decision reflected the same conditions that existed at the time the applicant made his PRRA submissions. The court applied the reasoning in *Mancia v Canada (Minister of Citizenship and Immigration)*, [1998] 3 FC 461 (CA) [*Mancia*], in concluding that there was no duty on the officer to put this decision to the applicant.

[15] In *Mancia*, the Federal Court of Appeal stated, in the context of a document relating to country conditions, that it is only where the decision-maker "relies on a significant post-submission document that evidences changes in the general country conditions that may affect the decision that the document must be communicated to that applicant." The test then is whether the document at issue may affect the decision.

[16] It is clear when reading this decision that the officer relied on *YK* and the name search he conducted and that they affected his decision, since it was because of these that he found that the applicant here would not suffer the Double Jeopardy Risk. The officer may be correct, however, the officer was required to put them to the applicant for his comment prior to rendering a decision. In failing to do so, natural justice was breached.

[17] Neither party proposed a question for certification nor is there any on the facts here.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is allowed, the decision of the officer rejecting the Pre-removal Risk Assessment application is set aside, the application is referred back for determination by a different officer, and no question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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