Federal Court  Cour fédérale

Date: 20150528

Docket: IMM-7157-14

Citation: 2015 FC 690

Vancouver, British Columbia, May 28, 2015

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

MAJID MOJAHED

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *IRPA*] for judicial review of a decision dated September 18, 2014 by the Refugee Protection Division [RPD] determining that the Applicant was excluded from Convention refugee status pursuant to Article 1E of the *United Nations Convention Relating to the Status of Refugees*, 189 UNTS 150 [the *Convention*].

[2] The central issue in this application for judicial review is whether the RPD properly applied the factors set out by the Federal Court of Appeal in *Zeng v Canada (Minister of Citizenship and Immigration)*, 2010 FCA 118 [*Zeng*], in applying Article 1E of the *Convention* and assessed the alleged risk of return to Iran. After carefully considering the record and the submissions made by counsel for both parties, I have come to the conclusion that the application must be dismissed.

Facts

[3] The Applicant, Majid Mojahed, was born in Iran on July 26, 1956. He alleges that he has been a vocal supporter of the monarchist cause in Iran for the past several decades and has been threatened by agents of the Iranian government both in Iran and in Austria. He makes the following claims.

[4] His family were allegedly prominent supporters of the monarchists in Iran. His father ran a newspaper that was supportive of the deposed Shah of Iran, and fled Iran in 1979 when the Islamic revolution overthrew the Shah. He was found to be a Convention refugee in Austria but was unable to sponsor the Applicant as the Applicant was no longer a minor by that time.

[5] The Applicant left Iran in 1980 to visit Austria. He spent some time there as a student, and subsequently moved to the United States where he lived from 1982 to 1991. He made an asylum claim there in 1982, which was unsuccessful.

[6] Mr. Mojahed returned to Iran in 1991, allegedly to better assist pro-monarchist activists using his connections from within the country. He lived in Iran for the next decade. He claims that the Iranian authorities learned of his assistance to monarchists around 2000 or 2001, and he was arrested and detained for one day but was able to bribe his way out of detention. With the help of his connections, he obtained a passport in March 2001. He obtained a visitor's visa for Austria, and was able to leave Iran on third attempt on August 24, 2001. He became a permanent resident in Austria on December 28, 2004.

[7] In January 2009, the Applicant left Austria for St. Maarten, where he worked in the construction industry, with status as visitor. As he did not return to Austria or the European Economic Area for an uninterrupted period of one year, he lost his permanent resident status. The Applicant claims that he never went back to Austria because in December 2008, an Iranian person (whom he believes is an agent of the regime in Iran) approached him in a Persian restaurant, insulted him and put a gun to his head.

[8] In February 2011, he was told that some non-Western people were looking for him in St. Maarten. He then came to Canada as a visitor in May 2011. He had previously made some trips to Canada to visit a woman to whom he had become engaged and to investigate business opportunities. He applied for a visitor record in June 2011, which was refused on June 21, 2012, at which point he lost his status in Canada. Having also learned from his brother in Iran that the authorities were still interested in him, he filed a claim for refugee protection on July 3, 2012. Since arriving in Vancouver, he has hosted political gatherings at his art gallery and has posted videos of himself endorsing the pro-monarchist cause online and on social media.

[9] His refugee claim was heard by the RPD over several days between November 7, 2013 and June 26, 2014. During the course of the hearing, it emerged that there was an open national arrest warrant against the Applicant in Austria for offences of fraud, aggravated fraud, breach of trust, fraudulent bankruptcy and suppression of documents and a trace/locate alert on Interpol. The Applicant claims that he was not aware that there were criminal charges against him in Austria until he signed a consent form to allow an information request, at the behest of the RPD member, and the results of the Minister's inquiries were disclosed in the refugee claim.

The impugned decision

[10] In a decision dated September 18, 2014, the RPD found that the Applicant was excluded from refugee protection pursuant to Article 1E of the *Convention* because he had voluntarily allowed his permanent residence status in Austria to lapse. In particular, the RPD made the following findings:

- Exclusion under Article 1F(b): The RPD noted that the Applicant had been charged with offences in the US and Austria and accepted that he had been cleared of the US charges. As regards the outstanding Austrian charges, the RPD noted that he had not been convicted. It concluded that there was insufficient evidence before it to exclude the Applicant under Article 1F(b) for serious non-political crimes outside Canada.

- Exclusion under Article 1E: The RPD applied the Zeng test, which is as follows (at para 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.

- Loss of status in Austria: Having acquired permanent resident status in Austria in 2004, the Applicant had enjoyed rights and obligations similar to those of an Austrian national. The RPD accepted evidence submitted by the Applicant and the Canadian Border Services Agency [CBSA] that he had lost this status because he remained outside of the European Economic Area for more than 1 year. The RPD concluded that this loss of status was voluntary because the Applicant deliberately left Austria. It found that the Applicant lacked credibility with respect to his claim that he was unaware that he had lost his status in Austria, noting that he gave evasive and contradictory answers in his PIF, his interview with CBSA officers when he made his refugee claim, and in oral evidence during his refugee hearing. The RPD also noted that the Applicant is highly educated, has an extensive history of residence, visa applications and travel throughout the world. Furthermore, it noted that he is a wealthy man and had access to legal assistance for previous immigration processes.

- The RPD also found the Applicant to lack credibility with respect to his claim that he had been at risk in Austria from Iranian nationals and that there was an attempt on his life during the restaurant incident in December 2008. It noted that the Applicant had difficulty describing the details of what had allegedly occurred during that incident. It further found that the police report he filed indicating that a complaint had been filed on December 11, 2008 at "Hafes" restaurant did not corroborate his claim as the report was very general, does not refer to the Applicant or any other victim by name, and does not describe a person pointing a gun at anyone.

- Furthermore, it pointed out that he could have maintained his permanent resident status in Austria by returning to any other EU country within the one year period, and that he had made minimal attempts to access Austria's ample state protection mechanisms before he left. It therefore concluded that the alleged risk he faced in Austria was not a valid reason for allowing his permanent resident status to lapse and he had voluntarily renounced his permanent resident status in Austria.

- Right to return to Austria: The RPD concluded that the possibility that the Applicant could return to Austria was "mixed". It found that he had no right to re-enter Austria as he had lost his permanent resident status. However, as the Austrian authorities had issued an arrest warrant against him for various fraud-related offences, the RPD concluded that should he be returned to Austria, the authorities would likely accept him in order to prosecute him in criminal proceedings. The Board noted that there was no guarantee that the Applicant would be able to remain in Austria. However, Austria also has an established system for providing protection to refugees and his own family members have secured refugee protection there in the past.

- Risk in Iran: The RPD concluded that the Applicant was not credible with respect to his claim that he had been a long-time supporter of the pro-monarchist movement and noted that the Applicant exhibited a pattern of evasion, changing testimony, contradictions and failure to disclose information material to his claim (for example, his failed asylum claim in the US in 1982 and the criminal charges in the US). Furthermore, it concluded that the fact that he had returned to live in Iran for ten years in 1991, that he had allowed his Austrian permanent resident status to lapse, and that he failed to claim refugee status in Austria, St. Maarten or in Canada until his visitor status expired, did not establish subjective fear and was inconsistent with his claim that he had been threatened by Iranian authorities for many years.

- Moreover, the RPD found that the Applicant had failed to adduce sufficient evidence of his alleged support of the pro-monarchist cause over the past thirty years, and was unable to articulate his views with any clarity. The RPD also found that it was only after the Applicant had arrived in Canada and filed his refugee claim that he began to produce online videos of his alleged political views and began to host pro-Shah events at his art gallery in Vancouver. The RPD concluded the Applicant made these videos and hosted these events with the sole purpose of supporting his refugee claim. However, the RPD did find that, given the public nature of these activities, there was a serious possibility that the Applicant faced a risk of persecution in Iran. Although the Applicant is not credible in the evidence presented regarding his risk in Iran at the time he arrived in Canada and made

his refugee claim, there is a possibility that his anti-regime dissent could become known by Iranian authorities.

- International obligations: With respect to Canada's international obligations, the RPD noted that there are various options and possibilities which includes a Pre-Removal Risk Assessment, the removal process which will determine which country he will be deported to, and Canada's response to Austria's Interpol bulletin. The RPD acknowledged that these other possibilities are not within the expertise of the RPD.

- Weighing the factors: The RPD concluded that the Applicant had egregiously abused Canada's refugee protection system by deliberately precluding his right to return to Austria and manufacturing an online political profile that would cause the Iranian authorities to take notice of him. It listed the objectives set out in Zeng, finding that the Applicant's manipulation of immigration and refugee processed did not maintain the integrity of the Canadian refugee protection system and constituted a form of asylum shopping that is incompatible with the surrogate dimension of international refugee protection. While the RPD stated that it "agreed that the claimant should not be removed to Iran due to the potential risk in his home country", it found that refugee protection, with its attendant rights and opening to further status in Canada, was not the appropriate pathway to protect the Applicant from risk in Iran. It found that the Applicant's blatant abuse of the timing and immigration processes combined with the possibility of return to Austria outweighed the other factors and he should therefore be excluded from refugee protection.

Issues

[11] The only substantive issue to be determined in this application is whether the RPD erred, in law or in fact, in concluding that Mr. Mojahed is excluded from refugee protection under Article 1E of the *Convention*.

Analysis

[12] Article 1E of the *Convention* was implemented in section 98 of the IRPA, and was meant to discourage asylum shopping. It precludes an individual from being granted refugee protection if that individual already possesses substantially the same rights and obligations as nationals of another surrogate country. Article 1E provides as follows:

1E. 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.	1E. Cette Convention ne sera pas applicable à une personne considérée par les autorités compétentes du pays dans lequel cette personne a établi sa résidence comme ayant les droits et les obligations attachés à la possession de la nationalité de ce pays.

[13] There is no issue between the parties that the proper framework to determine whether a person meets the criteria of Article 1E has been set out by the Federal Court of Appeal in *Zeng*, and that the RPD correctly referred to these criteria in assessing the Applicant's claim.

[14] What is disputed in the case at bar is whether the facts properly give rise to exclusion. This is a question of mixed fact and law, reviewable on the reasonableness standard, and yielding "substantial deference" to the RPD according to the Federal Court of Appeal in *Zeng* (at para 11). See also: *Zhong v Canada (Minister of Citizenship and Immigration)*, 2011 FC 279, at paras 15-16; *Dieng v Canada (Minister of Citizenship and Immigration)*, 2013 FC 450, at para 18. Accordingly, the Court shall not intervene if the decision-making process is justified, transparent and intelligible and the decision falls within a range of possible, acceptable outcomes which are

defensible in respect of the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at para 47; *Canada v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, at para 59.

[15] The parties are in agreement that the Applicant had permanent resident status in Austria and that he lost it as a result of living outside that country and the European Economic Area for an uninterrupted period of one year. The RPD was therefore called upon to consider and balance the various factors identified in *Zeng*.

[16] The Applicant did not seriously challenge the RPD's determination that he had voluntary lost his permanent resident status in Austria, or that his actions at the very least amounted to a constructive renunciation of his status in that country. The RPD could reasonably conclude that the Applicant, being highly educated and wealthy and having moved around significantly, must have been aware when he left Austria and did not return for an extended period of time that he was giving up his status there. To that extent, his departure was intentional and his loss of status was clearly voluntary. The Board could also reasonably find that his reason for allowing his status to lapse (the alleged attempt on his life in December 2008) was not valid, not only because there were inconsistencies in his story and a lack of corroborative documents, but also because he did not seriously try to access state protection in Austria and could have maintained his status merely by moving to any other EU country within the one year period.

[17] This may well not be a classic case of "asylum shopping", as the Applicant had not previously claimed asylum protection in Austria. Nor is it clear that the Applicant attempted to "game the system" or "queue jump" normal immigration waiting lists in order to move from a

safe country to a different country of his choice. Indeed, the Applicant first tried to obtain status in Canada as a business investor, and only claimed refugee status when Citizenship and Immigration Canada (CIC) refused to extend his visitor visa. That being said, the Applicant did have the rights and obligations similar to a national of a safe country and voluntarily failed to maintain his status, and this factor could be weighed against him by the RPD. The situation may well be different where an individual has allowed his status in a third country to lapse prior to any threat to him arising in his home country. Such a scenario may not be properly captured by Article 1E, the objective of which is to exclude persons who do not need protection. Such a caveat, however, does not apply here.

[18] The Applicant's main argument is that the RPD erred in assessing his right to return to Austria, and speculated in finding that he could be returned to that country. According to the Applicant, the RPD's finding that he could be removed to Austria on an extradition warrant is outside the jurisdiction of the RPD; similarly, the possibility of removal to Austria as a result of the PRRA process is baseless, especially since the Minister never suggested that possibility.

[19] To be fair, the RPD recognized that the Applicant does not have the right to re-enter Austria and that Austria does not have an obligation to re-admit him. Having said this, the RPD noted that the Applicant is the subject of a valid arrest warrant and is wanted by the Austrian police on fraud charges. That being the case, the RPD could reasonably find that the Austrian authorities are interested in the Applicant; whether this will prompt them to seek his extradition or accept his removal from Canada, at least for the purposes of pursuing the charges pending

against him under Austrian law, is obviously an open question. But it is clearly not unreasonable to infer from the circumstances that it is a distinct possibility.

[20] The RPD was not blind to the fact that such an outcome cannot be taken for granted, and that the eventual admission of the Applicant in Austria for the purpose of prosecuting him does not guarantee that he will thereafter be reinstated in his permanent resident status. The following paragraph of the RPD's reasons is quite telling in that respect:

> [34] This is a unique case that is very particular to the claimant's circumstances. If Austria wanted to refuse entry to the claimant, then why would they request a trace/alert for his whereabouts on Interpol? I assume that this information demonstrates that if the claimant were to be removed from Canada, he would be accepted by Austria, although only specifically for the purpose of trying to convict the claimant of the crimes with which he is charged. After the claimant is either cleared of the charges or is convicted and completes whatever consequences he faces, there is not a guarantee that he would be able to remain in Austria. At the same time, Austria is a country in which the law provides for the granting of asylum or refugee status, and the government has established a system for providing protection to refugees, and where the claimant's own family members have secured refugee protection in the past.

[21] This paragraph shows that the RPD was very much clear-eyed about the Applicant's situation and was under no illusion as to his right of return in Austria. In fact, the uncertainties in that regard led the RPD to conclude that this factor was mixed. I find nothing unreasonable in the reasoning of the RPD or in its determination with respect to that factor.

[22] Counsel for the Applicant also submitted that the RPD failed to weigh Canada's international obligations in coming to the decision that Mr. Mojahed can be excluded, despite

clear evidence that he would be at risk upon removal to Iran as a result of his *sur place* activities in Canada. This argument is without merit.

[23] First of all, the RPD did accept that the Applicant, though not credible in the evidence presented regarding his risk in Iran at the time he arrived in Canada and made his refugee claim, has a valid *sur place* claim as a result of his activities since that time. The RPD went as far as saying that the Applicant's recent public internet activities have raised the "serious possibility" of persecution, and have created a risk of imprisonment in conditions that could be inhumane.

[24] Second, the RPD was correct to underline that there are other processes in place to avoid the possibility of Canada indirectly running afoul of its international obligations. There is authority from both the Federal Court of Appeal and the Supreme Court in the context of Article 1F exclusions that rejects the notion that exclusion from refugee protection is tantamount to a final removal decision and that indicates that, where an applicant is found to be excluded under Article 1F, assessing risk is more properly the province of a PRRA or removals officer. At that stage, the country of removal will be clearer and the assessment of the risk will be undertaken by people with expertise and on the basis of the most up to date evidence.

[25] In *Xie v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 250, for example, the Federal Court of Appeal indicated that protection remains available despite a denial of refugee protection from Canada. The Court made it quite clear that assessing the risk of torture fell within the purview of a PRRA officer rather than the RPD (at para 39).

[26] Similarly, in *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68, [2014] 3 SCR 431, which also dealt with an exclusion under Article 1F of the *Convention* for serious criminality, the Supreme Court indicated that refugee protection is not the only mechanism through which Canada can comply with its international obligations to protect persons at risk. Chief Justice McLachlin, for the majority, held that s. 98 of the *IRPA* is consistent with the *Charter* and the *Charter* does not give a positive right to refugee protection. Rather, she indicated (at paras 67-68) that a stay of removal would be an appropriate vehicle in such cases to protect an applicant's *Charter* rights if he or she would face death, torture, or cruel and unusual treatment or punishment if removed to the country of origin.

[27] In the case at bar, the RPD weighed the factors identified in *Zeng* and determined that the Applicant should be excluded from refugee protection pursuant to Article 1E of the *Convention* because he voluntarily allowed his permanent residency status in Austria to lapse, lacked credibility, and engaged in self-serving conduct in generating a *sur place* claim. The penultimate paragraph of the RPD's reasons captures the gist of its balancing exercise:

> [61] The claimant left Austria having the rights and obligations similar to a national of that country. He could have maintained this status by either returning to Austria or by returning to a different EU country, but he failed to do so, and his permanent residency status lapsed. More than three years after leaving Austria, he claimed refugee protection in Canada, but presented a claim that lacks credibility. However, his subsequent deliberate actions put in place a situation that establishes a potential risk in Iran, even if that did not necessarily exist before. In these circumstances, I find that the claimant's blatant abuse of the timing and of the immigration processes, along with the possibility of return to Austria, outweighs the other factors outlined and that the claimant should be excluded from protection pursuant to Article 1E of the Convention.

[28] This is precisely the type of weighing exercise to which the Court should defer on a reasonableness standard of review, in light of the specialized nature of the RPD and its complete jurisdiction to determine the plausibility of testimony, to gauge the credibility of an account and to draw the necessary inferences. The RPD went out of its way to recognize that the Applicant should not be removed to Iran because of the potential risk he would be facing there, but added that the provision of refugee protection is not the appropriate pathway for this protection. This is clearly the kind of finding that the RPD was entitled to make, and the Applicant has failed to convince me that it falls beyond the range of possible, acceptable outcomes which are defensible in respect of the facts and law.

Conclusion

[29] For all of the foregoing reasons, I find that this application ought to be dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the Application is dismissed.

"Yves de Montigny"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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