Federal Court  Cour fédérale

Date: 20160623

Docket: IMM-4507-15

Citation: 2016 FC 702

Ottawa, Ontario, June 23, 2016

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

ZHAOHUI CHEN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application by the Applicant, Zhaohui Chen, for judicial review of a decision dated August 20, 2015 [the Decision] of a Senior Immigration Officer of the Pre-Removal Risk Assessment Unit of Citizenship and Immigration Canada [the Officer], rejecting the Applicant's Pre-Removal Risk Assessment [PRRA] application.

[2] For the reasons that follow, this application is allowed.

I. Background

[3] The Applicant is a citizen of China who entered Canada on November 19, 2007, having been sponsored as a permanent resident by his step-mother. On January 10, 2012, he was convicted of manslaughter and sentenced to five years imprisonment. He was therefore found to be inadmissible to Canada under section 36(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] on November 13, 2012, and a deportation order was issued against him.

[4] The Applicant initiated a PRRA application on January 27, 2014, claiming he would be persecuted in China for being a Baptist Christian. He also claimed that he would face retribution from the family of the manslaughter victim who reside in China. He further argued that he would be at risk of double jeopardy because China allows for the re-prosecution of crimes committed outside of China by Chinese nationals, even if the person has already been convicted, sentenced and released.

[5] A negative PRRA decision was rendered on June 12, 2014. The Applicant sought judicial review of this decision, which was allowed in *Chen v Canada (Minister of Citizenship and Immigration)*, 2015 FC 771. Justice Zinn found that there was a breach of procedural fairness because the officer had independently accessed and relied on information relating to the risk of double jeopardy in China, without giving the Applicant an opportunity to address it. As a result, the decision was referred back for determination by another officer, which is the decision currently under review.

II. Impugned Decision

[6] In the Decision, the Officer observed that the Applicant is inadmissible under section 36(1)(a) of IRPA and, as a result, would conduct an assessment only on the grounds prescribed by section 97 of IRPA, not on section 96 grounds related to Convention refugee status.

[7] The Officer accepted that the Applicant is a Baptist Christian and noted that the assessment of personalized risk under section 97 grounds includes any risks arising out of his profile as a Baptist Christian. The Officer then reviewed the evidence relating to freedom of religion in China and found that the Applicant would not face a section 97 risk if he is returned to China.

[8] The Officer noted that the United States Department of State reports that freedom of religion exists in China, but is severely restricted by the Chinese government, and cited a report of the Australian Refugee Review Tribunal [RRT], which explained that the Baptist denomination was abolished in China in the 1950s. The RRT reported that some of the abolished denominations remain visible, but, in general, the old denominations have disappeared. The RRT noted that although unregistered churches are formally illegal in China, they can be distinguished from other religious and spiritual groups that are banned as "evil cults". The Officer identified that the Baptist faith is not on the list of banned religions.

[9] The Officer observed that both the RRT and the Immigration and Refugee Board report the Chinese government's treatment of unregistered church members to vary between regions

and that, according to the RRT, the Applicant's region in China, Fujian, is a centre of Christian activity where, despite occasional crackdowns, the local authorities are generally tolerant towards unregistered Christian groups. However, the Officer found that the documentary evidence provided by the Applicant also demonstrated that there are some restrictions on religious freedom in Fujian, referring to evidence that house churches in Fujian face the constant and fearful risk of being closed down and having their members punished.

[10] Based on the evidence, the Officer accepted that religious freedom is severely restricted in China but found that enforcement of laws against unregistered churches varies from region to region. While there are restrictions, occasional crackdowns and harassment in Fujian, it is one of the most tolerant regions. The Officer also accepted that negative consequences include harassment, intimidation, property destruction and arrest but found that house church leaders are targeted for the most severe punishment. While ordinary underground church members can easily become targets of official crackdowns, the Officer concluded that most cases of serious harm involved church leaders and that religious leaders, activists and members of groups that are identified as cults by the Chinese government are at higher risk of detention and harassment than ordinary members. As a result, the Officer found that the Applicant would not be at a personalized risk of torture, risk to life, or risk of cruel and unusual treatment or punishment because of his profile as a Christian if he is returned to China.

[11] The Officer also addressed whether the Applicant would be at risk of re-prosecution for his crimes or at risk at the hands of the family of the manslaughter victim who reside in China

and rejected these grounds. However, nothing more need be said about these grounds, as they are not the basis for the arguments raised by the Applicant in this judicial review.

III. Issue and Standard of Review

[12] The Applicant raises one issue, whether the Officer erred by limiting his analysis under section 97 to physical harm and failing to consider whether the suppression of one's religious identity constitutes "cruel and unusual treatment".

[13] The Applicant suggests that this issue could be characterized as an error of law, reviewable on a standard of correctness, but acknowledges that *Dunsmuir v New Brunswick*, 2008 SCC 9 may require that a standard of reasonableness be applied. I conclude that the standard of review typically applicable to PRRA decisions is reasonableness (*Thamotharampillai v Canada (Minister of Citizenship and Immigration)*, 2016 FC 352 at para 18; *Belaroui v Canada (Minister of Citizenship and Immigration)*, 2015 FC 863 at paras 9-10; *Wang v Canada (Minister of Citizenship and Immigration)*, 2010 FC 799 at para 11) and that the issue raised by the Applicant does not warrant departure from that standard.

IV. Positions of the Parties

A. *Applicant's Submissions*

[14] The Applicant's position is that the Officer's failure to consider whether a violation of religious freedom, the suppression of religious identity, constitutes cruel and unusual treatment is an error of law. He argues that the forced suppression of one's religious identity through legal

prohibitions, even if they do not lead practitioners to be arrested or attacked, represents cruel and unusual treatment.

[15] The Applicant cites *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 [*Big M Drug Mart*]; *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12; and *Fosu v Canada (Minister of Employment and Immigration)* (1994), 90 FTR 182 as support for the proposition that freedom of religion requires a person to be able to openly practice his or her faith without fear of reprisals. He analogizes the circumstances in the present case to *VS v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1150 [*VS*], where the forced suppression of one's sexual identity was found to constitute persecutory treatment.

[16] Although the Applicant acknowledges that persecutory treatment is generally considered under section 96 of IRPA, he submits that the Officer failed to consider the overlapping nature of sections 96 and 97 and therefore, when recourse to section 96 is not available, whether this persecution constitutes cruel and unusual treatment pursuant to section 97. He argues that, in *AB v Canada (Minister of Citizenship and Immigration)*, 2009 FC 640 [*AB*], Justice Zinn held that what constitutes "cruel and unusual treatment" may be more expansive than what constitutes persecution. In that case, the Court found that an officer's conclusion that the discrimination faced by homosexuals in Guyana was not cruel and unusual treatment was unreasonable in light of his finding that persecution could have been established.

[17] The Applicant refers to case law considering the *Canadian Charter of Rights and Freedoms* [the Charter] to support his position that cruel and unusual treatment refers to acts

which would "outrage standards of decency" (*R v Smith*, [1987] 1 SCR 1045 at para 7), are "simply unacceptable" (*United States v Allard*, [1987] 1 SCR 564 at 572), would "shock the conscience" (*United States v Burns*, 2001 SCC 7 at para 68; *Kindler v Canada (Minister of Justice)*, [1991] 2 SCR 779 at 850 [*Kindler*]) or would violate the "Canadian sense of what is fair and right" (*Kindler* at 850). He argues that state sanctioned oppression of a religious group, even if it does not lead to the likelihood on a balance of probabilities of physical harm, would shock the conscience of Canadians and violates principles of fundamental justice in Canada.

B. *Respondent's Submissions*

[18] The Respondent's position is that the Officer properly conducted a restricted PRRA based only on section 97. The Applicant was precluded from consideration of whether he would face a serious possibility of persecution in China under section 96 because of his inadmissibility for serious criminality and sentence of over two years' imprisonment (pursuant to sections 112(3) and 113(e)(i) of IRPA). The Officer was only considering whether the Applicant would face a personalized danger of torture or a risk to his life or of cruel and unusual treatment or punishment under section 97.

[19] The Respondent submits that the Officer's findings under section 97 were reasonable. The Officer considered the documentary evidence relating to restrictions on religious freedom in China, to draw conclusions on the Applicant's section 97 risk, and was alive to the restrictions but found that enforcement of rules relating to such restrictions varies between regions. The Respondent argues that the fact Christians continue to practice at unregistered churches and the

fact that the treatment of Christians varies from region to region distinguishes the Applicant's circumstances from cases relating to individuals who are forced to hide their sexual orientation.

[20] The Respondent relies on *Kheloufi v Canada (Minister of Citizenship and Immigration)*, 2013 FC 481 [*Kheloufi*], in which Justice Gagné held that the analysis, in the context of a refugee claim or PRRA application, is not whether the laws of a given country would be considered compliant with the Charter.

[21] In response to the Applicant's position that there is an overlap between sections 96 and 97 of IRPA, the Respondent argues that the two provisions enshrine different international commitments by Canada and involve different thresholds of risk. The Officer considered the various risks alleged by the Applicant and applied the proper test in concluding that those allegations did not on the balance of probabilities establish a section 97 risk.

V. Analysis

[22] In oral argument, the Applicant's counsel explained his position that this application is not about the substantive content that should be assigned to the term "cruel and unusual treatment" for purposes of the application of section 97 of IPRA to cases involving alleged suppression of religious identity. Rather, his principal argument is that this was a risk raised by the Applicant which the Officer failed to consider. My decision to allow this application is based on a conclusion that the Applicant is correct in this latter assertion, that the Officer failed to analyze a particular risk arising out of the Applicant's profile as a Baptist Christian.

[23] The Respondent submits that this argument was not put to the Officer, who therefore cannot be expected to have considered it. However, my view is that the issue now raised by the Applicant on this application was raised by the Applicant before the Officer.

[24] In support of the PRRA, the Applicant's counsel resubmitted and relied on the written submissions that had been made on his earlier PRRA. In that document, the opening paragraph under the heading "Freedom of Religion" as a basis of risk states the following:

> The applicant is a devout Baptist Christian. As part of his religious activity he has a duty to spread the word of god and proselytize. Given that Baptist churches are not recognized as official churches in China, if he were to return he would be forced to attend illegal 'house churches' or to not practice his faith at all. The inability to participate freely in the chosen religion is a form of persecution. Participation solely through underground illegal Churches raises a risk to his life and well-being. Documentary evidence shows that individuals participating in Chinese Churches have been incarcerated, jailed, sent to reeducation camps. (emphasis added)

[25] The final paragraphs of the submissions on this basis of risk conclude as follows:

> The inability to openly practice his faith is a clear act of persecution in and of itself. The Officer's focus should not simply be on the risk of violence and incarceration, but the analysis must question whether on a balance of probabilities the applicant will be able to practice his religion openly.
>
> It is clear that the very existence of state laws against non-sanctioned religious groups drives such groups underground and is an act of persecution. Furthermore there is clear evidence that the imprisonment of regular parishioners is becoming much more prevalent and that the ability to express one's religious identity is becoming even more difficult. (emphasis added)

[26] Finally, the conclusion of these submissions states as follows:

> The documentary evidence clearly indicates a worsening situation for Protestants in China that do not belong to a state sanctioned Church. The applicant is clearly a devout member of his Baptist congregation, and participates in many Church activities. Based on the evidence the Officer must determine whether on a balance of probabilities he will be able to openly practice his religion, including proselytizing without state interference. It is our submissions that if returned he would face serious persecution based on religion. (emphasis added)

[27] These key paragraphs in the Applicant's written submissions identify his argument, that the very existence of laws restricting religious freedom represents an act of persecution, and that the Applicant is asking the Officer to consider not just risks of violence and incarceration but also of limitations to his ability to practice his religion openly, which the Applicant also describes as ability to express one's religious identity.

[28] The Respondent argues that these paragraphs are all framed in terms of "persecution", not "cruel and unusual treatment". The Applicant responds that he was using the term "persecution" generically, not in support of an argument based on section 96 of IRPA, and notes the paragraph in the conclusion of his submissions to refer to a determination on a balance of probabilities, which is the standard applicable to section 97 grounds. I agree with the Applicant on this point, particularly as the Officer was conducting a restricted PRRA considering only section 97. These submissions clearly relate to the Officer's determination whether, on a balance of probabilities, the Applicant will face a risk of torture, risk to life, or risk of cruel and unusual treatment or punishment if returned to China.

[29] It is also clear that the Officer did not consider the Applicant's arguments that Chinese law's suppression of his religious identity or religious freedom represents a basis of risk to the

Applicant against which he should be protected under section 97. Indeed, I did not understand the Respondent to be disputing this point, as the Respondent's argument was that the Officer was not required to consider this risk because it had not been raised.

[30] The Officer's conclusion was that the Applicant had not demonstrated on a balance of probabilities that he fits the profile of church or religious leader, activist, or cult member, and found that he would not be at a personalised risk of torture, risk to life, or a risk of cruel and unusual punishment. I read this finding to be a result of the Officer's analysis that the Applicant was not exposed to the risk of serious harm and higher risk of detention and harassment that, at least in Fujian, are more likely to be faced only by church leaders, activities and cult members. However, the Officer did not consider whether the lesser risk of harassment and detention, or the lesser harm, to which ordinary house church members are exposed in Fujian, or indeed the very existence of laws restricting religious freedom, still represents a restriction on religious freedom that constitutes cruel and unusual treatment.

[31] I note that the Respondent has cited a number of authorities where the rejection of claims for Convention refugee status and protection, asserted by applicants who would be returning to Fujian, has been upheld by this Court. However, those decisions involved conclusions, based on the documentary evidence considered in each case, as to particularly minimal impact upon Christians in Fujian. For instance:

A. In *Li v Canada (Minister of Citizenship and Immigration)*, 2011 FC 941 at para 39, the Court noted that the Refugee Protection Division [RPD] found no reliable document that indicated that regular members of a house

church have ever been arrested or detained in Fujian or otherwise had their chosen form of worship impeded in any significant way. At paragraphs 39 to 50, Justice Russell considered the documentary evidence before the RPD and found that its conclusions were within the acceptable range. In doing so, the Court considered at paragraphs 44 to 46 Justice Shore's conclusion in *Liang v Canada (Minister of Citizenship and Immigration)*, 2011 FC 65, that the destruction of house churches in Fujian may constitute evidence that the Chinese authorities are interfering with fundamental religious rights in Fujian in a persecutory manner, but distinguished that case based on the way the RPD had assessed the evidence before it;

B. In *He v Canada (Minister of Citizenship and Immigration)*, 2014 FC 44 at para 48, Justice Russell upheld the RPD's rejection of the applicant's claim, on the basis of evidence that, generally speaking, proselytizing was tolerated in Fujian provided it is not in the public domain and that, in some places, even open-air evangelism is allowed;

C. In *He v Canada (Minister of Citizenship and Immigration)*, 2013 FC 362 at paras 39 to 41, Justice de Montigny noted that the RPD officer chose to give little weight to documents referring to the closure of house churches in Fujian. The Court agreed with the applicant that he should not have to hide his religion to avoid persecution but found that it was not unreasonable for the officer to conclude that, if religious persecution was prevalent in Fujian, it would have been documented;

D. In *Chen v Canada (Minister of Citizenship and Immigration)*, 2013 FC 928, Justice Gleason upheld the RPD's rejection of the applicant's claim, concluding it was reasonable in light of the evidence before the RPD. The Court's analysis at paragraph 11 was as follows:

> [11] Finally, while it is true that a refugee claim may be premised on religious persecution falling short of arrest (see e.g. *Zhang v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1198, 182 ACWS (3d) 982), contrary to what the applicant asserts, the Board did not premise its finding only on the lack of arrest of Christians in Fujian province. Rather, the Board canvassed the documentation generally and noted that, while the evidence was mixed, there was little recent evidence of persecution of lay Catholics in Fujian. While certain reports did indicate general concerns with religious freedoms in Fujian, the Board noted that these reports lacked particulars of the problems faced by Christians in the Province and, therefore, afforded them minimal weight. The RPD therefore concluded that the applicant had not established that he would face any objective risk if returned to Fujian.

E. In *Yu v Canada (Minister of Citizenship and Immigration)*, 2010 FC 310, Justice Zinn upheld the RPD's rejection of the applicant's claim, noting at paragraph 33 that the RPD's weighing of the documentary evidence was not unreasonable. That documentary evidence was referred to at paragraph 32 of the decision as supporting an inference that no raids upon house churches in Fujian had occurred.

[32] While the Officer's conclusions in the case at hand include the relative degree of religious freedom in Fujian, the Officer nevertheless also accepted that there are restrictions on religious freedom in Fujian and occasional crackdowns on churches there. In my view, the

findings in the Decision do not reflect as high a level of religious tolerance in Fujian as the findings that were being considered in the cases cited above, and certainly not as high a tolerance as would be necessary to conclude that the Applicant's argument, that he would face suppression of his religious freedom and identity constituting cruel and unusual treatment, is without enough merit to be considered.

[33] As to the merits of that argument, I repeat my concurrence with the Applicant's position that this application is not about the substantive content that should be assigned to the term "cruel and unusual treatment" for purposes of the application of section 97 of IPRA to cases involving alleged suppression of religious identity. I will observe only that, depending on the factual context, I consider the Applicant's position to be sufficiently arguable to merit being considered by the Officer.

[34] In that regard, I note the Respondent's reliance on jurisprudence surrounding the constitutional protection against cruel and unusual treatment or punishment in section 12 of the Charter, arguing that this jurisprudence does not support an interpretation of the term "cruel and unusual treatment" that favours the Applicant's argument. The Respondent also relied on the decision in *Kheloufi*, which considered an argument that a PRRA officer had not fully considered evidence and arguments related to state coercion of religious minorities. Like the Applicant in the case at hand, the applicant in *Kheloufi* relied on the decision of the Supreme Court of Canada in *Big M Drug Mart*, on the right to freedom of religion guaranteed in the *Charter*. At paragraph 17 of *Kheloufi*, Justice Gagné stated as follows:

> [17] In the context of a refugee claim or PRRA application, although this Court has to rely on international concepts, the

> question is not whether all the laws of a given country would pass the test of the Canadian courts and would be considered as compliant with Canada's constitution and its *Charter of Rights and Freedoms*. Rather the question is whether this applicant faces more than a mere possibility of persecution, danger of torture, risk to life or risk of cruel and unusual treatment or punishment in his country, as a result of his religious beliefs, activities or practices.

[35] On the other hand, the Applicant also relies on Charter cases and on parallels with the decisions of this Court considering suppression of sexual orientation in *AB* and *VS*. In my view, those parallels give rise to credible arguments, although there are also distinguishing factors:

A. In *VS*, the officer considering the applicant's humanitarian and compassionate application that was under review had rejected the application on the basis that hardship confronting the applicant could be managed by the suppression of her sexual identity. Justice Barnes concluded that this was insensitive and wrong. However, the Decision under review in the present case is not premised on an assumption that the Applicant should suppress his religious identify.

B. In *AB*, Justice Zinn was considering the meaning of cruel and unusual treatment under section 97 of IRPA in the context of a finding by the PRRA officer that the harassment of homosexuals in Guyana could amount to persecution. There is no comparable finding by the Officer in the case at hand.

[36] While the parties' respective arguments help to frame the question, as to the extent to which the suppression of religious freedom or identity may constitute cruel and unusual

treatment, in my view the Court should not weigh any further into this question in the factual vacuum resulting from the Officer's failure to consider it in the Decision. While the Officer has made particular findings surrounding restrictions on religious freedoms and resulting risks in Fujian, these were not made or applied, nor was the country condition documentation considered, in the context of the Applicant's argument that the suppression of religious freedom or identity may itself constitute cruel and unusual treatment. This question is one of mixed fact and law, and a finding on the merits of such an argument should be made following consideration by a PRRA officer of the country condition documentation as it relates to this specific argument. Any development of jurisprudence on such an issue should take place in the context of decisions by the front line decision-makers with expertise in the consideration and application of the documentary evidence.

[37] In conclusion, I am allowing this application on the basis that the Decision is unreasonable in not addressing an argument surrounding risk that was advanced by the Applicant.

VI. Certified Question

[38] The Applicant submits the following question for certification as a serious question of general importance:

> In considering a PRRA application, does the officer have an obligation to consider whether risk factors that meet the threshold of persecution also constitute cruel and unusual treatment as contemplated by section 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27?

[39] The Respondent opposes certification of the proposed question.

[40] Pursuant to section 74(d) of IRPA, an appeal to the Federal Court of Appeal may be made only if, in rendering judgment, the Federal Court judge certifies that a serious question of general importance is involved and states the question. The test for certifying a question is that it "must (i) be dispositive of the appeal and (ii) transcend the interests of the immediate parties to the litigation, as well as contemplate issues of broad significance or general importance" (see *Zhang v Canada (Minister of Citizenship and Immigration)*, 2013 FCA 168 at para 9).

[41] I decline to certify the question. The Applicant has prevailed on this application. Moreover, he has done so on the basis that the Officer failed to address a particular argument as to risk that had been raised by the Applicant. My decision does not turn on an analysis of the parties' arguments as to the relationship between the section 96 protection against persecution on Convention grounds and the protection against cruel and unusual treatment or punishment afforded by section 97. As the basis for my decision is grounded in the particular facts of this case, it does not raise a serious question of general importance that transcends the interests of the parties to this litigation, and the particular question proposed by the Applicant would not be dispositive of an appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is allowed and the Applicant's Pre-Removal Risk Assessment application is referred to a different officer for re-determination in accordance with these reasons. No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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