Federal Court  Cour fédérale

Date: 20180719

Docket: IMM-5636-17

Citation: 2018 FC 756

Ottawa, Ontario, July 19, 2018

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

XIANGJU CHEN AND DEZI PENG

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This application arises from a pre-removal risk assessment [PRRA] finding that the Applicants, Xiangju Chen and Dezi Peng, were excluded from refugee protection in Canada under section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] because they had failed to establish that they could not safely return to their previous lawful residency in Venezuela.

[2] The Applicants were previously found to have a well-founded fear of religious persecution in China. On their PRRA application they maintained that they no longer had the option of returning to Venezuela as permanent residents. The error they assert on this application is that the PRRA Officer [Officer] failed to properly address the evidence that Mr. Peng had lost his immigration status in Venezuela and could not go back.

[3] The basis for the Applicants' claim to relief is set out in their Memorandum of Fact and Law in the following passages:

> 13. The Applicants PRRA submission relied upon the contents of the RAD decision. Given that the male Applicant's permanent resident card expired on April 30, 2017, given that he had been outside of Venezuela for more than two years, and given that it would be more than thirty days since his residency card expired by the time the PRRA application was considered, the male Applicant would have ben [sic] unable to apply for a returning resident Visa. Given his inability to apply for a visa to return to Venezuela, it was submitted the male Applicant was no longer properly excluded from refugee protection.
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> 14. The submissions noted that the Applicant had been practically unable to apply for a returning resident visa within the 30-day time-frame after his permanent resident card expired because Canadian immigration authorities had seized the passport he needed for such application.
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> 15. In view of the aforementioned evidence, it is submitted the PRRA officer needed to come to its own determination in respect of whether the male Applicant continued to have substantially similar status to nationals of Venezuela, including the right of return. If the answer was that the male Applicant had lost his right to return, than it was incumbent upon the PRRA officer to consider whether the Applicant might have taken steps to prevent the change of status.

[4] Because the issues raised by the Applicants are evidence-based, they must be reviewed on the standard of reasonableness. Indeed, factual findings relevant to exclusion under section 98 of the IRPA are entitled to "substantial deference": see *Canada v Zeng* 2010 FCA 118 at para 11, [2011] 4 FCR 3.

[5] The principal error that the Applicants assert concerns the Officer's "speculations" about whether Mr. Peng had a lawful right of return to Venezuela, given that his residency status had expired and he would have been unable to effect a timely renewal of that status because the Minister possessed his Chinese passport.

[6] The record discloses that, at the time of their Refugee Appeal Division [RAD] hearing, the Applicants enjoyed a right of return to Venezuela and they were accordingly excluded from claiming Canadian protection for that reason. However, by the time of their PRRA application, Mr. Peng had lost his Venezuelan immigration status by being out of the country for an extended period and by failing to apply for a renewal of that status. The Applicants complain that the Officer failed to carry out a fresh assessment of the evidence to determine whether Mr. Peng could actually reacquire his Venezuelan immigration status and whether he should be required, as a matter of law, to pursue that option.

[7] I accept the Minister's statement of the test for applying section 98 of the IRPA found in the following passage in *Zeng*, at para 28, 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.

However, nothing turns on the legal test for applying section 98 of the IRPA to the facts of this case. The fundamental weakness in the Applicants' argument about the adequacy of the PRRA decision is that it assumes the Minister had a duty to prove that the Applicants had an automatic right of return to Venezuela, or that Mr. Peng could have had his status restored on simple request. There is no question that the evidence on this issue was somewhat inconclusive. But the onus did not lie with the Minister — it lay with the Applicants and they failed to meet it: see *Shahpari v Canada* [1998] FCJ no 429 at para 11, 44 Imm LR (2d) 139 (FC). As can be seen from the Officer's reasons, a failure of proof was the basis for the PRRA refusal:

> Despite the recent expiry of the resident card, I note little evidence to suggest that Mr. Peng would be unable to return and remain in Venezuela as of "May 30, 2017." Counsel's submission letter does little to clearly explain this date, save for the reference to "the relevant laws of Venezuela (which are set out within the enclosed RAD decision as well as within the enclosed copy and translation of the Foreigners and Migration Law)." It appears this date is thirty (30) days after 30 April 2017, the state expiry of Mr. Peng's resident card.
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> I examined the selected articles of the *Venezuela's Foreigners and Migration Law (the Law)*. I note no discussion of the consequences in renewing one's residence in the country thirty days following the expiry of a visa or *cédula*. The only 30-day reference noted in the Law is described in Article 14, which explains a foreign resident's obligation and duty to register themselves to authorities in the country "within thirty days following their entry." The latter pertains to persons already in Venezuela and does not concern the principal issue of Mr. Peng's expired residency documents.

> I recognize the RAD decision places important emphasis on the applicants' valid residency documents in Venezuela in the panel's reasoning for exclusion (para. 50). The expiry of Mr. Peng's residency document may require the applicant to apply to return to Venezuela. In Article 6(3) of the Law, there is mention of the requirements and procedures referring "to admission, cites an IRB report (VEN101087.FE) that describes the steps to apply for a "resident visa." As stated earlier, the applicants provided minimal evidence of pursuing available avenues to renew Mr. Peng's residency documents. There is also scant evidence to suggest Venezuelan authorities would refuse a request to renew the residency documents, given his family ties to those with valid status, as well as his own years of prior residence in Venezuela. Given the above findings, I give little weight to the suggestion that as of 30 May 2017, Mr. Peng is no longer able to return to and reside in Venezuela.
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> As well, I examined the counsel's suggestion that Mr. Peng would "be subject to inadmissibility and deportation from the country (Venezuela)." There is minimal new evidence on file to suggest the relevant articles (38-39) of the Law apply to the co-applicant's current circumstances. I recognize Article 38(1) of the Law could potentially affect the co-applicant, as he currently does not have a valid resident visa or *cédula*. At the same time, the applicants have not demonstrated any attempt to renew Mr. Peng's residency documents, which could resolve this issue before returning to the country. There is also little to suggest the co-applicant in some way contravened the Law or triggered inadmissibility or deportation proceedings. Without new evidence confirming the co-applicant's inability to renew his residency documents, I find the suggestion that Mr. Peng would be "subject to inadmissibility and deportation" based on supposition. I therefore give it little weight in this decision.
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> It is incumbent on Ms. Chen and Mr. Peng to demonstrate that they are ineligible to return to Venezuela, given new developments since the RAD decision. The applicants did not succeed in establishing with clear and convincing evidence that Mr. Peng can no longer return to or resume residency in Venezuela. As a result, I find the new evidence insufficient to refute their exclusion from protection as described in section 98 of the IRPA.

[8] The Applicants were seeking special relief and needed to overcome an earlier finding by the RAD that they had permanent residency status in Venezuela. It was their obligation to

provide the evidence necessary to support the claim. They did not enjoy the luxury of avoiding the issue by failing to adduce probative evidence that a right of return to status in Venezuela for Mr. Peng no longer existed.

[9] Furthermore, in the absence of some evidence from Mr. Peng that he could not regain possession of his Chinese passport, it is also not open to him to assert that he was legally stymied. If he had requested his passport for the purpose of renewing his Venezuelan immigration status, it would probably have been returned to him. Only if such a request was refused could an argument be advanced that Canada had wrongfully frustrated his good intentions.

[10] This situation is not unlike the one considered by Justice Henry Brown in *Wasel v Canada (Citizenship and Immigration)*, 2015 FC 1409, [2015] FCJ No 1515, where the applicant was faulted for failing to take obvious steps to overcome a travel impediment:

> [20] In this case, the Applicant did not demonstrate why, having given up both his Syrian passport and his Greek Permanent Residence Permit, he could not apply and obtain new ones. There was no evidence he tried to obtain either, or of a possible outcome for such an attempt. Instead of making the appropriate applications, being turned down (as he seemed so certain would be the case) and providing that evidence to the appropriate tribunal, he asked the RAD to speculate on what will happen to him on his return to Greece with photocopies of the residence and passport documents.

[11] If there was a problem of speculation in this case, it was decidedly not of the Minister's making. Rather, it arose because the Applicants chose not to present the evidence required to prove that their status in Venezuela could, in all probability, not be regained. The Officer's

decision reflects no reviewable error in the treatment of the evidence. Indeed, the refusal of PRRA relief was an entirely reasonable outcome in the face of the Applicants' failure to adduce evidence that the RAD's section 98 exclusion finding no longer applied to their situation.

[12] I also reject the argument that the Officer failed to consider all of the factors required by the decision in *Zeng*, above. It was incumbent on Mr. Peng to establish that his immigration status in Venezuela was irretrievably lost. He failed to answer that question and there was accordingly no basis to look further into how that asserted loss arose. I also do not accept that the Officer was required to consider the prevailing country conditions in Venezuela beyond determining whether a risk of persecution was present. It will almost always be the case that country conditions in the host country will be less desirable than those in Canada. But if those conditions do not create a serious risk of persecution (as it was reasonably found in this case), they are not relevant to a person's obligation to reavail. Canada is not required to offer protection to claimants who have another safe option, even if the prospects here are better.

[13] For the foregoing reasons, this application is dismissed.

[14] Neither party proposed a certified question and no issued of general importance arises on the record.

JUDGMENT IN IMM-5636-17

THIS COURT'S JUDGMENT is that this application is dismissed.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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