Federal Court Cour fédérale

Date: 20110309

Docket: IMM-3909-10

Citation: 2011 FC 279

Ottawa, Ontario, March 9, 2011

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

ZONG LIN ZHONG
HUI QIN ZHONG

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated June 16, 2010, wherein the Applicants were determined to be neither convention refugees nor persons in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, R.S. 2001, c. 27 [IRPA].

[2] The Board determined that the Applicants were excluded from seeking refugee protection in Canada pursuant to Article 1E of the United Nations Convention Relating to the Status of Refugees (the Convention), that their alleged fear had no nexus with a Convention ground, and that their testimony regarding China, their country of citizenship, was neither plausible nor credible.

[3] Based on the reasons below, this application is dismissed.

I. Background

A. *Factual Background*

[4] The Applicants, Zong Lin Zhong and Hui Qin Zhong, are citizens of the People's Republic of China (China). They are brother and sister and arrived separately in Canada, in July and September 2007 respectively, with the intent to study. They made their claims for refugee protection in January 2008. At the hearing they both relied on the sister's Personal Information Form (PIF) and indicated a fear of persecution in both China, their country of citizenship, and Ecuador, where they lived with their parents as permanent residents prior to coming to Canada.

[5] The Applicants claimed a fear of persecution in China due to their association with an underground Christian church. The sister was introduced to Christianity by a neighbour, Aunt Wang, during a difficult period in her life in October 2003. Doctors were unable to help her but, as described in her PIF, "it was Jesus Christ who expelled Satan from me…" After witnessing this miracle, the Applicants' interest in God and Jesus Christ grew, but their parents prohibited the

Applicants, who were minors at the time, from joining the underground church. The Applicants instead studied the bible at home.

[6] In January 2004 the Applicants moved to Ecuador with their parents. They joined a church there and were baptized on December 25, 2004. Although their sins were washed away and the Applicants were reborn, they allege that they nonetheless experienced new forms of persecution in Ecuador in the form of discrimination and extortion because of their Chinese origin.

[7] The Applicants decided to leave Ecuador in June 2007 because gangsters once again visited their parents' restaurant for the purpose of extortion, but this time in addition to increasing the sum sought, the gangsters also threatened the family.

[8] In February 2008 the gangsters returned to their parents' restaurant and beat them. In August 2008 the Applicants learned that Aunt Wang's church in China had been raided. In an amended PIF the Applicants claim that agents of the Public Security Bureau (PSB) had been to their grandmother's house looking for the Applicants because the Applicants had allegedly withheld information regarding Aunt Wang's church. Consequently, the Applicants fear returning to Ecuador due to the gangsters and returning to China because of the PSB and lack of religious freedom.

B. *Impugned Decision*

[9] The Board found that the Applicants had permanent resident status in Ecuador when they made their claims for refugee protection in Canada. Although the Applicants let their status in Ecuador lapse, the Board found that, on a balance of probabilities, the Applicants had done this deliberately in order to support their claims for protection in Canada. The Board determined that the Applicants were therefore excluded under Article 1E of the United Nations Convention Relating to the Status of Refugees.

[10] The Board considered whether the Applicants had a well-founded fear of persecution in Ecuador. There was no documentary evidence to support the Applicants' contention that members of the Chinese community in Ecuador are particularly targeted by gangs and the Board found, on a balance of probabilities, that the basis of their claim of persecution was a generalized risk shared by all residents of Ecuador. As the claim was based on alleged criminal activity, there was no nexus with a Convention ground. Furthermore, the Board found that state protection is available in Ecuador and that the Applicants failed to disclose clear and convincing evidence that it would not be available to them if they returned to Ecuador.

[11] The Board also considered the Applicants' submissions regarding their alleged fear of persecution in China. The Board concluded that on a balance of probabilities the Applicants' testimony concerning the PSB's interest in and pursuit of the Applicants to be neither plausible nor credible.

II. Issues

[12] This application raises the following issues:

(a) Did the Board breach its duty of procedural fairness?

(b) Did the Board err in assessing the issue of exclusion?

(c) Did the Board err in assessing the claim against Ecuador?

(d) Did the Board err in assessing the claim against China?

III. Legislative Scheme

[13] Article 1(E) of the Convention provides as follows:

> 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.

IV. Standard of Review

[14] Questions related to natural justice and procedural fairness are questions of law and warrant review on a standard of correctness. As a result the decision maker is owed no deference (*Malik v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1283 at para 22).

[15] Similarly, the test for exclusion under Article 1(E) of the Convention is a question of law of general application to the refugee determination process and is reviewable on a standard of correctness. However, the question of whether the facts of a particular case give rise to an exclusion

is an issue of mixed fact and law and the Board is owed a significant degree of deference with respect to this determination (*Zeng v Canada (Minister of Citizenship and Immigration)*, 2010 FCA 118, 402 NR 154 at para 11).

[16] It is well-established that decisions of the Board as to credibility and the interpretation and assessment of evidence are all reviewable on a standard of reasonableness (*Lawal v Canada (Minister of Citizenship and Immigration)*, 2010 FC 558 at para 11; *NOO v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1045, [2009] FCJ No 1286 (QL) at para 38).

[17] As set out in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, reasonableness requires a consideration of the existence of justification, transparency and intelligibility in the decision-making process. It is also concerned with whether the decision falls within a range of acceptable outcomes that are defensible in respect of the facts and law.

V. Argument and Analysis

A. *Did the Board Breach its Duty of Procedural Fairness?*

[18] The Applicant submits that the Board questioned the Applicants in an aggressive and adversarial manner. The Applicants allege that the Board exhibited signs of bias and describe the conduct of the Board at the hearing as the Member “leading the applicants to slaughter.” The Applicants contend that they were denied an impartial hearing of their claim.

[19] The Respondent denies that the Board engaged in aggressive or adversarial questioning or that the Board asked questions that indicated a certain pre-disposition. Rather the Respondent takes the position that as there was no Refugee Protection Officer present, the presiding Member was entitled to ask direct questions on the merit of the claim, and to clarify the Applicants' meandering answers.

[20] As the Respondent notes, the Refugee Division is master of its own procedure, and absent a specific rule it can adopt a suitable hearing process as long as it complies with the requirements of fairness and natural justice (*Prassad v Canada (Minister of Employment and Immigration)*, [1989] 1 SCR 560, at para 16). In dealing with similar allegations in *Martinez v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1065, 35 Admin LR (4th) 261, Justice Judith Snider noted at para 12:

> [12] A unifying thread that one can draw from the jurisprudence is that the Board is afforded considerable latitude in how it conducts its hearings. A review of the cases also demonstrates that, where an allegation of this nature is raised, "[t]he dividing line between permissible and impermissible behaviour is one of fact"... For this purpose, the transcript is an important assessment tool for the Court. […]

[21] I have reviewed the transcript and accept the Respondent's submissions on this point. Although it appears that there was some disagreement between the Applicants' counsel and the Member on how to proceed with questioning regarding the issue of exclusion, the Member did not take an unreasonable approach and I cannot find that counsel's right to lead examination in chief was interfered with. Furthermore, I am not persuaded that the Applicant's right to a fair hearing was compromised in this case. There is no evidence that the Member's direction on how to proceed

interfered with counsel's ability to adduce relevant evidence, or advance any particular argument. As remarked in *Martinez*, above, at para 18:

> while the Board's conduct in questioning as it did was assertive and disruptive of the counsel's direct examination of the Applicants, there is not an evidentiary basis upon which I could conclude that it was more likely than not that the Board, whether consciously or unconsciously, would not decide fairly.

[22] Further, Applicants' counsel stated for the record her dissatisfaction with how the Member chose to order questioning on the issue of exclusion. However, she did not state her concern that the questions were inappropriate or indicative of any kind of bias on the part of the Member. Failure to raise a timely objection to a perceived breach of natural justice is considered by the jurisprudence of this Court to be an implied waiver of any such breach that might have occurred (*Kamara v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 448, 157 ACWS (3d) 398 at para 26).

[23] Although the Applicants allege a reasonable apprehension of bias, as the Respondent submits, the Applicants have failed to show that the Board was predisposed, and have not submitted any evidence that would meet the reasonable apprehension of bias test (*R v RDS*, [1997] 3 SCR 484, 151 DLR (4th) 193 at para 11). Bare assertions of leading questions will not suffice. It seems that both parties were confused at times. Questions were repeated and reposed in order to obtain an unambiguous answer. This was in fulfillment of the Member's fact-finding role and is not reflective of a desire to get the answers required to reject the Applicants' claim.

B. *Did the Board Err in Assessing the Issue of Exclusion?*

[24] The Applicants submit that the Board found that the Applicants were excluded under Article 1(E) of the Convention without considering why the Applicants' status in Ecuador lapsed. This, they argue, is a reviewable error as it does not accord with the test set out in the recent decision of the Federal Court of Appeal in *Zeng v Canada (Minister of Citizenship and Immigration)*, 2010 FCA 118, 402 NR 154.

[25] The Respondent argues that the Board properly applied the *Zeng* test and that the finding that the Applicants were excluded under Article 1(E) was reasonably open to the Board and should not be disturbed.

[26] In *Zeng*, the Federal Court of Appeal reformulated the criteria to consider in determining an exclusion at paras 28 and 29 as follows:

> [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.
>
> [29] It will be for the RPD to weigh the factors and arrive at a determination as to whether the exclusion will apply in the particular circumstances.

[27] The Applicant contends that the Board was mired in an earlier, seriously incomplete statement on the law of exclusion. The Applicants submit that as a result the Board failed to consider and balance the factors laid out by the Federal Court of Appeal in the third step of the test when considering the Applicants' status in Ecuador. However, this contention is not borne out in a review of the reasons.

[28] The Board considered the Applicants' status in Ecuador at the time they made their claim for refugee protection in Canada, and their status in Ecuador at the time of the hearing. The Board attempted to elicit an explanation for why the Applicants allowed their status to lapse. The responses indicated that the lapse in status was a result of the Applicants' voluntary inaction. The Board went on to examine the reason the Applicants chose not to renew their status. The Board was not persuaded that the Applicants' alleged fear of mistreatment in Ecuador was a reasonable justification for failing to take any action to maintain their status. The Board then went on to examine the substance of the claim of the alleged fear and also found it wanting. Consequently, I am unable to find that the Board erred in concluding that the Applicants were excluded under Article 1(E) of the Convention.

C. *Did the Board Err in Assessing the Claim Against Ecuador?*

[29] The Board found that the Applicants feared returning to Ecuador due to a risk of general criminal activity. The Applicants claimed that they were targeted by criminals because of their Chinese ethnicity. However, the Applicants were unable to provide any corroborating documentary

evidence supporting their objective fear. The Applicants submit that the Board erred in requiring documentary corroboration of their claim.

[30] It is trite law that in order to establish a well-founded fear of persecution a refugee claimant must show that the alleged fear is both subjectively and objectively well-founded. In order to establish a claim, the onus is on the Applicants to adduce evidence to establish that there is more than a mere possibility of persecution. The documentary evidence suggests that women, Afro-Ecuadorians, indigenous peoples and homosexuals experience elevated levels discrimination. There is no mention Chinese-Ecuadorians. The Board drew a negative inference from the lack of corroborating documentation and it was open to the Board to do so. The Applicants make the circular argument that they are targeted by criminals because of their wealth, and the Board failed to consider that the Applicants are perceived as wealthy because of their Chinese ethnicity and the consequent perception that they are hard-working and entrepreneurial. This is not persuasive. The Board gave the Applicants several opportunities to adduce evidence that would support that Chinese-Ecuadorians are targeted because of their ethnicity and the Applicants were unable to provide anything of probative value beyond their own personal allegations.

[31] In my view, based on the evidence, it was reasonable for the Board to conclude that the Applicants feared a general criminal risk shared by all residents of Ecuador. This lacks nexus to any Convention ground, and therefore the Applicants were unable to establish a claim for protection.

D. *Did the Board Err in Assessing the Claim Against China?*

[32] The Applicants claim could have been properly disposed of on the grounds that they were excluded from seeking refugee protection in Canada, as their permanent residence status in Ecuador offers them an alternative forum of domestic protection against what they fear in China. Additionally, the Board reasonably concluded that the Applicants' fear of returning to Ecuador was not well-established. The Board nonetheless went on to examine the Applicants claim against China. The Applicants allege that the Board erred in this analysis and unjustifiably found the Applicants claims to be neither credible nor plausible.

[33] In my view, the Applicant is not successful in raising any reviewable error with respect to the Board's analysis of the claim against China.

[34] The Applicants allege fear based on the raiding of an underground church they never attended, over four years after they left China for Ecuador. The Board is entitled to make such implausibility findings. The Board's findings in this regard are not in any way unreasonable and do not warrant the intervention of this Court.

[35] The Board made several findings which were independently determinative of the claim for refugee protection. The Applicants were not successful in arguing that there was an error in any one of these. As such there is no basis to disturb the Board's findings.

VI. Conclusion

[36] No question was proposed for certification and none arises.

[37] In consideration of the above conclusions, this application for judicial review is dismissed.

JUDGMENT

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

" D. G. Near "

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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