Federal Court  Cour fédérale

Date: 20150430

Docket: IMM-7099-14

Citation: 2015 FC 565

Ottawa, Ontario, April 30, 2015

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

QIN HANG CHEN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is the judicial review of a decision by an Immigration Officer [Officer] rejecting the PRRA application of the Applicant, who had been unsuccessful in his refugee claim before the Immigration and Refugee Board [IRB].

[2] The Applicant submitted "new" evidence in his PRRA, which evidence was dismissed by the Officer.

[3] The relevant provision for this judicial review is s 113*(a)* of the *Immigration and Refugee Protection Act*, SC 2001, c 27:

113. Consideration of an application for protection shall be as follows:	**113.** Il est disposé de la demande comme il suit :
(a) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection;	*a)* le demandeur d'asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'il n'était pas raisonnable, dans les circonstances, de s'attendre à ce qu'il les ait présentés au moment du rejet;

II. Background

[4] The Applicant is a citizen of China who made a refugee claim based upon his fear of persecution from the Chinese government for practicing Christianity in an "underground" (non-state approved) church.

[5] The IRB held that the determinative issues were credibility and the situation of Christians in Fujian Province. The IRB drew a number of negative inferences and credibility findings in concluding that the Applicant was not a Christian nor was he being pursued by the PSB. The IRB further concluded that the Applicant joining a Christian church in Canada was solely to support a

refugee claim. Finally, the IRB held that the Applicant could practice his faith in Fujian Province and did not face a serious possibility that he would be persecuted.

[6] With respect to the PRRA application, the Applicant filed the following:

1. Affidavit of the Applicant dated June 3, 2014 and May 21, 2014;
2. The Applicant's son's personal notebook;
3. Letter from the Applicant's wife;
4. Translated Fuqing City Public Security Bureau Summons dated March 11, 2014 for the Applicant;
5. Translated Fuqing City Public Security Bureau Arrest Warrant dated February 6, 2014 for Guoquin Mei;
6. Black and white photographs of the Applicant, his wife and son and photographs depicting a room with furniture displaced;
7. Translated medical documents dated March 11, 2014 indicating that the Applicant's wife sustained injuries to her arm;
8. A May 16, 2014 translated letter from the Applicant's wife indicating that the PSB visited her home in search of the Applicant - she indicates that they hit her with a baton when she attempted to stop them from damaging her home;
9. A May 26, 2014 translated letter from the Applicant's parents indicating that the PSB attended the Applicant's home, damaged his home and harmed his wife;
10. A May 19, 2014 translated letter from the Applicant's neighbour in China stating that she witnessed a police vehicle parked in front of the Applicant’s house and when she attended the home, the Applicant's wife was laying on the floor;

11. A May 20, 2014 translated letter from the Applicant's wife's neighbour indicating she witnessed police officers enter the Applicant's wife's home, smash and beat the Applicant's wife;
12. A May 29, 2014 translated letter from Cheng Shen He indicating that Gou Mei gave him a pamphlet in both Chinese and English and told him that a friend in Canada sent the materials to him;
13. IRB decision of June 26, 2000 and Federal Court Jurisprudence dated January 19, 2011 and May 4, 2012;
14. Refugee Protection Division [RPD] member statistics for RPD Member Favreau for 2012 and 2013;
15. RPD decision and PIF for Applicant;
16. A "To whom it may concern" letter from the Vancouver Chinese Pentecostal Church dated May 27, 2014;
17. Letters dated May 14, 2014 and May 30, 2012 and copies of donation receipts from the Living Water Assembly Church in Toronto;
18. Black and white photographs of the Applicant with fellow congregants in Toronto;
19. Certificate of Baptism for the Applicant dated April 24, 2011;
20. Translated letters from past co-congregates in China; and
21. Documentary material which discuss conditions in China.

[7] With respect to items 1-12, the Officer held that they were not "new evidence" because the information was not significantly different from what was previously provided to the IRB nor would it overcome its findings.

Item 21 was held to be evidence that predates the IRB decision and was reasonably available and could have been presented. The same was held regarding Items 13 and 15-20. Item 14 was said to be irrelevant.

[8] The critical date for the IRB evidence base is October 17, 2012, the date of the IRB decision. The bulk of the "new evidence" postdates the IRB decision. It included a 2014 summons for the Applicant served on his wife; an arrest warrant of 2014 for Mr. Mei, the recipient of religious material sent by the Applicant; and, witness statements attesting to a PSB raid on the Applicant's home.

All that evidence pointed to current risk consistent with the risk that the Applicant had alleged before the IRB.

[9] The Officer, having cited and quoted from *Raza v Canada (Citizenship and Immigration)*, 2006 FC 1385, 304 FTR 46 [*Raza*], concluded:

> The applicant, in the case at hand, has restated materially the same information which he presented to the RPD. He has not rebutted any of the findings of the RPD. As a result, I have insufficient evidence before me to arrive at a different conclusion from that of the RPD.

[10] The issues in this judicial review are:

- Did the Officer apply the correct legal test with respect to subsection 113*(a)*?

- Did the Officer err in his application of the section to the particular facts of the case?

III. Analysis

[11] The first issue is a matter of law for which correctness is the applicable standard. The second issue, whether the Officer erred or not, is mixed fact and law subject to the reasonableness standard (*Elezi v Canada (Citizenship and Immigration)*, 2007 FC 240, [2008] 1 FCR 365).

[12] Although the Officer quoted a pertinent part of *Raza* at the Federal Court, he/she totally ignored the analytical framework outlined by the Court of Appeal in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385, 289 DLR (4^{th}) 675, where the Court pointed out, at paragraph 13, that s 113*(a)* requires that an officer consider a number of questions:

> 1. Credibility: Is the evidence credible, considering its source and the circumstances in which it came into existence? If not, the evidence need not be considered.
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> 2. Relevance: Is the evidence relevant to the PRRA application, in the sense that it is capable of proving or disproving a fact that is relevant to the claim for protection? If not, the evidence need not be considered.
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> 3. Newness: Is the evidence new in the sense that it is capable of:
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> (a) proving the current state of affairs in the country of removal or an event that occurred or a circumstance that arose after the hearing in the RPD, or
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> (b) proving a fact that was unknown to the refugee claimant at the time of the RPD hearing, or

(c) contradicting a finding of fact by the RPD (including a credibility finding)?

If not, the evidence need not be considered.

4. Materiality: Is the evidence material, in the sense that the refugee claim probably would have succeeded if the evidence had been made available to the RPD? If not, the evidence need not be considered.

5. Express statutory conditions:

(a) If the evidence is capable of proving only an event that occurred or circumstances that arose prior to the RPD hearing, then has the applicant established either that the evidence was not reasonably available to him or her for presentation at the RPD hearing, or that he or she could not reasonably have been expected in the circumstances to have presented the evidence at the RPD hearing? If not, the evidence need not be considered.

(b) If the evidence is capable of proving an event that occurred or circumstances that arose after the RPD hearing, then the evidence must be considered (unless it is rejected because it is not credible, not relevant, not new or not material).

[13] The Officer did not conduct the required *Raza* type analysis. On that ground alone, this judicial review should be granted.

[14] More particularly, the Officer appears to have dismissed the new evidence because it was relevant to the original risk alleged. It is evident that much of this new evidence related to facts which arose well after the IRB decision.

[15] As held in *Kirindage De Silva v Canada (Citizenship and Immigration)*, 2007 FC 841, 159 ACWS (3d) 562, the fact that the new evidence relates to the old risk does not mean it should not be considered – it must.

> [17] Although the PRRA process is meant to assess only evidence of new risks, this does not mean that new evidence relating to old risks need not be considered. Moreover, one must be careful not to mix up the issue of whether evidence is new evidence under subsection 133(a) with the issue of whether the evidence establishes risk. The PRRA officer should first consider whether a document falls within one of the three prongs of subsection 113(a). If it does, then the Officer should go on to consider whether the document evidences a new risk.
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> …
>
> [21] The Officer excluded these documents solely based on the fact that they related to the allegations raised in front of the Refugee Board. This is not the test for new evidence set out in subsection 113(a). Consequently, I find that the Officer erred in law by misinterpreting 113(a).

[16] The Officer confused the issue of newness of evidence with whether that evidence established risk. The Officer's approach would sterilize a PRRA assessment and would result in ignoring evidence of current or continuing risk because the same type of risk had been dealt with earlier.

[17] Given my finding on the legal test, I will not comment further on the reasonableness of the decision other than to note that there was no evidence before the IRB that the Applicant's wife had been assaulted in the prior PSB search, nor was there evidence that the Applicant was being sought for spreading religious information.

IV. Conclusion

[18] Therefore, this judicial review will be granted, the decision quashed and the matter referred back to be determined by a different officer.

[19] There is no question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted, the decision is quashed and the matter is referred back to be determined by a different officer.

"Michael L. Phelan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Douglas Cannon	FOR THE APPLICANT
Bobby Bharaj	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Elgin, Cannon & Associates Barristers and Solicitors Vancouver, British Columbia	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT