Federal Court  Cour fédérale

Date: 20190124

Docket: IMM-1692-18

Citation: 2019 FC 104

Ottawa, Ontario, January 24, 2019

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

YUANCAI JING

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of the decision by the Refugee Protection Division of the Immigration and Refugee Board [the RPD] dated February 20, 2018, which allowed an application brought by the Minister of Public Safety and Emergency Preparedness [the Minister] to cease the Applicant's Convention refugee status and deem the Applicant's claim for refugee protection to be rejected.

II. Background

[2] The Applicant, Yuancai Jing, is a citizen of the People's Republic of China [China] born September 25, 1970, in Lianoning province, China.

[3] The Applicant is a practicing Protestant, and fled China in 2007 after the church group he attended was raided by the Public Security Bureau [the PSB]. He obtained a Canadian temporary resident visa and exited China with the assistance of a smuggler.

[4] The Applicant applied for Canada's protection on July 5, 2007. At this time, his Chinese passport was seized by immigration officials.

[5] The Applicant was found to be a Convention refugee, and was granted refugee protection, by way of a decision of the RPD dated April 26, 2010. At the time of this decision the RPD was not required to provide written reasons, and the Member did not provide reasons.

[6] The Applicant subsequently applied for a new Chinese passport, and it was issued on February 17, 2012.

[7] The Applicant returned to China using his Chinese passport:

a. From November 15, 2012 until January 12, 2013, to care for his elderly father who had broken a leg; and
b. From July 28, 2013, to October 14, 2013, to care for his ill mother.

[8] The Applicant then obtained another Chinese passport, which he used to travel to China between November 27, 2014 and December 11, 2014 to get married. He subsequently travelled under a Chinese passport on vacations to South Korea and Japan in 2015 and 2016, respectively.

[9] The Minister brought an application, dated August 7, 2015, to cessate the Applicant's refugee protection pursuant to section 108 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA], on the basis that the Applicant had voluntarily reavailed himself of China's protection due to his trips to China [the Application].

[10] Section 108 of the IRPA allows the Minister to apply to the RPD to cessate an individual's refugee protection on the grounds that, among other things, the individual has voluntarily reavailed themself of the protection of their country of nationality:

> 108 (1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances:
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> (a) the person has voluntarily reavailed themself of the protection of their country of nationality;
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> (b) the person has voluntarily reacquired their nationality;
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> (c) the person has acquired a new nationality and enjoys the protection of the country of that new nationality;
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> (d) the person has voluntarily become re-established in the country that the person left or remained outside of and in respect of which the person claimed refugee protection in Canada; or
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> (e) the reasons for which the person sought refugee protection have ceased to exist.
>
> (2) On application by the Minister, the Refugee Protection Division may determine that refugee protection referred to in

> subsection 95(1) has ceased for any of the reasons described in subsection (1).
>
> (3) If the application is allowed, the claim of the person is deemed to be rejected.

[11] Subsection 108(3) provides that if an application for cessation is allowed, the refugee protection claim is deemed to be rejected.

[12] The RPD heard this matter on February 16, 2018 [the Hearing].

[13] A Member of the RPD allowed the Application in a decision dated February 20, 2018 [the Decision], and the Applicant's application for refugee protection was deemed to be rejected pursuant to subsection 108(3) of the IRPA. The Applicant now seeks judicial review.

III. Issues

[14] The issues are:

A. Did the RPD Member err in her application of paragraph 108(1)(a) of the IRPA?

B. Did the RPD Member err by stating that she was not required by section 108 of the IRPA to consider the Applicant's risk, yet elsewhere in her decision considering the Applicant's risk?

C. Did the Member err in her analysis of the country condition information?

IV. Standard of Review

[15] The standard of review is reasonableness (*Norouzi v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 368 at para 18 [*Norouzi*]).

V. Analysis

A. *Did the RPD Member err in her application of paragraph 108(1)(a) of the IRPA?*

[16] The three part test for considering whether a refugee has reavailed themselves of the protection of their country of nationality is: (a) voluntariness: the refugee must act voluntarily; (b) intention: the refugee must intend by his action to reavail himself of the protection of the country of his nationality; and (c) reavailment: the refugee must actually obtain such a protection (*Siddiqui v Canada (Citizenship and Immigration)*, 2016 FCA 134 at para 6).

[17] There is a presumption that when a refugee applies for and obtains a passport from his country of nationality, it will be presumed that they intended to avail themselves of the protection of the country of nationality (*Abadi v Canada (Citizenship and Immigration)*, 2016 FC 29 at para 16 [*Abadi*]). This presumption can be rebutted by the refugee adducing evidence to the contrary (*Abadi*, above at para 17). However, it is only in "exceptional circumstances" that a refugee's travel to his country of nationality on a passport issued by that country will not result in the termination of refugee status (*Abadi*, at para 18).

[18] The Applicant disputes the Member's findings under the first two prongs of the above test.

[19] In relation to voluntariness, the Member considered that the Applicant approached the Chinese Consulate of his own volition to obtain a passport, and concluded that he had acted voluntarily.

[20] The Applicant argues that in *El Kaissi v Canada (Citizenship and Immigration)*, 2011 FC 1234 at paragraph 29 [*El Kaissi*], and the cases cited therein, this Court has contemplated that when an individual is compelled to return to their country of nationality for reasons seemingly beyond their control, their return will not be considered "voluntary":

> [29] An individual may be compelled to return to the country for reasons seemingly beyond their control (such as the birth of child, see *Kanji v Canada (Minister of Citizenship and Immigration)*, [1997] FCJ No 374, 70 ACWS (3d) 525; or to care for a sick mother, see *Shanmugarajah v Canada (Minister of Employment and Immigration)*, [1992] FCJ No 583, 34 ACWS (3d) 828 (FCA)). Absent an explanation or pressing need, however, re-availment is considered voluntary and calls the individual's subjective fear into question. For example, this Court has found that returning on a holiday or to investigate business opportunities would not constitute having been compelled to return
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> [Emphasis added]

[21] The Applicant submits that each of the three occasions he returned to China were in situations of pressing need beyond his control, and do not reasonably support the conclusion that he acted voluntarily. On the first two occasions, he returned to care for his elderly parents; on the third occasion, he returned to get married. The Applicant testified at the Hearing that he was not aware he could get married outside of China, or that he could obtain a refugee travel document.

[22] In relation to intention, the Applicant argues that his actions do not reasonably support a conclusion that he intended to avail himself of China's protection, because:

a. In order to avoid detection by the PSB, upon return to China he stayed at a cousin`s home rather than with his former wife and children;
b. He believed Chinese authorities would not know that he had re-entered China; and
c. He did not attend church during his visits to China due to fear of religious persecution.

[23] The Applicant also cites the language of Justice Boswell in *Yuan v Canada (Citizenship and Immigration)*, 2015 FC 923 at paragraph 36 [*Yuan*], and argues that his situation is analogous:

> [36] In these circumstances, a finding of actual re-availment cannot be justified and is unreasonable. How could the Applicant intentionally and actually re-avail himself of China's protection while actively avoiding -- and fearing -- the entities charged with that responsibility? How could someone who fears that the state of China will persecute him be "implicitly expressing confidence in the state of China to protect him" from its own officials and laws? The RPD's findings on these points were contradictory and, hence, unreasonable. The RPD's decision should therefore be set aside on this basis and the matter returned to the RPD for redetermination.

[24] I find that the Member's analysis is comprehensive, and reasonably found that the Applicant's actions in obtaining Chinese passports, and subsequently travelling under them, were voluntary. While *El Kaissi* correctly implies that in exceptional circumstances a refugee should

be able to return to a country from which they have fled fearing persecution, without giving up their refugee status, no such circumstances exist here. Particularly:

a. As discussed at the Hearing, the Applicant has several siblings in China who might have cared for his elderly parents, and there was no need for him to return to China for this purpose;
b. While the length of the trips should not be determinative, the fact that the Applicant's first two visits to China were each for a period of approximately two months supports a reasonable conclusion that the Applicant's actions were voluntary; and
c. Leaving aside the three visits to China, the Applicant did not address how his two separate vacations do not support a conclusion that his actions were voluntary.

[25] As well, the Member reasonably noted: (i) if the Applicant feared the PSB as he claimed, he could not have avoided them by simply staying with a cousin while visiting China; (ii) it was open to the Applicant to marry in Canada; and (iii) the Applicant's vacations to South Korea and Japan, using his Chinese passport, also demonstrated an intention to reavail.

[26] I find that the Member was reasonable to conclude that the Applicant's actions, travelling using a Chinese passport on five occasions and returning to China on three occasions, demonstrated an intention to reavail himself of China's protection.

[27] Moreover, unlike in *Yuan*, here the Member did not accept that the Applicant was in hiding while in China. Rather, the Member found that it was not probable, given the Applicant's

travel by train within China and his residence at his cousin's house, that the Applicant would be able to remain hidden.

[28] The Applicant's arguments in effect are a repetition of arguments that were made before the Member; the Member's analysis of the evidence was reasonable, and it is not the role of this Court to intervene and reweigh the evidence.

B. *Did the RPD Member err by stating that she was not required by section 108 of the IRPA to consider the Applicant's risk, yet elsewhere in her decision considering the Applicant's risk?*

[29] The Member wrote, at paragraphs 26-27 of the Decision:

> [26] I have considered Counsel's submissions that I must also consider the Respondent under the definition of the Refugee Convention and deal with reavailment as I would in a refugee claim, considering in a forward-looking manner if he would be persecuted if he were to practice his religion in China. Counsel notes that the authorities in China are cracking down on Protestants and the Respondent could not practice his faith in China. The Minister disagrees.
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> [27] I have read section 108 carefully, and I find that this section is silent as it relates to "residual profile" unlike section 109 that addresses this profile. I find that I agree with the Minister. There is no requirement to consider his risk, in that he nullified this risk by returning on multiple occasions.

[30] The Member went on, in the alternative, at paragraphs 28-37 of the Decision, to consider the risk to the Applicant as a Christian should he return to China.

[31] The Applicant argues that the Member erred by (1) concluding that no forward-looking risk analysis was required, and (2) despite this conclusion, conducting some analysis in the earlier paragraphs of the Decision of the risks that befell the Applicant upon his visits to China.

[32] Regarding the latter argument, the Applicant conflates a forward-looking risk assessment with an assessment of past risks. In considering whether a refugee has reavailed himself or herself to his or her country of origin, the RPD should consider the refugee's previous allegations of risk. The Member conducted such an analysis here. No error results from this consideration of past risks.

[33] The question of whether a forward-looking risk analysis is required under section 108 of the IRPA is not determinative of this application, because the Member conducted such an analysis in the alternative and the Member`s analysis was reasonable.

[34] However, this Court has held in a number of recent decisions that the RPD does not have to undertake a forward-looking risk analysis in a cessation decision (*Abadi*, at para 20; *Balouch v Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 FC 765 at para 19 [*Balouch*]; *Norouzi*, above). I note that this question of whether section 108 of the IRPA necessitates a forward-looking risk assessment was certified in both the *Balouch* and *Narouzi* decisions. Both appeals were ultimately abandoned. The Member was reasonable to reach the conclusion that she did.

C. *Did the Member err in her analysis of the country condition information?*

[35] The Applicant argues that in her alternative analysis of the Applicant's forward-looking risk, the Member erred by quoting from a 2010 document and misconstruing it as being an authority on the current conditions in China. Counsel for the Applicant had argued before the Member that this document showed that while attitudes towards Christians had been more permissive in 2010, attitudes had become stricter in recent years.

[36] While I agree that the Member may have misconstrued that particular piece of evidence, this error was not determinative of the Member's analysis, and does not result in a reviewable error. The Member's analysis of the country condition information considers numerous other documents, and the Member's conclusion, that the risk to the Applicant if he were to return home to the Lianoning province is low, was reached after a thorough consideration of the evidence and is reasonable.

JUDGMENT in IMM-1692-18

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;

2. There is no question for certification.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Lisa Winter-Card	FOR THE APPLICANT
Gregory G. George	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lisa R.G. Winter-Card Barrister and Solicitor Welland, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT