Federal Court Cour fédérale

Date: 20160203

Docket: IMM-2961-15

Citation: 2016 FC 127

Ottawa, Ontario, February 3, 2016

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

GORANCHO TRAJCHEVSKI (AKA GORANCHO TRAJECHVSKI), MARIJA TRAJCHEVSKI (AKA MARIJA TRAJECHVSKI), MILA TRAJCHEVSKI (AKA MILA TRAJECHVSKI)

Applicants

and

THE MINISTER OF CITIZENSHIP & IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a negative pre-removal risk assessment ("PRRA") decision of a senior immigration officer ("Officer") dated May 14, 2015 and made pursuant to ss 112 and 113 of the *Immigration and Refugee Protection Act,* SC 2001, c 27 ("IRPA").

Background

[2] The Applicants are citizens of Macedonia. The Principal Applicant is ethnic Roma, his wife, Marija, is ethnic Macedonian and they describe their minor daughter, Mila, as being of mixed ethnicity.

[3] On May 14, 2015 the Officer rendered the negative PRRA decision concerning the family. However, it was not until June 11, 2015 that counsel for the Applicants received notice of the decision and the Applicants were not served with the decision until June 22, 2015. In the interim, on June 5, 2015, the Applicants had made further submissions in support of their PRRA application, including documentary evidence of events in Macedonia which occurred in May 2015.

[4] The Applicants filed their application for judicial review on June 24, 2015 and sought a stay of their removal which was scheduled for August 6, 2015. The stay was denied on July 23, 2015.

Decision Under Review

[5] The Officer noted that the Applicants had stated that they were seeking protection because of ethnic tensions in their country and because of discrimination against the Principal and Minor Applicants. Further, that their counsel had submitted that the situation in Macedonia is worse now for the Applicants than it had been in December 2013 when the Refugee Protection

Division ("RPD") issued its decision and, as a Roma family, that they would suffer persecution in Macedonia.

[6] The PRRA Officer noted that his function was to determine if the new evidence supplied by the Applicants demonstrated either that they are at risk or that there has been a significant enough change to conditions in their home country such that the state protection analysis concluded by the RPD is no longer valid.

[7] The Officer assessed the new evidence, including a letter from the Principal Applicant's father which, for the reasons set out in the decision, he afforded little weight.

[8] The Officer then addressed the submission by the Applicants' counsel that Roma are not allowed to leave Macedonia as a result of the European Union's ("EU") warning that it may reintroduce visa restrictions against Macedonia because of refugee claims made in other EU countries. The PRRA Officer referred to an article in the Penn State Law Review from 2014 ("Penn State Article") which reported that the travel restrictions placed on Roma went into effect in May 2011. The Officer stated that, because the Applicants travelled to Canada in that month, they were not personally affected by the bar. Further, that the article made suggestions as to recourse, should they have problems upon their return, and that as of June 2014 passports are no longer seized from Macedonians who return to the country following failed refugee claims.

[9] The Officer then assessed the current country conditions in relation to state protection and found that, although Roma face discrimination, the evidence did not show a significant

change in country conditions from the time of the RPD's decision. Nor had the Applicants provided evidence that would show that state protection is not available to them. As the evidence before the Officer did not demonstrate a basis for a positive PRRA decision, the application was refused.

Issues

[10] Although not raised by either party in written submissions, in my view, a preliminary issue was whether the application is moot. However, counsel for the Respondent advised that he had no instructions on the point nor was he aware of whether the Applicants had been removed when their stay was denied. Counsel for the Applicants did not enlighten the Court on this point. Accordingly, the question of mootness is not addressed in these reasons.

[11] The issues as are as follows:

i. Did the Officer breach procedural fairness by not considering the Applicants' submissions sent after the decision was signed but before it was communicated to the parties?

ii. Did the Officer breach procedural fairness by relying on extrinsic evidence without providing the Applicants with an opportunity to respond?

Standard of Review

[12] The standard of review for issues of procedural fairness is correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79 [*Khela*]; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43).

[13] That standard has also been applied to the issue of a PRRA officer's duty to consider any evidence provided by a claimant (*Avouampo v Canada (Citizenship and Immigration)*, 2014 FC 1239 at para 7; *Ayikeze v Canada (Citizenship and Immigration)*, 2012 FC 1395 at para 13; *Monongo v Canada (Citizenship and Immigration)*, 2009 FC 491 at para 14) and in the context of the RPD's duty to consider further post-hearing submissions (*Ahanin v Canada (Citizenship and Immigration)*, 2012 FC 180 at para 37). The issue of when PRRA officers should give claimants an opportunity to respond has also been reviewed on the correctness standard (*Chandidas v Canada (Citizenship and Immigration)*, 2013 FC 257 at para 19; *Majdalani v Canada (Citizenship and Immigration)*, 2015 FC 294 at para 15; *Hernandez Moreno v Canada (Citizenship and Immigration)*, 2015 FC 1224 at para 15). However, the content of the duty is flexible and may differ depending on the context (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 21-28; *Khela* at para 89).

[14] When applying the correctness standard, a reviewing court will undertake its own analysis of the question without deference to the decision-maker's reasoning. The court must decide whether it agrees with the determination of the decision-maker; if not, the court will substitute its own view and provide the correct answer (*Dunsmuir v New Brunswick,* 2008 SCC 9 at para 50).

Issue 1: Did the Officer breach procedural fairness by not considering the Applicants' submissions sent after the decision was signed but before it was communicated to the parties?

[15] The Respondent concedes that the Officer was required to review materials received up to the date of the communication of the PRRA decision or until the Applicants received notice

that a PRRA decision had been rendered (*Chudal v Canada (Minister of Citizenship and Immigration),* 2005 FC 1073 at para 19; *Pur v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1109 at para 16) and that the Officer likely did not review the evidence submitted on June 5, 2015 ("June 5, 2015 submissions") prior to coming to his or her conclusions.

[16] Regardless, the Respondent submits that there was no procedural unfairness as the June 5, 2015 submissions would not have affected the outcome of the PRRA. This is because: the news articles all speak to a generalized risk in Macedonia and the documentary evidence must demonstrate a personalized risk to the Applicants, in this case based on their alleged Roma ethnicity (*Matute Andrade v Canada (Citizenship and Immigration)*, 2010 FC 1074 at para 48); the articles do not meet the definition of new evidence under s 113 of the IRPA as they do not demonstrate a significant enough change to the country conditions to render the RPD's state protection analysis invalid (*Hausleitner v Canada (Minister of Citizenship and Immigration)*, 2005 FC 641 at paras 31, 36); and, the articles would not have affected the Officer's negative assessment as they do not add anything relevant to the articles already on the record.

[17] A review of the June 5, 2015 submissions, which are entirely composed of internet news items, demonstrates that the articles are all very similar, report on the same three incidents and, as the Respondent submits, make absolutely no mention of the risk alleged by the Applicants based on their Roma ethnicity.

[18] The articles concern unrest in Macedonia, including: public protests in May 2015 arising from the release of wiretapped conversations between senior government officials, including the Macedonian Prime Minister, indicating that the government hired an off-duty police officer to kill a 22 year old man; an attack by alleged ethnic Albanian terrorists against police in a northern Macedonian town on May 10, 2015 resulting in 22 deaths (8 police and 14 members of the armed group), although other reports suggest that the government may have had involvement in the incident and question whether the armed group was supported by members of Macedonia's ethnic Albanian minority; and, finally, one article which spoke to the discovery of an explosive device in a café next to a government building.

[19] Accordingly, I agree with the Respondent that these articles speak, if anything, to a generalized risk in Macedonia. They do not demonstrate a personalized risk to the Applicants based on their Roma or mixed ethnicities. The Applicants also submit that because the violent incident on May 10, 2015 involved ethnic Albanians, and because Roma are also an ethnic minority, that they too may be at risk. In my view, this is a speculative link to the risk claimed by the Applicants.

[20] The Respondent also submits that the articles do not meet the definition of new evidence as prescribed by s 113 of the IRPA because they do not demonstrate significant enough change to country conditions to render the RPD's state protection analysis invalid. In my view, in the context of s 113, the question is whether the evidence is 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, or, material, in the sense that the claim probably would have succeeded if the evidence had been

available to the RPD (*Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 at para 13). The June 5, 2015 submissions are not relevant as they do not establish that the Applicants are personally at risk because of their Roma ethnicity, nor do they rebut the presumption of state protection based on ethnicity or general civic unrest. They are also not material as they are unlikely to have affected the outcome of the RPD's decision.

[21] While the Applicants submit that the June 5, 2015 submissions show a "new, violent and deadly insurrection" that began in May 2015 which "heavily affects the State's ability to provide protection to its nationals" and that the situation is worsening on a daily basis, in my view, the articles do not and could not support such an interpretation. While it is true that they document two violent events and one potential event, this does not establish the existence of an insurrection. Nor do the articles provide any evidence of a change in Macedonia's ability to protect its citizens.

[22] I would also note that, with respect to the documentation submitted by the Applicants that was considered by the Officer, he or she states that some of it dealt with ethnic Albanian issues, some reports were about violent incidents in Macedonia but were not described as arising from anti-Roma sentiment and, while counsel described the articles as highlighting persecution faced by Roma families, some were general accounts of violence without context or reference. The June 5, 2015 submissions provided similar information and, in my view, do not demonstrate a new risk or a significant change in Macedonia's country conditions that would have affected the outcome (*Gnanaseharan v Canada (Minister of Citizenship and Immigration)*, 2004 FC 872 at

paras 33-40). Therefore, the fact that the Officer did not consider them does not result in a breach of procedural fairness.

Issue 2: Did the Officer breach procedural fairness by relying on extrinsic evidence without providing the Applicants with an opportunity to respond?

[23] The issue of the prohibition by the Macedonian government on Roma citizens leaving that country was raised by the Applicants in their initial PRRA submissions. The Applicants submit that the Macedonian government's refusal to let its Roma citizens leave the country was discriminatory and racist and that they were relying on this information in their PRRA to support persecution and a lack of state protection by the Macedonian government. The Applicants submit that the Officer relied heavily on the Penn State Article, which was not found in the national document package, to refute the Applicants' evidence in this regard. Further, that the failure to provide the Applicants with an opportunity to respond to the extrinsic evidence results in a breach of procedural fairness.

[24] In this regard, the Applicants rely on the test set out by the Federal Court of Appeal in *Mancia v Canada (Minister of Citizenship and Immigration),* [1998] 3 FC 461 [*Mancia*] as to when procedural fairness requires disclosure of documents not found in the national document package. In that case, in answer to a certified question, the Federal Court of Appeal said that each case is to be decided based on its own circumstances but that fairness requires disclosure where the documents "are novel and significant and where the evidence changes in the general country conditions that may affect the decision" (*Mancia* at para 27).

[25] In this case, the Officer noted that the Penn State Article states that the limits on the ability of Roma to leave Macedonia were put in place in May 2011. The Officer found, as the Applicants left for Canada in May 2011, that they were not personally affected by the limit. However, that if they had any issues on return, the article also made suggestions as to the best route to take to seek relief against the government. In that regard, the article states that should a Roma individual wish to address his or her grievances, including racial profiling, against the Macedonian government, then the European Court of Human Rights is most likely to provide relief. The United Nations High Commissioner for Refugees is also a possibility, but less likely to provide a realistic remedy. The Officer also noted that the article states that passports are no longer seized from people returning to Macedonia.

[26] In my view, the Penn State Article was neither novel nor significant, nor did it change the general country conditions such that the RPD's state protection analysis would be affected.

[27] The policy precluding Roma travel was in effect since May 2011, thus it existed at the time that the RPD made its decision in December 2013. The article does not suggest that the policy changed during that period. So, while the article itself may post-date the RPD's decision and that of the Officer, the policy in issue does not. Further, it is not significant. This is because even if the article is in error, and there is no suggestion that that is the case, and the travel bar is still in place, this again is not a different situation from when the RPD rendered its decision. Thus, the article does not evidence changes in the country conditions in a way that would affect the RPD's decision. Or, as stated by the Officer, it does not show a significant change in the country conditions.

[28] I also do not agree with the Applicants' suggestion that the Officer uses the Penn State Article to discredit the Applicants' fear of persecution or to attack the Applicants' credibility. Rather, the Officer references the article to demonstrate that there had not been a significant change in country conditions in answer to the submission by counsel for the Applicants that Roma are prohibited from leaving Macedonia. And, while the article may refute that the prohibition still exists, for the reasons stated above, fairness in the context of these circumstances did not require disclosure and an opportunity to respond. Further, the Officer clearly stated in his reasons that he would not be revisiting the RPD's credibility findings and I am satisfied that he did not do so. Therefore, I do not accept the Applicants' submission made at the hearing before me that the Penn State Article was used to impugn their credibility.

[29] Accordingly, the Officer did not breach procedural fairness by relying on the Penn State Article without providing the Applicants with an opportunity to respond to it.

[30] For the above reasons, the application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.
2. There shall be no order as to costs.
3. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2961-15
STYLE OF CAUSE:	GORANCHO TRAJCHEVSKI (AKA GORANCHOTRAJECHVSKI), MARIJA TRAJCHEVSKI (AKA MARIJA TRAJECHVSKI), MILA TRAJCHEVSKI (AKA MILA TRAJECHVSKI) v THE MINISTER OF CITIZENSHIP & IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 27, 2016
JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	FEBRUARY 3, 2016

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