Federal Court  Cour fédérale

Date: 20160425

Dockets: IMM-4466-15
IMM-4467-15

Citation: 2016 FC 464

Ottawa, Ontario, April 25, 2016

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

OXANA SITNIKOVA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant is a 31-year-old citizen of Russia. She is a failed refugee claimant seeking protection from alleged persecution on account of her identity as a lesbian or bisexual woman. These applications for judicial review of an immigration officer's negative decision on her pre-removal risk assessment [PRRA] (IMM-4466-15) and the same officer's decision rejecting her humanitarian and compassionate application [H&C application] (IMM-4467-15) were heard together.

[2] For the following reasons, I find both decisions to be unreasonable.

Background

[3] In January 2008, the applicant entered Canada. One month later, she made a refugee claim on the basis of her sexual orientation which was rejected in September 2010, largely because the Refugee Protection Division of the Immigration and Refugee Board [RPD] found her not to be credible and found that she had failed to establish that she was lesbian.

[4] In April 2012, the applicant married a Canadian man who submitted an in-Canada spousal application on her behalf. The sponsorship was withdrawn due to marital breakdown. The applicant claims that she experienced domestic abuse at the hands of her Canadian spouse, who was charged with assault in connection with the abuse in May 2012. Following the breakdown of her marriage, the applicant converted her spousal application into the H&C application.

[5] In September 2012, the applicant submitted a PRRA application. This application was considered alongside the H&C application, by the same immigration officer who, in May 2013, rejected both. The applicant sought judicial review of both decisions, but withdrew her judicial review applications after the Minister of Citizenship and Immigration agreed to have both the PRRA and H&C applications re-determined by a different officer. It is that second officer's decisions that are the subject of these applications.

A. *The PRRA Decision*

[6] The officer's findings in her PRRA decision relating to the admission of evidence, her assessment of the evidence, and the risk of persecution are all at issue in this application.

[7] The officer considered letters and emails from friends, family, and former girlfriends of the applicant, which were submitted after her refugee hearing. According to paragraph 113(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, a PRRA applicant whose refugee claim 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." The officer stated that:

> I do not consider much of evidence presented to be new evidence. Portions of the letters from family and friends that refer to the applicant's past experiences will not be considered as I find that it could have reasonably been obtained and presented for consideration at her refugee hearing.

[8] The officer also considered a number of letters and emails from the applicant's family and neighbours. These letters recount police harassment of the applicant's family in Russia following her departure to Canada. The applicant claims that this harassment was carried out at the behest of a police officer who is the father of one of the applicant's former girlfriends. In one particularly egregious incident, police officers assaulted the applicant's grandfather, who suffered a heart attack and later died.

[9] The officer noted that the letters "are all dated in early October 2012 and they coincide with the timing of the applicant's PRRA application." The officer also noted that none of the

documents were sworn statements and that, while they are consistent with the applicant's story, they lack details. The officer also noted that "[n]one of the writers indicate that they sought to bring formal complaints against the harassing officers and if not, why not." Finally, the officer noted that:

> …all the writers are close family or friends with the applicant. Given all this combined with the previous credibility concerns raised regarding the cited risk allegations, I find that the emails, letters from the mother, sisters and neighbours are self-serving in nature and offer little probative value. I assign this evidence very little weight.

[10] The officer considered country condition documents that set out the risks that LGBT individuals face in Russia. The officer concluded that LGBT activists and openly gay persons are targeted:

> The articles and documents submitted clearly cite that LGBT activists, educators who are LGBT or engage in LGBT rights activism outside of the workplace are targeted. People that are openly gay, especially men, are subject to workplace discrimination and targets of physical attack by homophobic members of society.

[11] Applying these risk profiles to the applicant, the officer held that:

> Evidence submitted does not indicate that the applicant was involved in LGBT activism, education or promotion of LGBT rights in Russia prior to her departure from the country" [and] [t]he account provided by the applicant about her experience in Russia suggests she was not an openly gay or bisexual individual while living in Russia.

[12] The officer concluded that:

> The applicant may have had some friendships, relationships or contacts with LGBT people in Russia and Canada. Taking into

> account the current country conditions regarding attitudes and treatment of sexual minorities, I find that the applicant may face some discriminatory and/ or negative social attitudes due to her relationships or associations with LGBT people in Russia but I do not find that her personal circumstances are similar to those members of the LGBT community in Russia that have been or are currently being targeted or victims of persecutorial treatment. I find that based on her personal circumstances and profile that there is no more than a mere possibility that she will encounter discrimination or mistreatment due to her sexual orientation or links to the LGBTQ community that would rise to the level of persecution. [emphasis added]

B. *The H&C Decision*

[13] The officer's assessment of the applicant's risk in the H&C decision is the same as the officer's assessment of the applicant's risk of facing persecution in the PRRA decision. In particular, the officer repeats her finding that, because the applicant is not involved in LGBT activism and was not openly a member of the LGBT community in Russia; she does not fall within a targeted group.

[14] Similarly, in the H&C decision, the officer dismisses some of the applicant's evidence from her family and friends in part because they "have a vested interest in the positive outcome of this application." This finding is very close to the officer's finding in the PRRA decision, that evidence from the applicant's family and friends should be discounted because it is "self-serving."

[15] One piece of evidence that the officer considered in the H&C decision, but that was not mentioned in the PRRA decision, was a psychological assessment of the applicant, dated November 30, 2012, by Dr. Celeste Thirlwell. The assessment found that the applicant had

complex post-traumatic stress disorder as well as depression characterized by anxiety and suicidal ideation. It also found that the applicant required treatment with antidepressants, cognitive behavioural therapy, and interpersonal therapy. It concluded that the applicant would suffer irreversible psychological and emotional damage if she were returned to Russia, and would face a serious risk of suicide.

[16] In considering this evidence, the officer noted that the assessment was based on a single interview on October 31, 2012, rather than on an ongoing therapeutic relationship. The officer also noted that the assessment was based on information provided by the applicant and that there was no indication that the applicant had sought out the "required" treatment since the interview. The officer also noted that there was no evidence as to whether the applicant's condition had improved or how it had interfered with her day-to-day functioning, which appeared to be normal. The officer concluded that:

> [w]hile I find that the applicant may indeed be struggling with some emotional and mental health challenges, there is no evidence that the applicant is seeking treatment to improve the condition or that her condition has prevented her from participating in a positive working and social life.
>
> As a result, I give little weight to this factor in the global assessment.

Issues

[17] The issue in each application is the same: Was the officer's decision reasonable?

Analysis

The PRRA Decision

[18] First, the applicant submits that the officer erred in excluding evidence from the applicant's family, friends, and girlfriends to the extent that it recounted events that preceded her refugee hearing, on the grounds that this evidence should have or could have been adduced before the RPD. She relies on the Federal Court of Appeal's decision in *Raza v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385, [2007] FCJ No 1632 at paras 13-15 [*Raza*], where the Court provided the following guidance on the application of paragraph 113(a) of IRPA:

> As I read paragraph 113(a), it is based on the premise that a negative refugee determination by the RPD must be respected by the PRRA officer, unless there is new evidence of facts that might have affected the outcome of the RPD hearing if the evidence had been presented to the RPD. Paragraph 113(a) asks a number of questions, some expressly and some by necessary implication, about the proposed new evidence. I summarize those questions as follows:
>
> 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.
>
> 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.
>
> 3. Newness: Is the evidence new in the sense that it is capable of:
>
> 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
>
> b. proving a fact that was unknown to the refugee claimant at the time of the RPD hearing, or
>
> c. <u>contradicting a finding of fact by the RPD (including a credibility finding)?</u>
>
> 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).
>
> The first four questions, relating to credibility, relevance, newness and materiality, are necessarily implied from the purpose of paragraph 113(a) within the statutory scheme of the IRPA relating to refugee claims and pre removal risk assessments. The remaining questions are asked expressly by paragraph 113(a).
>
> I do not suggest that the questions listed above must be asked in any particular order, or that in every case the PRRA officer must ask each question. What is important is that the PRRA officer must consider all evidence that is presented, unless it is excluded on one of the grounds stated in paragraph [13] above.
>
> [emphasis added]

[19] The applicant's submission that some of the excluded evidence contradicts a finding of fact by the RPD, and is therefore "new" evidence, according to paragraph 3(c) of the test in *Raza* is not accepted. The applicant ignores the other parts of the test in *Raza*. In particular, she ignores paragraph 5(a), which states that an applicant may only adduce evidence that was not reasonably available, or could not reasonably have been presented, at the RPD hearing. This is

the criterion that the officer invoked when she stated that "[p]ortions of the letters from family and friends that refer to the applicant's past experiences will not be considered as I find that it could have reasonably been obtained and presented for consideration at her refugee hearing." Having found that portions of the applicant's evidence were inadmissible under paragraph 5(a) of the *Raza* test, there was no need for the officer to consider whether that evidence was "new" within the meaning of paragraph 3(c). It was excluded evidence under paragraph 5(a).

[20] The applicant cites this Court's decision *Elezi v Canada (Minister of Citizenship and Immigration)*, 2007 FC 240, [2008] 1 FCR 365 [*Elezi*] which contains a statement that PRRA officers have jurisdiction to admit evidence notwithstanding that it reasonably could have been adduced before the RPD.

[21] Relying on *Elezi*, the applicant says that the officer erred in failing to consider whether the evidence she adduced should be admitted, even if it reasonably could have been adduced before the RPD. However, *Elezi* pre-dates *Raza*, and *Raza* is clearly now binding on this Court. Moreover, the broad approach to admissibility expressed in *Elezi* has not been followed in subsequent jurisprudence: see, for example *Deri v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1042, 256 ACWS (3d) 902, at para 61 and *Rodriguez Torres v Canada (Minister of Citizenship and Immigration)*, 2015 FC 888, 256 ACWS (3d) 397, at para 31.

[22] Second, the applicant submits that the officer erred by assessing evidence based on what it does not say, rather than on what it says. For example, the officer discounted letters describing

the police harassment of the applicant's family because "[n]one of the writers indicate that they sought to bring formal complaints against the harassing officers and if not, why not."

[23] I agree. In *Belek v Canada (Minister of Citizenship and Immigration)*, 2016 FC 205 at para 21, I held that:

> ...documents that corroborate some aspects of an applicant's story cannot be discounted merely because they do not corroborate other aspects of his story: *Mahmud v Canada (Minister of Citizenship & Immigration)*, 167 FTR 309 at paras 8-12 [*Mahmud*]. Here the RAD assigns little weight to a letter that corroborates some of the applicant's story simply because it fails to provide details that would further corroborate his story. The RAD fails to explain why it would be reasonable to expect these further details to have been provided, such that a negative inference can be drawn from their absence: See *Taha v Canada (Minister of Citizenship & Immigration)*, 2004 FC 1675 at para 9. Absent such justification, the RAD's treatment of this document is unreasonable.

[24] This reasoning applies in the present case. If the letter writers had mentioned that they had complained about police harassment and no action was taken, then this might have corroborated the applicant's claim that the police are, at best, indifferent to her persecution. However, the mere fact that the letter writers did not mention this is no reason to discount the evidence that they did provide.

[25] The applicant also complains that the officer erred when she dismissed letters and emails from the applicant's family and friends on the basis that they were "self-serving." The applicant submits that evidence should not be discounted simply because it comes from individuals who are inclined to support the applicant. This is especially true when the evidence is of a personal nature, and so cannot be expected to come from disinterested strangers.

[26] If this was the only basis on which the letters were given little weight, then I would agree with the applicant. However, the officer did not discount the applicant's evidence solely because it came from individuals who support the applicant. The officer also cited credibility concerns about the applicant, as well as weaknesses in the letters themselves, including their lack of detail and the fact that they were not sworn statements. After considering all of these factors, the officer concluded that the letters had been engineered to support the applicant's claim. I cannot say that this assessment was unreasonable.

[27] Third, the applicant submits that the officer erred in holding that she will not be persecuted in Russia because, although openly LGBT people are persecuted, the applicant was not openly lesbian or bisexual when she was in Russia (and presumably will not be openly lesbian or bisexual if she returns). The applicant claims that, by expecting her to conceal her sexual orientation in order to avoid persecution, the officer has simply replaced one persecutory consequence (violence and discrimination) with another (enforced suppression of an innate characteristic). This has previously been found to be a reviewable error by this Court: see for example, *Fosu v Canada (Minister of Citizenship and Immigration*), 2008 FC 1135 , [2008] FCJ No. 1418, at para 17, and *Antoine v Canada (Minister of Citizenship and Immigration)*, 2015 FC 795, 258 ACWS (3d) 153, at para 23).

[28] The respondent takes issue with the applicant's characterization of the officer's reasoning on this point. According to the respondent, the officer did not imply that the applicant could avoid persecution by concealing her sexual orientation. To the contrary, the officer found that, even if the applicant was open about her sexual orientation, she would not face persecution. The

respondent points to the officer's ultimate conclusion that the applicant may face some discriminatory or negative social attitudes as a result of her associations with LGBT people, but that this will not amount to persecution.

[29] The applicant says that when the officer referred to her facing discrimination as a result of her associations with members of the LGBT community, the officer was talking about discrimination that would arise merely from the applicant associating with openly LGBT people, rather than the more serious discrimination that would result if she herself was openly as lesbian or bisexual. The applicant denies that the officer found that she could avoid persecution while being openly lesbian or bisexual.

[30] The officer's reasoning on this point is ambiguous. On one reading, the officer found that the applicant will avoid persecution only if she is not openly lesbian or bisexual. On the other reading, the officer found that the applicant will avoid persecution even if she is openly a member of the LGBT community. If pressed, I would conclude that the officer likely meant to say that applicant will avoid persecution only if she is not openly lesbian or bisexual. As noted, that manner of examining risk based on sexual orientation has been rejected and the officer's decision would be in error.

[31] Regardless, the ambiguity of the reasoning is, in itself, a problem. As the Supreme Court observed in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47 "reasonableness is concerned mostly with the existence of justification, transparency and

intelligibility within the decision-making process." The officer's reasoning on this point lacks the intelligibility that the reasonableness standard demands.

[32] In summary, the officer's PRRA decision is unreasonable because she improperly assessed the evidence based on what it does not say, arguably required the applicant to remain closeted in order to avoid a risk of persecution, and in any event, provided unintelligible reasoning on the applicant's risk. It will be set aside.

The H&C Decision

[33] As noted above, the officer's analysis of the applicant's risk in the H&C decision is virtually identical to her analysis of the applicant's risk in the PRRA decision. This analysis is therefore unreasonable for the reasons outline above.

[34] Although the officer's H&C decision must be quashed as unreasonable based on the risk analysis alone, given that the application will be reconsidered by another officer I will briefly comment on the applicant's other submissions that the H&C decision is unreasonable for the sake of completeness.

[35] The applicant submits that the officer erred in discounting Dr. Thirlwell's report on the basis that the applicant had not sought the required treatment mentioned in the report. The applicant also submits that the officer ignored Dr. Thirlwell's evidence that the applicant would suffer irreversible psychological and emotional damage if she were returned to Russia. In support of these arguments, the applicant cites the Supreme Court's decision in *Kanthasamy v*

Canada (Minister of Citizenship and Immigration), 2015 SCC 61, [2015] SCJ No 61 at paras 47-48 [*Kanthasamy*], where the Court held that:

> Having accepted the psychological diagnosis, it is unclear why the Officer would nonetheless have required Jeyakannan Kanthasamy to adduce additional evidence about whether he did or did not seek treatment, whether any was even available, or what treatment was or was not available in Sri Lanka. Once she accepted that he had post-traumatic stress disorder, adjustment disorder, and depression based on his experiences in Sri Lanka, requiring further evidence of the availability of treatment, either in Canada or in Sri Lanka, undermined the diagnosis and had the problematic effect of making it a conditional rather than a significant factor.
>
> Moreover, in her exclusive focus on whether treatment was available in Sri Lanka, the Officer ignored what the effect of removal from Canada would be on his mental health. As the Guidelines indicate, health considerations in addition to medical inadequacies in the country of origin, may be relevant: Inland Processing, s. 5.11. As a result, the very fact that Jeyakannan Kanthasamy's mental health would likely worsen if he were to be removed to Sri Lanka is a relevant consideration that must be identified and weighed regardless of whether there is treatment available in Sri Lanka to help treat his condition: *Davis v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 97 (CanLII), 96 Imm. L.R. (3rd) 267 (F.C.); *Martinez v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 1295 (CanLII), 14 Imm. L.R. (4th) 66 (F.C.). As previously noted, Jeyakannan Kanthasamy was arrested, detained and beaten by the Sri Lankan police which left psychological scars. Yet despite the clear and uncontradicted evidence of such harm in the psychological report, in applying the "unusual and undeserved or disproportionate hardship" standard to the individual factor of the availability of medical care in Sri Lanka — and finding that seeking such care would not meet that threshold — the Officer discounted Jeyakannan Kanthasamy's health problems in her analysis [emphasis added].

[36] The present case is distinguishable from *Kanthasamy* in that, unlike the officer in that case, the officer in the case at bar did not appear to accept the psychological diagnosis.

[37] In other words, the officer did not impugn Dr. Thirlwell's clinical judgment; she simply found that the story upon which her diagnosis was based not to be credible, and that the applicant's subsequent behaviour was not that of one who is seriously ill and in need of the treatment that Dr. Thirlwell claimed is "required." This is not an unreasonable assessment of the report's evidentiary value.

[38] The applicant also submits that the officer erred in assessing her evidence based on what it does not say, rather than on what it says. I agree that the officer sometimes committed this error. For example, the officer discounted a letter from the applicant's former girlfriend, in part because the letter does not attach "objective evidence" that her father is a police officer. In doing so, the officer appeared to ignore what the letter did say, which is that he is a powerful and connected police officer who blames the applicant for his daughter's sexual orientation, and who regularly sends police officers to search for the applicant and harass her family.

[39] Other examples of this error are alleged by the applicant; however, I am not convinced that they are such. For example, the officer assigned low weight to an email from another former girlfriend partly because she did not actually witness an alleged homophobic assault of the applicant that she recounts in the email. In doing so, it could be said that the officer erred by discounting the email based on what it does not say, while ignoring what it does say, which is that writer witnessed the applicant's injuries after the assault, and that the assault occurred because the writer, who was an experienced boxer, was not around to protect the applicant. However, it could also be said that the officer was simply noting a limitation on the probative

value of the email; that the writer could not directly corroborate that the assault occurred or that it was motivated by homophobia.

[40] After reviewing the various examples of this error alleged by the applicant, I conclude that, although the officer's assessment of the evidence is questionable in some respects, her decision would not merit intervention on this ground alone.

[41] Finally, the applicant submits that the officer erred by requiring the applicant to meet the "unusual and undeserved or disproportionate" hardship test for H&C relief. The applicant cites *Kanthasamy* at paras 33 and 45, in which the Supreme Court held that:

> The words "unusual and undeserved or disproportionate hardship" should therefore be treated as descriptive, not as creating three new thresholds for relief separate and apart from the humanitarian purpose of s. 25(1). As a result, what officers should not do, is look at s. 25(1) through the lens of the three adjectives as discrete and high thresholds, and use the language of "unusual and undeserved or disproportionate hardship" in a way that limits their ability to consider and give weight to all relevant humanitarian and compassionate considerations in a particular case. The three adjectives should be seen as instructive but not determinative, allowing s. 25(1) to respond more flexibly to the equitable goals of the provision.
>
> …
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> Applying [the reasonableness] standard, in my respectful view, the Officer failed to consider Jeyakannan Kanthasamy's circumstances as a whole, and took an unduly narrow approach to the assessment of the circumstances raised in the application. She failed to give sufficiently serious consideration to his youth, his mental health and the evidence that he would suffer discrimination if he were returned to Sri Lanka. Instead, she took a segmented approach, assessed each factor to see whether it represented hardship that was "unusual and undeserved or disproportionate", then appeared to discount each from her final conclusion because it failed to satisfy that threshold. Her literal obedience to those adjectives, which do not appear anywhere in s. 25(1), rather than looking at his

> circumstances as a whole, led her to see each of them as a distinct legal test, rather than as words designed to help reify the equitable purpose of the provision. This had the effect of improperly restricting her discretion and rendering her decision unreasonable.

[42] I am not persuaded that the officer in the present case committed the same error as the officer in *Kanthasamy*.

[43] It is true that the officer concludes her decision by stating that:

> …overall I find that individually and cumulatively, the elements presented in this case are insufficient to establish that the applicant would suffer unusual and undeserved or disproportionate hardship if she applies for permanent residence from outside Canada.

[44] However, the applicant has not convinced me that the officer uses this test to unduly fetter her discretion, either by creating a high threshold for relief or by failing to consider and give weight to all relevant humanitarian and compassionate factors. Therefore, while the impugned test was certainly cited, there is no indication that it was applied in an impermissible way. The officer's reference to this test does not render her decision unreasonable.

[45] In summary, the officer's H&C decision is unreasonable because she improperly assessed some of the evidence based on what it does not say, arguably required the applicant to remain closeted in order to avoid a risk of persecution, and in any event, provided unintelligible reasoning on the applicant's risk. It will be set aside.

[46] No question was proposed to be certified in either matter.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. Application IMM-4466-15 is allowed, the officer's PRRA decision is set aside, the applicant's PRRA application is to be re-assessed by a different officer, and no question is certified; and

2. Application IMM-4467-15 is allowed, the officer's H&C decision is set aside, the applicant's H&C application is to be re-assessed by a different officer, and no question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Meghan Wilson	FOR THE APPLICANT
Brad Gotkin	FOR THE RESPONDENT

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SOLICITORS OF RECORD:

Jackman, Nazami & Associates Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT