Federal Court  Cour fédérale

Date: 20170120

Docket: IMM-2515-16

Citation: 2017 FC 74

Ottawa, Ontario, January 20, 2017

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

ANDRII STOROZHUK
STEPHANIIA STOROZHUK

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicants, Andrii Storozhuk and Stephaniia Storozhuk, are citizens of Ukraine. They came to Canada in July 2012 and, upon arrival in Montreal, made claims for refugee protection based on religious persecution. In May 2014, their claims were denied by the Refugee Protection Division of the Immigration and Refugee Board (RPD) on credibility grounds. An application for judicial review of that decision was heard and dismissed by this Court in June 2015.

[2] The applicants were then provided with an opportunity to have a Pre-Removal Risk Assessment (PRRA). A negative decision was rendered on April 28, 2016. This is their application for judicial review of that decision under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA or the Act].

I. DECISION UNDER REVIEW

[3] The applicants raised a new risk in their PRRA application. Mr. Storozhuk claimed that he is a pacifist and refuses to report for military duty in Ukraine for fear that he would be forced to commit war crimes or crimes against humanity. In support of that claim he submitted two notices, which his relatives had forwarded from the Ukraine, requiring him to report for military duty. The applicants submitted a copy of the notices with an accompanying translation as evidence of conscription.

[4] In reviewing the applicants' PRRA applications and submissions, pursuant to section 113 of the IRPA, the officer did not consider submissions which pre-dated the findings of the RPD, submissions which could reasonably have been available for consideration by the RPD, or submissions which did not materially differ from what was considered by the RPD in rendering its decision.

[5] The officer noted that the issue of religious affiliation and beliefs, which underpinned the applicants' claim before the RPD, was not raised or addressed by them in their PRRA

application. The claim that Mr. Storozhuk is a pacifist and fears reporting for military duty was assessed as a new risk.

[6] The officer described at some length the new evidence submitted by the applicants. The officer was concerned with the genuineness of the new evidence, and referred to a number of issues pointing to a lack of indicia of reliability of the two military notices:

a) both notices were not dated and the translations did not indicate when they were issued;

b) the applicants did not indicate the names of their relatives who allegedly received the notices or how/why the notices were delivered to them in Ukraine;

c) both notices suggested that failure to appear for medical examination would result in a penalty of 85 *hryvans*, but the second notice made no reference to Mr. Storozhuk's failure to appear after the first notice or any resulting penalty; and,

d) the applicants did not indicate how or when the notices were forwarded to them in Canada or provide the accompanying envelopes in which the notices reached them.

[7] The officer made no credibility finding against the applicants based on the notices. The officer stated that although Mr. Storozhuk has submitted "what he believes to be a call in notice for military conscription, I find that the applicants have not provided objective evidence to corroborate these notices." Ultimately, the officer gave more weight to the objective documentary evidence regarding the parameters of conscription in Ukraine.

[8] The officer noted that between 1993 and 1995, Mr. Storozhuk had completed over a year of military duty in Ukraine. The officer's own consultation on conscription practices in Ukraine

indicated that the traditional conscription age in Ukraine ranges between 20 and 27 years of age. In the officer's view, Mr. Storozhuk being 42 years of age [at the time of completing his PRRA application], and having previously completed over a year of military duty in Ukraine, fell outside the categories of individuals being conscripted.

[9] The officer also considered a copy of a publication by the All-Ukrainian Human Rights Commission as well as news articles submitted by the applicants describing the death of several soldiers in Ukraine. The officer found that the applicants failed to indicate how they were similarly situated to the persons described in these articles. The officer concluded that these articles related to general country conditions and conditions faced by the general population.

[10] Having considered the totality of the evidence, the officer found that there was less than a mere possibility that the applicants would face persecution in Ukraine as understood by section 96 of the IRPA. The officer also concluded that there were no substantial grounds to believe that the applicants face a risk to life or a risk of cruel and unusual treatment or punishment as understood by section 97 of the IRPA. As such, the officer refused the PRRA application.

II. RELEVANT LEGISLATION

[11] The relevant provisions of the IRPA read as follows:

Application for protection	**Demande de protection**
112 (1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the	**112 (1)** La personne se trouvant au Canada et qui n'est pas visée au paragraphe 115(1) peut, conformément aux

regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).	règlements, demander la protection au ministre si elle est visée par une mesure de renvoi ayant pris effet ou nommée au certificat visé au paragraphe 77(1).
Consideration of application	**Examen de la demande**
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;

III. ISSUES

[12] The respondent raised a preliminary issue regarding documentary evidence included in the Application Record. This evidence consisted of a series of news articles regarding military service in Ukraine and a United Kingdom Home Office report which did not appear in the Certified Tribunal Record. The Home Office report post-dated the PRRA decision. The documents appeared to have been retrieved from the Internet after the decision was issued. These materials were evidently not before the PRRA officer when the officer made the decision.

[13] It is trite law that judicial review of an administrative decision is made on the basis of the evidence that was before the decision-maker. Additional evidence is only admissible in very narrow circumstances, where it may be needed to resolve issues of procedural fairness or jurisdiction: *McKenzie v Canada (Minister of Citizenship and Immigration)*, 2015 FC 719, [2015] FCJ No 718 at para 44; see also *Alabadleh v Canada (Minister of Citizenship and Immigration)*, 2006 FC 716, [2006] FCJ No 913 at para 6; *Ontario Association of Architects v Association of Architectural Technologists of Ontario*, 2002 FCA 218, [2003] 1 FC 331 at para 30.

[14] The present matter does not raise any question of procedural fairness that would require the admission of the disputed additional evidence. Nor are there any jurisdictional issues which it would be helpful to resolve. It appears that the applicants searched the Internet following receipt of the officer's decision to find evidence that would contradict his findings. It is not the role of the Court on judicial review to receive, consider and weigh fresh evidence as if conducting the determination *de novo.* The additional evidence is not, therefore, admissible and was not taken into consideration in this judicial review.

[15] There is no dispute between the parties that the standard of review of a PRRA officer's finding of fact and mixed fact and law is reasonableness: *Thamotharampillai v Canada (Minister of Citizenship and Immigration)*, 2016 FC 352, [2016] FCJ No 312 at para 18. I agree.

[16] As such, deference must be given to the PRRA officer's analysis of the evidence in the record as it falls within the officer's expertise: *Belaroui v Canada (Minister of Citizenship and*

Immigration), 2015 FC 863, [2015] FCJ No 845 at para 9; *Aboud v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1019, [2014] FCJ No 1059 at para 17.

[17] In the application of the reasonableness standard, the Court should not intervene unless the officer's decision does not fall within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 47.

[18] The remaining issue is:

1. Was the decision of the PRRA officer reasonable in light of the new evidence?

IV. ANALYSIS

[19] The applicants submit that the officer's decision was unreasonable because they were not given an opportunity to respond to the concerns about the authenticity of the two notices.

[20] The applicants' position is not supported by the settled jurisprudence. As a general principle, there is no duty on a PRRA officer to seek updated submissions as the onus is on a PRRA applicant to ensure that all relevant evidence is before the officer: *Tovar v Canada (Minister of Citizenship and Immigration)*, 2015 FC 490, [2015] FCJ No 469 at para 21; *Ormankaya v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1089, [2010] FCJ No 1362 at para 31. The applicants failed to meet that onus and did not provide sufficient evidence

to establish the authenticity of the notices or of the adverse implications of the notices that they wished the officer to accept.

[21] The officer explicitly considered the two notices, but found that, in light of the objective evidence, they failed to establish a forward-looking risk. I agree with the respondent that, even accepting that the notices were genuine and that Mr. Storozhuk might be required to attend a medical examination as a prelude to possible enrollment in the Ukraine military, this did not establish a risk of persecution.

[22] It was open to the officer to conclude, based on the documentary evidence, that someone of Mr. Storozhuk's age and prior service was unlikely to be conscripted: *Obazee v Canada (Minister of Citizenship and Immigration),* 2012 FC 871, [2012] FCJ No 935 at para 25; *Ferguson v Canada (Minister of Citizenship and Immigration),* 2008 FC 1067, [2008] FCJ No 1308 at para 33.

[23] In any event, even if he had been found to be fit for military service, prosecution under a law of general application for failing to respond to a call-up notice or for refusing to serve on conscientious objection grounds, would not normally constitute persecution: *Sahin v Canada (Minister of Citizenship and Immigration),* 2013 FC 664, [2013] FCJ No 701 at para 55-57; *Ozunal v Canada (Minister of Citizenship and Immigration),* 2006 FC 560, [2006] FCJ No 709 at paras 16-17, and 22-24; *Usta v Canada (Minister of Citizenship and Immigration),* 2004 FC 1525, [2004] FCJ No 1832 at paras 14-16.

[24] There are, without doubt, circumstances in which the application of military service laws will amount to persecution. But this would require evidence of more serious consequences than that which seems to be the situation in Ukraine on the facts presented to the officer in this case. As noted, mere prosecution under a law of general application in a functioning democratic state would not normally suffice. However, being forced to serve in the military of an authoritarian regime committing human rights abuses might well be found by a Canadian tribunal to constitute persecution. While the applicants argued that was the situation in Ukraine, the evidence did not substantiate that claim.

[25] In my view, it was reasonable for the officer to question the authenticity of the two notices submitted as new evidence by the applicants. For evidence to have sufficient probative value, it has to convince the officer of the fact that it sets out to prove: *Carillo v Canada (Minister of Citizenship and Immigration),* 2008 FCA 94, [2008] 4 FCR 636 at para 30.

[26] The shortcomings outlined by the officer were reasonably found to diminish the probative value of the documents. For example, the applicants failed to explain how or why the two notices were received by their relatives. In that regard, the residential address listed for Mr. Storozhuk in both notices did not match any of the applicants' former addresses provided in their application. It was open to the officer to consult recent and publicly available reports on country conditions even when they have not been submitted by the applicants: *Jama v Canada (Minister of Citizenship and Immigration),* 2014 FC 668, [2014] FCJ No 734. The officer's review of the relevant news sources and National Documentation Package did not support the applicants' claim about the consequences of failing to respond to the notices.

[27] The officer explicitly considered the new evidence as well as the All-Ukrainian Human Rights Commission publication and news articles describing the death of several soldiers in Ukraine. This is contrary to the applicants' position that the officer ignored relevant evidence. It was not unreasonable for the officer to conclude, in the circumstances of this case, that the applicants failed to demonstrate how they are similarly situated to the persons described in the submitted news articles.

[28] In the result, the application is dismissed. No questions were proposed for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed. No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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