Federal Court Cour fédérale

Date: 20170706

Docket: IMM-5185-16

Citation: 2017 FC 654

Ottawa, Ontario, July 6, 2017

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

TIMEA BALOGH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a pre-removal risk assessment [PRRA] decision by a Senior Immigration Officer [Officer] dated October 25, 2016, in which the Officer determined that the Applicant would not be subject to risk of torture, be at risk of persecution, or face a risk to life or risk of cruel and unusual punishment or treatment if removed to Hungary, her country of nationality.

[2] For the reasons explained in greater detail below, this application is allowed, because it is my conclusion that the Officer's decision was influenced by credibility findings, such that the Officer was required to convoke a hearing, or at least consider whether the concerns about the Applicant's credibility engaged the factors that would require a hearing, to provide the Applicant with an opportunity to disabuse those concerns.

II. Background

[3] The Applicant, Ms. Timea Balogh, is a citizen of Hungary who arrived in Canada on November 25, 2008 and made a refugee claim on January 21, 2009. Her claim was based on her Roma ethnicity and her alleged fear of persecution at the hands of the Hungarian Guards, as well as her alleged fear of her step-mother's ex-husband, Mr. Sandor Jakovics. Mr. Jakovics had accompanied Ms. Balogh and her mother to Canada but has since been deported. Ms. Balogh alleged that Mr. Jakovics blamed her for the separation from her mother, had threatened her while he was in Canada, and would harm her if she was returned to Hungary.

[4] Ms. Balogh's application for refugee protection was refused by the Refugee Protection Division [RPD] on September 27, 2011. The RPD made adverse credibility findings with respect to Ms. Balogh's allegations that Mr. Jakovics had threatened her in Canada, found that there was insufficient corroborating evidence to support those allegations, found that she provided no reliable evidence that she suffered discrimination or persecution in Hungary because of her Roma ethnicity, and found that she failed to rebut the presumption of state protection in Hungary with clear and convincing evidence. Ms. Balogh filed an application for leave for judicial review of this decision, but leave was denied on February 8, 2012.

[5] Ms. Balogh subsequently submitted a PRRA application, in which she maintained the allegations that had been considered by the RPD and submitted additional evidence to support her allegations against Mr. Jakovics. In her PRRA application, she also alleged fear of her own ex-partner Gabor Nagy, who she states was abusive towards her in Hungary. She states that she was raped by Mr. Nagy after she ended the relationship with him and that she went to the police but they did not accept her complaint because she was Roma.

[6] Ms. Balogh's PRRA application was denied on July 10, 2013. She applied for judicial review of this decision, which was granted by the Federal Court on January 20, 2015, finding that the PRRA officer had erred in conducting the required state protection analysis (see *Balogh v Canada (Minister of Citizenship and Immigration)*, 2015 FC 76 [*Balogh*]). The Court ordered a redetermination by a different officer, and Ms. Balogh submitted her updated PRRA application on March 19, 2015, including new evidence in support of her allegations against Mr. Nagy and what she described as the worsening situation for Roma in Hungary and the unavailability of state protection. On October 25, 2016, she again received a negative PRRA decision, which is the subject of this judicial review.

[7] On December 23, 2016, Ms. Balogh submitted a motion for a stay, which I granted on December 29, 2016.

III. Impugned Decision

[8] The Officer found that Ms. Balogh failed to demonstrate that she is at risk in Hungary at the hands of either Sandor Jakovics or Gabor Nagy, finding there to be little evidence to support her claim that she will be sought out and harmed by either of these men in Hungary.

[9] Ms. Balogh alleged that Mr. Jakovics approached her on a bus in Mississauga on August 20, 2011 and threatened her, and that he subsequently began to stalk her. The Officer considered Ms. Balogh's evidence related to the risk from Mr. Jakovics, including a letter from Toronto Police Service [TPS] she received in response to a request for access to information. This letter refers to two Event Details Reports made in 2010 and an occurrence synopsis which states that Ms. Balogh made a complaint on August 23, 2011. The Officer noted that the complaint had been redacted throughout and the subject's name had been removed.

[10] The Officer observed that Ms. Balogh never followed up with the investigation into the Mississauga incident. The Officer also noted that Ms. Balogh stated on her PRRA application that Mr. Jakovics began stalking her after that incident, as a result of which she entered the Red Door Shelter on Queen Street where she resided for 6 months, but that Mr. Jakovics found her there as well. However, Ms. Balogh had also provided a letter from Red Door, dated October 28, 2011, which stated that she had been residing there since May 19, 2011, months before the Mississauga incident and the alleged stalking. The Officer noted there were no police reports with respect to the alleged stalking or Mr. Jakovics visiting the shelter.

[11] Based the inconsistencies in the information provided by Ms. Balogh, the lack of details in the police reports, and the lack of recent evidence with respect to the investigation into Mr. Jakovic's threatening behaviour on August 20, 2011, the Officer gave Ms. Balogh's statements, the documentation obtained from the TPS, and the letter from the Red Door Shelter little weight in establishing a personalized risk for Ms. Balogh.

[12] With respect to Mr. Nagy, the Officer noted that Ms. Balogh provided very little information with respect to her relationship with him, such as dates or timelines of events, that she did not present her allegations related to Mr. Nagy to the RPD, and that she provided no explanation for this omission. Her PRRA submissions included a letter postmarked October 31, 2012, which she states is from Mr. Nagy, in which he threatens her life. She also presented a Facebook message which she states was sent to her alias account by a friend of Mr. Nagy's and which includes a threat towards her. As Ms. Balogh failed to bring this risk before the RPD and proffered little corroborating evidence, the Officer gave little weight to these documents in demonstrating a forward-looking risk.

[13] Having found that Ms. Balogh had not demonstrated risk at the hands of either Mr. Jakovic or Mr. Nagy, the Officer analyzed the country conditions in Hungary from the perspective of Roma people in general but did not focus on domestic violence. The Officer acknowledged that there are a number of human rights issues including societal discrimination and exclusion but noted that, while there have not been any major gains, there has also been no deterioration of existing protections or programs. The Officer concluded that Ms. Balogh had failed to demonstrate that the level of discrimination she is likely to encounter in Hungary rises

to the level of persecution or that the protections that currently exist would not serve her. The Officer noted that clear and convincing evidence of the state's unwillingness or inability to provide protection must be provided unless a state has completely broken down. In this case, the Officer concluded that Ms. Balogh had not satisfied this requirement.

IV. Preliminary Issue

[14] In written argument, the Respondent raised a preliminary issue, objecting to the Applicant's reliance on the affidavit of Cassandra Fu, a legal assistant in the office of the Applicant's counsel. Ms. Fu's affidavit attaches the motion record that the Applicant filed in support of the stay motion, which includes Ms. Balogh's own affidavit. However, the Respondent argued that Ms. Balogh's affidavit includes evidence that, while perhaps relevant to the issues on the stay motion, was not before the Officer in making the PRRA decision and therefore is not appropriate for this application for judicial review.

[15] The Respondent's Memorandum of Argument submitted that Ms. Fu's affidavit does not comply with s. 12(1) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 [the Immigration Rules], which provides that affidavits filed in connection with an application for leave for judicial review shall be confined to such evidence as the deponent could give if testifying before the Court. The Respondent therefore requested that Ms. Fu's affidavit be struck and submitted that, because the Applicant will then have failed to provide an affidavit necessary to perfect her application under s. 10 (2) of the Immigration Rules, the application should be dismissed.

[16] However, at the hearing of this application for judicial review, the Respondent's counsel explained that these arguments were raised before the Court granted leave, and therefore before the Certified Tribunal Record was generated, and reflected concern that the Respondent was disadvantaged by being unable to determine from the Applicant's affidavit material precisely which evidence had been before the Officer when the impugned decision was made. Leave having since been granted, the Respondent's counsel advised at the hearing that the Respondent is not particularly relying on these arguments at this juncture, as the Respondent now has the benefit of the Certified Tribunal Record which reflects the record that was before the Officer.

[17] The Applicant's counsel acknowledged in oral argument that Ms. Fu's affidavit includes material that was not before the Officer. She advised that, with the exception of two documents related to the history of this proceeding (Ms. Balogh's first PRRA decision and the decision in *Balogh* which set it aside), she intended to rely only upon documents in the Certified Tribunal Record. Consistent with that acknowledgement, I agree with the Respondent's position that affidavit material filed in support of an application for leave and judicial review should be confined to what is properly relevant and admissible on the application itself. With limited exceptions, such as explanatory background and evidence intended to establish procedural unfairness, such affidavits should be confined to material that was before the decision-maker.

[18] There is no requirement that an application for judicial review be supported by an affidavit personally sworn by the applicant (see *Zheng v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1152, at para 5). The concern is that Ms. Fu's affidavit, which simply attaches the motion record that was filed in the Applicant's stay motion, appears to have been

submitted as a means of supporting the application for leave without adequate thought having been given to the differences between what is relevant to a stay motion and what is relevant to a judicial review. Such a practice is to be discouraged. However, particularly as the Respondent is not now pressing this point, the shortcoming in the Applicant's approach to her supporting affidavit material does not warrant dismissing her application on the basis that it has not been perfected, as her challenge to the Officer's decision is based on arguments as to errors appearing on the face of the record (see *Turcinovica v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 164, at paras 11-14).

V. Issues

[19] The Applicant submits the following issues for the Court's consideration:

A. Did the Officer err by failing to convoke a hearing and in failing to provide the Applicant with an opportunity to disabuse concerns of credibility?

B. Did the Officer err in assessing state protection?

VI. Standard of Review

[20] The Applicant takes the positon that the first of the above issues is a matter of procedural fairness and therefore subject to review on the standard of correctness, with the second issue being subject to the standard of reasonableness. The Respondent's position is that the standard of reasonableness applies to both issues.

[21] The parties' disagreement related to standard of review surrounds how the first issue is framed. The Applicant frames it as a question of procedural fairness, reviewable on a standard of correctness, relying on Justice Boswell's decision in *Zmari v. Canada (Minister of Citizenship and Immigration)* 2016 FC 132, at paras 10-13. However, there is also substantial authority that the standard applicable to a PRRA officer's decision whether to hold an oral hearing is reasonableness (see *Ikeji v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1422, at para 20 [*Ikeji*]; *Sanchez v Canada (Minister of Citizenship and Immigration)*, 2016 FC 737, at para 4; *Ibrahim v Canada (Minister of Citizenship and Immigration)*, 2014 FC 837, at para 6, citing *Bicuku v Canada (Minister of Citizenship and Immigration)*, 2014 FC 339, at paras 16-20; *Ponniah v Canada (Minister of Citizenship and Immigration)*, 2013 FC 386 at para 24; and *Mosavat v Canada (Minister of Citizenship and Immigration)*, 2011 FC 647, at paras 7-10).

[22] Based on my review of the case law, the selection of the applicable standard of review appears to depend on whether the Court in a particular case characterizes the issue of whether an oral hearing should have been granted as a matter of procedural fairness, in which case the standard of correctness is selected, or as involving the interpretation of the *Immigration and Refugee Protection Act*, SC 2001, c.27 [IRPA], in which case the standard is reasonableness.

[23] In my view, when the issue is whether a PRRA officer should have granted an oral hearing, the appropriate standard is reasonableness, as the decision on that issue turns on interpretation and application of the officer's governing legislation. Section 113(b) of IRPA provides that a hearing may be held if the Minister, on the basis of prescribed factors, is of the

opinion that a hearing is required, and s. 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002/227 [IRPR] prescribes the applicable factors to be the following:

(a) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;	**a)** l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur;
(b) whether the evidence is central to the decision with respect to the application for protection; and	**b)** l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;
(c) whether the evidence, if accepted, would justify allowing the application for protection.	**c)** la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

[24] The arguments in the present case focused on the first of these factors, whether there is evidence that raises a serious issue of the Applicant's credibility, and in particular on whether the Officer's reasoning, which is expressed in terms of sufficiency of evidence, is more properly characterized as a credibility finding (what is sometimes referred to as a "veiled credibility finding"). At paragraph 20 of the decision in *Ikeji*, Justice Strickland held that reasonableness is the standard of review for questions of veiled credibility findings and, while noting the divided jurisprudence on the standard of review applicable to a PRRA officer's decision respecting an oral hearing, held that this is also reviewable on the reasonableness standard. Justice Strickland reached this conclusion because such a decision is made by the officer considering the requirements of s. 113(b) of IRPA and the factors in s. 167 of IRPR, which involves a question of mixed fact and law.

[25] I agree with this analysis and consider it to be particularly applicable to the present case, where the Applicant's position surrounding the issue of an oral hearing turns on the argument that the Officer made what amount to a veiled credibility finding. I will therefore apply the reasonableness standard to both issues in this application.

VII. Analysis

A. *Did the Officer err by failing to convoke a hearing and in failing to provide the Applicant with an opportunity to disabuse concerns of credibility?*

[26] The question the Court must consider is whether the negative PRRA decision by the Officer was based on negative credibility findings, as argued by the Applicant, or findings of insufficiency of evidence, as argued by the Respondent.

[27] In connection with the police report, the Respondent submits that the Officer's conclusion is that there was little useful information that could be derived from that documentation, as it reflected only that Ms. Balogh made a complaint on August 20, 2011, but nothing more than that. Nor was there any more recent information on the investigation into the alleged incident. As such, the police report was of little probative value in supporting Ms. Balogh's allegations of risk, and there was no recent evidence of a resulting investigation to support a finding of forward-looking risk. I consider this to be an accurate characterization of the Officer's analysis of the police report, i.e. that it was of little assistance to Ms. Balogh because of insufficient probative value, not concerns about credibility.

[28] Similarly, I accept the Respondent's position that, in giving little weight to the letter from the Red Door Shelter, the Officer was analyzing the probative value of that evidence, and not making a credibility finding. As noted by the Respondent, that letter referred only to the fact that Ms. Balogh had been living at the shelter and did not speak to Mr. Jakovics attempting to find her there.

[29] However, the evidence before the Officer also included Ms. Balogh's own statement, describing the Mississauga incident and the subsequent alleged stalking by Mr. Jakovics. The Officer cited inconsistencies with information provided by Ms. Balogh as once of the reasons for giving the evidence, including Ms. Balogh's statements, little weight. I read the reference to inconsistencies as related, at least in part, to the Officer's observations in the preceding paragraphs of the decision that, while Ms. Balogh stated she entered the Red Door Shelter when Mr. Jakovics began to stalk her, the letter from Red Door stated she had been living there since May 19, 2011, month before the alleged stalking that drove her to the shelter. It is difficult to characterize this analysis other than as an adverse credibility finding. The Officer doubted the veracity of Ms. Balogh's statement that she had been stalked, because there were inconsistencies between what she said and the documentary evidence.

[30] Similarly, in considering Ms. Balogh's statement of the alleged abuse by Mr. Nagy, the Officer noted that she had provided little information about him or her relationship with him, and little corroborating evidence of the abuse. This can all be characterized as a finding of insufficiency of evidence. However, the Officer's analysis of these allegations was also significantly influenced by the fact that Ms. Balogh had not raised this risk before the RPD.

While not expressed as a credibility finding, I cannot see any other way to characterize that component of the Officer's analysis, i.e. that the Officer doubted the veracity of Ms. Balogh's evidence because she had not raised the allegations of risk presented by Mr. Nagy when presenting her refugee claim.

[31] As such, my conclusion is that the Officer's decision was influenced by both findings of insufficiency of evidence and adverse credibility findings. The Court cannot speculate whether the Officer would have reached a negative decision on the PRRA based on the insufficiency concerns alone. The credibility concerns engage the provisions of s. 113(b) of IRPA and s. 167 of IRPR surrounding the availability of an oral hearing, and the Officer was required to consider the factors in s. 167 and specifically whether the evidence to which the credibility concerns relates is central to the decision on the application for protection. This is particularly the case in the circumstances of this application, where the written submissions in support of Ms. Balogh's application for protection expressly requested that she be given an oral hearing if the Officer had any doubts as to her credibility.

B. *Did the Officer err in assessing state protection?*

[32] A finding of adequate state protection can be determinative in the rejection of a PRRA application. Therefore, notwithstanding my conclusions in connection with the first issue raised by the Applicant, it is necessary to consider the second issue whether the Officer erred in assessing the availability of state protection in Hungary.

[33] The Officer limited the state protection analysis to consideration of the country conditions in Hungary from the perspective of Roma people in general and did not consider whether state protection is available in relation to domestic or gender violence. This approach resulted from the Officer's conclusion that Ms. Balogh had not demonstrated that she was at risk in Hungary at the hands of either Mr. Jakovics or Mr. Nagy. However, having found above that the Officer based that conclusion at least in part on adverse credibility findings, without affording Ms. Balogh an oral hearing or at least considering whether the credibility concerns engaged the s. 167 factors, the Officer's decision cannot be sustained based on the state protection analysis which did not focus on the gender or domestic violence risks.

[34] It is therefore my conclusion that the Officer's decision falls outside the range of possible, acceptable outcomes, defensible in respect of the facts and the law, and is not reasonable. The decision must be returned for redetermination in accordance with these Reasons.

[35] Neither of the parties proposed any question for certification for appeal, and none is stated.

JUDGMENT in IMM-5185-16

THIS COURT'S JUDGMENT is that this application for judicial review is allowed, the Officer's decision is set aside, and the matter is returned for redetermination by another officer in accordance with the Court's Reasons for Judgment. No question is certified for appeal.

"Richard F. Southcott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5185-16
STYLE OF CAUSE:	TIMEA BALOGH v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JUNE 27, 2017
JUDGMENT AND REASONS:	SOUTHCOTT, J.
DATED:	JULY 6, 2017

APPEARANCES:

Wennie Lee	FOR THE APPLICANT
Joselyn Espejo-Clarke	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Wennie Lee Lee & Company Barrister & Solicitor Toronto, Ontario	FOR THE APPLICANT
Nathalie G. Drouin Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT