Federal Court Cour fédérale

Date: 20171201

Docket: IMM-1868-17

Citation: 2017 FC 1082

Ottawa, Ontario, December 1, 2017

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

OXANA SITNIKOVA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Oxana Sitnikova is a Russian citizen who sought refugee protection in Canada based upon the risk that she claimed to face in Russia as a result of her sexual orientation.

Ms. Sitnikova claimed to be at risk from the father of a former lover, who was a powerful police official. Ms. Sitnikova asserts that this individual continues to seek her out in order to harm her because of his anger at Ms. Sitnikova having been sexually involved with his daughter.

[2] The Refugee Protection Division of the Immigration and Refugee Board rejected Ms. Sitnikova's refugee claim, finding that much of her evidence was not credible and that she had not established that she was in fact a lesbian.

[3] Ms. Sitnikova subsequently filed an application for permanent residence on humanitarian and compassionate grounds, as well as an application for a Pre-removal Risk Assessment. Both of these applications were refused. These reasons relate to Ms. Sitnikova's application for judicial review of the negative PRRA decision.

[4] Ms. Sitnikova asserts that the Officer erred in refusing to consider evidence adduced in relation to her PRRA application on the basis that it did not satisfy the test for new evidence. The Officer further erred, Ms. Sitnikova says, in making veiled credibility findings without affording her an oral hearing

[5] For the reasons that follow, I have concluded that the Officer's treatment of the evidence adduced by Ms. Sitnikova in support of her PRRA application was unreasonable, and that the Officer erred in making what were veiled credibility findings without affording Ms. Sitnikova an oral hearing. Consequently, her application for judicial review will be granted.

I. Background

[6] This is the third time that Ms. Sitnikova's PRRA application has been considered. Her application for judicial review of the first refusal of her PRRA application was settled out of court, and the second refusal was quashed on judicial review by Justice Zinn: *Sitnikova v. Canada (Citizenship and Immigration)*, 2016 FC 464, 45 Imm. L.R. (4th) 298 (*Sitnikova* #1).

[7] The only documentary evidence that Ms. Sitnikova provided to the Refugee Protection Division to confirm her sexual orientation was a letter from a woman she claimed to have dated in Canada, a photograph of the couple eating dinner, and a letter from the 519 Church Street Community Centre confirming that Ms. Sitnikova attended an LGBTQ refugee support group. The RPD was not satisfied that this evidence was sufficient to overcome its concerns with respect to her credibility.

[8] Ms. Sitnikova produced a number of additional documents in support of her PRRA application in an effort to establish that she was a lesbian. These included two letters from a different woman with whom Ms. Sitnikova had been involved in a two-year, live-in relationship in Canada, as well as letters from two former girlfriends and a gay male friend, all of whom were still living in Russia. Ms. Sitnikova also provided statements from her mother, sister and neighbours of her mother's in Russia, all of whom confirmed incidents of police harassment, allegedly at the behest of the father of Ms. Sitnikova's former girlfriend.

[9] In addition, Ms. Sitnikova submitted dental x-rays that she says corroborate her claim that her tooth was broken during a beating that she suffered in Russia on account of her sexual orientation. Finally, Ms. Sitnikova provided the Officer with medical evidence relating to her current mental health.

[10] The Officer considering Ms. Sitnikova's PRRA found that some of the evidence adduced by her in an attempt to establish her sexual orientation did not meet the statutory test for new evidence, and that the remaining evidence was insufficient to overcome the negative credibility finding made by the Refugee Protection Division. Consequently, the PRRA application was refused.

II. Standard of Review

[11] The determinative issue in this application involves a finding by the Officer as to whether the evidence that was provided by Ms. Sitnikova in support of her PRRA application was "new evidence", and whether it was materially different to the evidence adduced by Ms. Sitnikova before the Refugee Protection Division. These are factually-intensive questions that are reviewable against the reasonableness standard: *Nwabueze v. Canada (Citizenship and Immigration)*, 2017 FC 323 at para. 7, [2017] F.C.J. No. 354; *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 53, [2008] 1 S.C.R. 190.

[12] In reviewing a decision against the reasonableness standard, the Court must consider the justification, transparency and intelligibility of the decision-making process, and whether the decision falls within a range of possible acceptable outcomes which are defensible in light of the facts and the law: see *Dunsmuir*, above, at para. 47; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para. 59, [2009] 1 S.C.R. 339.

III. Analysis

[13] The Immigration Officer considering Ms. Sitnikova's PRRA application accepted that members of the LGBTQ community are currently at risk of persecution in Russia. The Officer was not, however, satisfied that Ms. Sitnikova was a lesbian.

[14] In coming to this conclusion, the Officer noted that Ms. Sitnikova had provided documents which the Officer characterized as being "*similar or identical* to the documents provided to the RPD" [my emphasis]. According to the Officer, the fact that Ms. Sitnikova had identified a different person as a partner in Canada did not require the Officer to revisit the credibility findings of the RPD.

[15] The Officer determined that some of the evidence produced by Ms. Sitnikova that referred to incidents that occurred prior to the RPD decision could have been available to her at the time of her RPD hearing with reasonable diligence, and therefore should be excluded on the basis that it was not "new evidence" within the meaning of section 113 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. This included evidence from Ms. Sitnikova's former partners in Russia, and her dental records. The Officer also concluded that the portions of letters and emails from Ms. Sitnikova's family and friends that referred to experiences that pre-dated her refugee hearing could have been obtained for her refugee hearing and would therefore not be considered.

[16] These findings were reasonably open to the Officer in light of the record before him and need not be addressed further.

[17] The Officer was, however, prepared to consider evidence that related to incidents of harassment and threats to Ms. Sitnikova's family in Russia that occurred after her refugee hearing as "new evidence". That said, the Officer stated that "little weight" would be given to the email correspondence purportedly from several different individuals describing these incidents on the basis that these documents were not sworn, and "an email address can be created by anyone".

[18] This Court has expressed concerns regarding cases where PRRA Officers have endeavoured to avoid the use of the word "credibility" in the hopes of avoiding a hearing: *Uddin v. Canada (Citizenship and Immigration)*, 2011 FC 1289 at para. 3, [2011] F.C.J. No. 1572 . As Justice Hughes observed in *Uddin*, the intent of the *Immigration and Refugee Protection Act*, its Regulations and the attendant jurisprudence is clear: if credibility is a central issue and is likely

to lead to a result unfavourable to the applicant, a hearing should be held. As Justice Hughes observed, "[i]t is not for a PRRA Officer to finesse these requirements by endeavouring to couch what are, in reality, credibility concerns, in language suggesting lack of evidence or contradictory evidence": *Uddin*, above, at para. 3.

[19] The documents in question in this case were attached to an affidavit sworn by Ms. Sitnikova, who stated under oath that the documents were obtained from the individuals identified as the authors of the emails and letters. She was, therefore, attesting to their authenticity as documents emanating from the sources identified in the documents themselves. In choosing to give the documents "little weight", the Officer was implicitly finding Ms. Sitnikova's sworn statement regarding the provenance of the documents not to be credible. In such circumstances, the Officer was obliged to provide Ms. Sitnikova with an oral hearing: *Uddin*, above; *Rajagopal v. Canada (Citizenship and Immigration)*, 2011 FC 1277, 6 Imm. L.R. (4th) 130.

[20] This Court has, moreover, previously commented on the practice of decision-makers giving "little weight" to documents without making an explicit finding as to their authenticity: see, for example, *Marshall v. Canada (Citizenship and Immigration)*, 2009 FC 622 at paras. 1-3, [2009] F.C.J. No. 799 and *Warsame v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 1202, at para. 10. If a decision-maker is not convinced of the authenticity of a document, then they should say so and give the document no weight whatsoever. Decision-makers should not cast aspersions on the authenticity of a document, and then endeavour to hedge their bets by giving the document "little weight". As Justice Nadon observed in *Warsame*, "[i]t is all or nothing": at para. 10.

[21] That said, it is, of course open to a decision-maker to explain why he or she is not satisfied that a document that has been accepted as genuine should be given much weight: *Marshall*, above at para. 3.

[22] In this case, the Officer explained that little weight would be given to evidence that related to incidents of harassment and threats to Ms. Sitnikova's family in Russia that occurred after her refugee hearing because all of the writers were close family or friends of Ms. Sitnikova's. While the handwritten letter from the three neighbours confirms that they had known Ms. Sitnikova's family for some time, there is nothing in the record to suggest that Ms. Sitnikova's mother's neighbours were close friends of either Ms. Sitnikova or her family.

[23] Further, as I discuss in the companion decision *Sitnikova v. Canada (Citizenship and Immigration)*, 2017 FC 1081, it is clear from the jurisprudence that evidence should not be ignored *solely* because it comes from individuals who are connected to the person concerned.

[24] Ms. Sitnikova also provided the Officer with numerous documents from various individuals in Canada including her former long-term partner that confirmed her involvement in same-sex relationships. She also provided the Officer with numerous photographs of her and her former partner in a variety of locations. Some of these photos were quite intimate in nature.

[25] The Officer described this evidence as "*similar or identical*" to the documents that Ms. Sitnikova had provided to the RPD. This led the Officer to conclude that "[t]he fact that [Ms. Sitnikova] has identified a different person as a partner in Canada did not demonstrate that [the Officer] need[ed] to revisit the findings of the RPD".

[26] I agree with Ms. Sitnikova that while the evidence may have been similar in form, in that it included letters and photographs, it was materially different in substance to the evidence that was before the RPD, and should therefore have been addressed.

[27] Finally, I am also satisfied that the Officer erred by discounting some of the evidence provided by Ms. Sitnikova in support of her PRRA, based on what the evidence did not say, rather than on what it says. For example, the Officer discounted letters describing the police harassment of the applicant's family in Russia because there was "no record of formal complaints against the police officers". However, as Justice Zinn observed in *Sitnikova* #1, "documents that corroborate some aspects of an applicant's story cannot be discounted merely because they do not corroborate other aspects of his story": at para. 23, citing *Belek v Canada (Minister of Citizenship and Immigration)*, 2016 FC 205 at para. 21, [2016] F.C.J. No. 205.

IV. Conclusion

[28] For these reasons, the application for judicial review is allowed. I agree with the parties that the case is fact-specific and does not raise a question that is suitable for certification.

JUDGMENT IN IMM-1868-17

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed and the matter is remitted to a different PRRA Officer for re-determination.

"Anne L. Mactavish"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1868-17
STYLE OF CAUSE:	OXANA SITNIKOVA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 22, 2017
JUDGMENT AND REASONS:	MACTAVISH J.
DATED:	DECEMBER 1, 2017

APPEARANCES:

Meghan Wilson	FOR THE APPLICANT
Hillary Adams	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Jackman Nazami & Associates Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT