Federal Court  Cour fédérale

Date: 20181105

Docket: IMM-349-18

Citation: 2018 FC 1110

Ottawa, Ontario, November 5, 2018

PRESENT: The Honourable Madam Justice Walker

BETWEEN:

DULCE DENNISE GOMEZ SANDOVAL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Dulce Dennise Gomez Sandoval, the Applicant, seeks judicial review of a decision ("Decision") refusing her application for a Pre-Removal Risk Assessment ("PRRA") on the basis that she had not rebutted the presumption of adequate state protection in Mexico. The Decision was made by a senior immigration officer ("PRRA Officer") of Citizenship and Immigration Canada on November 23, 2017. This application is brought pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA").

[2] For the reasons that follow, the application will be allowed. The PRRA Officer failed to consider the Applicant's evidence regarding her ex-husband's familial ties to a Mexican drug cartel in his assessment of the availability and adequacy of state protection for the Applicant. As a result, the Decision is not reasonable.

I. Background

[3] The Applicant is a citizen of Mexico. She first made a claim for refugee protection in Canada in March 2009. At about the same time, her then boyfriend (DR) came to Canada and subsequently filed a claim for refugee protection. In May 2009, the Applicant and DR married in Canada. Their refugee claims were refused on July 23, 2010.

[4] The Applicant and DR had two children in Canada: one son born on January 30, 2010 and a second son born on October 30, 2011. The Applicant, DR and their children were removed to Mexico on May 28, 2012. Shortly after the family's return to Mexico, the Applicant and DR separated when the Applicant found out that DR had proposed marriage to another woman. The couple reconciled but DR became physically and verbally violent towards the Applicant. In August 2013, the Applicant left DR and initiated divorce proceedings in Mexico. The divorce was finalized on January 15, 2015.

[5] Due to her continuing fear of DR, the Applicant fled to the United States with her two children in September 2014 and filed a claim for refugee protection. The Applicant remained in the United States while her refugee claim was being processed. However, her work permit expired in June 2017 and she was no longer able to support herself and her children. The

Applicant entered Canada on July 4, 2017 and has been living with her brother and his family. The Applicant filed her PRRA application on July 24, 2017.

II. Decision under Review

[6] The Decision is dated November 23, 2017. The PRRA Officer concluded that the Applicant had not submitted sufficient evidence to rebut the presumption of state protection in Mexico and refused her PRRA application.

[7] The PRRA Officer briefly recounted the Applicant's immigration history, including her failed refugee claim in 2010, her pending refugee claim in the United States and her return to Canada in July 2017. The PRRA Officer summarized the Applicant's fear of return to Mexico as involving a fear of "her ex-husband who was stalking her and might engage in a custody battle for the children".

[8] The focus of the Decision was the nature and availability of state protection in Mexico for women who suffer abuse at the hands of a domestic partner. The PRRA Officer began his analysis by stating that Mexico maintains a fully functioning court system and had in place numerous resources to assist women in need. He noted the presumption that a state is capable of protecting its citizens absent a complete state breakdown and the onus on an applicant to rebut the presumption with clear and convincing evidence. The PRRA Officer then reviewed documentary evidence which detailed the Mexican penal provisions prohibiting domestic violence and the measures taken by the state to enforce the laws and protect at-risk women.

[9] The PRRA Officer relied on this Court's jurisprudence regarding the issue of state protection to establish a number of principles. He noted that no government is expected to guarantee perfect protection to all of its citizens at all times. The fact that a state is not always successful in protecting its citizens will not justify a claim for protection, particularly when the state is in effective control of its territory, has military, police and civil authorities, and is making serious efforts to protect its citizens (*Canada (Employment and Immigration) v Villafranca*, [1992] FCJ No 1189 (QL) (FCA)). The PRRA Officer also noted that the burden of rebutting the presumption of state protection is directly proportional to the level of democracy in the state in question.

[10] The PRRA Officer did not refer to the Applicant's conduct specifically but clearly found her lack of engagement with the Mexican authorities to be one of the determinative factors in refusing the PRRA application. He stated that the stronger the state institutions within a democracy, such as Mexico, the greater the onus on an applicant to demonstrate that they have exhausted all available avenues of recourse. An applicant cannot rely on their own reluctance to engage the state (citing *Camacho v Canada (Citizenship and Immigration)*, 2007 FC 830 at para 10, relying on *Kim v Canada (Citizenship and Immigration)*, 2005 FC 1126 at para 10).

[11] The PRRA Officer focused on the Applicant's fear of a custody battle in Mexico and concluded:

> While it is clear that the Applicant would prefer to remain in Canada and avoid the family court process that may occur should her ex-husband pursue his potential custodial rights, these are not circumstances that give rise to a need for international protection as contemplated in IRPA.

> My review of the application, the documentary evidence, and country conditions leads me to conclude that the Applicant in this particular case the Applicant [*sic*] faces no more than a mere possibility that she would face persecution, or be in danger of torture, or would face a risk to her life or of cruel and unusual treatment or punishment.

III. Preliminary Issue

[12] The Respondent raised a preliminary issue with the Court regarding additional information and documents submitted by the Applicant in support of her application for judicial review. In her affidavit dated February 16, 2018, the Applicant states she fears returning to Mexico because of DR's connection to a drug cartel. The Respondent argues that the Applicant did not express this fear in her PRRA narrative. The Respondent also contests the Applicant's submission of certain articles that were not in the Certified Tribunal Record ("CTR"). The Respondent submits it is well established that judicial review proceeds on the basis of what was before the decision-maker. Further, the Applicant must demonstrate that any documents not contained in the CTR were in fact before the PRRA Officer (*Ogbuchi v Canada (Citizenship and Immigration)*, 2016 FC 764 at paras 15-16; *El Dor v Canada (Citizenship and Immigration)*, 2015 FC 1406 at para 32).

[13] The issue regarding the additional articles submitted as exhibits to the Applicant's affidavit was resolved at the hearing of this application. The Applicant agreed that my review of the Decision would proceed on the basis of the documents contained in the CTR.

[14] The Respondent has not specified which portions of the Applicant's affidavit should be struck as introducing new evidence. I have reviewed the affidavit and find that the evidence

alleged in the affidavit was in substance before the PRRA Officer, subject to one sentence. In paragraph 2 of the affidavit, the Applicant states: "I fear going back to Mexico because he [DR] and his family are members of the CIDA gang and I fear serious violence." The Applicant did not make this statement to the PRRA Officer. The statement seeks to bolster the Applicant's central argument contesting the Decision and cannot be introduced on judicial review. Therefore, I have not considered the statement in arriving at my decision. I have focused on the content of the Applicant's PRRA application and narrative which were before the PRRA Officer and formed the basis of the Decision.

IV. Issues

[15] The Applicant raises two issues in this application:

1. Did the PRRA Officer err in failing to consider in its state protection analysis that the Applicant's risk profile included fear of DR as an associate of a drug cartel in Mexico?

2. Did the PRRA Officer err in law in failing to conduct an assessment of the Applicant's PRRA application pursuant to section 96 of the IRPA?

V. Standard of Review

[16] The decision of a PRRA officer is reviewed by this Court against the reasonableness standard (*Yang v Canada (Citizenship and Immigration)*, 2018 FC 496 at para 14; *Lakatos v Canada (Citizenship and Immigration)*, 2018 FC 367 at para 13 (*Lakatos*); *Korkmaz v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 1124 at para 9). This includes any state protection analysis as the question of adequate state protection is a question of mixed fact and law (*Lakatos* at para 13; *Canada (Citizenship and Immigration) v Neubauer*, 2015 FC 260 at

para 11). The Court will only interfere if the decision lacks justification, transparency, or intelligibility, and falls outside the range of possible, acceptable outcomes which are defensible on the particular facts of the case and in law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[17] The failure by a PRRA officer to conduct an assessment required pursuant to section 96 or 97 of the IRPA, the second issue raised by the Applicant, is an error of law and is reviewed for correctness (*Thamotharampillai v Canada (Citizenship and Immigration)*, 2016 FC 352 at para 17; *Canada (Citizenship and Immigration) v Flores Carrillo*, 2008 FCA 94 at para 29 (*Flores Carrillo*)).

VI. Analysis

1. *Did the PRRA Officer err in failing to consider in its state protection analysis that the Applicant's risk profile included fear of DR as an associate of a drug cartel in Mexico?*

[18] The Applicant submits that the Decision is unreasonable because the PRRA Officer failed to consider that DR, the agent of persecution, was part of and related to the leader of the Cartel Independiente De Acapulco ("CIDA") drug cartel. As such, DR had access to the resources and influence of the cartel. The PRRA Officer only assessed the risk the Applicant would face as a female victim of domestic violence in Mexico in his determination of the availability and adequacy of state protection for the Applicant. The Applicant argues that the PRRA Officer was required to consider the risk she would face from CIDA and the effect of the influence of the cartel on her ability to secure effective state protection.

[19] The Respondent submits that the Decision was reasonable. The Applicant has not established that her risk from DR's alleged connections to a drug cartel was before the PRRA Officer. The Respondent argues that the Applicant is asking the Court to require the PRRA Officer to consider "implied submissions" based on her PRRA narrative in which she mentioned that DR's sister and brother-in-law were leaders in a drug cartel but did not express a fear or risk based on those facts (*Trabelsi v Canada (Citizenship and Immigration)*, 2016 FC 585 at para 20 (*Trabelsi*)).

[20] The parties agree that the PRRA Officer assessed the Applicant's PRRA application on the basis of her fear of renewed domestic abuse by DR should she return to Mexico. The parties also agree that the PRRA Officer did not consider DR's familial ties and regular engagement with his sister and with the leader of CIDA or the effect of those relationships on the availability and adequacy of state protection for the Applicant. The determinative question in this judicial review application is whether the omission by the PRRA Officer to consider DR's links to CIDA renders the Decision unreasonable. The answer lies in an analysis of the evidence before the PRRA Officer and a determination of whether the Applicant identified her ex-husband's ties to the cartel in a manner sufficient to require the PRRA Officer to consider those ties in his state protection analysis.

[21] The following information was before the PRRA Officer:

- In the PRRA application: In the section entitled "Supporting Evidence", the Applicant listed the following information:

TYPE OF DOCUMENT	HOW DOES THIS SUPPORT YOUR REQUEST FOR PROTECTION?

Former spouse birth certificate	Relationship to criminal members;
Sister of former spouse certificate	Relationship to former spouse;
Daughter of sister's former spouse birth certificate	Relationship to leader of criminal group;
News of criminal section	Proof of criminal activities of ex-husband's family members; and
Violence of police report	Proof of police report for protection

- In the PRRA narrative: The Applicant described DR's relationship with his sister (YM) who was in jail and accused of murder, extortion, drug trafficking and armed robbery. The Applicant and DR visited his sister in jail. In June 2013, the applicant and DR visited YM again for a birthday party for the sister's daughter. At the party, the Applicant met YM's husband (JPC). JPC first identified himself using an alias and only introduced himself properly to the Applicant once the other guests had left. The Applicant stated that DR's mother "told me to keep the secret of [JPC's] identity or that we had any contact with him, she told me he was the leader o[f] a criminal organization named CIDA […] and he was wanted not only by police but by other criminal groups".

- In the PRRA narrative: The Applicant stated that DR began to visit his sister every week and would attend private parties and meetings with JPC. She felt that DR was getting involved in certain activities. Fearing for her children's safety, the Applicant asked DR to stop this behaviour. After he refused, the Applicant left DR in August 2013, before his birthday, because DR planned to take the family to Cuernavaca, Morelos, Mexico to one of JPC's properties.

- In the PRRA Narrative: The Applicant explained that DR continued his abuse. Eventually, the Applicant contacted a lawyer who assisted her in preparing a police report alleging domestic abuse by DR. The Applicant described her experience in attempting to file the police report as follow:

> The person who was taking my report, [MP], told me she knew this family and that they were very dangerous people, she said she used to be their neighbor and she advise me to not continue with the report, after talking to her and my lawyer for a few minutes, we found more safe to just not

> mention [YM] and [JPC]'s names and/or family relation to [DR].

- News article (from El Heraldo, dated March 29, 2015) titled *"Cae chief of hitmen in Acapulco, belonging to CIDA*": The article references the detention of three individuals linked to CIDA and states:

  > One of the detainees is identified as [PN], "El Pavel", 23 years old, cell chief of hit men. To whom the federal government holds responsible for various executions of members of antagonistic groups, as well as for the sale and distribution of drugs, land collection and extortion. In addition, for the government, this person provided protection to [JPC], "El Pilar", chief of hired killers and of the Independent Cartel in Acapulco

- News article (from Milenio.com, dated June 1, 2014), titled "*In one week, 15 dead in Guerrero prisons*": The article details an attack on recently transferred prisoners in an Acapulco prison and makes reference to DR's sister, YM, as one of the transferred prisoners.

[22] I agree with the Respondent that the Applicant did not specifically state in her evidence before the PRRA Officer that DR's ties to CIDA added to her fears of returning to Mexico or diminished her confidence in the availability of state protection. Nevertheless, I find that the Decision was not reasonable as the PRRA Officer failed to consider any of the evidence cited above or to question why that evidence was before him. As a result, he did not fully assess all material aspects of the Applicant's risk profile against the adequacy of state protection for her in Mexico. I note that my finding does not establish whether or not the Applicant in fact satisfied her burden of adducing sufficient relevant, reliable and convincing evidence that DR's ties to CIDA would defeat the adequacy of the state protection available to her (*Flores Carrillo* at para 30). Such a determination must be made by a PRRA officer. In so doing, the officer must fully and transparently review the evidence before him or her. In this case, the PRRA Officer did

not do so, rendering the Decision unintelligible and opaque. The Applicant is left to wonder why the PRRA Officer ignored this facet of her evidence.

[23] Although the Applicant's PRRA narrative did not contain a statement that she feared her ex-husband's links to the drug cartel if she returned to Mexico, there is no other apparent reason for her to have provided this evidence and information. The birth certificates of YM and DR's niece were submitted specifically to show DR's familial relationship to his jailed sister and to the leader of CIDA. The Applicant referred to her concerns regarding DR's meetings with YM and JPC and her fear for the safety of her children. The articles before the PRRA Officer focused on YM and JPC as the leader of CIDA. The PRRA Officer made no mention of this evidence in the Decision.

[24] The PRRA Officer stated that the Applicant cannot rebut the presumption of state protection by asserting only a subjective reluctance to engage with the state. She had to approach the state to test the adequacy of available protection. The PRRA Officer is correct in this regard. However, he ignored the Applicant's evidence that she did engage with the state in filing a police report alleging domestic abuse by DR. When she did so, she was counselled by the police to remove all references to DR's family as they were "very dangerous people". The PRRA Officer failed to consider the Applicant's experience with the police and the concern expressed by the police officer of a mere mention of known CIDA members in his state protection analysis.

[25] A decision is unreasonable if a decision-maker "fails to consider the evidence before it and to properly evaluate the risk that might be faced by the claimant" (*Echeverria Olivares v*

Canada (Citizenship and Immigration), 2012 FC 1010 at para 6). In *Herrera Andrade v Canada (Citizenship and Immigration)*, 2012 FC 1490, Justice Gleason, as she then was, explained the failure to properly consider an applicant's actual profile at para 20:

> In the past year, this Court has overturned RPD decisions on state protection in Colombia only where the RPD was shown to have failed to properly assess the background or "profile" of the claimant and the claimant fell into one of the groups that the documentary evidence indicates may be at risk in Colombia […] These cases turn on the failure of the Board to consider the heart of the claims advanced by the claimants and to assess their profiles against the documentary evidence, which indicated that they might be at risk. Simply put, in these cases, the Board failed to conduct the analysis it was required to undertake.

[26] In failing to assess the Applicant's profile as an individual whose ex-husband has ties to a drug cartel against the country documentation for Mexico, the PRRA Officer failed to conduct the analysis contemplated by Justice Gleason. At a minimum, the evidence submitted by the Applicant in her PRRA application raised the question of a drug cartel connection and influence. In order to meet the requirements of transparency and intelligibility, the PRRA Officer was required to consider the evidence and provide an analysis of the effect of the evidence on the availability of adequate state protection for the Applicant.

[27] The Applicant's case can be distinguished from *Trabelsi*, where a stay of removal was before the Court and the underlying application for judicial review took issue with a decision refusing a PRRA application. Justice Roy found that the allegations made by the applicant in the case were presented as an exhibit to the applicant's affidavit, which he did not sign and which was not certified. Therefore, the alleged submissions were not before the PRRA officer and the PRRA officer was not required to consider "implied submissions" which could have been found

in the file (*Trabelsi* at para 20). In contrast, in the present case, the Applicant referred to her ex-husband's links to CIDA in her PRRA narrative and provided supporting documentary evidence in her PRRA application.

2. *Did the PRRA Officer err in law in failing to conduct an assessment of the Applicant's PRRA application pursuant to section 96 of the IRPA?*

[28] The failure by the PRRA Officer to assess the Applicant's cumulative profile is determinative in this application. However, I will briefly address the Applicant's submissions regarding this second issue. The Applicant argues that the PRRA Officer failed to conduct a section 96 assessment. She submits that her fear of gendered violence from her ex-husband has a nexus to a Convention ground and the Officer had an obligation to consider protection under both sections 96 and 97 of the IRPA.

[29] The Respondent submits that the PRRA Officer's finding of state protection was determinative and that separate analyses of the Applicant's case under sections 96 and 97 based on different standards of proof are not required. I agree with the Respondent's submission. The Respondent references jurisprudence of this Court which establishes that, where a reasonable state protection finding is made, the PRRA officer does not need to address any other issue raised (*Flores Carrillo* at para 38; *Rosas Maldonado v Canada (Citizenship and Immigration)*, 2011 FC 1183 at para 19; *Lakatos* at para 13). In other words, the state protection finding is fatal to an applicant's case. The fact that I have found the PRRA Officer's conclusion on adequate state protection unreasonable does not change the analysis of this second issue. On redetermination of the Applicant's case, the PRRA officer in question will be required to assess

the Applicant's risk profile taking into account DR's links to CIDA and any influence those links may have on the adequacy or effectiveness for the Applicant of the available state protection. The PRRA officer will not be required to conduct distinct state protection analyses under sections 96 and 97. In *Sran v Canada (Citizenship and Immigration*), 2007 FC 145 at paragraphs 11 and 13, Justice Noël explained the nature and effect of a finding of adequate state protection as follows:

> [11] It is well-established in the jurisprudence of this Court that where state protection is available, a claim for refugee protection cannot succeed. In other words, this Court has held repeatedly that the availability of state protection is determinative in refugee protection cases, and accordingly, if state protection is found to be available it is not necessary to address the other issues brought forward by a refugee claimant (see *Shimokawa v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 445 at para. 16; *Judge v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1089 at paras. 4-9; *Muszynski v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1075 at para. 6; *Danquah v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 832 at para. 12).
>
> [13] Summarily, an individual can only benefit from refugee protection where they either demonstrate that their country of origin is unwilling or unable to protect them or that attempting to seek protection from their country of origin is useless or would aggravate their situation; neither was demonstrated by the Applicant in the case at hand. As such, the Applicant cannot qualify as person in need of protection pursuant to section 97 of IRPA nor a Convention Refugee even had the Applicant established that there was a nexus between his claim and one of the five grounds for persecution listed in the definition of Convention refugee at section 96 of IRPA.

VII. Conclusion

[30] The PRRA Officer failed to consider the evidence placed before him by the Applicant regarding DR and his familial links to CIDA. The evidence added a distinct factor to the Applicant's risk profile and was material to the question of whether the state protection generally

available to victims of domestic abuse in Mexico would be adequate and effective in the Applicant's case. Therefore, the Decision lacks transparency and intelligibility and was not reasonable. It is not possible to determine whether the result fell within the possible and acceptable outcomes for the case as it appears the PRRA Officer simply did not consider this evidence. This application for judicial review will be allowed and the matter remitted for redetermination by a different PRRA officer.

[31] No question for certification was proposed by the parties and none arises in this case.

JUDGMENT in IMM-349-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. The decision of the Pre-Removal Risk Assessment Officer is set aside and the matter is remitted for redetermination by a different officer.

3. No question of general importance is certified.

"Elizabeth Walker"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Aadil Mangalji	FOR THE APPLICANT
Leila Jawando	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Long Mangalji LLP Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT