Federal Court  Cour fédérale

Date: 20190515

Docket: IMM-4855-18

Citation: 2019 FC 684

Ottawa, Ontario, May 15, 2019

PRESENT: Mr. Justice Favel

BETWEEN:

OKIEMUTE JANE JOE-EDEBE

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [IRPA] of a negative Pre-Removal Risk Assessment [PRRA], dated August 27, 2018, conducted by a Senior Immigration Officer [Officer] with Citizenship and Canada pursuant to section 112 of the IRPA. For the following reasons, the application for judicial review is allowed.

II. Background

[2] The Applicant, aged 40, is a citizen of Nigeria. She came to Canada from the United States of America [USA] in May of 2017 and claimed asylum due to her fear of persecution in Nigeria on the basis of her sexual orientation. The Applicant claims to have been a victim of domestic violence at the hands of her husband who found out about the Applicant's bisexuality in 2010. The Applicant states that she was forced into a marriage with her husband on November 25, 2006.

[3] It is submitted that neither the Applicant's family nor her in-laws accept her homosexuality. The Applicant was with a second female partner in September of 2016 while still being married, which made her previous female partner envious enough to reveal the Applicant's bisexuality to her entire family. The Applicant had to flee Nigeria without anyone's knowledge because her family wanted to punish her for what is seen as a forbidden act in her country. The Refugee Protection Division [RPD] of the Immigration and Refugee Board found the Applicant's claim to be ineligible because of the Safe Third Country Agreement. Although she was excluded from Canada for one year, the Applicant returned to Canada illegally in October that same year and was once again found ineligible to make a refugee claim. A deportation order was issued against her on October 28, 2017. The Applicant's removal to Nigeria was then scheduled for October 4, 2018, however, she was granted a stay of removal by this Court, pending the consideration and final determination of this application. The Applicant filed for a PRRA application on November 21, 2017.

III. Decision under Review

[4] On August 27, 2018, the Applicant's PRRA application was rejected. According to the Officer, the Applicant would not be subjected to risk of torture, a risk of persecution, or face a risk to life or risk of cruel and unusual treatment or punishment if returned to Nigeria.

[5] Although the Officer noted that the Applicant's statement in support of her PRRA application was not in the form of an affidavit, he nonetheless took it into consideration. Counsel for the Applicant presented photos of the Applicant's bruised face after an alleged beating by her husband. However, pursuant to section 161(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR], the Officer chose to disregard such evidence, explaining that only written submissions are to be considered in the context of a PRRA. The Applicant next submitted three letters of attestation regarding the Applicant's sexual orientation. After considering these letters, the Officer gave them "minimal weight because they are undated, and because they have not been signed and witnessed as sworn documents by any authority". The Officer also noted that the three letters in question had some similarities, namely because of their same font, capital letter headings at the top of the letters, as well as the authors' name in bold letters. There was also no indication or evidence to corroborate that these letters originated in Nigeria.

[6] The Officer found that there was insufficient evidence provided by the Applicant (such as letters from other women in Nigeria) to corroborate the assertion that she was in same sex relationships since she was in secondary school. The Officer also found that there was

insufficient objective evidence before him to determine that the Applicant sought medical treatment in 2010 following the injuries caused by her husband's beating towards her. Therefore, the Officer was not convinced that the Applicant's husband would continue harming his wife if she were to return to Nigeria.

[7] The Officer also found that a hearing was not required under subsection 113(b) of the IRPA. None of the prescribed factors of section 167 of the IRPR had been met in the Applicant's case, particularly because there was no evidence that raised a serious issue of the Applicant's credibility.

[8] After reviewing the documentary evidence before him, the Officer was of the view that there was insufficient objective evidence before him "to indicate that the applicant's husband, her in-laws and their family, the Nigerian authorities or anyone else in Nigeria would have an ongoing interest in the applicant on account of her sexual orientation". There was also insufficient evidence to demonstrate the Applicant's involvement in the LGBTQ community or her same sex relationships in Canada. After reviewing the entire evidence before him, the Officer found that the Applicant is not described in section 96 of the IRPA or that she faces a personalized, forward looking risk in Nigeria, as per section 97 of the IRPA.

IV. Issues and Standard of Review

[9] According to the Applicant, the issues to be determined in the present matter are the following:

1. Was the Officer's decision reasonable?

2. Did the Officer breach procedural fairness by not holding an oral hearing?

[10] The applicable standard of review in reviewing a PRRA officer's findings of fact, and consideration of evidence, is that of reasonableness. A PRRA decision involves questions of fact or mixed fact and law (*Lakatos v Canada (Citizenship and Immigration)*, 2018 FC 367 at para 13). Therefore, the Court shall only intervene if the decision falls outside "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]). As for the second issue, the standard of review applicable to whether an oral hearing is required in the context of a PRRA application continues to take two different paths. In some cases, the Court takes the position that the correctness standard ought to be applied as the issue raised involves a question of procedural fairness. In other cases, however, the Court applies the reasonableness standard as the decision to grant or not to grant an oral hearing is factual and contextual and falls under the PRRA officer's discretion (*Huang v Canada (Citizenship and Immigration)*, 2018 FC 940 at para 12). In any case, the Court will not address this issue any further as it is convinced that the Officer committed a reviewable error in refusing to look into the evidence submitted by the Applicant. This error, in and of itself, justifies the intervention of this Court as the PRRA Officer rendered an unreasonable decision.

V. Analysis

[11] The application for judicial review is allowed.

[12] The Court finds that the Officer committed a reviewable error in refusing to consider the photos submitted by the Applicant in support of her PRRA application. In her written submissions for the assessment of her PRRA application, the Applicant clearly stated that she is a victim of domestic violence at the hands of her husband. The Applicant also indicated that she is providing photos of her bruised face after an alleged beating. In his reasons, the Officer gave the following explanation to justify his decision not to look into the evidence that was clearly before him:

> - counsel on behalf of the applicant has provided some photos, which counsel states are pictures of the applicant's bruised face after a beating
>
> - however, it should be noted that pursuant to section 161(1) of the Immigration and Refugee Protection Regulations (IRPR), consideration is only given to evidence that is submitted in written format
>
> - therefore, I do not give consideration to the photos that have been submitted by counsel
>
> - nonetheless I do give consideration to text, narratives or descriptive information (where it has been submitted) in regards to the photos
>
> (Certified Tribunal Record, the PRRA Decision, p 7)

[13] Both parties seem to have a different understanding of the use of words "written submissions" under section 161(1) of the IRPA which reads:

> Subject to section 166, a person applying for protection may make written submissions in support of their application and for that purpose may be assisted, at their own expense, by a barrister or solicitor or other counsel.

[14] In a PRRA application, it is trite law that the Applicant bears the burden of proof (*Ferguson v Canada (Citizenship and Immigration)*, 2008 FC 1067 at para 21). The Officer also acknowledged this in his reasons, stating that "in a PRRA application, the burden of proof is on the applicant claiming protection", however, he chose to disregard relevant evidence provided by the Applicant in support of her allegation of domestic violence which can also be read in her personal statement evidence.

[15] The Officer was required to consider the entire evidence on file and to assess the evidence's weight before him prior to finding that there was insufficient evidence to conclude that the Applicant's husband would continue to harm the Applicant if she were removed to Nigeria.

> [23] An applicant is permitted to make submissions in support of his or her PRRA application in accordance with section 161 of the Regulations. In making submissions, the applicant must identify the evidence relied on in support of his or her allegations and the evidence must meet the requirements of subsection 113(a) of the IRPA. Subsection 113(a) restricts the evidence an applicant may submit to new evidence that arose after the rejection of the applicant's refugee claim or evidence that was not reasonably available to the applicant at the time of the refugee proceedings. [Emphasis added by the Court].
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> (*Perampalam v Canada (Citizenship and Immigration)*, 2018 FC 909 at para 23)

[16] The Applicant was found ineligible, twice, to present a refugee claim, therefore, she was not heard before the RPD. It was the first time that the Applicant was provided an opportunity to present her case in the context of a PRRA application to the PRRA Officer. It is the applicant's responsibility to ensure that their application is complete with all the relevant and necessary evidence that would support any written submissions for the assessment of their PRRA

application. To ignore evidence simply because it comes in the form of a photo and not in "written format" is an error that requires this Court's intervention (See for example *Gari v Canada (Citizenship and Immigration)*, 2018 FC 660 at para 14; *Chen v Canada (Citizenship and Immigration)*, 2009 FC 379 at para 41; *Win v Canada (Citizenship and Immigration)*, 2008 FC 398 at para 15; *Osagie v Canada (Solicitor General)*, 2008 FC 398 at para 4).

[17] Finally, when determining whether an oral hearing is required under section 167(1) of the IRPR, the PRRA officer will consider all of the "evidence" that is put before them in support of the applicant's PRRA application. In the case at bar, it is unclear whether the Officer also chose to ignore the photos in question submitted by the Applicant in finding that an oral hearing was not required, based on all the evidence before him.

[18] For these reasons, the Court finds that that the Officer's decision is unreasonable as it does not fall within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para 47).

VI. Conclusion

[19] The application for judicial review is allowed. No question of general importance is certified.

JUDGMENT in IMM-4855-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed and the matter is referred to a differently constituted panel for re-determination;
2. There is no question for certification; and
3. There is no order as to costs.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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