Federal Court  Cour fédérale

Date: 20240208

Dockets: IMM-4930-21
IMM-4928-21

Citation: 2024 FC 209

Ottawa, Ontario, February 8, 2024

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

FLORENSA KUKA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Florensa Kuka [Applicant], a citizen of Albania, applies for judicial review of two decisions, both dated February 26, 2021, made by the same senior immigration officer [Officer]. In a Pre-Removal Risk Assessment [PRRA] decision [IMM-4928-21] the Officer found that the Applicant would not be subject to risk if returned to Albania. In the second decision [IMM-4930-21], the Officer refused the Applicant's application for permanent residence on humanitarian and

compassionate [H&C] grounds, as she would not face hardship if she relocated to another part of Albania. The applications were heard together.

[2] The parties raise several issues for determination and this Judgment and Reasons will address the issues that, in my view, are dispositive of these applications.

[3] Concerning the PRRA decision, it is unreasonable due to contradictory findings with aspects of the H&C decision. I also find that the Officer breached the Applicant's right to procedural fairness by failing to provide notice of an internal flight alternative [IFA].

[4] Concerning the H&C decision, the Officer also breached the Applicant's right to procedural fairness by failing to provide notice of an IFA. This decision is also unreasonable due to the relocation analysis.

[5] The applications for judicial review in both the PRRA and the H&C decisions are granted.

II. Background

[6] The Applicant arrived in Canada in July 2014 after she broke off an arranged marriage. The family of the man she was arranged to marry declared a blood feud against her and her family. The Applicant asserts that her brother coerced her into the engagement and that her brother and ex-fiancé physically abused her because she refused to marry. In order to leave Albania, she applied for Canadian study permits in September 2013 and February 2014, both of which were refused for financial reasons.

[7] While engaged, the Applicant began seeing another man in Albania and became pregnant. When confronted about the pregnancy by her brother, she ran away to stay with a friend. While at her friend's house, her ex-fiancé called and demanded she return home while threatening her family. She either miscarried or terminated the pregnancy shortly before she decided to flee to Canada.

[8] In May 2014, the Applicant made her first attempt to enter Canada. While hiding from her family, she obtained an Italian passport and driver's license that she used to travel to Italy. Italian authorities detained and questioned her for using fraudulent documents and confiscated her documents but did not remove her to Albania. In the course of applying for permanent residency, she later learned she faced criminal charges in Italy because of this incident. She pled guilty through an Italian lawyer and she was given a conditional suspended sentence.

[9] Around July 2014, the Applicant obtained another Italian passport and driver's license and travelled to Canada through Spain. At the Canadian port of entry, she used the Italian passport and told the Canada Border Services Agency [CBSA] she was entering as a visitor. The passport was subject to a lost or stolen lookout. She then admitted she had used fraudulent documents to claim asylum in Canada. She filed a refugee claim in July 2014.

[10] The Applicant told the CBSA she met a man, Mr. Kurbini, a Canadian permanent resident or citizen, the week before her first attempt to enter Canada. She claimed she had no contact with Mr. Kurbini after leaving Albania but appeared to be travelling with him when she was detained in Italy in May 2014. In September 2014, she married Mr. Kurbini in Canada and applied for

permanent residence through the spousal sponsorship program. The Applicant then withdrew her refugee claim.

[11] In March 2019, she applied for permanent residence on H&C grounds. In August 2019, she applied for a PRRA.

[12] In April 2020, she left her husband and retained new counsel, who made further submissions in her H&C application. The Officer rejected the Applicant's PRRA and H&C applications in February 2021.

III. The Decisions

A. *PRRA*

[13] As noted above, when the Applicant applied for permanent residence via a spousal sponsorship, she withdrew her refugee claim. Therefore, the Immigration and Refugee Board of Canada [IRB] did not hear the alleged risk that she faced in Albania from her family and her ex-fiancé's family under section 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The Officer noted this in the PRRA decision. The Applicant also requested an oral hearing pursuant to section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR] if any credibility concerns arose.

[14] The Officer summarized the Applicant's claim as set out in her Basis of Claim form, the CBSA interview notes, and national documentation regarding blood feuds and domestic violence

in Albania. The PRRA was rejected for insufficient evidence demonstrating her risk in Albania. The Officer found that the Applicant did not establish her claims regarding the blood feud, domestic violence, and the pregnancy due to the lack of corroborating statements from her friend or her former partner in Albania, as well as the absence of medical documents about the miscarriage.

[15] The Officer concluded that Albanian authorities are able to help victims of blood feuds. The Officer conducted additional research regarding the protection of domestic violence survivors, but felt it was unnecessary to make a finding given the insufficient evidence that the Applicant had suffered domestic violence.

[16] The Officer then concluded that internal relocation was possible because there was no evidence that the Applicant's ex-fiancé and family had any reach or influence outside of the area where she lived. The Officer did not know where the Applicant's friend resided and assumed it was in the same area as the Applicant's alleged persecutors.

[17] The Officer also commented on the fact that the Applicant has not resumed her claim for refugee protection or filed a new claim.

[18] Finally, the Officer believed it was unnecessary to have an oral hearing per section 167 of the IRPR because the Applicant had not demonstrated any risk in Albania.

B. *H&C*

[19] The Officer found that the Applicant's employment, self-sufficiency, and letters of support demonstrated her establishment in Canada. However, the Officer weighed the use of fraudulent documents to enter Canada heavily against the Applicant, especially since she had previously been detained in Italy and, did not declare the false documents to the CBSA until she was questioned about them.

[20] The Officer considered a psychologist's report, which assessed her risk for future criminal behaviour. According to the Officer, however, the report outlines mental health concerns of the Applicant and it was performed for the purpose of adding to her spousal sponsorship application. It was given little weight because it did not show the Applicant sought psychological help other than meeting with a counselor a couple of times and the report was based on a set of appointments over a period of four days.

[21] In the analysis of the hardship, the Officer acknowledged the Applicant's fear of her own family and her ex-fiancé and his family, domestic violence is an "ongoing problem" in Albania, and victims often face great difficulty in trying to obtain justice. The Officer found that "this also weighs positively for [the Applicant] with regards to her fear of returning to the country."

[22] However, the Officer concluded that relocation in Albania is an option, given the lack of evidence that her ex-fiancé's family or her family have any influence or reach outside of her hometown. The decision suggests the Applicant can relocate to another area of the country, such

as southern Albania, without hardships because of her capability in finding employment and travelling alone.

IV. Issues and Standard of Review

[23] As stated in the Overview, both applications for judicial review are granted based on this Court's consideration of determinative issues. The determinative issues in the PRRA decision are best characterized as:

(1) Is the decision unreasonable due to the contradictory findings made in the H&C decision?

(2) Did the Officer breach procedural fairness by failing to provide notice of an IFA?

[24] The determinative issue for the H&C decision is best characterized as whether the Officer breached procedural fairness by failing to provide notice of an IFA or was the internal relocation finding unreasonable.

[25] After considering the parties' submissions on these determinative issues, it is my view that this case does not engage one of the exceptions set out by *Canada (Minister of Citizenship and Immigration)* v *Vavilov*, 2019 SCC 65 [*Vavilov*]. Therefore, the presumption of reasonableness is not rebutted (at paras 16-17). A reasonableness review is a robust form of review that requires the Court to consider both the outcome of the decision and the underlying rationale to assess whether the decision, as a whole, bears the hallmarks of reasonableness— justification, transparency and intelligibility—and whether it is justified in relation to the relevant factual and

legal constraints that bear on the decision (*Vavilov* at paras 14-15, 99). A decision will be unreasonable where there are shortcomings in the decision that are sufficiently central or significant (*Vavilov* at para 100). This may include instances where the reasons exhibit clear logical fallacies, or where decision-maker has fully misapprehended or failed to account for the evidence before it (*Vavilov* at paras 104, 126). If the reasons of the decision-maker allow a reviewing Court to understand why the decision was made and determine whether the decision falls within a range of acceptable outcomes, the decision will be reasonable (*Vavilov* at para 85-86). The party challenging the decision bears the burden of showing that the decision was unreasonable (*Vavilov* at para 100).

[26] On the other hand, issues of procedural fairness involve a standard of review akin to correctness (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*CP Railway*]; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43). The Court has no margin of appreciation or deference on questions of procedural fairness. Rather, when evaluating whether there has been a breach of procedural fairness, a reviewing Court must determine if the procedure followed by the decision-maker was fair, having regard to all the circumstances (*CP Railway* at para 54; *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC) at 837-841 [*Baker*]).

V. Analysis – PRRA refusal [IMM-4928-21]

A. *Is the decision unreasonable due to the contradictory findings made in the H&C decision?*

(1) Applicant

[27] Any findings made when considering a PRRA and H&C must be made "based on knowledge of the complete record" (*Abdinur v Canada (Citizenship and Immigration)*, 2020 FC 880 at para 13). The Officer's conclusion that no risk had been established is unreasonable in light of the contrary finding in the H&C decision. In the H&C decision, the Officer granted positive weight to the evidence of the Applicant's fear of her family because of domestic violence and the alleged blood feud, which was inconsistent with the PRRA conclusions (*Denis v Canada (Citizenship and Immigration)*, 2015 FC 65 at para 49).

[28] The intelligibility of the PRRA decision is also challenged because of the Officer's comment that the Applicant had not resumed or initiated a new refugee claim. This comment demonstrates a misapprehension of the refugee scheme, which bars withdrawn refugee claimants from reapplying for asylum (IRPA, s 101(c)). It also indicates the Officer's reasoning may have relied on this fact to impugn the Applicant's fear.

(2) Respondent

[29] The Officer was making an alternative finding when it granted positive weight to the Applicant's fears in the H&C analysis by determining that even if the Applicant's fears were true, there were still insufficient H&C factors present to grant the application. This was not contradictory with the conclusions in the PRRA reasons.

[30] Further, the Officer did not make an adverse inference in making the comment about reinstating the refugee claim. The Officer simply noted that the Applicant had withdrawn her refugee claim and cannot reinstate it now.

(3) Analysis

[31] I agree that the contradictory findings in the H&C decision and in the PRRA decision are not transparent or coherent, suggesting that the PRRA findings are unreasonable. In this case, it is not clear on what basis the Officer gave positive weight to the hardship claimed by the Applicant in the H&C context while simultaneously concluding that she had not provided sufficient evidence of the same past or future hardship in the PRRA application. The Officer's reasons suggest the facts of the Applicant's experiences were established in one setting, but not in the other, without any explanation.

[32] I do not agree with the Respondent that the Officer made an alternative analysis. Rather, the words of the decision give positive weight to the alleged hardship in the H&C decision without qualification.

[33] I agree that the comment regarding the withdrawn refugee claim also signals a misapprehension of the refugee protection scheme, which contributes to the PRRA decision being unreasonable.

B. *Did the Officer breach procedural fairness by failing to provide notice of an IFA?*

(1) Applicant

[34] The Officer relied on an unidentified IFA, which was unfair and unreasonable. Where there is no IRB hearing and reasons to rely on, the PRRA officer must provide notice to the applicant (*Moreno v Canada (Citizenship and Immigration)*, 2015 FC 1224 at paras 17-18) The Officer made an IFA finding—using the language of internal relocation in the country—that was speculative (*Haastrup v. Canada (Citizenship and Immigration)*, 2020 FC 141 at para 27, citing *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, 1993 CanLII 3011 (FCA) [*Thirunavukkarasu*]). The Officer also failed to name a specific location for consideration (*Manzoor-Ul-Haq v Canada (Citizenship and Immigration)*, 2020 FC 1077 at para 31; *Utoh v Canada (Citizenship and Immigration)*, 2012 FC 399 at para 20).

[35] In addition, the Officer failed to assess the second branch of the IFA test, which would make the decision unreasonable.

(2) Respondent

[36] The Officer's internal relocation finding was not speculative, as the Officer based it on the documentary evidence that victims of blood feuds can relocate in Albania and the Applicant's suggestion that her ex-fiancé was unable to locate her while she was hiding with her friend. PRRA officers are under no duty to give notice that they are considering the question of internal relocation (*Palaguru v Canada (Citizenship and Immigration)*, 2009 FC 371 at paras 21-23 [*Palaguru*]). The Applicant raised the issue of relocation when she stated Albania was small and that she would be unable to hide. The PRRA guidelines available online indicate that

applications may be denied because of an IFA. The Applicant knew or ought to have known that the Officer would consider internal relocation because the issue arises from her own story and she raised the issue in her affidavit by stating that Albania is a country with a small population so she would be unable to hide.

[37] Even if the failure to give notice is a technical breach of fairness, the Applicant has not explained why relocation is impossible, and the outcome would be the same.

[38] Further, the Officer is not required to provide reasons about the second branch of the IFA test, because the Applicant had already relocated to her friend's house in the past, demonstrating the reasonableness of internal relocation.

(3) Conclusion

[39] An officer must apply the two pronged test to assess whether a viable IFA exists: the Board must be satisfied on a balance of probabilities that there is no serious possibility of an applicant being persecuted in the proposed IFA; and the conditions in the part of the country proposed as an IFA must be such that it would not be unreasonable for an applicant to seek there upon consideration of all the circumstances (*Rasaratnam v Canada (Minister of Employment and Immigration)*, 1991 CanLII 13517 (FCA); *Thirunavukkarasu)*.

[40] In both the PRRA and H&C decisions, the Officer did not directly refer to an IFA nor specify a location. Rather, the Officer used the term internal relocation and, in my view, the Officer did not apply either part of the IFA test.

[41] The IFA determination is procedurally unfair because the Officer did not give the Applicant an opportunity to respond to the Officer's suggestion that relocation was possible, or that she was safe while staying with her friend in Albania in 2014. The Officer also failed to identify the location being considered. Unlike PRRAs that follow an IRB decision, as occurred in *Palaguru*, in the present matter, the Officer had no IFA findings to defer to in the assessment since the Applicant had withdrawn her refugee claim. Consequently, the Applicant was given no opportunity to make submissions about the reasonableness of relocation in Albania.

[42] The Officer relied on objective documentary evidence and the Applicant's affidavit to conclude that her alleged persecutors had no influence outside of their area of residence. It is unclear whether the Officer knew where the Applicant and her ex-fiancé's families live in Albania. The conclusion that relocation was reasonable because the Applicant did not provide sufficient evidence of her ex-fiancé's family connections or influence across Albania is both unreasonable and procedurally unfair.

VI. Analysis – H&C refusal [IMM-4930-21]

A. *Did the Officer breach procedural fairness by failing to provide notice of an IFA or was the relocation finding unreasonable?*

(1) Applicant

[43] The Officer's conclusion that the Applicant could relocate to southern Albania was both unreasonable and unfair. The finding is unfair because the Applicant was not advised that internal relocation would be considered to mitigate hardship of domestic violence (*Baco v*

Canada (Citizenship and Immigration), 2017 FC 694 at para 22 [*Baco*]). The Applicant was not given a meaningful opportunity to participate in the process (*Baker* at para 30).

[44] Further, the finding is unreasonable because it is speculative and has no basis in the record or misapprehends key facts (*Vavilov* at para 128). In finding that the Applicant could transfer her skills to Albania, the Applicant argues the Officer failed to consider submissions about the hardship faced by single divorced women in finding employment. The finding was made without regard to the evidence (*Zhong v Canada (Citizenship and Immigration)*, 2017 FC 223 at para 25).

[45] The determination that relocation can mitigate hardship is also unreasonable, as the Officer failed to consider compassionate factors in the broader sense. The Officer incorrectly used the hardship lens, which the Supreme Court of Canada ruled was too narrow in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 (*Marshall v Canada (Citizenship and Immigration)*, 2017 FC 72 at paras 26, 33, 35-37; *Orbizo v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 203 at para 31; *Damte v Canada (Citizenship and Immigration)*, 2011 FC 1212 at para 34; *Dowers v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 593 at para 7). The Officer did not undertake a holistic and empathetic analysis of the Applicant's application when it dismissed the claim based on the possibility of relocation.

(2) Respondent

[46] The IFA finding was not speculative because the Officer based it on the country documentation about blood feud victims in Albania, as well as the Applicant's narrative that suggests her ex-fiancé could not locate her at her friend's house.

[47] No notice was required because the Applicant's sworn statement commented on the size and population of Albania and the ability to avoid her family or her ex-fiancé's. Further, the Applicant has not explained why she could not live in Albania.

(3) Conclusion

[48] The Applicant's right to procedural fairness was breached by the lack of identification of a viable IFA in Albania. In *Baco*, Justice Boswell held that fairness requires notice of an IFA or an opportunity to respond in an H&C (at para 21). This was not done in the present matter. Had the Officer given the Applicant an opportunity to provide oral or written submissions in the PRRA, the internal relocation analysis in the H&C may not have triggered further procedural fairness requirements. However, because the ultimate refusal depended greatly on the relocation finding, the Officer's failure to notify the Applicant is unfair.

[49] The analysis is also unreasonable because it imports an analysis applied in the refugee context into an H&C process intended to be much broader, given the different interests at stake. The Officer considered the same factors in both decisions: the political influence of the Applicant's ex-fiancé and his family and their reach and power in Albania. The Officer then considered her ability to support herself in southern Albania, without considering any of the objective evidence and submissions on country conditions for women in her circumstances. Her ability to avoid threats and violence is relevant in an analysis of unusual and underserved or disproportionate hardship. However, the Officer did not inquire into her personal circumstances, such as her level of education and work experience, and the lack of social supports such as family and friends, compared to the networks she has built in Canada over the last eight years.

As the Officer's analysis appears to adopt the IFA test of serious risk and unreasonableness, it fails to respond to the equitable purpose of the H&C, and is unreasonable.

VII. Conclusion

[50] The application for judicial review of the PRRA decision [IMM-4928-21] is granted because of the inconsistent findings made in the H&C reasons and the unfairness arising from the IFA analysis without prior notice to the Applicant.

[51] The application for judicial review of the H&C decision [IMM-4930-21] is granted because of procedural fairness and reasonableness concerns raised in the relocation analysis.

[52] The parties did not raise any question for certification and I agree that none arises.

JUDGMENT in IMM-4930-21 and IMM-4928-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review of the PRRA decision [IMM-4928-21] is granted.
2. The application for judicial review of the H&C decision [IMM-4930-21] is granted.
3. There is no question for certification.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-4930-21 AND IMM-4928-21
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APPEARANCES:

SAMUEL PLETT	FOR THE APPLICANT
CHRISTOPHER EZRIN	FOR THE RESPONDENT

SOLICITORS OF RECORD:

DESLOGES LAW GROUP PROFESSIONAL CORPORATION TORONTO, ONTARIO	FOR THE APPLICANT
ATTORNEY GENERAL OF CANADA DEPARTMENT OF JUSTICE TORONTO, ONTARIO	FOR THE RESPONDENT