Date: 20091118

Docket: IMM-1414-09

Citation: 2009 FC 1173

Ottawa, Ontario, November 18, 2009

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

PATRICIA GONZALEZ PEREA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by a Pre-Removal Risk Assessment (PRRA) Officer, dated February 26, 2009, denying the applicant's application for protection.

[2] The decision under review is a re-determination of the applicant's first PRRA, dated July 19, 2008, pursuant to the Order of Mr. Justice Campbell dated April 3, 2008 (*Perea v. Canada (MCI)*, 2008 FC 432).

FACTS

Background

[3] The forty (40) year old applicant is a citizen of Mexico. She arrived in Canada on June 2, 2001 from Mexico and claimed refugee status on November 15, 2001. Her refugee claim was rejected by the Refugee Protection Division (RPD) of the Immigration and Refugee Board on August 5, 2004. An application for leave to apply for judicial review was denied. An application to the RPD to re-open her refugee claim was also denied.

[4] On February 24, 2006 the applicant initiated her first PRRA application which was denied on July 19, 2007. On judicial review, Justice Campbell sets out the evidentiary basis of the applicant's first PRRA at paras. 2-3 of his Order dated April 3, 2008 quashing the PRRA:

> ¶2 The Applicant's new evidence claim is as follows:
>
> > She is someone who is targeted by her boyfriend for deserting him, she is a long term victim of spousal abuse of a severe and life threatening nature. Her boyfriend has also targeted her because she has seen evidence that he is a "madrina" who kidnaps, tortures and does various acts of violence for the Mexican governmental system or the judicial police. She tried to denounce him with the office of the Attorney-General which has made her return to her country impossible because of the threat to her life.
> >
> > …
>
> ¶3 The Applicant's new evidence is that, in April 2005, her uncle in Mexico was murdered. The Applicant's argument to the PRRA Officer was that the murder was directly connected to her prospective fear of risk, and in making this argument she relied on the evidence of her uncle's partner, Mr. Morales. Mr. Morales had offered evidence to the RPD, but again offered new evidence before the PRRA Officer that some 10 days before the uncle's murder he was attacked and threatened by who he considered to be

> judicial or ministerial police in an effort to have him reveal the whereabouts of the Applicant. Mr. Morales reported this incident to the Attorney General of Justice in Mexico by a letter dated April 8, 2005. In addition, in support of the Applicant's application for protection on the new evidence, Mr. Flores, a member of a political party who helped her escaped from Mexico, wrote a letter to confirm that the Applicant's uncle was shot by the judicial police for not revealing the Applicant's whereabouts, and he predicts that the Applicant will face the same fate as her uncle if she returns to Mexico.

[5] Justice Campbell held that the PRRA officer failed to make an independent evaluation of Mr. Morales' evidence, instead choosing to rely on opinions expressed by the RPD. The Court further held that it was a reviewable error to impugn Mr. Flores' evidence on the basis he was not a disinterested party without giving it due consideration (*Perea, supra,* at paragraph 7).

[6] In July 2008 the applicant was informed that she could file a second PRRA and invited to make submissions and file new evidence.

The decision under review

[7] On February 26, 2009 the PRRA officer denied the applicant's second PRRA.

[8] At page 4 of the PRRA decision the officer stated that the RPD found that the risks presented by the claimant from her ex-common-law partner were not credible due to the inconsistencies and discrepancies in the evidence, and the behaviour of the applicant was inconsistent with her risk allegations.

[9] The PRRA submissions included documents which described the problems faced by the applicant's uncle and his same-sex partner in April 2005 from the applicant from the applicant's ex-common law partner who was looking for the applicant. The applicant provided a sworn affidavit dated November 15, 2005 by Mr. Fransisco Rico-Martinez of FCJ Refugee Centre in Toronto who undertook a fact finding mission to Mexico to learn about domestic violence against women and the danger to women who attempt to flee their abusive partners such as the applicant.

[10] The PRRA officer identified several concerns with respect to the evidence. First, a newspaper article describing an assault upon the applicant's uncle curiously did not mention the uncle's death, even though the article post-dated the incident. Second, Mr. Flores, the author whose letter is submitted, had no first hand knowledge of the uncle's alleged murder. Third, there is little to tie circumstances of the uncle's death to the applicant's stated risk. Fourth, it was implausible that the applicant's uncle and his partner continued to live in Acapulco throughout the threats to their safety and the uncle's murder if the applicant's ex-common law partner was indeed as dangerous as he is said to be. Fifth, the uncle's murder could just as likely been committed by disguised criminals, a practice not unusual in Mexico. Sixth, the officer was not able to discern the full contents of the doctor's original letter because there was no translation attached.

[11] The fact the applicant was able to leave on her own with her own passport, communicate with Mr. Morales and her uncle over the years, and avoid detection by her ex-common law partner, was implausible in the officer's opinion.

[12] The officer held that in any event the determinative issue at the RPD was Internal Flight Alternative (IFA). The applicants were therefore required to also address this issue at the PRRA stage.

[13] The applicants did not address the issue of IFA in their PRRA submissions. The officer compared the evidence and held that the recent country condition documentation should be preferred to the affidavit of Mr. Rico-Martinez who undertook a fact finding mission to Mexico and determined that no IFA exists for formerly abused women. The objective country condition documentation did not address the issue of traceability of abused women by their abusers.

[14] The officer held that insufficient evidence was provided to rebut the viability and reasonableness of the IFAs identified by the RPD.

[15] The PRRA officer concluded that since an IFA exists, the applicant does not meet the requirements for protection under ss. 96 and 97 of IRPA.

LEGISLATION

[16] Section 96 of the IRPA confers protection upon person who are Convention refugees:

96**.** A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe

	social ou de ses opinions politiques :
(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	*a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	*b*) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

[17] Section 97 of IRPA for confers protection on persons who may be at a risk to their life or to a risk of cruel and unusual punishment which is personalized, or at risk torture:

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	*a*) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	*b*) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) the person is unable or, because of that risk, unwilling	(i) elle ne peut ou, de ce fait,

to avail themself of the protection of that country,	ne veut se réclamer de la protection de ce pays,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,	(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

[18] Section 113(a) of IRPA allows a PRRA applicant to present only evidence that arose after the rejection of the refugee claim. Section 113(b) allows the Minister to hold a hearing:

113. Consideration of an application for protection shall be as follows:	113. Il est disposé de la demande comme il suit :
(*a*) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection;	*a*) le demandeur d'asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'il n'était pas raisonnable, dans les circonstances, de s'attendre à ce qu'il les ait présentés au moment du rejet;
…	…
(*b*) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;	*b*) une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;

[19] Subsection 161(2) of the IRPR requires the applicant to identify new evidence:

…	…
(2) A person who makes written submissions must identify the evidence presented that meets the requirements of paragraph 113(*a*) of the Act and indicate how that evidence relates to them.	(2) Il désigne, dans ses observations écrites, les éléments de preuve qui satisfont aux exigences prévues à l'alinéa 113*a*) de la Loi et indique dans quelle mesure ils s'appliquent dans son cas.

ISSUES

[20] The applicant raises the following issue:

1. The PRRA officer misapplied the applicant's particular facts and circumstances within her second PRRA to s. 113(a) of the IRPA and an assessment of "state protection".

[21] The Court finds that the determinative issue in this case is:

Did PRRA officer err in finding that a reasonably viable IFA existed?

STANDARD OF REVIEW

[22] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, 372 N.R. 1, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of (deference) to be accorded with regard to a particular category of question (see *also Khosa v. Canada (MCI)*, 2009 SCC 12, per Justice Binnie at paragraph 53)."

[23] This IFA issue concerns the relative weight assigned to evidence, the interpretation and assessment of such evidence, and whether the officer had proper regard to all of the evidence when reaching a decision. It is clear that as a result of *Dunsmuir* and *Khosa* that such questions are to be reviewed on a standard of reasonableness [see my decisions in *Christopher v. Canada (MCI)*, 2008 FC 964 *Ramanathan v. Canada (MCI)*, 2008 FC 843 and *Erdogu v. Canada (MCI)*, 2008 FC 407, [2008] F.C.J. No. 546 (QL)]. Recent case law has reaffirmed that the standard of review for questions of state protection or internal flight alternative is reasonableness (*Okpiaifo v. Canada (MCI)*, 2009 FC 906, per Deputy Justice Tennenbaum, at paragraph 9).

[24] In reviewing the officer's decision using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." (*Dunsmuir* at paragraph 47; *Khosa, supra*, at para. 59).

ANALYSIS

Issue: Did PRRA officer err in finding that a reasonably viable IFA existed?

[25] The applicant submits that the PRRA officer erred in finding that the applicant has a viable IFA in Mazatalan, Guadalajara, or Monterrey.

[26] The applicant in this case neglected to make any submissions on the issue of an IFA even though she had notice by the RPD that the issue of an IFA is alive. The applicant chose to address the RPDs determinations of risk, and to rely on the purported profile of her ex-common law partner as a state agent to assert that no IFA would be viable. The PRRA officer decided that if her ex-common-law partner, as a state agent, could trace the applicant anywhere in Mexico, he would have known that she left Mexico 8 years ago, using her own passport, and would not be bothering the applicant's now dead uncle, or the uncle's same-sex partner. This finding was reasonably open to the PRRA officer. Moreover, the applicant has not met her onus of proving that she is still being sought 8 years after leaving, or that her ex-common-law partner could find her at one of the 3 IFAs.

Mr. Justice Campbell's Order

[27] The Reasons for Order and Order of Justice Campbell dated April 3, 2008 set aside the applicant's first PRRA decision because: (1) the first PRRA officer found Mr. Morales' evidence not credible because the RDP found that he was not a "disinterested party" to the applicant's claim. Justice Campbell held that the PRRA officer did not make an independent evaluation of Mr. Morales' new evidence, but simply relied upon the opinion expressed by the RPD; and (2) the PRRA officer did not accept Mr. Flores' evidence because he was considered not to be a "disinterested party" to the applicant's claim. Justice Campbell held that it was unfair to disregard this evidence because he is "disinterested". This evidence concerned risk to the applicant in her home state, not with respect to the IFAs identified by the Board.

[28] Justice Campbell's overall conclusion was that the first PRRA officer approached the applicant's evidence with a "degree of suspicion" and "relied upon a criterion (disinterested witness) that is almost impossible for any applicant to meet". Justice Campbell held at paragraph 7:

> It is my opinion, that to glibly say that because they are not persons disinterested in the Applicant's claim their evidence should be given no value, is a remarkably unfair approach to take.

[29] For these reasons, Justice Campbell set aside the first PRRA decision and remitted it to another PRRA officer for redetermination. That second PRRA officer's decision is now before the Court on judicial review but on an issue unrelated to the evidence upon which Justice Campbell decided.

The second PRRA decision

[30] The second PRRA decision is 14 pages long. It is comprehensive. The second PRRA decision reviewed the Refugee Board's three page credibility analysis which found the applicant not credible for detailed reasons. The PRRA officer can only consider new evidence which arose after the Refugee Board's decision.

[31] The important and determinative part of the PRRA officer's second decision is at page 7 of the decision:

> … What is not clear is why, almost 8 years later, her ex-common-law partner would have an interest in tracking her down or harming her either.

Then the PRRA officer states even accepting that the ex-common-law partner is still interested in her and continues to threaten those close to her, the determinative finding of the Board was that the applicant had an IFA available to her in Mexico. The PRRA decision stated at page 8:

> It is this finding that needs to be addressed by the applicant and her counsel with evidence of new developments to the applicant's personal circumstances or in the country conditions, such that the IFA is no longer available to her.

[32] The PRRA officer found with respect to the IFA issue that:

1. There was no evidence of new risk developments with respect to the Refugee Board's finding that the applicant had an IFA;
2. The affidavit of Francisco Rico-Martinez, who conducted a one week fact-finding mission in Mexico, was not given any weight because the deponent has no expertise, no knowledge of conditions in Mexico outside of his week-long visit, and his affidavit did not contain information pertaining to new developments in Mexico with respect to the IFAs;

3. The PRRA officer weighed this affidavit, but did not give it more weight than recent country condition reports which do not disclose any changes in country conditions with respect to an IFA for the applicant;
4. The PRRA officer rejected statements in the affidavit about the "traceability of women victims of abuse" because they are not corroborated in other country reports. The PRRA officer found that if Mexican authorities, including the police were assisting abusers locate their victims in other parts of Mexico, it is reasonable to assume that these incidents would be noted in the country reports with respect to domestic abuse;
5. Without needing to decide whether the applicant's alleged abuser was a "state agent" and well-connected, if the abuser was a state agent with good connections, he would have realized that the applicant left Mexico 8 years ago using her own passport, and has been communicating with her relatives since she has been out of the country; and
6. The PRRA officer concluded at page 10 of the decision:

> I find it reasonable, as did the Board, that the applicant would be able to go to an area where she is not known, and relocate without her ex-common-law partner finding her. Should the applicant return to the country, it would be reasonable to assume that her ex-common-law partner would not even be aware that she has returned to the country, let alone what city she has returned to. Especially given that over more than 7 years he appears to remain unaware that the applicant is in Canada.

[33] On a reasonableness standard of review, I am of the view that this finding with respect to the IFA was reasonably open to the PRRA officer, and for this reason this application for judicial review must be dismissed.

CERTIFIED QUESTION

[34] Both parties advised the Court that this case does not raise a serious question of general importance which ought to be certified for an appeal. The Court agrees.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

The application for judicial review is dismissed.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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