Federal Court  Cour fédérale

Date: 20091124

Docket: IMM-2476-09

Citation: 2009 FC 1207

Ottawa, Ontario, November 24, 2009

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

CESAR PEREZ ARIAS
MARIA ANGELICA RODRIGUEZ JEMIO
KAREN VALERIA PEREZ RODRIGUEZ
ERLAN AUGUSTO PEREZ RODRIGUEZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] Mr. Cesar Perez Arias (the "Principal Applicant"), his wife, Ms. Maria Angelica Rodriguez Jemio and their children Karen Valeria Perez Rodriguez and Erlan Augusto Perez Rodriguez (collectively "the Applicants") seek judicial review of the decision of Pre-Removal Risk Assessment Officer, P.A. Bassi (the "Officer"), dated March 30, 2009. In that decision, the Officer

rejected the Applicants' claim to be found persons in need of protection pursuant to section 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act").

Facts

[2] The Applicants are citizens of Bolivia. The Principal Applicant arrived in Canada in March 2000 and his wife and children arrived in August of the same year.

[3] The Applicants sought Convention refugee protection in Canada on the basis of the Principal Applicant's political activities, that is active involvement with the teachers' union in La Paz. The claim was rejected by a decision made on June 13, 2003 on the basis that the Immigration and Refugee Protection Division found that the Principal Applicant's evidence lacked plausibility and further, that an objective basis for fear of persecution was lacking. An application for leave and judicial review was dismissed on October 31, 2003.

[4] The Applicants submitted a Pre-Removal Risk Assessment ("PRRA") application. This was rejected on January 6, 2005, on the grounds of implausibility and lack of credibility. The Applicants did not seek leave for judicial review and they were deported to Bolivia on February 8, 2005. They returned to La Paz.

[5] According to the affidavit filed by the Principal Applicant in support of this application for judicial review, he participated on February 18, 2005 in a march that had been organized by the

teachers' union. Three days later he went to inquire about a teaching position. He was reportedly told that there would be no new teaching positions.

[6] On the same day, according to the affidavit filed by the Principal Applicant's wife, she was sexually assaulted in her home by agents of the Ministry of the Interior. The Applicants submit that this attack was a result of the Principal Applicant's political activities with the Union.

[7] The Applicants did not report the attack to the police because they believed the perpetrators were agents of the state. Instead, the Applicants fled La Paz on the night of the attack and went to the town of Huarina. The Principal Applicant's wife was examined by a doctor on February 22, 2005. The results of that examination were recorded in the hospital's records. A medical certificate attesting to the contents of the hospital's records was submitted by the Applicants in support of their second PRRA application.

[8] The Applicants left Bolivia on March 16, 2005 and went to the United States. They remained in that country until entering Canada again on September 29, 2008. During their sojourn in the United States, the Principal Applicant was employed as a labourer in construction demolition. He suffered an injury to his hand that required several surgeries. In the affidavit filed in this proceeding, the Principal Applicant says that his entry into Canada with his family was delayed because he was undergoing medical treatment in the United States.

[9] Upon returning to Canada, the Applicants were ineligible to present a claim for refugee protection as a consequence of the fact that they had previously been deported from this country.

[10] The basis of the Applicants' second PRRA application remained the Principal Applicant's political activities with the teachers' union. They submitted new evidence consisting of a medical certificate from the hospital where the wife of the Principal Applicant was examined and notarized statements from a parish priest in the town of Huarina, from a neighbour of the Applicants' family and from the father-in-law of the Principal Applicant.

[11] As well, the Applicants submitted a psychosocial assessment that had been carried out in Toronto upon the Principal Applicant, his wife and their eldest child. The Principal Applicant was assessed as having a major depressive disorder. His wife was assessed as having Post Traumatic Stress Disorder.

[12] The Officer, in refusing the PRRA application, found the new evidence to be less then persuasive and found that the Applicants had not provided sufficient evidence to show that they would be at risk of harm from any person or group in Bolivia. The Officer also found that there was adequate state protection available to the Applicants. The Officer made his decision upon reviewing the material submitted, as well as his personal research upon country conditions and without an oral hearing.

[13] Now, in this application for judicial review, the Applicants argue that the lack of an oral hearing gave rise to a breach of procedural fairness. The Applicants rely upon subsection 113(b) of the Act and section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the "Regulations") in making this argument.

[14] Alternatively, the Applicants submit that the Officer committed reviewable errors in the manner in which he weighed the evidence and further erred in his finding that state protection was available.

Discussion and Disposition

[15] The first matter to be addressed is the applicable standard of review, having regard to the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190. Questions of law and of procedural fairness are reviewable on the standard of correctness and questions of fact, mixed fact and law and of the exercise of discretion are reviewable on the standard of reasonableness.

[16] The Applicants submit that the Officer made credibility findings in rejecting their PRRA applications. Relying on subsection 113(b) of the Act and on section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the "Regulations"), they argue that they were entitled to an oral hearing when their credibility was engaged.

[17] The Minister of Citizenship and Immigration (the "Respondent") takes the position that the Applicants had no right to an oral hearing because the Officer based the decision upon the insufficiency of the evidence, not the credibility of the Applicants.

[18] Subsection 113(b) of the Act and section 167 of the Regulations provide as follows:

113. Consideration of an application for protection shall be as follows:	113. Il est disposé de la demande comme il suit:
…	…
(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;
…	…
167. For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors are the following: (a) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act; (b) whether the evidence is central to the decision with respect to the	167. Pour l'application de l'alinéa 113b) de la Loi, les facteurs ci-après servent à décider si la tenue d'une audience est requise : a) l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur; b) l'importance de ces éléments de preuve pour la prise de la décision

application for protection; and (c) whether the evidence, if accepted, would justify allowing the application for protection.	relative à la demande de protection; c) la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

[19] The language of subsection 113(b) makes it clear, in my opinion, that the availability of an oral hearing in the PRRA context lies solely in the discretion of the Respondent, having regard to the "prescribed factors" that are identified in section 167 of the Regulations. The fact that those prescribed factors exist in a given case does not lead to the inevitable conclusion that an oral hearing must be held. In this regard, I respectfully depart from the approach taken in the decision of *Tekie v. Canada (Minister of Citizenship and Immigration)*, 50 Imm. L.R. (3d) 306 (F.C.).

[20] I am mindful that the principle of judicial comity must be taken into account when a judge of the Court purports to depart from a prior decision of the Court. In this regard, I refer to the decision in *Almrei v. Canada (Citizenship and Immigration)* (2007), 316 F.T.R. 49 at paras. 61 and 62 where Justice Lemieux said the following about judicial comity:

> (3) The principle of judicial comity
>
> 61 The principle of judicial comity is well-recognized by the judiciary in Canada. Applied to decisions rendered by judges of the Federal Court, the principle is to the effect that a substantially similar decision rendered by a judge of this Court should be followed in the interest of advancing certainty in the law. I cite the following cases:
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> - Haghighi v. Canada (Minister of Public Safety and Emergency Preparedness), [2006] F.C.J. No. 470, 2006 FC 372;

> - Benitez v. Canada (Minister of Citizenship and Immigration) [2006] F.C.j. No. 631, 2006 FC 461;
>
> - Pfizer Canada Inc. v. Canada (Minister of Health), [2007] F.C.J. No. 596, 2007 FC 446;
>
> - Aventis Pharma Inc. v. Apotex Inc., [2005] F.C.J. No. 1559, 2005 FC 1283;
>
> - Singh v. Canada (Minister Citizenship and Immigration) [1999] F.C.J. No. 1008;
>
> - Ahani v. Canada(Minister Citizenship and Immigration), [1999] F.C.J. No. 1005;
>
> - Eli Lilly & Co.v. Novopharm Ltd. (1996), 67 C.P.R. (3d) 377;
>
> - Bell v. Cessma Aircraft Co. (1983) 149 D.L.R. (3d) 509 (B.C.C.A.)
>
> - Glaxco Group Ltd. et al. v. Minister of National Health and Welfare et al. 64 C.P.R. (3d) 65;
>
> -Steamship Lines Ltd. v.M.N.R., [1966] Ex. CR 972.
>
> 62 There are a number of exceptions to the principle of judicial comity as expressed above they are:
>
> 1. The existence of a different factual matrix or evidentiary basis between the two cases;
> 2. Where the issue to be decided is different;
> 3. Where the previous condition failed to consider legislation or binding authorities that would have produced a different result, i.e., was manifestly wrong; and
> 4. The decision it followed would create an injustice.

[21] In my opinion, the third exception identified by the Court in *Almrei* applies here.

[22] In *Tekie*, Justice Phelan focused on the language of section 167 of the Regulations and not the language of subsection 113(b) of the Act in concluding that an oral hearing was required.

[23] The language of subsection 113(b), with the words "may" and "of the opinion" suggests to me the availability of a hearing will always be a matter of discretion, not a matter of right. The Applicants were not deprived of a right nor did they suffer from a breach of procedural fairness when they did not have an oral hearing before the Officer.

[24] However, the manner in which the Officer purported to reject the Applicants' applications on the basis of insufficiency of evidence is problematic. I agree with the Applicants' submission that the Officer in fact made the decision on credibility grounds but failed to disclose and identify those grounds. In short, the Officer did not believe the evidence presented by the Applicants but he did not express that disbelief. The Officer purported to reject the PRRA applications on one ground, that of insufficient evidence, but in reality, he rejected the applications on the basis of credibility concerns.

[25] Surely this is improper and in my opinion, a breach of the obligation to provide adequate reasons for the decision. "Adequate reasons" means the "real" reasons for a decision. In this regard, I refer to the decision in *Hilo v. Canada (Minister of Employment and Immigration)*, 15 Imm. L.R. (2d) 199 (F.C.A.) where the Federal Court of Appeal said the credibility findings must be expressed in "clear and unmistakable terms". In my opinion, it is open to the Officer to make credibility findings, even on a paper hearing. However, when an Officer makes a credibility finding he must be

honest, forthright and transparent. The problem here is that the Officer in fact cloaked the credibility concerns in the language of sufficiency of evidence. That is a breach of procedural fairness and does not meet the legal requirements.

[26] This breach of procedural fairness is the dispositive issue in this case. Therefore, it is not necessary to dispose of the other issues that were raised.

[27] The application for judicial review is allowed, the decision of the PRRA Officer is set aside and the matter is remitted to another officer for determination.

[28] Counsel were given the opportunity to submit a proposed question for certification by Thursday, November 26, 2009. Counsel for each party has advised that no question for certification is proposed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is allowed. There is no question for certification arising.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	CESAR PEREZ ARIAS, MARIA ANGELICA RODRIGUEZ JEMIO, KAREN VALERIA PEREZ RODRIGUEZ AND ERLAN AUGUSTO PEREZ RODRIGUEZ v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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