Federal Court  Cour fédérale

Date: 20091130

Docket: IMM-2934-09

Citation: 2009 FC 1224

Ottawa, Ontario, November 30, 2009

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

PETRA MARIA DAVIS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) of a decision of a Pre-Removal Risk Assessment officer (the officer), dated April 23, 2009, rejecting the application of a pre-removal risk assessment (PRRA) by the Applicant.

Factual Background

[2] The Applicant is a citizen of St. Vincent and the Grenadines (St. Vincent) born on April 21, 1971 who claims she has been the victim of physical abuse, sexual abuse, homelessness, domestic

abuse and poverty while in St. Vincent. The Applicant claims her mother and step-father were the perpetrators of this abuse when she was a minor, but that she recently experienced ill treatment at the hands of her former common-law spouse, John Knight.

[3] The Applicant began living with Mr. Knight in 1987 and she claims she began to suffer domestic abuse from the beginning of the relationship until she left St. Vincent to come to Canada in March 1995.

[4] The Applicant submitted her refugee claim on January 15, 2003 and her claim was based on her being a victim of domestic violence in St. Vincent. The Applicant's refugee claim was rejected by the Refugee Protection Division of the Immigration and Refugee Board (RPD) on February 3, 2004, on the basis of a lack of credibility in her story and on the fact that there was adequate state protection available. The Applicant challenged that decision before the Federal Court, but the application for leave was denied in June 2004.

[5] Subsequently, the Applicant submitted an application under humanitarian and compassionate grounds (H&C) pursuant to subsection 25(1) of the Act and she was asked to provide updated submissions in September 2008. The H&C application was denied on April 29, 2009. The officer rejected the Applicant's H&C claim because she did not provide sufficient evidence to demonstrate that her personal circumstances were such that having to apply for a permanent resident visa from outside of Canada would create unusual, undeserved or disproportionate hardship for her.

[6] The Applicant brought motions for stays of the removal orders concerning both her H&C application and the negative PRRA determination dated April 23, 2009. On June 15, 2009, this Court granted both stay motions. The negative PRRA determination forms the basis of this application for leave and judicial review.

Impugned Decision

[7] The officer determined that the Applicant would not be subject to risk of persecution, danger of torture, risk to life or risk of cruel and unusual treatment or punishment if she returned to her country of nationality or habitual residence.

[8] The officer found there was insufficient corroborating evidence such as medical reports or police reports which would support that, after being physically abused and suffering a miscarriage, the Applicant sought medical attention and/or state protection from state agencies or authorities in St. Vincent.

[9] The officer was of the view that the Applicant did not provide sufficient evidence concerning the details of her present mental health treatment or in the years since she was first diagnosed with chronic major depressive episode and post-traumatic stress disorder in 2003. The officer also found that insufficient evidence was provided to show that the Applicant would not be able to access the mental health services in St. Vincent she might require if she were to return.

[10] The RPD recognized that domestic violence is an ongoing and serious problem in St. Vincent. However, the officer found it is clear that positive means of recourse exist for women and victims. The officer acknowledged some of the weaknesses of the system identified by the St. Vincent and the Grenadines Human Rights Association but also noted its comments about the island's culture in which women tend not to lodge complaints about abuse and the efforts made by the government and non-governmental organizations to counteract this by educating women about their rights. The officer obtained information concerning the Family Court and its role in helping victims of abuse and he considered information about the police force and about the complaint process in place.

[11] The officer determined that adequate, though not necessarily perfect, state protection is available to the Applicant in St. Vincent. Therefore, the officer found there is less than a mere possibility that the Applicant would be subjected to persecution as described in section 96 of the Act. Similarly, there are no substantial grounds to believe that she would face a risk of torture, nor are there reasonable grounds to believe the Applicant would face a risk to life, or a risk of cruel and unusual treatment or punishment as described in paragraphs 97(1)(a) and (b) of the Act.

Issue

[12] As per the hearing, the issues for the Court to decide are the following:

1. Did the Officer err in rejecting the credibility of the Applicant or failing to refer to corroborative or supportive evidence?

2. Did the Officer err in relying on post-submission documentary evidence?

Relevant Legislation

[13] The following legislation is relevant to the issues to be determined by this Court:

Immigration and Refugee Protection Act, S.C. 2001, c. 27:

Person in need of protection **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	Personne à protéger **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 to avail themself of the protection of that country,	(i) elle ne peut ou, de ce fait, 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	(iii) la menace ou le risque ne

incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

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.

Person in need of protection
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

Personne à protéger
(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

Consideration of application
113. Consideration of an application for protection shall be as follows:

Examen de la demande
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;

(c) in the case of an applicant not described in subsection 112(3), consideration shall be on the basis of sections 96 to 98;	c) s'agissant du demandeur non visé au paragraphe 112(3), sur la base des articles 96 à 98;
(d) in the case of an applicant described in subsection 112(3), consideration shall be on the basis of the factors set out in section 97 and	d) s'agissant du demandeur visé au paragraphe 112(3), sur la base des éléments mentionnés à l'article 97 et, d'autre part :
(i) in the case of an applicant for protection who is inadmissible on grounds of serious criminality, whether they are a danger to the public in Canada, or	(i) soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un danger pour le public au Canada,
(ii) in the case of any other applicant, whether the application should be refused because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of Canada.	(ii) soit, dans le cas de tout autre demandeur, du fait que la demande devrait être rejetée en raison de la nature et de la gravité de ses actes passés ou du danger qu'il constitue pour la sécurité du Canada.

Applicant's Arguments

[14] The Applicant submits the officer erred in finding there is adequate and effective state protection, as this protection is qualified by the officer as having "some notable shortcomings". The officer breaches fairness in consulting Response to Information Request (RIR) document VCT102962 (RIR VCT102962) which was not available when the H&C and PRRA applications and submissions were filed. The Applicant submits the document should have been disclosed before the officer made his decision (*Mancia v. Canada (Minister of Citizenship and Immigration)*, [1998]

3 F.C. 461, 226 N.R. 134 (F.C.A.); *Palaguru v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 371, [2009] F.C.J. No. 477 (QL) at par. 27).

[15] Further, the Applicant alleges that the officer does not cite the negative information contained in another Response to Information Request (RIR VCT102614) dated November 13, 2007. The Applicant also argues that this evidence is important because two Responses to Information Requests show a different context than that of the RPD decision in January 2004, where the RPD found that state protection was adequate.

[16] In her application, the Applicant submits a letter from Kenneth Farrell, a Canadian citizen formerly of St. Vincent whom the Applicant met approximately seven (7) years ago. The Applicant argues Mr. Farrell was a witness to the Applicant receiving information from other persons who advised her that Mr. Knight wanted to cause her harm. The Applicant alleges that the officer cannot find that the letter is of limited weight.

[17] The Applicant further submits the conclusion that the letter from Mr. Farrell is from an interested party and is given limited weight implies that the Applicant's allegation of new risk factors was not credible, which ultimately means the Applicant's credibility was rejected. In the context of a PRRA application, an officer who rejects an applicant's credibility without an interview has exceeded jurisdiction and erred in law.

Respondent's Arguments

[18] The Respondent alleges that there is insufficient evidence to suggest that the response by authorities in St. Vincent to complaints of domestic violence has deteriorated since the RPD's decision in February 2004.

[19] The Respondent submits the officer was obliged to consider the most up to date documentary evidence of which the officer was aware and that the officer committed no error in considering a Response to Information Request which post-dated the Applicant's submissions (*Hassaballa v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 489, 157 A.C.W.S. (3d) 602 at par. 33). The Respondent further submits that it was appropriate for the PRRA officer to have considered the RPD decision and any new evidence which post-dated the Applicant's unsuccessful RPD claim when determining the merit of the Applicant's PRRA (*Kaybaki v. Canada (Solicitor General of Canada)*, 2004 FC 32, 128 A.C.W.S. (3d) 784 at par. 11).

Analysis

[20] Prior to the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 90, a PRRA decision was considered globally and the application of the relevant law to the facts was assessed on a standard of reasonableness *simpliciter* (*Figurado v. Canada (Solicitor General)*, 2005 FC 347, [2005] 4 F.C.R. 387 and *Demirovic v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1284, 142 A.C.W.S. (3d) 831). It was also held that questions of fact were to be reviewed on a standard of patent unreasonableness, questions of mixed

fact and law on a standard of reasonableness, and questions of law on a standard of correctness (*Kim v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 437, 272 F.T.R. 62 at par. 19).

[21] Following *Dunsmuir*, the review of PRRA decisions should continue to be subject to deference by the Court and are reviewable on the newly articulated standard of reasonableness. As a result, this Court will only intervene to review a PRRA officer's decision if it does not fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above at par. 47). For a decision to be reasonable there must be justification, transparency and intelligibility within the decision making process.

[22] A PRRA application is not an appeal of a negative refugee decision, but rather an assessment based on new facts or evidence which demonstrates that the person is now at risk of persecution, torture, risk to life or risk of cruel and unusual treatment or punishment. In a pre-removal risk assessment, protection may be afforded to a person who, upon removal from Canada to their country of nationality, would be subject to a risk to their life or to a risk of cruel and unusual treatment. This risk is assessed differently than in an H&C application. The PRRA officer is not required to make explicit reference to every negative comment in the country condition documentation (*Cupid v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 176, 155 A.C.W.S. (3d) 396, at par. 17).

[23] The risk assessment to be carried out at the PRRA stage is not to be a reconsideration of the Board's decision, but instead, is limited to an evaluation of new evidence that either arose after the

Applicant's refugee hearing or was not previously reasonably available to the Applicant (*Hausleitner v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 641, 139 A.C.W.S. (3d) 115).

[24] The officer found that the new information provided in the form of documentary evidence is insufficient to show a risk to life or cruel and unusual punishment to the Applicant. The decision of a PRRA officer is to be accorded deference since it involves findings of fact, but it must be supported by the evidence. The presumption that the decision maker has considered all the evidence is a rebuttable one and, where the evidence in question is of significant probative value, the Court can make a negative inference from the decision maker's failure to mention it (*Kaybaki*). In the case at bar, there was no breach of procedural fairness in relying on the two Responses to Information Requests without first warning the Applicant (*Hassaballa* at par. 33).

[25] One of the officer's fundamental concerns was the letter from Mr. Farrell. The said letter was silent with respect to particulars of the alleged threats against the Applicant by Mr. Knight. More particularly, information such as the dates of these alleged threats and when Mr. Farrell overheard these alleged telephone conversations between the Applicant and her friends are missing. The Court is of the view that it was not unreasonable for the officer to place little weight on this letter. The Court is in agreement with the Respondent that this letter could be referring to incidents that may have occurred prior to the Applicant's RPD decision that was rendered in 2004. Mr. Farrell's letter is thus insufficient as there is no timeframe to substantiate the allegations that were being made. The officer's treatment of the letter was not unreasonable and the officer did not

make a credibility finding (*Selliah v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 872, 256 F.T.R. 53 at par. 27). Rather, the officer found that the objective evidence submitted was insufficient to establish the risks alleged by the Applicant and gave it little weight. Consequently, as there was no credibility finding, no oral interview needed to be conducted.

[26] The PRRA officer correctly determined that the Applicant's specific allegations were unsupported by the objective documentary evidence. The objective evidence is insufficient to demonstrate a personalized risk for the Applicant if she were to return to St. Vincent. The application for judicial review is therefore dismissed.

[27] The parties did not propose any questions for certification and, in my view, there is no question that warrants certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed. No question is certified.

"Richard Boivin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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