Federal Court		Cour fédérale

Date: 20100504

Citation: 2010 FC 489

Ottawa, Ontario, May 4, 2010

PRESENT: The Honourable Mr. Justice Phelan

Docket: IMM-2302-09

BETWEEN:

GRACEL BERNADET JESSAMY
SADREENA GRACEL JESSAMY

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: IMM-2639-09

BETWEEN:

GRACEL BERNADET JESSAMY
SADREENA GRACEL JESSAMY

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] There are two judicial reviews at issue. IMM-2639-09 relates to an enforcement officer's refusal to defer deportation. It is, as the parties agreed, moot because Justice O'Keefe granted an emergency stay and because there are no *Borowski* type issues raised.

IMM-2302-09 is the judicial review of the negative PRRA decision, a matter which is very much alive.

II. FACTS

[2] The Applicants, Gracel and Sadreena Jessamy, are citizens of Barbados; Gracel is the mother and for purposes of these Reasons is referred to as the Applicant.

[3] The Applicant's claim is that her husband was verbally and physically abusive. Over the course of their 15-year relationship, he assaulted her frequently including attacking her with a screwdriver, hitting her with a shovel, a belt buckle, a vase and a hammer. He also threatened the Applicant with an ice-pick and frequently with a gun. The husband abused her son and added sexual assault to his many other attacks on her. At least some of these incidents resulted in scars and hospitalization.

[4] The Applicant attempted to escape her husband's abuse but she was always recaptured. Having fled to her aunt's home, her husband burned the house; having fled to St. Vincent, he dragged her home.

[5] The Applicant claimed that she had phoned the police on many occasions after some of these attacks but they were dismissive of her problems because they were domestic issues.

[6] Finally, in August 2002, she and her daughter fled to Canada and filed their refugee claim. Her son followed in December and joined in the claim. The refugee claim included a medical report confirming the physical indications of severe abuse. A report from Dr. Pilowsky on post-traumatic stress syndrome and depression – a common feature of some of these cases – was also filed.

[7] The Applicant's refugee claim (including that of her children) was rejected on grounds of credibility and state protection in February 2004. Leave was never perfected. It is erroneous to conclude that the judicial review was dismissed on its merits.

[8] The Applicant submitted her first PRRA in January 2007 which was negative. Her son was removed in December 2007 but the Applicant and her daughter were given a deferral to allow for completion of Grade 11. The Applicant applied for judicial review of this first PRRA.

[9] Justice Russell granted judicial review on the grounds of a flawed state protection analysis without taking issue with the conclusions on new evidence and restatement of old risk.

[10] In Justice O'Keefe's emergency stay, he expressed concern that the Applicant faced the prospect of being beaten but he was most concerned that the daughter could lose her Grade 12 if removed prematurely. That concern has now passed.

[11] The Applicant has been unable to secure the hospital report related to the injury caused by the hammer attack. The problem appears to be the cost of the report rather than the non-existence of it.

[12] In response to the opportunity to submit additional evidence on the new PRRA flowing from Justice Russell's decision, the Applicant filed evidence from her husband's cousin, from her aunt, from a friend and from her son. All stated that the husband had not changed, that he would continue to seek her out and was harassing her son toward that end. The Applicant also filed a letter from a friend who confirmed the past abuse.

[13] The PRRA Officer concluded that, after referring to s. 113*(a)* of the *Immigration and Refugee Protection Act*, S.C. 2001 ch. 27 (IRPA), three of the letters submitted merely confirmed that the Applicant had been in an abusive relationship and that her husband had threatened to kill her upon her return to Barbados. These letters were not accepted as new evidence – there was no new risk development or change in country conditions.

[14] The Officer rejected one letter because there was no evidence of why it could not have been submitted to the Board. The son's letters, one that outlined that his father wanted all of them dead and the other that he had been approached about his mother's whereabouts, were contradictory (presumably because if the father wanted all of them dead, he would not have asked the son about the mother's whereabouts, he would simply have killed the son). The son had also not sought protection from the police.

[15] Notwithstanding this assessment of the evidence before her and the Refugee Protection Division's (RPD) conclusion that the claim of spousal abuse was not credible, the Officer went on to accept that the Applicant had been in an abusive relationship but that state protection was available in Barbados. The Officer went on to consider aspects of state protection including control of a functioning police force, laws against violence toward women, efforts against domestic violence, funding of a shelter and support for victims' groups and police training.

[16] The Officer ultimately concluded that there was insufficient evidence on state protection to reach a conclusion different from the Board.

III. ANALYSIS

[17] Section 113 of IRPA provides:

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	*a*) le demandeur d'asile

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;	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	(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

that the applicant constitutes to the security of Canada.	la sécurité du Canada.

[Emphasis added]

[18] The standard of review on a PRRA decision as a whole and on state protection is well established as reasonableness (*Clarke v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 357). On the interpretation and application of IRPA, s. 113, it is correctness and reasonableness respectively. (See *Elezi v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 240 at paragraph 22.)

> **22** When assessing the issue of new evidence under subsection 113*(a)*, two separate questions must be addressed. The first one is whether the officer erred in interpreting the section itself. This is a question of law, which must be reviewed against a standard of correctness. If he made no mistake interpreting the provision, the Court must still determine whether he erred in his application of the section to the particular facts of this case. This is a question of mixed fact and law, to be reviewed on a standard of reasonableness.

[19] There are a number of difficulties with this PRRA decision:

(a) the treatment and consideration of whether the letter evidence constitutes new evidence was erroneous and unreasonable;

(b) the finding of abuse was inconsistent with the treatment of the letter evidence; and

(c) the finding of state protection was flawed in that it ignored the personalized risk.

[20] The legal test for "new evidence" under s. 113*(a)* is set forth in *Raza v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385 at paragraph 13:

13 As I read paragraph 113(*a*), it is based on the premise that a negative refugee determination by the RPD must be respected by the PRRA officer, unless there is new evidence of facts that might have affected the outcome of the RPD hearing if the evidence had been presented to the RPD. Paragraph 113(*a*) asks a number of questions, some expressly and some by necessary implication, about the proposed new evidence. I summarize those questions as follows:

1. Credibility: Is the evidence credible, considering its source and the circumstances in which it came into existence? If not, the evidence need not be considered.

2. Relevance: Is the evidence relevant to the PRRA application, in the sense that it is capable of proving or disproving a fact that is relevant to the claim for protection? If not, the evidence need not be considered.

3. Newness: Is the evidence new in the sense that it is capable of:

   (a) proving the current state of affairs in the country of removal or an event that occurred or a circumstance that arose after the hearing in the RPD, or

   (b) proving a fact that was unknown to the refugee claimant at the time of the RPD hearing, or

   (c) contradicting a finding of fact by the RPD (including a credibility finding)?

   If not, the evidence need not be considered.

4. Materiality: Is the evidence material, in the sense that the refugee claim probably would have succeeded if the evidence had been made available to the RPD? If not, the evidence need not be considered.

5. Express statutory conditions:

(a) If the evidence is capable of proving only an event that occurred or circumstances that arose prior to the RPD hearing, then has the applicant established either that the evidence was not reasonably available to him or her for presentation at the RPD hearing, or that he or she could not reasonably have been expected in the circumstances to have presented the evidence at the RPD hearing? If not, the evidence need not be considered.

(b) If the evidence is capable of proving an event that occurred or circumstances that arose after the RPD hearing, then the evidence must be considered (unless it is rejected because it is not credible, not relevant, not new or not material).

[21] While the fact that the evidence post-dates the hearing does not *per se* make it new evidence, likewise evidence that refers to an old risk should not be rejected as “not new” where it speaks to the development of the risk and is materially different evidence of that old risk.

[22] The error in the Officer’s approach to this evidence was the failure to address the five questions or factors outlined by the Court of Appeal. This analysis is not necessarily formulaic as long as it is clear the factors were considered. The Officer concluded that the letters from the three women did not show a change of circumstances and are not new evidence. The Officer did not first consider whether the evidence was new before considering what it showed.

[23] The analytical step of considering first whether the evidence was new is important in this case because the Officer did not consider (i) relevance in terms of proving or disproving a fact that was relevant to the claim of protection, and (ii) newness in terms of contradicting a finding of fact by the RPD (including a credibility finding). Therefore, there was an error of law.

[24] The Officer's conclusion as to the significance of the evidence (which is tied in with the "newness" analysis) is unreasonable. Firstly, the evidence shows that the old risk is continuing, present and real; secondly, the evidence differs from that which was before the Board. It was unreasonable to reject the evidence as not new.

[25] The Officer's rejection of the new evidence is further undermined by her acceptance that the Applicant was in an abusive relationship but had state protection. This was not a finding where risk was presumed as an alternative position but discounted by the availability of state protection.

[26] In finding that the Applicant was in an abusive relationship, the Officer made a finding that was contrary to the Immigration and Refugee Board (Board) which rejected that submission on the grounds of credibility. The Officer accepted the only evidence which could ground a finding of abusive relationship but rejected it as not "new" for purposes of admissibility. The Officer's finding that there was no substantially different risk is unreasonable given her finding which was contrary to the Board's decision.

[27] The assessment of state protection in this case is unreasonable because it did not address the Applicant's personal circumstances. The Officer's analysis of Barbados' system and efforts for state protection was reasonable but it did not then focus on whether that state protection would be available to the Applicant.

[28] Having accepted that the Applicant was in an abusive relationship, there was no consideration of the Applicant's evidence of her past efforts to engage state protection when she was subjected to abuse. Those efforts were unsuccessful and whether they were adequate was never addressed.

IV. CONCLUSION

[29] For these reasons, this judicial review is granted, the PRRA decision is quashed and the matter is referred back to a new officer for a fresh consideration.

[30] The issue of this Applicant's status has been up and down the immigration and court systems for far too long. She is either entitled to stay here for protection or she must go. It is expected that this new PRRA will be completed quickly and conclusively.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is granted, the PRRA decision is quashed and the matter is referred back to a new officer for a fresh consideration.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2302-09
STYLE OF CAUSE:	GRACEL BERNADET JESSAMY SADREENA GRACEL JESSAMY and THE MINISTER OF CITIZENSHIP AND IMMIGRATION
AND	
DOCKET:	IMM-2639-09
STYLE OF CAUSE:	GRACEL BERNADET JESSAMY SADREENA GRACEL JESSAMY and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 16, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	Phelan J.
DATED:	May 4, 2010

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