Federal Court Cour fédérale

Date: 20110211

Docket: IMM-1610-10

Citation: 2011 FC 172

Ottawa, Ontario, February 11, 2011

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

INDRADEI PARRASRAM DHRUMU

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, dated February 16, 2010, of a Pre-Removal Risk Assessment (PRRA) officer, denying the applicant's request for protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act).

FACTS

Background

[2] The applicant, a 49 year-old citizen of Guyana, arrived in Canada on December 5, 2003 and made a claim for refugee protection based on persecution on the ground of race, gender and political opinion, because she was Indo-Guyanese, a woman and a member of the ruling People Progressive Party (PPP).

[3] The refugee claim was rejected in a decision dated January 18, 2005 by the Refugee Protection Division of the Immigration and Refugee Board (the Board). The Board held that the determinative issue was lack of credibility. The Board provided a detailed examination of discrepancies and omissions in the applicant's evidence.

[4] The applicant submitted a PRRA application which was denied on February 16, 2010, and is the subject of this judicial review application.

Decision under Review

[5] The PRRA officer denied the PRRA application because the officer found that the applicant did not face more than a mere possibility of persecution under section 96 nor was it more likely than not that the applicant faced a risk of torture, or a risk to her life or of cruel and unusual treatment or punishment under section 97 of the Act.

[6] The officer considered the applicant's evidence that had not been submitted in the refugee claim, and conducted independent research into country conditions in Guyana as they related to the applicant.

[7] The officer considered whether the evidence submitted by the applicant was "new" evidence within the meaning of section 113 of the Act. In particular, the officer considered the following evidence that the applicant had submitted:

1. Documentary evidence of risks of criminal attacks faced by the applicant on account of her status as a Guyanese returning from abroad and as a woman. Regarding this evidence, the officer concluded as follows:

> Counsel has submitted that there is evidence that criminal gangs target Guyanese who return from abroad and that violence against women is endemic across Guyana and therefore the applicant is likely to be victimized by criminal gangs, in addition to the fact that she would be alone in Guyana with no family support or protection. However, I do not consider this to be new evidence as it was reasonably available for consideration by the Board. I do not find it to be evidence of new risk developments which are personal to the applicant and which have arisen since the date of the Board's decision.

2. Affidavits from two friends of the applicant. The first of these affidavits was from a long-time acquaintance of the applicant who stated that she had volunteered with the applicant campaigning during Guyana's 1992 general elections. She confirmed the widespread attacks made against people based on race, and stated that the applicant received constant threats to her life and on several occasions took refuge in the affiant's home before finally fleeing Guyana. The affiant states that she is sure that the applicant's life would be in danger in Guyana. The second affidavit was from a long-time friend of the applicant. The affiant attested that in 2003 on account of her membership in the PPP the applicant faced physical

abuse to her person and attacks on her house that caused her to leave. This affiant, too, stated that the applicant's life would be in danger if she returned to her home in Guyana. The PRRA officer found that these affidavits were also not new evidence within the definition of section 113 of the Act:

> Counsel has also submitted affidavits from the applicant and two friends that do post-date the decision of the Board, however, I find that they were reasonably available for the applicant's refugee hearing. I do not find this constitutes new evidence as they refer only to the applicant's circumstances which were considered by the Board. No new risk developments are contained in these affidavits. Moreover, no explanation has been provided by the applicant or her counsel as to why these affidavits could not have been presented to the Board for its consideration. I note that the deponents (a close acquaintance and a friend) state that they have been aware of the circumstances faced by the applicant and the information contained is essentially a repetition of the same information that the applicant provided to the RPD. The applicant does not explain why these affidavits could not have been provided by the these deponents for the applicant's hearing.

3. 113 pages of additional documentation regarding country conditions in Guyana. The officer stated that this generalized information was considered with regard to assessing current country conditions, but was not evidence of new risk developments or of risks faced by the applicant that are personal to the applicant and not faced by the general population. The officer concluded:

> I do not consider this to be new evidence and none of it rebuts the significant findings of the Board.

[8] The officer found that the applicant's submissions also failed to reveal any risk developments faced by the applicant that had not been addressed by the Board. The officer concluded as follows:

> In regards to the remaining submissions made by counsel, it appears to me that most of the arguments made by counsel are really addressed to the correctness of the RPD decision. Those arguments are misplaced as they could and should have been made in a challenge to the RPD decision. The Applicant cannot, having failed to bring an application for judicial review of that decision, bring what can be described as a collateral attack on the RPD decision in the context of the PRRA decision.

[9] The officer reviewed its own research into country conditions in Guyana. The officer found that Guyana is a functioning democracy in which civil authorities generally maintain effective control of the security forces and in which the government is capable of protecting its citizens. The officer recognized, however, that the police forces face significant difficulties, including poor training, poor equipment, budgetary constrains, corruption, staff shortages, and lack of public confidence and cooperation. Citing *Canada (Attorney General) v. Ward*, (1992) 2 S.C.R. 689, the officer found that the applicant had failed to rebut the presumption of state protection that operated in the case.

[10] The officer quoted *Kaybaki v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 32, in which I stated, at paragraph 11, that “The PRRA application cannot be allowed to become a second refugee hearing. The PRRA process is to assess new risk developments between the hearing and the removal date.”

[11] The officer concluded as follows:

> In the case at hand, I have insufficient objective evidence before me that the applicant would be denied police protection for any reason should she require it. The applicant in her PRRA submissions has failed to provide, by way of evidence, clear and convincing proof of the state’s inability to protect. She has failed to rebut the presumption

of state protection. I acknowledge that there are tensions amongst the Indo and Afro-Guyanese communities affecting social and political life and find however, that these are risks faced by the entire population. I do not find that the applicant has provided sufficient objective evidence that she, by virtue of her personal circumstances, faces risks greater than other citizens of Guyana nor has she provided sufficient objective evidence that the government would be unable to or unwilling to offer her protection should she require it. Consequently, I am not persuaded to arrive at a different conclusion from that of the Immigration and Refugee Board.

LEGISLATION

[12] Section 96 of the Act, grants protection to 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.

[13] Section 97 of the Act grants protection to persons whose removal would subject them personally to a danger of torture, or to a risk to life, or to a risk of cruel and unusual treatment or punishment:

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 (i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country, (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, (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and (iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant : (i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays, (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) 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) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

[14] Section 113(a) of the Act allows a PRRA applicant to present only evidence that arose after the rejection of the refugee claim:

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

> 113. Il est disposé de la demande comme il suit:
>
> 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;
>
> . . .

[15] Subsection 161(2) of the *Immigration and Refugee Protection Regulations* S.O.R./2002-227, 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

[16] The applicant raises the following two issues:

1. Did the officer fail to assess new, material, and relevant evidence of personal risk to the applicant?; and

2. Did the officer err in its legal interpretation of what constitutes new evidence?

STANDARD OF REVIEW

[17] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, 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 *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, per Justice Binnie at paragraph 53.

[18] The jurisprudence is clear that factual determinations made by a PRRA officer are to be reviewed on a standard of reasonableness: see, for example, my decision in *Girmaeyesus v. Canada (Citizenship and Immigration)*, 2010 FC 53, at paragraph 23.

[19] In reviewing the Board'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*, supra, at paragraph 47; *Khosa*, supra, at paragraph 59.

[20] The question of the proper interpretation of the requirement for new evidence in section 113 of the Act is a question of law to be determined on a standard of correctness: see, for example, my decision in *Singh v. Canada (Citizenship and Immigration)*, 2009 FC 774, at paragraph 13.

ANALYSIS

<u>Issue 1</u>: Did the officer fail to assess new, material, and relevant evidence of personal risk faced by the applicant?

[21] The applicant submits that the officer failed to assess the new evidence provided by the applicant. I disagree. As detailed above, the officer enumerated and evaluated all of the evidence that the applicant had submitted. The applicant is not able to identify any evidence that she submitted to the PRRA officer that was not explicitly considered in the officer's reasons.

<u>Issue 2</u>: Did the officer err in its legal interpretation of what constitutes new evidence?

[22] The applicant submits that the PRRA officer erred in its legal interpretation of what constitutes new evidence under section 113 of the Act. The applicant, relying upon *Kirindage De Silva v. Canada (Citizenship and Immigration)*, 2007 FC 841, and *Raza v. Canada (Citizenship and Immigration)*, 2007 FCA 385, submits that new evidence that clarifies or further validates a feared risk may qualify as new evidence.

[23] In *Raza*, the Federal Court of Appeal considered the meaning of section 113(a) of the Act. At paragraph 13 of that decision, the Court states that the criterion of "newness" relates to three factors: proof the current state of affairs or an event that occurred subsequent to the refugee hearing in the country of removal; proof of a fact that has only become known to the applicant subsequent to the refugee hearing; or contradiction of a finding of fact made at the refugee hearing.

[24] In *De Silva*, Deputy Justice Teitelbaum stated the error committed by the PRRA officer in that case at paragraph 21:

> The Officer excluded these documents solely based on the fact that they related to the allegations raised in front of the Refugee Board. This is not the test for new evidence set out in subsection 113(a).

[25] In this case, the officer excluded the evidence not because it related to risk allegations made before the Board, but rather because it did not demonstrate any new developments in any risks identified before the Board, any new risks faced by the applicant, or any new facts that had come to the applicant's attention subsequent to her hearing before the Board. In addition, the Board concluded that none of the evidence successfully rebutted the Board's findings of fact.

[26] The applicant relies on *De Silva* per Justice Teitelbaum for when new evidence may be considered by the PRRA officer under section 113 of the Act. He states at paragraph 17:

> … this does not mean that new evidence relating to old risks need not be considered … The PRRA officer should first consider whether a document falls within one of the three prongs of subsection 113(a) …

The three prongs are:

1. if the new evidence arose after the rejection by the Board; or
2. was not reasonably available (at the time of the Board hearing); or
3. could not reasonably have been expected to have been presented at the time of the Board hearing.

[27] In the application at bar, the new evidence presented to the PRRA officer was reasonably available at the time of the Board hearing and could have been presented to the Board. The fact that the new evidence corroborates events, contradicts findings of the Board, and clarifies the evidence before the Board does not make it new evidence under section 113 of the Act. If it did, the applicant could split her case, and present evidence at the PRRA stage which could have been presented at the

Board stage. This is exactly the wrong which section 113 of the Act prohibits, and which the Federal Court of Appeal confirms in *Raza*, supra.

[28] The applicant also relies on *Komahe v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1521 at paragraph 28:

> … there was nothing he (the applicant) could have done before the Board decision to make the documents available to the Board.

In the case at bar, all of the applicant's evidence before the PRRA officer could have been marshalled before the Board hearing.

[29] It is clear to the Court, therefore, that the PRRA officer in this case properly interpreted the requirements of section 113(a) of the Act with regard to the evidence submitted by the applicant on this application.

[30] Accordingly, there is no basis upon which this Court can interfere with the PRRA officer's findings.

CERTIFIED QUESTION

[31] 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'S JUDGMENT is that:

This application for judicial review is dismissed.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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