Federal Court  Cour fédérale

Date: 20111128

Docket: IMM-1007-11

Citation: 2011 FC 1372

Ottawa, Ontario, November 28, 2011

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

OMAR FERNANDO RICO ESPEJO
CHRISTOPHER DAN RICO
ANGELICA BEBEL RICO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants seek judicial review of a decision by a Pre-Removal Risk Assessment (PRRA) Officer of the respondent Minister of Citizenship and Immigration Canada. The Officer found the applicants had not satisfied section 113(a) of the *Immigration and Refugee Protection Act*, 2001, c. 27 (*IRPA*) and therefore rejected the applicants' PRRA application. For the reasons that follow, the application for judicial review is dismissed.

Facts

[2] The principal applicant is Mr. Omar Fernando Rico Espejo, a 34-year old citizen of Colombia. Mr. Espejo has two children, a son aged 14, and a daughter aged 9 both of whom are citizens of the U.S. Mr. Espejo's refugee claim was heard jointly with that of his brother-in-law's, Mr. Alfonso Pardo Espinosa on January 26, 2010. In support of his claim, Mr. Espejo relied on the evidence presented by Mr. Espinosa at his refugee claim hearing. Mr. Espejo did not adduce any evidence of his own.

[3] Mr. Espinosa's claim was predicated on a fear that he would be targeted by the Autodefensas Unidas de Colombia (AUC), due to his insubordination of his commanding officer, a Captain, who was allegedly cooperating with AUC in 2004. Mr. Espinosa submitted a report to the Lieutenant Colonel at his battalion headquarters which detailed this Captain's instructions not to destroy coco crops and Mr. Espinosa's eye-witness account of the Captain's receipt of cash-in-hand from the AUC. It was Mr. Espinosa's claim that the action of filing the report against his commanding officer made him a target of AUC and other officers within the battalion.

[4] The Refugee Protection Division (RPD) determined that Mr. Espinosa's claim lacked credibility as his evidence was marked by a number of inconsistencies in both his oral and written evidence. Mr. Espinosa's refugee claim was therefore rejected on February 12, 2010 and, as a result, so too was Mr. Espejo's and his two children's. This Court denied their application for leave for judicial review on August 17, 2010.

[5] Mr. Espejo claimed before the PRRA Officer that he had been extorted by Fuerzas Armadas Revolucionarias de Colombia (FARC) in 2007 and fears that he and his children will be kidnapped by this organization should they return to Colombia. He claims that he has already met an extortionary demand by paying to them 10,000,000 Colombian pesos, following which, he faced a demand for another payment of 20,000,000 Colombian pesos. Instead of paying on the second demand, Mr. Espejo returned to the U.S. Mr. Espejo claims that FARC is still looking for him and maintains a fear that FARC will attempt to recruit his children into the organization.

[6] The PRRA Officer rejected Mr. Espejo's PRRA application on the basis that Mr. Espejo had not satisfied section 113(a) of the *IRPA*, because the evidence presented in support of the PRRA application could have been presented at the refugee hearing. Additionally, the PRRA Officer found that there was no more than a mere possibility that Mr. Espejo would suffer persecution should he be returned to Colombia and similarly that there was no more than a mere possibility that Mr. Espejo's children would face persecution if returned to the U.S. The PRRA Officer found that there were no reasonable grounds to believe that any of the applicants would face a risk to life or of cruel and unusual punishment if returned to Colombia, in the case of Mr. Espejo, or the U.S., in the case of his children. The documentary evidence filed in support was given no weight by the PRRA Officer because none of it was original and none of it was accompanied by an affidavit of translation from the translator.

Issue

[7] The issue in this case is therefore whether the evidence of such events constituted "new evidence" within the meaning of section 113(a) as interpreted in *Raza v Canada (Citizenship and*

Immigration), 2006 FC 1385, and whether in refusing to consider this evidence because it did not amount to a "new risk development", the PRRA Officer misconstrued section 113(1) of the *IRPA* and thereby erred in law.

Analysis

[8] Section 113(a) of the *IRPA* states as follows:

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;

[9] The jurisprudence of this Court with respect to the meaning of section 113(a) is unambiguous. As Justice Judith Snider held in *Perez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1379 at para 5:

> It is well-established that a PRRA is not intended to be an appeal of a decision of the RPD….The purpose of the PRRA is not to reargue the facts that were before the RPD. The decision of the RPD is to be considered as final with respect to the issue of protection under s. 96 or s. 97, subject only to the possibility that new evidence demonstrates that the applicant would be exposed to a new, different or additional risk that could not have been contemplated at the time of the RPD decision.

[10] This view has been endorsed in other decisions of this Court such as *Mehesa v Canada*, 2011 FC 338; *Selduz v Canada (Minister of Citizenship & Immigration)*, 2010 FC 583; and *Narany v Canada (Minister of Citizenship & Immigration)*, 2008 FC 155 at para 7, identify but three.

[11] In assessing whether evidence presented in a PRRA application qualifies as new evidence, more than the date of the evidence is relevant. The PRRA officer can consider whether anything of substance is new. As Justice Mosley stated in *Raza*:

> …In assessing "new information" it is not just the date of the document that is important, but whether the information is significant or significantly different than the information previously provided: *Selliah*, above at para. 38. Where "recent" information (i.e. information that post-dates the original decision) merely echoes information previously submitted, it is unlikely to result in a finding that country conditions have changed. The question is whether there is anything of "substance" that is new…

[12] In dismissing the appeal from Justice Mosley's decision, the Federal Court of Appeal agreed with this statement. Justice Sharlow stated in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385:

> One of the arguments considered by Justice Mosley in this case is whether a document that came into existence after the RPD hearing is, for that reason alone, "new evidence". He concluded that the newness of documentary evidence cannot be tested solely by the date on which the document was created. I agree. What is important is the event or circumstance sought to be proved by the documentary evidence.
>
> Counsel for Mr. Raza and his family argued that the evidence sought to be presented in support of a PRRA application cannot be rejected solely on the basis that it "addresses the same risk issue" considered by the RPD. I agree. However, a PRRA officer may properly reject such evidence if it cannot prove that the relevant facts as of the date of the PRRA application are materially different from the facts as found by the RPD.

[13] Counsel for Mr. Espejo submits that in the application of section 113(a) a distinction is to be made between adducing a "new risk" and adducing "new evidence" to the PRRA officer. In my view, however, it is difficult to sustain a claimed "new risk" to a PRRA applicant should he or she be removed to his or her home country without adducing "new evidence" in support of that "new risk" claim. To some degree, they are of necessity, co-dependant, a point made by Justice Michael Kelen in *Kaybaki v Canada (Minister of Citizenship and Immigration)*, 2004 FC 32.

[14] Here, however, the PRRA Officer reasonably concluded that Mr. Espejo had knowledge and belief that he was, allegedly, a target of FARC before and during his refugee claim hearing. It will be remembered that section 113(a) compels a PRRA applicant to adduce "new evidence that arose after the rejection or [that] 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." In the present case, Mr. Espejo's evidence was not new, nor did it arise after the rejection of his claim, nor was it unreasonably unavailable to him and nor was it unreasonable to expect him to present it at the time of his hearing or at the time his claim was rejected.

[15] Appropriately, the PRRA Officer wrote:

> The principal applicant's problems with the FARC occurred in 2007, well before his refugee hearing in January 2010. While I acknowledge that it was held jointly with that of his brother-in-law, the applicant could have raised this issue at the hearing. He has provided no reasonable explanation as to why he did not raise his family's encounter with the FARC at the hearing.
>
> Moreover, I note that his Counsel raised the issue of the applicant's brother-in-law possibly being a person of interest to the FARC. Reasonably, at that time, the principal applicant could have raised the

> issues his family faced with respect to the FARC back in 2007 when in Colombia. Moreover, the risk with respect to fear of kidnapping and recruitment has been a longstanding problem in Colombia and therefore irrespective of the minor applicants' age, this was reasonably known to the principal applicant and could have been presented for consideration.
>
> Any risks with respect to the FARC could have reasonably been raised at the time the applicants had their refugee hearing. The mere fact that the principal applicant presented a protection claim before a panel of the RPD indicates to me his awareness that this was his opportunity to seek Canada's protection by specifying all the risks feared.

[16] The Officer analyzed the evidence before her in a manner consistent with the decision of the Court of Appeal in *Raza*. No error of law arises. To the extent the Officer made determinations of fact they fell within the range of possible, acceptable outcomes defensible in respect of the facts and law. The intervention of this Court is not warranted.

[17] In conclusion, I note that the Officer nonetheless analyzed the substance of the evidence in support of the claim and found that it did not meet the threshold of either section 96 or section 97 of the *IRPA*. I note as well that while the Notice of Application is in the name of Omar Espejo alone, all of the subsequent documents filed before the Court refer to him as the principle applicant and to his two children, as applicants. The Court therefore directs, of its own motion, that the style of cause be amended to add Christopher Dan Rico and Angelica Bebel Rico as applicants to reflect the documents and proceedings as they have in fact been filed and unfolded.

[18] For the foregoing reasons, the application is dismissed.

[19] No question for certification has been proposed and none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be and is hereby dismissed. No question for certification has been proposed and none arises.

"Donald J. Rennie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1007-11
STYLE OF CAUSE:	OMAR FERNANDO RICO ESPEJO v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto
DATE OF HEARING:	October 4, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	RENNIE J.
DATED:	November 28, 2011

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