Federal Court

Cour fédérale

Date: 20111215

Docket: IMM-7331-11

Citation: 2011 FC 1484

BETWEEN:

BAKOME COLETTE BODIKA-KANINDA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

LEMIEUX J.

I. Introduction and Background

[1] On Saturday, December 3, 2011, I granted a stay of the Applicant's removal to South Africa pending the determination of the Applicant's application for leave and judicial review and if granted until the Applicant's judicial review application had been determined. These reasons explain why the stay was granted.

[2] The underlying proceeding to which the stay application is grafted is an application for leave and judicial review of the August 8, 2011 decision of a Pre-Removal Risk Assessment Officer

(PRRA Officer) who decided that the Applicant would not be a risk under sections 96 and 97 of the *Immigration and Refugee Protection Act*, 2001, c. 27 (*IRPA*) if returned to South Africa.

[3] The Applicant was born in the Republic of Congo, formerly Zaire, but lost her citizenship to that country after obtaining South African citizenship in 1999 after immigrating there in the early 1990s with her husband whom she divorced in 2004.

[4] She then began a common-law relationship in 2005 with J.B. which lasted until August 2007. She terminated that relationship because he had over that time period sexually abused her. During that relationship, the Applicant worked as a pharmacist in Saudi Arabia returning many times to South Africa.

[5] She finally fled from J.B. and from South Africa after J.B. broke into her house armed with a gun threatening to kill her and her children. She moved out, stayed a short period of time with her son and returned in September 2007 to Saudi Arabia coming to Canada in December 2007 making a refugee claim after her house in Cape Town was vandalized in May 2008 by persons at the behest of J.B. she suspects.

[6] Her refugee claim was refused for a number of reasons: (1) delay in making a claim; (2) voluntary returns to South Africa during her abusive relationship with J.B.; (3) failure to claim for refugee status in numerous countries she had travelled to during that relationship; and (4) absence of corroborative evidence as to the very existence of J.B. including a statement she made to Canadian

officials in March 2007 when she applied for a visa to come to Canada for a visit. She indicated that she was married in Zaire and not divorced.

[7] In particular, the member of the Refugee Protection Division (RPD) was concerned that the Applicant has submitted no proof of J.B.'s existence. The Tribunal gave the Applicant two weeks to produce some evidence. The Applicant produced an affidavit from her son and a photo of her with a man. The Tribunal did not give any weight to the photo because the identity of the person was unknown and did not establish a common-law relationship. She gave no weight to the son's affidavit because it was dated after the hearing had concluded. A judge of this Court refused to grant leave from the Tribunal's decision.

<u>II. The PRRA Officer's decision</u>

[8] The PRRA Officer noted the risk alleged by the Applicant was the same as she had put forth to the RPD.

[9] He acknowledged the Applicant had provided new evidence, namely; (1) a psychological report from Dr. Young; (2) a police report dated December 2, 2010; (3) four affidavits from persons in South Africa; and (4) country condition reports on the protection accorded to women in South Africa, victims of domestic abuse.

[10] For the purposes of these reasons, I need focus on the PRRA Officer's analysis of the affidavits. He wrote the following:

> Quant aux 3 autres affidavits au dossier, il s'agit des documents ou les auteurs clament avoir été témoins de la vie commune et

> tumultueuse de la demanderesse avec Johnson Buthelezi. Ils affirment qu'ils ont vu la demanderesse battue par son conjoint, mais sans qu'aucun d'entre eux n'alerte la police. Même si j'accepte que la demanderesse a eu une vie commune avec Johnson Buthelezi, j'accorde peu de valeur probante à ces documents. En effet, les auteurs de ces témoignages n'expliquent pas pourquoi en 2007 la demanderesse s'est présentée à l'ambassade canadienne comme mariée à François Bodika-Kaninda.
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> Même se j'accepte, de par leurs date de production, que les documents fournis constituent des nouveaux éléments de preuve, je ne leur accorde aucune valeur probante. Ces documents ne prouvent pas un fait qui était inconnu de la demanderesse au moment de l'audience et ils ne sont pas capables de contredire un fait établi par la Commission, en l'occurrence l'absence de crainte subjective de la part de la demanderesse qui a miné sa crédibilité.
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> La jurisprudence qualifie une preuve de « fait nouveau » ou de « nouveau élément de preuve » que si et seulement si celle-ci (la preuve) est en corrélation avec soit les conditions générales du pays, soit avec la situation personnelle du demandeur plutôt que de se baser sur la date ou la preuve a été produite. Ceci est pour empêcher qu'un demandeur débouté ne fabrique facilement de « nouveaux » affidavit et de preuves documentaires afin de contrer le verdict de la Commission et ainsi soutenir sa demande d'asile, transformant ainsi une demande ERAR en un appel de la décision de la Commission. Je trouve que c'est ici le cas.
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> [Je souligne]

III. Analysis and conclusions

[11] The required three part test to obtain a stay is well known. The Applicant has the burden of establishing; (1) a serious issue; (2) irreparable harm; and (3) the balance of convenience.

[12] In this case, to establish a serious issue, the threshold is low. The Applicant is not required to establish that she has a strong case. The test is whether the issues raised are neither frivolous or vexatious. I see the following issues:

a. Whether the PRRA Officer misconstrued the evidence of Dr. Young on the issue of the Applicant's subjective fear;

b. Whether the PRRA Officer properly analysed the concept of new evidence under section 113 of the *IRPA*;

c. Whether the PRRA Officer drew erroneous findings of fact on the Mwabi, Mukeba and Ntumba affidavits, particularly on the issue whether those affidavits did not contradict the findings of the RPD on the issue of J.B.'s existence and the complaints made to the police (See *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385, para 13); and

d. Whether the PRRA Officer failed to consider the effectiveness of the South African laws related to domestic violence.

[13] The Applicant has made out irreparable harm in the following ways: (1) Dr. Young who evaluated the Applicant twice states the Applicant is at risk of attempting suicide if returned to South Africa; (2) the affidavit evidence shows J.B. exists and was extremely violent towards the Applicant; and (3) that after the relationship was severed J.B. continued to harass the Applicant.

[14] Having made out irreparable harm and serious issues, the balance of convenience favours the Applicant.

"François Lemieux"
Judge

Ottawa, Ontario
December 15, 2011