Federal Court  Cour fédérale

Date: 20130528

Docket: IMM-3336-12

Citation: 2013 FC 561

Ottawa, Ontario, May 28, 2013

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

JOANNA JOSEPH,
MERISSA RUTH RUBEN

Applicants

and

MINISTER OF CITIZENSHIP & IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision by a pre-removal risk assessment (PRRA) officer (the officer) dated March 9, 2012, wherein the applicant's PRRA application was refused. The officer's decision was based on the finding that the applicants would not be subject to risk of persecution, danger of torture, risk to life or risk of cruel and unusual treatment or punishment if returned to St. Lucia.

[2] The applicants request that the officer's decision be set aside and the application be referred for redetermination by a different officer.

Background

[3] The principal applicant, Joanna Joseph and her daughter, Merissa Ruth Ruben, are citizens of St. Lucia. The principal applicant's common law spouse began abusing her in September 1998. He sexually assaulted her after the birth of her daughter in May 2000. The abuse continued and in February 2002, the principal applicant's abuser hit her with a piece of wood and broke her finger. On March 23, 2002, the principal applicant fought with her spouse and he attempted to kill her with a knife. The principal applicant then escaped to Canada. Since her arrival in Canada, her abuser was charged with sexually assaulting a young woman, but is now out of jail and has threatened to kill the principal applicant and her daughter.

[4] The applicants made a claim for refugee protection which was denied on January 11, 2011. The applicants made a PRRA application on October 28, 2011.

Officer's PRRA Decision

[5] In a letter dated March 9, 2012, the officer informed the applicants that the application had been rejected. It was accompanied by written reasons.

[6] The officer summarized the applicants' immigration history and began by noting that a PRRA application is not an appeal of the Refugee Protection Division's (RPD) decision. The officer noted that the applicants had provided no newspaper articles or country reports, but had provided letters from family members and other individuals. The officer accepted them as evidence given that they postdated the RPD decision.

[7] The officer noted the background of the principal applicant's claim and her description of abuse in St. Lucia, including that she stated she had gone to the police who had told her they could only give her spouse a warning.

[8] The officer excerpted passages from several country conditions documents, including the United States Department of State (DOS) 2010 report on St. Lucia and an Immigration and Refugee Board report. They described state protection efforts in St. Lucia for victims of domestic abuse.

[9] The officer reviewed a letter by the principal applicant indicating her inability to care for her daughter in St. Lucia. The letter also outlined that she had family support in Canada. The officer reviewed other letters confirming the hardship the principal applicant would face upon return to St. Lucia and another letter confirming her employment in Canada.

[10] The officer concluded that these were hardship factors that could not be considered in rendering a PRRA decision, as it is only concerned with risk.

[11] The officer noted the letters described the abuse suffered by the principal applicant. The officer accepted that the principal applicant had been abused by her former common law spouse.

[12] The officer noted the principal applicant had provided little information as to how she was able to obtain the information that her abuser had been released from prison and threatened to kill her. The officer considered another letter which indicated that the police in St. Lucia would not take action until after another attack on the principal applicant. The officer noted the principal applicant had provided little other evidence of her allegation that the police had only been willing to give her abuser a warning.

[13] The officer indicated the protections available from a domestic violence statute in St. Lucia and recited the principles of state protection. The officer accepted that domestic violence in St. Lucia is a problem and that there had been criticism of the state's effort in providing protection to victims of domestic violence. The officer noted the domestic violence statute and the US DOS report indicating that police have arrested and charged perpetrators in a number of domestic violence cases. The government does fund a women's support centre.

[14] The officer found that upon return to St. Lucia, should the principal applicant find that her former partner continues to threaten or attack her, she could turn to the authorities for assistance. The officer accepted that the authorities had been criticized in regards to providing protection, but found that the state does provide assistance and does make serious efforts in providing to those who suffer from domestic abuse and that St. Lucia is a parliamentary democracy and makes serious

efforts to protect women who have suffered from violence. The fact that the principal applicant's abuser had been imprisoned for a sexual assault demonstrated such serious efforts.

[15] The officer rejected the application on the basis of little clear and convincing proof that St. Lucia was unable to provide protection.

Issues

[16] The applicants submit the following points at issue:

1. Whether the officer breached procedural fairness by failing to grant an oral hearing?
2. Did the officer err in assessing the principal applicant's credibility?
3. Did the officer err by improperly assessing the availability of state protection?

[17] I would rephrase the issues as follows:

1. What is the appropriate standard of review?
2. Did the officer breach procedural fairness?
3. Did the officer err in denying the application?

Applicants' Written Submissions

[18] The applicants raise three arguments.

[19] First, the officer's failure to conduct an oral hearing is a violation of procedural fairness reviewable on a correctness standard. The three factors from section 167 of the Act's Regulations were present, which creates a rebuttable presumption in favour of granting a hearing. The officer clearly doubted the principal applicant's credibility, as he did not accept that the police refused to assist her, even if he was using the reasoning of sufficiency of evidence.

[20] Second, the officer erred by not accepting the principal applicant's claim that the police had refused to provide the principal applicant with protection in the past. There is a presumption that a claimant's testimony is truthful unless there is a reason to doubt it. In the absence of contradictory evidence, it is an error for a PRRA officer to require corroborative evidence and to make a negative credibility finding on the sole basis of the lack of corroborative evidence. Pursuant to the Gender Guidelines, the requirement of producing corroborative evidence is particularly relaxed in cases where the claim is based upon gender related violence.

[21] Third, the officer failed to take a contextual approach to state protection. A PRRA applicant can rebut the presumption of state protection with evidence of her actual attempts to seek protection. This Court has held that credibility must be assessed before state protection to avoid assessing the latter in a factual vacuum. The principal applicant provided testimony the police refused to help her after she had suffered abuse. This should have served to rebut the presumption of state protection. The officer's analysis of country conditions evidence was done in a factual vacuum.

Respondent's Written Submissions

[22] The respondent points out that on the stay motion in this proceeding, Mr. Justice Leonard Mandamin found the applicants did not raise a serious issue.

[23] The respondent argues the officer made no credibility finding. Rather, it was a matter of the sufficiency of evidence. The comment that the applicants had provided little other evidence does not make it a credibility finding. The jurisprudence of this Court has made clear it is not necessary to make a credibility finding to conclude that uncorroborated evidence will not overcome the legal burden of proving a fact on the balance of probabilities. In the absence of evidence with sufficient probative value, it was reasonable for the officer to conclude the principal applicant had not proven, on a balance of probabilities, she had taken the necessary measures to seek state protection.

[24] The Gender Guidelines do not apply to a PRRA officer. The officer was alert and sensitive to the gender based nature of this claim and considered the challenges of domestic violence in St. Lucia. Even if the Gender Guidelines applied, the officer satisfied its requirements.

[25] The officer did not breach natural justice by failing to grant an oral hearing. Oral PRRA hearings are held only in exceptional circumstances, when all the circumstances listed in section 167 of the Regulations are met. The issue here was the weight of each piece of evidence as opposed to credibility. There was no credibility finding, veiled or explicit. The onus was on the principal applicant to establish her claim and she was required to provide all relevant submissions and evidence.

[26] The officer's state protection findings were reasonable. The evidence was that the principal applicant had made a single complaint to the police. The Federal Court of Appeal has held that an applicant must do more than seek protection at one police station. Even assuming the officer made a credibility finding about her efforts to seek state protection, this fact was not determinative. It is insufficient for an applicant to rely solely on country conditions evidence if she failed to avail herself of state protection. There was no factual vacuum here and it is not an error to conduct a state protection analysis without first making credibility findings. The officer was aware of the principal applicant's personal circumstances and accepted her account of suffering domestic violence.

Analysis and Decision

[27] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 57, [2008] 1 SCR 190).

[28] It is trite law that the standard of review of PRRA decisions is reasonableness (see *Wang v Canada (Minister of Citizenship and Immigration)*, 2010 FC 799, [2010] FCJ No 980 at paragraph 11; and *Aleziri v Canada (Minister of Citizenship and Immigration)*, 2009 FC 38, [2009] FCJ No 52 at paragraph 11). Similarly, issues of state protection and of the weighing, interpretation and assessment of evidence are reviewable on a reasonableness standard (see *Ipina v Canada (Minister of Citizenship and Immigration)*, 2011 FC 733, [2011] FCJ No 924 at paragraph 5; and *Oluwafemi v*

Canada (Minister of Citizenship and Immigration), 2009 FC 1045, [2009] FCJ No 1286 at paragraph 38).

[29] In reviewing the officer's decision on the standard of reasonableness, the Court should not intervene unless the officer came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47 and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59, [2009] 1 SCR 339). As the Supreme Court held in *Khosa* above, it is not up to a reviewing court to substitute its own view of a preferable outcome, nor is it the function of the reviewing court to reweigh the evidence (at paragraph 59).

[30] It is also trite law that the appropriate standard of review for issues of procedural fairness is correctness (see *Wang* above, at paragraph 13 and *Khosa* above, at paragraph 43). No deference is owed to decision makers on these issues (see *Dunsmuir* above, at paragraph 50).

[31] **Issue 2**

Did the officer breach procedural fairness?

I agree with the Minister that the officer did not make a credibility finding in this decision. As Mr. Justice Russel Zinn explained in *Ferguson v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1067 at paragraph 27, [2008] FCJ No 1308, sufficiency of evidence is distinct from credibility:

> Evidence tendered by a witness with a personal interest in the matter may also be examined for its weight before considering its credibility because typically this sort of evidence requires corroboration if it is to have probative value. If there is no corroboration, then it may be unnecessary to assess its credibility as its weight will

> not meet the legal burden of proving the fact on the balance of probabilities. When the trier of fact assesses the evidence in this manner he or she is not making a determination based on the credibility of the person providing the evidence; rather, the trier of fact is simply saying the evidence that has been tendered does not have sufficient probative value, either on its own or coupled with the other tendered evidence, to establish on the balance of probability, the fact for which it has been tendered. …

[32] I do not agree that the officer's reference to "little other evidence or information" was a stealth credibility finding. There was therefore no presumption that the officer ought to hold a hearing and no procedural fairness violation.

[33] **Issue 3**

Did the officer err in denying the application?

The applicants argue the officer did not properly consider the applicants' evidence of a lack of state protection.

[34] This Court has repeatedly held that the test for state protection is concerned with the adequacy of that protection and not merely efforts to provide it. In *Lopez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1176, [2010] FCJ No 1589, Mr. Justice Roger Hughes made this clear at paragraph 8:

> Another error of law is with respect to what is the nature of state protection that is to be considered. Here the Member found that Mexico "is making serious and genuine efforts" to address the problem. That is not the test. What must be considered is the actual effectiveness of the protection.

[35] In this decision, the officer concluded the following:

1. St. Lucia ". . . does provide assistance and does make serious efforts in providing protection to those who suffer from domestic abuse."

2. St Lucia ". . . is a parliamentary democracy and does make serious efforts to protect its citizens".

3. The imprisonment of the applicant's abuser demonstrates that St. Lucia ". . . does make serious efforts to protect women who have suffered from violence."

[36] At no point in the decision does the officer refer to the adequacy of state protection. It is therefore difficult to infer that the officer applied the proper test on this essential issue.

[37] Although the officer excerpted many country conditions facts, in the "Findings" section, the officer focused on a St. Lucia statute designed to protect women from domestic violence. The mere existence of a statute is evidence of an effort to protect, but not actual protection. Evidence of the adequacy of protection would be that which indicates whether the statute has actually resulted in improved protection and whether that improvement was to such a level as to be adequate.

[38] Here, the officer noted that the police had arrested and charged perpetrators in "a number" of domestic violence cases and that many cases are not prosecuted due to victims being reluctant to press charges. This is also evidence which speaks much more to the efforts of the state than its adequacy.

[39] I, of course, agree with the respondent that there is a presumption of state protection that the applicants must overcome and that this is a factual determination that this Court must defer to.

However, the officer's state protection finding was based on a misapplication of this Court's clear jurisprudence and the evidentiary findings are sufficiently rooted in that misapplication to render the decision unreasonable.

[40] The application for judicial review is therefore granted and the matter is referred to a different officer for redetermination.

[41] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed and the matter is referred to a different officer for redetermination.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

***Immigration and Refugee Protection Act*, SC 2001, c 27**

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
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.
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	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 incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(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) 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.

***Immigration and Refugee Protection Regulations*, SOR/2002-227**

167. For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors are the following:	167. Pour l'application de l'alinéa 113b) de la Loi, les facteurs ci-après servent à décider si la tenue d'une audience est requise :
(a) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;	a) l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur;
(b) whether the evidence is central to the decision with respect to the application for protection; and	b) l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;
(c) whether the evidence, if accepted, would justify allowing the application for protection.	c) la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

FEDERAL COURT

SOLICITORS OF RECORD

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