Federal Court  Cour fédérale

Date: 20150122

Docket: IMM-6168-13

Citation: 2015 FC 86

Ottawa, Ontario, January 22, 2015

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

RAUHA NDESHIPAN SHILONGO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter and Background

[1] Pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*Act*], the Applicant seeks judicial review of a pre-removal risk assessment [PRRA] that denied her request for protection under subsection 112(1) of the *Act*. The Applicant asks the Court to set aside the PRRA decision and return the matter to a different officer for re-determination.

[2] The Applicant is a 35 year old female citizen of Namibia from the village of Onambone. Prior to her arrival in Canada, she had lived for nearly seven years in the United Kingdom where she had legal status as the accompanying partner of her boyfriend. When her boyfriend returned to Namibia to attend to his family's business, the Applicant lost her status in the United Kingdom. If she had gone back with him though, she feared that she would be "targeted for forced marriage, physical abuse, rape and death from her uncle with the approval and assistance of her father." She therefore came to Canada instead on August 23, 2010, and immediately sought refugee protection.

[3] On October 25, 2011, the Applicant's application for protection was refused by the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada. The RPD did not question the Applicant's story that her father had promised her in marriage to her uncle, nor did it disbelieve that she was raped and beaten by her uncle several times after she refused to marry him. However, the RPD found that the Applicant had an internal flight alternative [IFA] in Windhoek, where the state could protect her.

[4] The Applicant applied for leave to judicially review the RPD's decision to this Court, but her application was dismissed on February 9, 2012 (*Shilongo v Minister of Citizenship and Immigration*, IMM-8437-11 (FC)).

[5] On November 16, 2012, the Applicant applied for the PRRA now under review, essentially relying on the same allegations of risk. Subsequent to her PRRA application, the Applicant was scheduled for removal from Canada on October 24, 2013, but such removal was

deferred as she secured a stay of removal from this Court until this judicial review application was decided.

II. Decision under Review

[6] A senior immigration officer [the Officer] rejected the Applicant's PRRA on June 26, 2013. Although the Applicant's counsel had requested an interview, no oral hearing was held.

[7] Since the Applicant's claim for protection had already been rejected by the RPD, paragraph 113(a) of the *Act* applied and the Applicant was limited to presenting "only new evidence that arose after the rejection [by the RPD] or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented".

[8] Citing that paragraph of the *Act*, the Officer rejected several documents that were dated June 4, 2003, including medical reports and a personal statement from the Applicant requesting police protection. Although the Applicant's counsel asserted that her brother had requested these documents years ago and they had only recently been released, the Officer did not accept that explanation. In any event, the Officer determined that all these documents were irrelevant since the RPD had not questioned the Applicant's story or her credibility. The Officer also determined that some of the correspondence from the Applicant's siblings was not new evidence, since all such correspondence did was confirm that the Applicant's uncle and father are still looking for her, a fact which the Officer stated would not affect the RPD's findings that Windhoek is an IFA for the Applicant.

[9] The same was not necessarily true of the statutory declarations from the Applicant's mother and brother, each dated November 15, 2012. They stated that the Applicant's uncle had visited her brother's house in Windhoek on August 26, 2012, demanding to know the Applicant's whereabouts, and that her uncle's body guards had attacked the family. The Officer discounted these declarations, however, as follows:

> I note that these attestations come from parties with a vested interest in a positive outcome for the applicant's case. Moreover, there is no indication that the applicant's mother and brother made any efforts to report the threats and attacks to the police in Windhoek. It is reasonable to expect that if they were attacked and threatened at their home that they would have sought redress from the state, and I am not persuaded that protection would not be reasonably forthcoming.
>
> …Accepting the applicant's evidence regarding continued threats does not rebut the findings of state protection in the IFA of Windhoek.
>
> …I find that I have insufficient evidence before me to allow me to arrive at a different conclusion from that of the Board, particularly where the applicant has failed to rebut the state protection findings of the Board in the IFA of Windhoek.

[10] The Applicant also submitted to the Officer that similarly situated individuals like her cousin have been known to disappear or have been killed for refusing to enter a forced marriage, but the Officer determined that there was not sufficient evidence to corroborate these statements, nor any reference to her cousin's disappearance in the correspondence from any of her family members.

[11] Finally, the Officer assessed the documentary evidence submitted by the Applicant, even though it was not personal to her. That evidence did not show that the country conditions had changed since the RPD made its decision and, in fact, confirmed the existence of state protection

by showing that, while gender-based violence occurs, the perpetrators are convicted. Thus, the Officer saw no reason to depart from the RPD's decision, and concluded that the Applicant could receive adequate state protection in Windhoek.

III. The Parties' Submissions

A. *The Applicant's Arguments*

[12] According to the Applicant, the Officer's finding that the new evidence did not rebut the findings of state protection in the IFA of Windhoek is unreasonable. The Applicant argues, relying on the decision in *Suduwelik v Canada (Citizenship and Immigration)*, 2007 FC 326 at paragraph 23, that the Officer should not have discounted the statutory declarations just because they came from interested parties. It was incumbent on the Officer to consider the Applicant's personal risk profile in light of all the evidence, the Applicant says, and not simply to rely upon generalized country condition evidence.

[13] Furthermore, the Applicant says that the Officer here did not apply the *Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution* [Guidelines], even though the Applicant's claims should have engaged them. The Applicant points out that there is no reference whatsoever to the Guidelines in the Officer's decision and that he was not sensitive to what the Guidelines suggest is a reasonable approach. In this regard, the Applicant cites the decision in *Talo v Canada (Citizenship and Immigration)*, 2012 FC 478 at paragraph 5, 408 FTR 102.

[14] In addition, the Applicant states that the Officer's plausibility finding is not subject to as much deference as other credibility findings. According to the Applicant, it was not reasonable for the Officer to assume that the Applicant's mother and brother would or should have gone to the police after her uncle's body guards had attacked them in Windhoek. The Applicant submits that this plausibility finding was not supported by the evidence (citing, e.g., *Lozano Pulido v Canada (Citizenship and Immigration)*, 2007 FC 209 at paragraph 37, and *Gjelaj v Canada (Citizenship and Immigration)*, 2010 FC 37 at paragraphs 3- 4).

[15] The Applicant urges the Court to take a step back and look at the bigger picture. The Applicant's mother had taken the Applicant to the police on two occasions prior to her departure from Namibia, but there was no adequate state protection in either instance. According to the Applicant, it is just as plausible that the past experiences of the Applicant and her mother may have made her mother realize that there would likely be ineffective or inadequate state protection. The Applicant submits that the Officer should have analysed this aspect of the Applicant's circumstances more closely than he or she did.

[16] As to the decision in *Obeng v Canada (Citizenship and Immigration)*, 2009 FC 61 [*Obeng*], upon which the Respondent relies, the Applicant says that *Obeng* can be distinguished on the basis that the applicant in that case was not credible and there was contradictory information in the new evidence. Also, in *Obeng*, the evidence was not rejected because of where it came from. The Applicant says that the new evidence here clearly shows the agent of persecution has now visited the proposed IFA of Windhoek, looking for the Applicant.

B. *The Respondent's Arguments*

[17] The Respondent says that the applicable standard of review in respect of the Officer's decision is reasonableness (citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraphs 47-48, 53, [2008] 1 SCR 190 [*Dunsmuir*]).

[18] The Respondent states that it was clearly open to the Officer to give the new evidence little weight. The Officer's plausibility finding, according to the Respondent, is reasonable and stands up to scrutiny (citing *Perea Duran v Canada (Minister of Citizenship and Immigration)*, 2006 FC 43 at paragraph 15). Further, the Respondent argues that there still is state protection available to the Applicant in Windhoek, even with the evidence of the renewed threats from her uncle. The Respondent urges the Court to find that the Applicant needed to show more objective evidence of the threat she allegedly faced (citing *Obeng* at paragraph 31). The Respondent also asks the Court to follow the decision in *Obeng*, which is a similar case involving a female citizen of Ghana.

[19] In any event, the Respondent submits that the analysis of state protection done by the RPD and by the Officer here was reasonable. Furthermore, the Respondent says that the nature of the new evidence concerning the IFA available to the Applicant did not obligate the Officer to explicitly consider the Guidelines (citing *Obeng* at paragraph 35, and *Fernandez v Canada (Citizenship and Immigration)*, 2008 FC 232 at paragraph 6).

[20] The Respondent therefore submits that the Officer's decision was reasonable and that the reasons for it do not have to be perfect (citing *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraph 14, [2011] 3 SCR 708).

IV. Standard of Review and Analysis

A. *Standard of Review*

[21] Absent any question of procedural fairness, the standard of review by which to assess a PRRA officer's decision is reasonableness (*Jainul Shaikh v Canada (Citizenship and Immigration)*, 2012 FC 1318 at paragraph 16). Since a PRRA officer's assessment of any new evidence under paragraph 113(a) of the *Act* is essentially a question of mixed fact and law, the decision attracts deference. Accordingly, this Court may only intervene if the PRRA officer's reasons are not justified, transparent and intelligible, or if the decision is not within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at paragraph 47).

[22] The Federal Court of Appeal in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 at paragraph 13, 289 DLR (4th) 675 [*Raza*], determined that a PRRA officer must respect a negative refugee determination by the RPD "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." For the purposes of assessing that, the Court of Appeal in *Raza* summarized the following questions to be asked about the new evidence:

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).

[23] The Federal Court of Appeal further noted in *Raza* that a PRRA application by a failed refugee claimant is not an appeal or reconsideration of the decision of the RPD to reject a claim for protection. Nevertheless, it may require consideration of some or all of the same factual and legal issues as a claim for refugee protection. This being so, it was not unreasonable for the Officer here to look to the RPD's state protection findings.

[24] In *Silva v Canada (Citizenship and Immigration)*, 2012 FC 1294 at paragraph 20, Madam Justice Elizabeth Heneghan stated that, because of *Raza*, "a finding by the RPD that a claimant has an IFA or can access state protection or is not credible would preclude a positive finding in a PRRA unless the claimant shows, with new evidence, that a material change in circumstances has occurred since the prior determination by the RPD".

[25] The essential issue now before the Court, therefore, is whether it was reasonable for the Officer not to find that a material change in circumstances has occurred since the prior determination by the RPD.

B. *Analysis*

[26] The RPD had assessed and determined that there was an IFA for the Applicant in Windhoek in view of the fact that she came from a traditional community and feared forced marriage, physical abuse, rape and death at the hands of the uncle to whom she had been promised, her father, and their agents. This fear was present while she lived in the village of Onambone until she fled Namibia with her boyfriend in December, 2003. Neither the RPD nor the Officer here questioned the Applicant's credibility or the fact she has been subjected to

physical abuse, rape and death threats from her uncle with the approval and assistance of her father.

[27] The test to determine whether an IFA is available is set out in *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 at 709-710, 140 NR 138 (CA) [*Rasaratnam*]. The decision-maker must be satisfied on a balance of probabilities that: (1) there is no serious possibility that the claimant will be persecuted in the proposed IFA; and (2) conditions in the proposed IFA are such that, in all the circumstances, it would be reasonable for the claimant to seek refuge there.

[28] In this case, the Officer found that the new evidence did not rebut the finding that the Applicant had a viable IFA in Windhoek. The Officer concluded that: "I have insufficient evidence before me to allow me to arrive at a different conclusion from that of the Board, particularly where the applicant has failed to rebut the state protection findings of the Board in the IFA of Windhoek".

[29] Part of that finding was based on the Officer's view that the sworn statements could not be trusted because they were from the Applicant's family members. In my view, that was unreasonable. Although it is often better for such evidence to be corroborated (*Ferguson v Canada (Citizenship and Immigration)*, 2008 FC 1067 at para 27, 74 Imm LR (3d) 306), it was still sworn testimony, and it is difficult to know what other evidence could reasonably be expected in a situation like this. After all, a threat such as that alleged would never have been made to someone completely uninterested in the Applicant's life, and if the sworn statements are

true then the Applicant's mother and brother were the only witnesses; there could be no evidence of the incident of which they are not the ultimate source. As Mr. Justice Russel Zinn observed in a similar situation in *Rendon Ochoa v Canada (Citizenship and Immigration)*, 2010 FC 1105 at para 10, 93 Imm LR (3d) 113, they were "uniquely placed to provide evidence and are indeed the only people who could properly provide the evidence that is sworn to in their statements."

[30] This evidence was also important. Before the RPD, the only threat that the Applicant had ever faced was in the village of Onambone. Now that threat had materialized in the very place that the RPD found was a viable IFA for the Applicant, and it was unreasonable to find that would not likely have changed the RPD's analysis.

[31] I agree with the Applicant that in these circumstances, it was incumbent upon the Officer to consider the Applicant's personal risk profile in light of all the evidence, and not simply rely upon generalized country condition evidence. The Officer should have assessed whether there was any serious possibility that the Applicant would be persecuted in the proposed IFA and, also, whether the conditions in the proposed IFA were such that, in all the circumstances, it would be reasonable for the Applicant to seek refuge there.

[32] In this case, the Officer did not reasonably account for the fact that the Applicant's agent of persecution had made his way to the alleged IFA. Moreover, the Officer did not address whether it would be reasonable for the Applicant to seek refuge in the IFA in view of the fact that her uncle had recently been looking for her there.

[33] I also agree with the Applicant that *Obeng*, while superficially similar to this case, is not determinative. Although *Obeng* also was a case of a woman being subjected to a forced marriage and allegations of abuse, the applicant in that case failed to establish that her life and her safety were threatened or that she would be at risk if returned to Ghana. That is unlike the Applicant here, whose credibility and fear were not questioned by the RPD or the Officer. In addition, the documents from interested parties which had been considered by the PRRA officer in *Obeng* had fundamental flaws by not being dated and not signed, unlike the statutory declarations from the Applicant's mother and brother in this case.

V. Conclusion

[34] In view of the foregoing reasons, it is unnecessary to address the other arguments raised by the parties, since I find that it was not reasonable for the Officer to rely simply upon generalized country condition evidence and not consider or assess the Applicant's personal risk in light of the new evidence. The Officer's decision is not defensible in view of the facts or the law.

[35] In the result, the Applicant's application for judicial review is allowed, the matter remitted to another immigration officer for re-determination and there shall be no award of costs. No serious question of general importance is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. the application for judicial review is granted;

2. the matter remitted to another immigration officer for re-determination;

3. no question of general importance is certified; and

4. there is no order as to costs.

"Keith M. Boswell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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