Federal Court Cour fédérale

Date: 20110823

Docket: IMM-18-11

Citation: 2011 FC 1017

Ottawa, Ontario, August 23, 2011

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

MARIBEL NUNEZ RODRIGUEZ
JULIO CESAR MENDEZ-NUNEZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants seek judicial review of a negative Pre-Removal Risk Assessment (PRRA) decision, dated December 13, 2010.

[2] The principal applicant, Maribel Nunez Rodriguez, is a citizen of Mexico. Her claim for protection is based on abuse by her former husband. The male applicant is her 20 year old son. The Refugee Protection Division (RPD) found that Ms. Rodriguez was in fact abused, but that state protection was available. The RPD found that the principal applicant made only one attempt to seek

police protection and rejected her explanations for failing to make serious effort to obtain police protection. The RPD also found that the applicants had a viable internal flight alternative (IFA) in the Federal District. I will not further recount the facts which underline the RPD's decision as they are not germane to the reasons why this application is granted.

[3] The PRRA officer's decision should be set aside on the grounds that the officer erred in finding that the expert opinions put before him did not constitute new evidence. The opinions, when viewed through the proper legal framework, constitute new evidence and should have been considered by the officer.

The PRRA Submissions

[4] The principal applicant's PRRA submissions included two expert affidavits providing opinions about the availability of state protection for women experiencing domestic violence in Mexico. The first was from Dr. Alicia Elena Perez Duarte y Norona, a law professor at the National Autonomous University of Mexico and former Special Prosecutor for Crimes Related to Acts of Violence Against Women in Mexico City from 2006-2007. She is a recognized expert on family law and human rights having served as a Magistrate for the Superior Court of Justice in the Federal District, Director of the Office of Family and Civil Matters in the Attorney General's Office and Legal Advisor to the Permanent Mission of Mexico in Geneva, Switzerland. The second affidavit is from Jimena Avalos Capin, a policy researcher and an attorney with eight years of constitutional and administrative law litigation experience and an expert in access to information and privacy in Mexico.

The Decision Under Review

[5] The PRRA officer found that expert reports were not new evidence. Even though the reports post-date the RPD's rejection of the claim, the PRRA officer found that the information contained in the reports was not significantly different than that which was before the RPD. The PRRA officer also found that the information provided by Dr. Norona could reasonably have been presented at the RPD hearing.

[6] The PRRA officer relied on *Raza v Canada (MCI)*, 2006 FC 1385, wherein Justice Mosley found that the PRRA officer's role was to consider the present situation and determine whether there was anything of substance that was new since the RPD decision. The PRRA officer also referred to *Escalona Perez v Canada (MCI),* 2006 FC 1379, where this Court held that the RPD decision was final and the new evidence on the PRRA was to determine whether applicants were subject to a new, different or additional risk that could not have been contemplated at the time of the RPD decision. *Raza* of course, was sustained on appeal, but for somewhat expanded reasons, which as will be seen, the officer did not apply.

[7] As noted, the *Raza* test, as expressed by the Federal Court of Appeal, includes criteria in addition to those described by Justice Mosley. The full test is as follows:

> 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).

[8] The expert opinions contained in reports submitted to the PRRA officer constitute new evidence according to the *Raza* test. Both experts were, *prima facie*, well-qualified to speak to state protection issues in Mexico and no issue was taken with their credentials. The evidence which their reports address is relevant, as it pertains directly to adequacy of state protection institutions in Mexico. The evidence is also material in that it directly contradicts the RPD's findings on facts which were integral to its decision on both state protection and on IFAs. It is also new, both substantively and chronologically.

[9] The RPD rejected the principal applicant's contention that her former husband would be able to locate her in the Federal District as "unreliable and unsupported", noting that there was no evidence that individuals could access federal databases to track people down. The affidavit of Ms. Capin directly contradicts this finding. She states that it is possible to buy such information on the internet for as little as $40.00 and that it is also possible to obtain personal data from government databases due to rule of law problems, upon which she expands. In the report, cases are described where protected data was obtained by men who declared they were the husband of the woman concerned. The report advises of cases where personal data has been given out by mid and low-level government officials in exchange for bribes or gifts, a practice which Ms. Capin describes as "very common". Similarly, Dr. Norona confirms a practice of individuals obtaining protected information through bribery and states that when she was a government official she was offered money to provide access to confidential information.

[10] Ms. Capin's opinion contains information that is both new and substantively different than what was before the RPD and which calls into question the RPD's conclusion that there was no evidence that women could be tracked by obtaining personal information from government officials. The evidence contradicts the PRRA officer's conclusion that the information was not significantly different, and leads to the conclusion that the PRRA officer unreasonably discounted this evidence. Finally, the evidence is new, in that it addresses the current availability of protection in Mexico, and the effectiveness of the very institutions the RPD relied on in support of its conclusion that state protection was available.

[11] I note that the PRRA officer did not reject the expert opinions solely on the grounds that the evidence was not new. The PRRA officer also found that the information provided by Dr. Norona was reasonably available for presentation at the RPD hearing. I do not find this conclusion to be reasonable. While it may be true that Dr. Norona may have been available to provide an expert opinion for the RPD hearing her opinion, however, post-dates the RPD decision and was submitted to provide details of the current country conditions. The PRRA officer's approach, if accepted, would mean that PRRA applicants could never submit an expert opinion on the current country conditions from an expert who could have given an opinion at the RPD hearing, even to speak to a change in country conditions. This cannot be what Parliament intended to have been the effect of the pre-removal risk assessment provision.

[12] The RPD based its finding on the adequacy of state protection, in part, on the existence of the Office of Special Prosecutor of Crime Related to Acts of Violence Against Women. Dr. Noroma was the Special Prosecutor appointed to this position but resigned from the post by reason of what she considered to be the systemic failure of Mexican authorities to address gender violence. Thus, the very person in charge of ensuring that women were afforded state protection asserted, in uncontradicted evidence, that Mexico could not provide protection. As well, the RPD looked to the existence of protection orders as evidence of adequate state protection. The new evidence tendered in the form of Dr. Noroma's report directly questions the probity of relying on the existence of these orders, where she notes that "while the 2007 law provided for protection orders, the Mexican law enforcement authorities are not equipped to respond quickly or efficiently to enforce them."

[13] In sum, this evidence fully meets the criteria set forth by the Federal Court of Appeal in *Raza v Canada (MCI)* 2007 FCA 385. The evidence is new in that it addresses facts unknown to the claimant at the time of the initial PRRA decision; it is material in that it addresses questions of fact that were integral to the decision in question; and, it directly contradicts certain findings of fact on which the determinations of state protection and IFAs were predicated. For these reasons, the PRRA officer was required to consider the new evidence submitted by the applicants and to assess the risk of removal in light of it. It was a reviewable error for the PRRA officer not to do so.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted. The matter is remitted to a different officer for re-consideration in accordance with these reasons.

2. There is no question for certification.

"Donald J. Rennie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-18-11
STYLE OF CAUSE:	MARIBEL NUNEZ RODRIGUEZ JULIO CESAR MENDEZ-NUNEZ v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto
DATE OF HEARING:	July 19, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	RENNIE J.
DATED:	August 23, 2011

APPEARANCES:

Ms. Carole Dahan Ms. Laura Brittain	FOR THE APPLICANTS
Ms. Leanne Briscoe	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Refugee Law Office Toronto Ontario	FOR THE APPLICANTS
Myles J. Kirvan, Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT