Federal Court  Cour fédérale

Date: 20160908

Docket: IMM-5401-15

Citation: 2016 FC 1021

Ottawa, Ontario, September 9, 2016

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

JOEL GAUAN GO
(A.K.A. NIKKIE GO)

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Ms. Go, is a citizen of the Philippines. She was born as a biological male but lives as a transsexual woman. Ms. Go is also HIV-positive. She lived in the United States

between 1998 and 2005. While living in the United States and prior to her deportation to the Philippines in 2005 she was convicted of a drug offence.

[2] As a transsexual woman, Ms. Go alleges that she was subject to severe mistreatment in the Philippines. She alleges that the police, among others, subjected her to abuse, discrimination and sexual violence. She further alleges that the police subjected her to arbitrary detention and extortion because she is a transsexual woman.

[3] Ms. Go arrived in Canada on a visitor's visa in 2008. She claimed refugee protection in February 2012. On that same date, she was arrested and detained on the grounds that she was in Canada without authorization. Her claim was found to be inadmissible on grounds of serious criminality for having been convicted of an offence in the United States that would be punishable by a term of imprisonment of ten years in Canada. A Humanitarian and Compassionate [H&C] application was refused in 2013 as was a Pre-Removal Risk Assessment [PRRA]. The PRRA decision was quashed and returned for reconsideration. Ms. Go's second PRRA application was refused in October 2015. It is that decision that is now before this Court.

[4] Ms. Go asks that the second PRRA decision be set aside and the matter returned for redetermination by a different Officer. She argues that the PRRA Officer [Officer] adopted and applied the wrong test for state protection by considering state efforts as opposed to the operational adequacy of state protection for someone in her circumstances. She also submits that it was unreasonable for the Officer to have imposed an obligation on her to seek police protection where the police have been an agent of persecution. She further submits that the

Officer unreasonably relied on evidence of positive state action related to gay and lesbian Filipinos that is not relevant to the applicant. Finally, Ms. Go argues that the Officer erred by analyzing her gender and medical condition separately thereby failing to consider the cumulative effect of the risks she identified.

[5] The application requires that I consider the following issues:

A. Did the Officer err in identifying the test for state protection?

B. Are the Officer's state protection findings unreasonable?

C. Did the Officer err by not conducting a cumulative assessment of Ms. Go's risk profile?

[6] I am not persuaded that the Officer committed a reviewable error and dismiss the application for the reasons that follow.

II. Standard of Review

[7] Ms. Go argues that the Officer is owed no deference in identifying the state protection test to be applied. I agree. The test for state protection has been developed in the jurisprudence. Where it is alleged that a decision-maker has misunderstood that test the Court will review the issue on a standard of correctness (*Dawidowicz v Canada (Minister of Citizenship and Immigration*), 2014 FC 115 at para 23 [*Dawidowicz*] citing *Ruszo v Canada (Minister of Citizenship and Immigration*), 2013 FC 1004 at para 22).

[8] Ms. Go also submits that the Officer's alleged failure to conduct a cumulative assessment of her risks amounts to an error in law, to be reviewed on a correctness standard. I disagree.

[9] A failure to consider a ground of persecution or risk has been held to amount to a breach of procedural fairness (*Varga v Canada (Minister of Citizenship and Immigration)*, 2013 FC 494 at para 6). However, in this case the issue is not whether the Officer considered all grounds, but whether the Officer assessed the cumulative impact of all grounds. This, in my opinion, involves an analysis of the facts and the law attracting the reasonableness standard of review (*Gorzsas v Canada (Minister of Citizenship and Immigration)*, 2009 FC 458 at paras 15-18).

[10] The Officer's adequacy of state protection findings also engages a question of mixed fact and law to which the reasonableness standard of review applies (*Hoo v Canada (Minister of Citizenship and Immigration*), 2016 FC 283 at para 8).

III. Analysis

A. *Did the Officer err in identifying the test for state protection?*

[11] Ms. Go submits that the Officer adopted the wrong legal test for state protection, pointing to the following statement in the Officer's decision in support of this position:

> No state is expected to provide perfect protection to all citizens at all times rather, state protection is considered adequate if a state is in effective control of its territory, has military, police and civil authority in place, and makes serious efforts to protect its citizens.

[12] Ms. Go submits that this statement shows that the Officer incorrectly applied a "serious efforts by the state" test. I disagree.

[13] The jurisprudence establishes that the test to be applied in considering state protection is one of the adequacy of state protection for someone in circumstances similar to those of the claimant (*Dawidowicz* at paras 29 and 30). However, the extract cited above is not setting out the test for state protection. Rather, the Officer was setting out the presumption that a claimant must overcome to establish the inadequacy of state protection where there is not a complete breakdown in the state apparatus. In the next sentence the Officer notes "… that an applicant can rebut the presumption of the state protection by providing clear and convincing evidence that the state is unable to provide them with the necessary protection." In my opinion, this sentence demonstrates that the Officer understood that the issue to be considered was the ability of the Philippine authorities to provide Ms. Go "with the necessary protection". The decision demonstrates that the Officer's analysis not only addressed state efforts but also recognized the operational shortcomings and gaps demonstrated by the evidence. This strengthens my view that the Officer correctly identified the state protection test.

[14] The Officer did not err in identifying the test for state protection.

B. *Are the Officer's state protection findings unreasonable?*

[15] Ms. Go submits that the Officer's state protection findings were unreasonable in that the Officer (1) imposed a burden on her to complain about police misconduct directed at her and (2) engaged in a selective review of the evidence and considered inapplicable evidence.

[16] The Officer undertook a review of the evidence noting that Ms. Go was at risk both on the basis that she is a transsexual and HIV-positive. The Officer notes that Ms. Go reported abuse and discrimination emanating from her family, the police and society generally. The Officer also noted that Ms. Go had never reported any abuse or discrimination to authorities.

[17] Relying on the Supreme Court of Canada's decision in *Canada (Attorney General) v Ward*, [1993] 2 SCR 689[*Ward*], Ms. Go argues that it was unreasonable for the Officer to expect her to have complained to the police as the police had previously abused her. I disagree.

[18] In this case, the Officer recognized that Ms. Go had been abused by police officers, and also noted the documentary evidence outlining the need for the police to do more to protect lesbian, gay, bisexual, transgender [LGBT] and HIV-positive individuals. Contrary to Ms. Go's submissions, the Officer considered her personal circumstances in conducting the state protection analysis. Ms. Go disagrees with the Officer's conclusion arguing that evidence was mischaracterized, cherry-picked or misread.

[19] While Ms. Go disagrees with the result, the Officer was required to weigh the evidence and come to a conclusion. I agree with the respondents. Ms. Go's disagreement is with the Officer's weighing of the evidence. This is not a basis upon which this Court will interfere.

[20] It is true that a failure to approach the state for protection will not automatically defeat a claim (*Da Souza v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1279 at para 18 referring to *Ward* at para 49). However, this does not mean that police misconduct will

automatically alleviate a claimant of their obligation to seek state protection. This is particularly so where there is evidence of functioning mechanisms to investigate and punish misconduct (*Beri v Canada (Minister of Citizenship and Immigration)*, 2013 FC 854 at para 29).

C. *Did the Officer err by not conducting a cumulative assessment of Ms. Go's risk profile?*

[21] Ms. Go argues that the Officer conducted a bifurcated analysis of the risks she faced as a transsexual, on the one hand, and a HIV-positive individual, on the other. In conducting this analysis, she submits that the Officer acknowledged the existence of discrimination and abuse against transsexuals and HIV-positive persons, but failed to consider the cumulative impact of this discrimination and abuse. Relying on Justice Anne Mactavish's decision in *Djubok v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 497 [*Djubok*], Ms. Go argues that the failure to conduct a cumulative analysis of the various forms of discrimination was a reviewable error. Again, I disagree.

[22] The Officer's analysis begins by acknowledging that Ms. Go alleges risk on two grounds. The Officer then addressed the risks faced by LGBT individuals and individuals who are HIV-positive concurrently throughout the decision. While the Officer did not expressly state that the cumulative risks were being assessed, Ms. Go's risks were not assessed in discrete silos or addressed in isolation, as was the case in *Djubok*.

[23] The Officer was aware of the risks faced by a transsexual HIV-positive individual, and while Ms. Go argues that the Officer erred in failing to mention specific evidence, it is well

established that an Officer need not to do so. The Officer did not err in addressing the risks faced by Ms. Go.

IV. Conclusion

[24] The Officer did not commit a reviewable error in determining Ms. Go's PRRA. The parties have not identified a question for certification and none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed. No question is certified.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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