Federal Court Cour fédérale

Date: 20181211

Docket: IMM-1851-18

Citation: 2018 FC 1252

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Montréal, Quebec, December 11, 2018

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

SYLVAIN RONALD
EDOUARD PAMELA SHERLY

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

<u>JUDGMENT AND REASONS</u>

[1] The applicants are spouses of Haitian nationality whose refugee claims in Canada have been declared ineligible under paragraph 101(e) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] and the Safe Third Country Agreement, because they first entered the United States. On August 15, 2017, they filed a pre-removal risk assessment (PRRA) application. On September 14, 2017, they filed additional submissions. On January 5, 2018, an

immigration officer [the officer] denied the PRRA application, and the applicants received that decision on March 13, 2018. On April 3, 2018, they requested the administrative reconsideration of this negative decision. On April 10, 2018, the same officer dismissed the request for reconsideration, hence this application for judicial review.

[2] Today, this is an application to review the legality or reasonableness of the officer's refusal to reconsider the PRRA decision. The applicants argue that this decision is unreasonable or otherwise violates their right to procedural fairness. It is not disputed that the officer had the discretion to reconsider the PRRA decision (*Hussein v Canada (Citizenship and Immigration)*, 2018 FC 44, at para 52 [*Hussein*]) and that the decision taken based on the merits of the administrative review application must be reviewed on a standard of reasonableness (*Pierre Paul v Canada (Citizenship and Immigration)*, 2018 FC 523, at paras 26–27 [*Pierre Paul*]). However, issues of procedural fairness must be assessed on a standard of correctness (*Canada (Citizenship and Immigration) v Khosa,* [2009] 1 SCR 339, at para 43).

[3] Before proceeding further, a brief overview of the relevant facts is in order.

[4] Mr. Sylvain Ronald, the principal applicant, worked for the Ministère de la Santé publique et de la population (department of public health and population) [MSPP] in Haiti as assistant section head. While he and his spouse, Édouard Pamela Sherly, were waiting for the bus to go to Cap Haïtien on March 23, 2016, two unknown men made the applicants get into their car, threatening them with rifles. This was because the principal applicant is a member of the Ligue éducative et culturelle haïtienne (Haitian educational and cultural league) [LECH], which fights against the presence of street gangs. After being released, the applicants filed a complaint

with the police the same day. But the principal applicant continued to receive threatening calls. On August 1, 2016, the applicants filed a second complaint with the police. The female applicant, a nurse, was pregnant at the time. On August 3, 2016, she went to the United States, and their son was born in that country. She returned to Haiti in November 2016 with their son, but the threats continued; they then went back to the United States in June 2017. The principal applicant joined them a few weeks later.

[5] On August 5, 2017, the family arrived in Canada and claimed refugee protection. Except for that of their son, their refugee protection claims were inadmissible. That said, on August 15, 2017, the applicants were advised that they had until August 30, 2017, to apply for a PRRA, and until September 14, 2017 to file written submissions and any relevant documentary evidence. As a result, on August 15, 2017, the applicants made their PRRA application. It was received by the officer on August 23, 2017. Additional submissions were filed on September 14, 2017, and were received by the officer on September 18, 2017.

[6] In the PRRA decision itself, which is not the subject of this application for judicial review, the officer noted that the applicants referred to evidence filed after the application and package tracking evidence. However, the officer concluded as follows:

> [TRANSLATION]
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> The applicant did not submit a copy of the complaint [to the police] sent in Haiti or proof of its receipt. . . . In addition, the applicant did not submit any documents proving that he was a member of the LECH or even of the MSPP or of the fact that his car had been vandalized . . . .

[7] The officer therefore determined that there was insufficient evidence demonstrating a personalized risk and that they were not refugees or persons in need of protection under sections 96 and 97 of the Act. Rather than seeking judicial review of the PRRA officer's negative decision, the applicants instead applied for administrative reconsideration in April 2018.

[8] Thus, in support of their request for reconsideration, the applicants filed a statement by their former counsel dated April 3, 2018. She bluntly stated that, following her clients' filing of the PRRA application, she did send by parcel post in September 2017 the additional evidence mentioned in the written submissions. It should be noted that, in their submissions of September 14, 2017, the applicants referred to this additional evidence that would be delivered to them from Haiti. According to a copy of the proof of delivery, the package containing the documents in question was sent from Port-au-Prince, Haiti, on September 9, 2017, and actually arrived at customs clearance in Quebec on September 13, 2018. In any event, the applicants refiled this evidence in support of their request for reconsideration.

[9] It should be understood that an administrative reconsideration decision has two steps. The first step is to determine whether the original decision should be reconsidered. The second step involves the actual reconsideration of the decision in question as well as the filing of new evidence in support of the reconsideration application (*Pierre Paul* at paras 27–29). On April 10, 2018, the officer who rendered the PRRA decision denied the request to reconsider her decision for the following reasons:

> [TRANSLATION]
>
> We hereby respond to your additional submissions dated April 6, 2018, regarding your [PRRA] application.

> Your PRRA application was considered on its merits and was refused. We sent you the decision by letter on January 5, 2018, thus definitively closing your application. After reviewing the additional information/documents you submitted, I decided not to proceed with the reopening of your file for the following reasons:
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> - Evidence that you submitted was available at the time of the decision;
> - We received your application on August 23, 2017, and your additional submissions on September 18, 2017. The decision was rendered on January 5, 2018, five months later. The delay was sufficient to submit additional documentation;
> - The principles of natural justice or procedural fairness have been followed;
> - The responsibility to send documents within the prescribed timelines is the responsibility of the applicant.

[10] As part of this judicial review application, the respondent filed an affidavit by the officer who rendered the PRRA decision and the reconsideration decision. She stated that she rendered the PRRA decision on January 5, 2018, with the evidence on record and never received the additional documents mentioned in the administrative reconsideration request; she only received the documents in question on April 6, 2018.

[11] The applicants argue today that the officer did not review the evidence submitted in support of the request for reconsideration in a serious and careful manner. The PRRA officer who decides on the merits of a request for administrative reconsideration must verify the decision in question to determine whether it was properly made. Based on their former counsel's statement, the applicants contend that the package containing the additional documents, which were ignored in the January 2018 PRRA decision, was indeed sent to the officer in Vancouver

soon after the additional submissions, on or about September 14, 2017. The documents were not "additional evidence". The officer clearly did not consider all of the evidence available. The refusal to reconsider the file is unreasonable or otherwise breaches procedural fairness.

[12] For his part, the respondent submits that the officer reasonably exercised her discretion not to grant the request for reconsideration because the applicants relied on evidence that was available at the time of the PRRA decision. The officer never received the package in question before making the PRRA decision. Indeed, the officer respected procedural fairness because she had no obligation to defer the decision until the applicants filed the additional documents to which they referred in their September 2017 additional submissions.

[13] Intervention is warranted in this case. The respondent's argument is based on circular legal reasoning. Although the officer did not violate a principle of procedural fairness, she nevertheless exercised her discretion unreasonably. In their written submissions of September 14, 2017, the applicants stated twice that [TRANSLATION] "[a] delay in delivery means that we will have to submit this evidence to you later". The package that the applicants' former counsel claims to have sent to the officer in September 2017 contained, among other things, the two complaints made to the police in March and August 2016 and documents attesting to the fact that the applicant was a member of the LECH, such as his membership card, and photographs indicating that the applicants' car was vandalized.

[14] First, let us say that, in theory, with respect to the PRRA application itself and the PRRA decision, the officer was not required to wait for the receipt of the additional evidence announced

in the September 2017 written submissions. Legally speaking, a decision could have been taken as of September 14, 2017. Nevertheless, if this additional evidence was indeed before the officer on January 5, 2018, she still had to consider it when making her decision. On the other hand, justice should not only be done, but be seen to be done.. Here, the applicants are of good faith and they should not be victims of administrative red tape. The Court considered the statement of the applicants' former counsel and the affidavit of the officer. The former states that the documents were sent to the officer shortly after the additional submissions were filed. But the officer asserts that those documents were never received before the request for reconsideration when the applicants filed them for the second time. It is therefore likely that the documents were lost in the delivery process.

[15] In the case at bar, the officer refused to exercise her discretion because the evidence that the applicants re-filed with their request for reconsideration was purportedly available at the time of the PRRA decision. This is problematic in this case because the applicants had no way of knowing that this was the case and that the additional documents supposedly sent by their former counsel had not been received. Also, the officer disregarded, if not misunderstood, the reasons for the request for reconsideration. The fact that the additional documents were sent by the applicants and were apparently not received by the officer in September 2017 is a circumstance beyond the applicants' control and gives rise to the administrative reconsideration of the PRRA decision. Failure to consider these circumstances renders the refusal to reconsider the PRRA application unreasonable.

[16] For these reasons, the application for judicial review is allowed. The decision dated April 10, 2018, is set aside and the file will be returned to another officer. Counsel raised no question of general importance.

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THE COURT ORDERS AND ADJUDGES that the application for judicial review is allowed**.** The decision dated April 10, 2018, is set aside and the request for reconsideration is returned to another officer.

"Luc Martineau"
Judge

Certified true translation
This 14th day of February 2019

Margarita Gorbounova, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1851-18
SYTLE OF CAUSE:	SYLVAIN RONALD AND EDOUARD PAMELA SHERLY v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	DECEMBER 5, 2018
JUGEMENT AND REASONS:	MARTINEAU J.
DATED:	DECEMBER 11, 2018

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