Federal Court  Cour fédérale

Date: 20090923

Docket: IMM-5099-08

Citation: 2009 FC 951

OTTAWA, ONTARIO, September 23, 2009

PRESENT: The Honourable Louis S. Tannenbaum

BETWEEN:

NENAD KOTUR and ALENKA BARESIC

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the October 1, 2008 decision of Pre-Removal Risk Assessment Officer Thierry Alfred N'kombe (the "Officer") who rejected the applicants' Pre-Removal Risk Assessment ("PRRA") application.

BACKGROUND

[2] The applicants, Mr. Kotur and Ms. Baresic, are citizens of Croatia. Ms. Baresic arrived in Canada in September 2003 and Mr. Kotur arrived in May 2004. They both applied for refugee

protection on the basis of their fear of persecution due to Mr. Kotur's Serbian ethnicity and their mixed common-law relationship, as Ms. Baresic is Croatian. The claim was denied by the Refugee Protection Division ("RPD") in February 2006 on the basis of lack of credibility. Leave to apply for judicial review of that decision was denied.

[3] The applicants also made an application for permanent residence from inside Canada on humanitarian and compassionate grounds ("H&C") which was denied on the same day as their PRRA application. The challenge to that decision will be dealt with in a separate set of reasons.

[4] On December 10, 2008, the applicants applied for, and were granted, a stay of their removal to Croatia, originally scheduled for December 13, 2008, until such time as their application for leave and judicial review is determined on both the PRRA and H&C applications.

ANALYSIS

[5] PRRA officers may be considered specialized administrative tribunals to whom significant deference is owed, in particular for their decisions regarding the weight to be given to evidence presented before them. For this reason, the reasonableness standard of review applies to their decisions (*Da Mota v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 386). The determination of risk on return to a particular country is in large part a fact-driven inquiry and courts must give deference to factual based decisions (*Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339). The Court's role is not to re-weigh the evidence but

may intervene if the decision is not supported by the evidence tendered or fails to consider appropriate factors (*Kaybaki v. Canada (Solicitor General)*, 2004 FC 32).

[6] The PRRA process, in the present context, is intended to be an assessment based on new facts or evidence which have arisen since the negative refugee determination. Paragraph 113(*a*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, states:

113. Consideration of an application for protection shall be as follows: (*a*) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection;	**113.** Il est disposé de la demande comme il suit : *a*) le demandeur d'asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'il n'était pas raisonnable, dans les circonstances, de s'attendre à ce qu'il les ait présentés au moment du rejet;

[7] In *Raza v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FCA 385, 370 N.R. 344, at paras. 13-15, Justice Sharlow for the Federal Court of Appeal identified credibility, relevance, newness and materiality as evidentiary characteristics to be considered, along with the express statutory conditions, in determining whether evidence submitted can be accepted by a PRRA officer under paragraph 113(*a*) of the IRPA.

[8] One of the points of consideration listed by Justice Sharlow, in terms of "newness", is whether the proposed new evidence is capable of contradicting a finding of fact by the RPD. In this instance, the Officer notes a letter from the male applicant's mother and finds that "there is no reference of the alleged persecution, physical attack, or family feud that the applicants alleged to have suffered". He assigns little weight to it. However, the Officer fails to note a letter from the female applicant's mother, dated March 10, 2006, which not only refers to the "family feud" but warns her daughter that a family member has threatened to kill the male applicant. She expressly states that the applicants' child will never be accepted by her family and the applicants will receive no support. The Officer fails to address this piece of evidence in any way even though it would appear to contradict the RPD's findings. He does not indicate whether or not he accepts it as new evidence and, if he did accept it, why he discounted it.

[9] As the applicants submit, the country condition reports which the Officer relies on to draw his conclusion that the applicants would not be at risk if returned to Croatia, contain passages which contradict his conclusions. In the Responses to Information Requests cited by the Officer, the following passage can be found:

> …The International Helsinki Federation (IHF) reported that the overall situation of human rights had improved in Croatia, "[h]owever, the situation of the Serb and Roma minorities remained deplorable. Although the government had good intentions, it did not take enough concrete measures to prevent discrimination against Serbs" (27 June 2005, 9). Also according to the IHF, the population had "deep resentment and animosity" with respect to ethnic Serbs (IHF 27 June 2005, 9). According to one source, the Ministry of Interior reported that there were 50 attacks against Serbs in Croatia during 2005 (*Courrier des Balkans* 17 Jan. 2006). The source then reports that the president of the Croatian Helsinki Committee (CHC),

> commenting on the increase of these attacks from prior years, suggested human rights in Croatia had deteriorated (ibid.).
> [emphasis added]

[10] The US Department of State Report on Croatia – 2007, contains similar passages, notably:

> While constitutional protection against discrimination applied to all minorities, open discrimination and harassment continued against ethnic Serbs and Roma.
> [emphasis added]

[11] Justice Evans' comments in *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35 at para. 17 are instructive:

> However, the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": *Bains v. Canada (Minister of Employment and Immigration)* (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact.
>
> [emphasis added]

[12] The information contained in the objective documentary evidence relied upon by an officer is not for his or her selective use. It is incumbent on an officer to expressly consider contrasting points when arriving at a determination. Failure to do so leaves open the inference

that the officer overlooked the contradictory documentary evidence when coming to a negative determination.

CONCLUSION

[13] The Officer's decision ignored evidence and did not state why evidence of a contradictory nature was discounted. I infer from these omissions that he made an erroneous finding of fact without regard to the evidence. This error is serious enough to taint the entire impugned decision and to warrant the intervention of this Court.

[14] Neither party proposed a question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. For all the above reasons this application for judicial review is allowed, the decision of the PRRA Officer is set aside and the matter is sent back to a different Pre-Removal Risk Assessment Officer for re-determination.
2. There is no question of general importance to certify.

"Louis S. Tannenbaum"
Deputy Judge

AUTHORITIES CONSULTED BY THE COURT

1. *Canada v. Ward*, [1993] 2 SCR 689
2. *Salibian v. M.E.I.*, [1990] 3 F.C. 250 (C.A.)
3. *Mandelat v. M.E.I.* (F.C.A., nos. A-537-89 and A-538-89)
4. *Retnem v. M.E.I.* (1991), 13 Imm. L.R. (2d) 317 (F.C.A.)
5. *Iossifov v. M.E.I.* (A-854-92)
6. *Kadhm v. M.C.I.* (F.C.T.D., IMM-652-97)
7. *N.K. v. Canada*, [1995] F.C.J. No. 889
8. *Cepeda-Gutierrez v. MCI*, [1998] F.C.J. No. 1425
9. *C.D. v. M.C.I.* [2008] F.C.J. No. 631
10. *Pillai v. M.C.I.*, 2008 FC 1312
11. *Osorio v. M.C.I.*, 2005 FC 1459

FEDERAL COURT

SOLICITORS OF RECORD

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