Date: 20100319

Docket: IMM-496-09

Citation: 2010 FC 318

Ottawa, Ontario, March 19, 2010

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

AVIS CASANDRA JAMES
KESBURN LENIS DURRANT
ATESHA ALCENIA DURRANT
NASHBORN ANTHONIO JAMES

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), for judicial review of a decision of a pre-removal risk assessment officer (the PRRA officer) dated January 21, 2009, which determined that the applicants

would not be subject to risk of persecution, danger of torture, risk to life or risk of cruel and unusual treatment or punishment if returned to St. Vincent and the Grenadines (the PRRA decision).

[2] The applicants request that the PRRA officer's decision be quashed and that their claims be referred back to a different officer for redetermination. However, for the reasons that follow, I find that this application should be dismissed.

Background

[3] Avis Casandra James (Avis) is a citizen of St. Vincent and the Grenadines. She and her children came to Canada in 2006 and were allowed to enjoin the refugee claim of her sister, Neslyn, and several other family members. The refugee claim was in regards to Avis's husband, Lennox, who in 2001 attacked her brother, Noel, with a machete. Lennox was later convicted for the attack and was still in prison in St. Vincent.

[4] Noel and his children were accepted as refugees. The Refugee Protection Division (the Board) however denied the claims of Neslyn and Avis and their respective family members in a decision dated January 29, 2008. The Board stated that the applicants had not rebutted the presumption of state protection. The applicants had submitted to the Board that Lennox was plotting to kill them all upon his release and then commit suicide. Primary evidence of this threat came in the form of a letter from a prison officer. The Board questioned the authenticity of the letter and wondered why the prison officer had sent the letter in support of the applicants' refugee claim, but

had not taken it to the authorities to prevent an early release for Lennox. Particularly with regard to Avis's claim, the Board relied on the fact that she had been able to get a six month restraining order against Lennox in 2002 which was complied with, but then did not seek another such order when Lennox moved back in with her during 2003. In the Board's view, these actions showed that Avis had been provided with protection from the authorities before and that she would have received further protection had she sought it.

[5] This Court denied the applicants leave to judicially review the Board's decision in June of 2008.

[6] In support of their PRRA application, the applicants submitted about 15 letters from the family members themselves and from other family members and friends. The letters contained opinions about the seriousness of Lennox's threat, his deficiencies as a father and also reflected on the good character of the applicants and their sincere desire to remain in Canada.

PRRA Officer's Decision

[7] As a preliminary matter, the PRRA officer stated that he had independently reviewed all the documents and evidence before him, as well as the publicly available documents on the country conditions.

[8] The PRRA officer then reviewed the Board's decision and materials and determined that having read all the letters submitted in support of the PRRA, they were not new evidence. The letters merely restated materially the same circumstances and risks that were before the Board. There is no reason why the letters could not have been submitted to the Board. The applicants have failed to present any evidence of any new personalized risk developments arising since.

[9] The PRRA officer then turned to a review of country conditions. He found that documentary evidence indicates that state protection exists for victims of domestic abuse. He considered documentary evidence that violence against women continues to be a serious problem, but found that there has not been a significant change in country conditions since the applicants' refugee claim was heard.

Issues

[10] The following are the issues in this case:

1. What is the appropriate standard of review?

2. Did the PRRA officer err in concluding that the applicants had not presented new evidence under subsection 113(a)?

3. Did the PRRA officer err in concluding that based on the evidence provided by the applicants, they would not be subject to risk of torture, be at risk of persecution, or face a risk to life of cruel and unusual treatment or punishment if removed to St. Vincent?

Applicants' Written Submissions

[11] The applicants submit that upon receiving evidence submitted in support of a PRRA, officers must consider its credibility, relevance, newness and materiality. Evidence which clarifies or further validates something raised at the Board may qualify as new evidence. If evidence can be accepted under subsection 113(a), an officer must go on to consider if it evidences a new risk. The PRRA officer erred by simply dismissing the evidence as not being sufficient to rebut the Board's findings. The new threat was evidenced by the letter of Mr. Robinson which stated that Lennox had become aware that he was now with Avis and that Lennox was now threatening to kill him and his whole family, causing him to quit his job and come to Canada too. The PRRA officer said he read the letters but did not offer any analysis to suggest that he actually considered them.

[12] The applicants also submit that the PRRA officer was too selective in his review of state protection and country conditions, leaving out significant details that contradicted his ultimate conclusions. He should not have accepted that there is effective state protection. The evidence shows that there is not even adequate protection for women in St. Vincent.

Respondent's Written Submissions

[13] The respondent submits that the deferential standard of reasonableness is to be applied. Determinations by PRRA officers are in large part fact driven. Countries' human rights records and personal risk upon returning are outside the realm of the Court's expertise. Courts may not re-weigh

factors, but may intervene only if a PRRA decision is unsupported by the evidence or failed to consider appropriate factors. Neither is the case here.

[14] The respondent further submits that it is the applicants who have the burden to establish their PRRA application with credible and trustworthy evidence. Here they failed to rebut the presumption of state protection. The state did in fact protect Avis by first issuing a restraining order and later incarcerating Lennox.

[15] Finally, the respondent asserts that the decision was not unreasonable. Regarding the evidence that was before the PRRA officer, there was no explanation as to how it is new, or why it could not have been tendered before the Board as is required under section 113 of the Act. The evidence is in regards to continuing threats from Lennox, but these are not new threats. The Board had considered similar evidence by Mr. Robinson. The PRRA officer did not ignore evidence and was not required to mention every piece of evidence. Further, regarding the state protection analysis, the onus to rebut the presumption of state protection remains at all times on the applicants. Applicants must introduce evidence of inadequate state protection and then convince the trier of fact that on the balance of probabilities, state protection is inadequate. Evidence to rebut the presumption must be clear and convincing and be both relevant and reliable. No such evidence was provided.

Analysis and Decision

[16] **Issue 1**

What is the standard of review?

It is well established that the determinations of PRRA officers are accorded significant deference and are reviewable, post-*Dunsmuir* (*Dunsmuir v. New Brunswick*, 2008 SCC 9), on the standard of reasonableness (see *Raza v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1385, 58 Admin. L.R. (4th) 283, affm'd, 2007 FCA 385, 289 D.L.R. (4th) 675, *Ruiz v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 465, [2006] F.C.J. No. 573 (QL) at paragraph 12, *Muszynski v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1075, [2005] F.C.J. No. 1329 (QL) at paragraphs 7and 8).

[17] In the Federal Court decision in *Raza* above, Mr. Justice Mosley, at paragraph 10, reviewed some of the law regarding the significant deference accorded to decisions of PRRA officers:

> [10] PRAA officers have a specialized expertise in risk assessment, and their findings are usually fact driven, and therefore warrant considerable deference: *Selliah v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 872, 256 F.T.R. 53 at para.16 [*Selliah*]. Considerable deference is owed to the factual determinations of a PRAA officer including their conclusions with respect to the proper weight to be accorded to the evidence placed before them: *Yousef v. Canada (Minister of Citizenship and Immigration)*,2006 FC 864, [2006] F.C.J. No. 1101at para. 19 [*Yousef*]. In the absence of a failure to consider relevant factors or reliance upon irrelevant ones, the weighing of the evidence lies within the purview of the officer conducting the assessment and does not normally give rise to judicial review: *Augusto v. Canada (Solicitor General)*, 2005 FC 673, [2005] F.C.J. No. 850, at para. 9.

[18] I add however, that the issue at hand, while still a question of mixed law and fact, is more law intensive than a PRRA officer's ultimate conclusion. In other words, the determination of whether evidence submitted constitutes new evidence under subsection 113(a) is not owed as much deference as largely fact driven determinations such as the PRRA officer's determination of risk.

[19] **Issue 2**

Did the PRRA officer err in concluding that the applicants had not presented new evidence under subsection 113(a)?

Subsection 113(a) of the Act indicates that in PRRA applications where a refugee claim has been rejected, applicants can only present: (i) evidence that arose after the rejection, (ii) evidence that was unavailable, or (iii) evidence that they could not reasonably have been expected to have presented. If an applicant asserts that the evidence falls into the second or third category, he or she must provide an explanation as to why it was not available or could not have been presented (see *Elezi v. Canada (Minister of Citizenship and Immigration)*, [2008] 1 F.C.R. 365, 2007 FC 240 at paragraph 26, *Kaybaki v. Canada (Solicitor General of Canada)*, 2004 FC 32, [2004] F.C.J. No. 27 (QL)).

[20] In *Elezi* above, Mr. Justice de Montigny noted however, that the mere fact that the evidence is dated after the Board decision, does not mean that the evidence is new if it merely affirms the existence of facts that pre-date the decision (see *Elezi* above, at paragraphs 27 to 30). The evidence must relate to new developments.

[21] In *Kaybaki* above, Mr. Justice Kelen warned at paragraph 11 that:

> . . . the PRRA application cannot be allowed to become a second refugee hearing. The PRRA process is to assess new risk developments between the hearing and the removal date.

[22] The Federal Court of Appeal in *Raza v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385, 289 D.L.R. (4th) 675, [2007] F.C.J. No. 1632 (QL), recently reflected on the additional substantive thresholds that evidence must pass under subsection 113(a). At paragraph 13, Madam Justice Sharlow states:

> [13] As I read paragraph 113(a), it is based on the premise that a negative refugee determination by the RPD must be respected by the PRRA officer, 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. Paragraph 113(a) asks a number of questions, some expressly and some by necessary implication, about the proposed new evidence. I summarize those questions 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).

[23] The above questions do not need to be asked in every case or in any particular order. "…What is important is that the PRRA officer must consider all evidence that is presented, unless it is excluded on one of the grounds stated in paragraph [13] above." (see *Raza* above, at paragraph 15).

[24] I agree that new evidence relating to old risks should be considered (see *Kirindage de Silva et al v. The Minister of Citizenship and Immigration*, 2007 FC 841). However, the evidence must be new evidence.

[25] The law has not changed in the sense that an applicant must show that there has been a new development or provide evidence of a development or fact that was not presented to the Board. If a PRRA officer can determine that evidence does not meet the express statutory conditions, no other questions need to be asked. In substance, *Raza* above, has highlighted the additional requirements that the evidence be credible and that the new developments described must be relevant and material to the failed refugee claim.

[26] Here, the applicants submit as new evidence a letter stating that Lennox had found out about Avis's relationship with Mr. Robinson who also now resides in Canada. According to the handwritten letter, Lennox now wants to kill Mr. Robinson's whole family and has a new motive to kill Avis's whole family. While this may qualify as a new development for the purposes of passing the express statutory conditions question, it fails at the materiality stage. In the Board's decision however, the Board accepted Avis's evidence that Lennox wanted to kill her.

[27] In *Raza* above, Madam Justice Sharlow found that the evidence presented in that case failed at the materiality stage:

> [17] Counsel for Mr. Raza and his family argued that the evidence sought to be presented in support of a PRRA application cannot be rejected solely on the basis that it "addresses the same risk issue" considered by the RPD. I agree. However, a PRRA officer may properly reject such evidence if it cannot prove that the relevant facts as of the date of the PRRA application are materially different from the facts as found by the RPD.
>
> [18] In this case, Mr. Raza and his family submitted a number of documents in support of their PRRA application. All of the documents were created after the rejection of their claim for refugee protection. The PRRA officer concluded that the information in the

> documents was essentially a repetition of the same information that was before the RPD. In my view, that conclusion was reasonable. The documents are not capable of establishing that state protection in Pakistan, which had been found by the RPD to be adequate, was no longer adequate as of the date of the PRRA application. Therefore, the proposed new evidence fails at the fourth question listed above.

[28] The prime issue in the Board decision here was state protection, yet none of the applicants' letters went to that issue. Like in *Raza* above, it was open for the PRRA officer to conclude that none of the applicants' letters provided any new evidence that would go to rebut the Board's decision. The PRRA officer did not have to provide a more detailed legal analysis of why each letter was not material. I would not allow judicial review on this ground.

[29] **Issue 3**

Did the PRRA officer err in concluding that based on the evidence provided by the applicants, they would not be subject to risk of torture, be at risk of persecution, or face a risk to life of cruel and unusual treatment or punishment if removed to St. Vincent?

The Board had determined that the applicants were not refugees or persons in need of protection because they had not been able to rebut the presumption of state protection. In fact, the primary evidence on that issue was the fact that the state had provided protection from Lennox, the agent of persecution, by providing a restraining order that was obeyed and later incarcerating him.

[30] Since the PRRA officer determined that the applicants did not provide any new evidence under subsection 113(a), it was incumbent on him to respect the decision of the Board (see *Raza* above, at paragraph 13).

[31] Despite this, the PRRA officer reviewed updated country information on St. Vincent. He reviewed the updated U.S. Department of State, Saint Vincent and the Grenadines: Country Reports on Human Rights Practices – 2007, (released March 11, 2008). The evidence stated that St. Vincent is a democratic state with political and judicial institutions capable of protecting its citizens, but also that violence against women remained a serious problem. In the end, the PRRA officer concluded that there has not been a significant change in the country conditions since the Board decision.

[32] The applicants cannot, on judicial review, argue that the PRRA officer should have come to a different conclusion than the Board, when the applicants had not provided him with any new material evidence. I would not allow judicial review on this ground.

[33] The application for judicial review is therefore dismissed.

[34] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[35] **IT IS ORDERED THAT** the application for judicial review is dismissed.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

The *Immigration and Refugee Protection Act*, S.C. 2001, c. 27

112.(1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).	112.(1) La personne se trouvant au Canada et qui n'est pas visée au paragraphe 115(1) peut, conformément aux règlements, demander la protection au ministre si elle est visée par une mesure de renvoi ayant pris effet ou nommée au certificat visé au paragraphe 77(1).
(2) Despite subsection (1), a person may not apply for protection if	(2) Elle n'est pas admise à demander la protection dans les cas suivants :
(a) they are the subject of an authority to proceed issued under section 15 of the Extradition Act;	a) elle est visée par un arrêté introductif d'instance pris au titre de l'article 15 de la Loi sur l'extradition;
(b) they have made a claim to refugee protection that has been determined under paragraph 101(1)(e) to be ineligible;	b) sa demande d'asile a été jugée irrecevable au titre de l'alinéa 101(1)e);
(c) in the case of a person who has not left Canada since the application for protection was rejected, the prescribed period has not expired; or	c) si elle n'a pas quitté le Canada après le rejet de sa demande de protection, le délai prévu par règlement n'a pas expiré;
(d) in the case of a person who has left Canada since the removal order came into force, less than six months have passed since they left Canada after their claim to refugee	d) dans le cas contraire, six mois ne se sont pas écoulés depuis son départ consécutif soit au rejet de sa demande d'asile ou de protection, soit à un prononcé d'irrecevabilité, de

protection was determined to be ineligible, abandoned, withdrawn or rejected, or their application for protection was rejected.

désistement ou de retrait de sa demande d'asile.

(3) Refugee protection may not result from an application for protection if the person

(3) L'asile ne peut être conféré au demandeur dans les cas suivants :

(a) is determined to be inadmissible on grounds of security, violating human or international rights or organized criminality;

a) il est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée;

(b) is determined to be inadmissible on grounds of serious criminality with respect to a conviction in Canada punished by a term of imprisonment of at least two years or with respect to a conviction outside Canada for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years;

b) il est interdit de territoire pour grande criminalité pour déclaration de culpabilité au Canada punie par un emprisonnement d'au moins deux ans ou pour toute déclaration de culpabilité à l'extérieur du Canada pour une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;

(c) made a claim to refugee protection that was rejected on the basis of section F of Article 1 of the Refugee Convention; or

c) il a été débouté de sa demande d'asile au titre de la section F de l'article premier de la Convention sur les réfugiés;

(d) is named in a certificate referred to in subsection 77(1).

d) il est nommé au certificat visé au paragraphe 77(1).

113.Consideration of an application for protection shall be as follows:

113. Il est disposé de la demande comme il suit :

(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;

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;

(b) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;

b) une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;

(c) in the case of an applicant not described in subsection 112(3), consideration shall be on the basis of sections 96 to 98;

c) s'agissant du demandeur non visé au paragraphe 112(3), sur la base des articles 96 à 98;

(d) in the case of an applicant described in subsection 112(3), consideration shall be on the basis of the factors set out in section 97 and

d) s'agissant du demandeur visé au paragraphe 112(3), sur la base des éléments mentionnés à l'article 97 et, d'autre part :

(i) in the case of an applicant for protection who is inadmissible on grounds of serious criminality, whether they are a danger to the public in Canada, or

(i) soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un danger pour le public au Canada,

(ii) in the case of any other applicant, whether the application should be refused because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of

(ii) soit, dans le cas de tout autre demandeur, du fait que la demande devrait être rejetée en raison de la nature et de la gravité de ses actes passés ou du danger qu'il constitue pour la sécurité du Canada.

Canada.

FEDERAL COURT

SOLICITORS OF RECORD

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