Federal Court  Cour fédérale

Date: 20100720

Docket: IMM-5799-09

Citation: 2010 FC 765

Ottawa, Ontario, July 20, 2010

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

DEISY JULIETH DUITAMA GOMEZ,
EDISON GIOVANNI AMORTEGUI,
DANIEL ALEJANDRO AMORTEGUI DUITAMA and
LAURA SOFIA AMORTEGUI DUITAMA

Applicants

and

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

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] Ms. Deisy Julieth Duitama Gomez applies, with her immediate family members, for judicial review of a pre-removal risk assessment (PRRA) made October 7, 2009 wherein the PRRA Officer determined the Applicants would not be subject to personalized risk to life or risk of cruel or unusual treatment should they return to Columbia.

[2] Ms. Gomez (the Applicant) is the principal applicant; she, her spouse and two children are citizens of Columbia. The Applicant was kidnapped and raped by members of FARC, a terrorist group active in Columbia. She fears the group will renew efforts to extort money from her under the threat of violence. The Officer accepted the allegations of kidnapping and rape, but gave no weight to the threat of extortion.

[3] For reasons that follow I am granting the judicial review.

Facts

[4] The PRRA Officer summarized from the Applicant's affidavit:

> "The applicant states that her family has been persecuted by the FARC in Columbia. She states that her grandmother and her brother inherited a farm in Columbia and were forced to pay a *vacuna* to the FARC. She states that her grandmother and mother (who lived on the farm with the applicant) decided to abandon the farm for their safety and moved to Bogota. The applicant states that she lived with her grandmother and her mother lived in another home in Bogota. The applicant states that on 13 January 1997, the FARC was able to track down her mother and brother and they were kidnapped. After the applicant's grandmother pleaded with the guerrillas to release them and promising to pay the later on, they were released. The applicant states that her mother made a denunciation to the authorities about what happened but did not mention her brother, as she feared for his safety. The applicant states that her mother planned her flight to the U.S., but could not take the children. She states her mother and uncle fled to the U.S., as they were able to obtain visas. She states that she and her siblings lived with her grandmother and moved houses so that they could not be found. In 2002, the applicant's mother had returned to visit from the U.S. and she was once more kidnapped by the FARC and eventually released. The applicant states that her mother filed a denunciation with the authorities about the kidnapping but refused to state where her children were living because she feared FARC would obtain the

> information and come after them for reprisals. After this event, the applicant's mother returned to the U.S. once again. The applicant states that on 18 September 2002, she was kidnapped and raped by the FARC as a consequence of her mother's denunciation. She states that she was eventually released and returned to her grandmother. The applicant states she was afraid to call the police, as the FARC would find out, just as they had found out about her mother's denunciation. The applicant states in May 2004, she moved in with Giovanni in a common-law relationship. She states that she witnessed a shooting that was close to her home and later realized that the man who was shot was probably mistaken for her common-law husband. She states that she left Colombia in October 2008 and travelled to the United States with great pain and tribulations."

[5] While this account captures an overview of the Applicant's account, there is more which makes the degree of her suffering quite remarkable. The circumstances of the rape and subsequent events are not referred to, nor questioned, by the PRRA Officer.

[6] The Applicants delivered submissions and supporting documents on their PRRA application on August 26, 2009. They advised that further evidence would be forthcoming including a psychological assessment of the Applicant. The PRRA Officer issued the negative decision five weeks later prior to receipt of further evidence from the Applicants.

[7] The Applicants had been previously denied opportunity to make a PRRA application because of the circumstances of their arrival in Canada which became the subject of attention by advocacy groups and litigation. However those events are not, in my view, relevant considerations in this judicial review of the October 7, 2009 negative PRRA decision.

Issues

[8] The issues I have to address in this application for judicial review are:

1. Did the PRRA Officer deny the Applicant's procedural fairness by not receiving the Applicants' further evidence?

2. Did the PRRA Officer err in the analysis of the availability of state protection?

Legislation

[9] The *Immigration and Refugee Protection Act*, (2001, c.27) (IRPA)

provides at section 113:

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; (b) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required; (c) in the case of an applicant not described in subsection 112(3), consideration shall be on the basis of sections 96 to 98; (d) in the case of an applicant described in subsection 112(3), consideration shall be on the	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; b) une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires; c) s'agissant du demandeur non visé au paragraphe 112(3), sur la base des articles 96 à 98; 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) soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un danger

basis of the factors set out in section 97 and (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 (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 Canada.	pour le public au Canada, (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.

[10] Section 167 of the *Immigration and Refugee Regulations*, (SOR/2002-227) provide specific factors an Officer must take into account when considering whether or not an oral hearing is in order. The regulation reads:

167. For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors are the following: (a) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act; (b) whether the evidence is central to the decision with respect to the application for protection; and (c) whether the evidence, if accepted, would justify allowing the application for protection.	167. Pour l'application de l'alinéa 113b) de la Loi, les facteurs ci-après servent à décider si la tenue d'une audience est requise : a) l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur; b) l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection; c) la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis,

justifieraient que soit accordée
la protection.

Standard of Review

[11] In *Dunsmuir v. New Brunswick*, 2008 SCC 9 (*Dunsmuir*), the Supreme Court of Canada held there are two standards of review at common law in Canada: correctness and reasonableness (para. 34). The standard of correctness generally applies to questions of law; such as questions of natural justice or procedural fairness. The standard of reasonableness applies to questions of fact or mixed facts and law (para. 51).

[12] The Supreme Court also held a standard of review analysis need not be conducted in every instance. Where the standard of review applicable to the particular question before the Court is well settled by past jurisprudence, the reviewing court may apply that standard. *Dunsmuir*, para. 57.

[13] Both parties argue the appropriate standard of review for an officer's decisions on the facts and most questions on fact and law should be reviewed on the standard of reasonableness. Whereas questions concerning the officer's duty of procedural fairness towards the applicant are reviewable on the standard of correctness, *Liu v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 877; *Ram v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 548. I agree.

[14] Finally, I note that in *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, at para. 59 the Supreme Court of Canada stated:

> “Reasonableness is a single standard that takes its colour from the context. One of the objectives of Dunsmuir was to liberate judicial review courts from what came to be seen as undue complexity and formalism. Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (Dunsmuir, at para. 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.”

Analysis

Did the PRRA Officer breach her duty of procedural fairness towards the Applicant by not receiving her further evidence or conduct an oral hearing?

Further Evidence

[15] The PRRA Officer did not wait for the Applicant’s psychological report nor did the Officer give the Applicants an oral hearing.

[16] The Respondent submits the Applicants had the opportunity to make their PRRA submissions: submitting 250 pages of material five weeks prior to the decision.

[17] The Respondent submits, drawing on *Barrack v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 962, a humanitarian & compassionate grounds case, that an applicant has the burden of adducing proof of any claim on which his or her application relies and makes a scant application at his or her own peril. A PRRA Officer has no obligation to inquire into a deficient application.

[18] I agree with this principle, but it does not apply in this case. The Applicant's submissions were detailed and full – the opposite of scant. In advising more submissions were forthcoming, the Applicant was meeting her obligation to substantiate her claims. For example, the PRRA Officer accepted the Applicant's allegations of rape and kidnapping and was alerted to a psychological report to be submitted as evidence to prove assertions with respect to their impact on the Applicant's mental health and vulnerability.

[19] The documentary evidence discloses that women are at a higher risk of sexual assault and other gender related crimes because of the conflict in Columbia. The Applicant is a vulnerable female who is a reported rape victim. In these circumstances the Guidelines concerning Women Refugee Claimants Fearing Gender-Related Persecution issued by the Chairperson pursuant to section 159(1)(h) of *IRPA* are applicable and the psychological assessment should be relevant. The PRRA Officer gives no reason for ignoring the expected psychological assessment of the Applicant, nor did she take any of the Chairperson's guidelines into account.

Oral Hearing

[20] The Respondent submits there is no need for an oral hearing when an officer assesses the weight of evidence, not its credibility. Where credibility is at issue in evidence central to the claim which would likely lead to the application being granted the *IRPA* regulations require an oral hearing.

[21] The Applicant argues, successfully in my opinion, that the officer's assessment of central evidence was based on veiled credibility findings. She refers to Justice MacKay's decision in *Zokai v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1581 at paragraph 13:

> "I do not suggest that if an oral hearing is requested that request must be granted. Yet here one was requested and the circumstances supporting that request were advanced but no reference was made in the PRRA decision to consideration of the request, to the circumstances advanced, or the factors set out in the regulations to be weighed in considering the request. Moreover, the essence of the decision is that the applicant's story and professed fears are given no weight, effectively rejecting the applicant's evidence as not credible even though no specific reference is made to credibility as an issue. That process of decision making was ultimately unfair, particularly, where the timing of the process effectively foreclosed a reasonable time for presentation of supporting evidence."
> (emphasis added)

[22] The PRRA Officer finds there is insufficient evidence the Applicants would be targeted by any terrorist group in Columbia. The PRRA Officer notes the Applicant's mother only referred to the high price of her kidnappers' ransom because she had relatives abroad. The Officer discounts the evidence because she failed to refer to the kidnappers' demands for payment of vacuna (i.e. war tax) on the family farm when she filed denunciations with the police after each of her two kidnappings. The Officer draws this inference notwithstanding both kidnappings occurred after the grandmother and mother abandoned the farm to the FARC.

[23] Further, the Applicant stated in her affidavit that her grandmother and mother were compelled to pay FARC the vacuna and later store illegal products on their farm. When they could no longer pay, they abandoned the farm and moved to Bogota where they thought they would be safe. Instead FARC kidnapped her mother and brother and demanded a ransom. The

Applicant was 13 years old at the time and living at her grandmother's home. At one point she answered the door at her home to receive a package for her grandmother. The package contained the tips of her mother's fingers to underscore the demand for money. The medical evidence in the record discloses that her mother, among other indicia of wounds, is missing the top joints of two fingers on her left hand.

[24] The Applicant also attested to the circumstances of her own kidnapping and rape. She stated:

> The next morning, one of them (the kidnappers) came to me and he was on the phone talking to may grandmother. He told me to say "hi" to her and tell her how good they were treating me. I was just crying and my grandmother was crying too. Then he told my grandmother that these things happen to those who talk too much, that it was because my mother had made a denunciation about her kidnapping. They said they would exterminate all of us, then he hung up the phone.

[25] In addition, the PRRA Officer notes the Applicant provided a translation of a letter dated March 18th, 2009 from a Psychiatrist in Bogota. The letter states the Applicant received treatment for persecutory delusions; suicide attempts; trauma due to rape; and claustrophobia. It is an independent confirmation of the Applicant's account of sexual assault and underlines the suffering it has caused in her life. The Officer notes the translation states she *is* receiving treatment in Bogota in March 2009, but, during that month, the Applicant was in detention in Canada. Significantly, the Officer writes: "In the absence of an explanation, I assign it no weight." The Officer found a contradiction which would more appropriately go to the Applicant's credibility, which in turn should create a need for an oral hearing in the event there is

a misunderstanding. But since there was no oral hearing, the Applicant had no opportunity to offer an explanation.

[26] I find the Officer identified issues that are at the heart of the Applicant's credibility with respect to the relevant factors in section 97 of the *IRPA*. This evidence is central to the question of whether or not this application would be accepted if properly assessed.

[27] I find the PRRA Officer made an adverse credibility finding with respect to the Applicant's evidence and did not afford her an opportunity to address it, as would have been required, in an oral hearing pursuant to section 167 of the IRPA *Regulations*.

Did the PRRA Officer err in the analysis of the availability of state protection?

[28] Finally, the Respondent defends the PRRA Officer's assessment of the evidence concerning the availability of state protection. It submits the onus is on the Applicants to "adduce, relevant, reliable and convincing evidence which satisfies the trier of fact on the balance of probabilities that the state protection is inadequate." *Canada (Minister of Citizenship and Immigration) v. Flores Carrillo*, 2008 FCA 94, para. 30.

[29] In *Ward v. Canada (Attorney General)*, [1993] S.C.J. No. 74, the Supreme Court of Canada held that the test as to whether a state is able to protect a citizen is twofold. First, those situations where state protection "might reasonably have been forthcoming" will defeat a claimant's failure to seek state protection. Second, in a practical sense, the claimant must provide

clear and convincing confirmation of a state's inability to protect. This may be in relation to the claimant or to a similarly situated person.

[30] The Federal Court of Appeal recognized in, *Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, that there may be "exceptional circumstances" where the claimant may not need to exhaust all possible protections available for state protection.

[31] In *Flores Zepeda v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 491, at para. 16, Justice Tremblay-Lamer stated:

> Indeed, in my opinion, the requirement of having to place oneself in danger in order to exhaust all protection avenues would constitute and "exceptional circumstance" referred to the by the Federal Court of Appeal above [*Hinzman*].
> (emphasis added)

[32] In assessing whether the Applicant rebutted the presumption of state protection, the PRRA Officer asserts the Applicants did not seek protection in Colombia. She alleges the Applicant relied instead on her mother's experience denouncing her kidnappings by FARC. The officer adds these kidnappings happened in 1997 and 2002. The Officer also noted the spouse's mother and grandmother still reside in Columbia.

[33] However, the PRRA Officer chooses to ignore the consequences of the mother's denunciations. The mother filed her first denunciation with the authorities in 1997 and was subsequently kidnapped again in 2002 when she visited Columbia to see her children. The

mother's second denunciation led to the Applicant being kidnapped and sexually assaulted in 2004.

[34] The Officer glosses over the glaring absurdity in the Applicant's case, which is that reporting FARC to the police invites terrible consequences; in her case, kidnapping and sexual assault. Instead of dealing with this head-on, the Officer generalizes about a steady decline in FARC kidnappings between 2002 and 2006 and concludes FARC is in "irreversible decline" and "weakening". The Officer's generalizations do not answer the Applicant's specific and well founded allegation that the police have been of no use to her or her mother, a similarly situated person. This missing link belies the Officer's incomplete analysis and renders her conclusion unreasonable.

Conclusion

[35] I conclude the PRRA Officer failed to wait for or give reasons for not waiting for the further evidence being the psychological evidence concerning the effects of FARC sexual assault against the Applicant. This by itself may not determine whether this Application should succeed. However, when coupled with the failure to grant the Applicant an oral hearing on findings which go to the Applicant's credibility there is a breach of the Officer's duty of procedural fairness.

[36] The Officer also failed to properly assess the Applicant's case and her reason for not seeking state protection given the evidence concerning the consequences of her mother's two

denunciations. This resulted in an incomplete analysis and renders the finding on state protection unreasonable.

[37] The application for judicial review is granted.

[38] The parties have not proposed a question for certification and I see no reason to find one.

[39] I make no order for costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is granted.
2. The parties have not proposed a question for certification and I see no reason to find one.
3. I make no order for costs.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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