Federal Court Cour fédérale

Date: 20121206

Docket: IMM-2764-12

Citation: 2012 FC 1431

Vancouver (British Columbia), December 6, 2012

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

LYUBOV TERENTEVA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The Applicant is a citizen of Uzbekistan who seeks judicial review of a decision by a Pre-Risk Removal Assessment [PRRA] Officer pursuant to section 112 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The Applicant submits that the PRRA Officer unreasonably assessed the evidence in finding that she did not have a well-founded fear of persecution under section 96 of the *IRPA* and that she was not a person in need of protection under section 97 of the *IRPA*. The Applicant further submits that the PRRA Officer applied the incorrect test in determining

if the documentary evidence demonstrated that similarly-situated individuals in Uzbekistan fell within the scope of sections 96 or 97 of the *IRPA*.

II. Judicial Procedure

[2] This is an application under subsection 72(1) of the *IRPA* for judicial review of a PRRA Officer's decision, dated February 6, 2012.

III. Background

[3] The Applicant, Ms. Lyubov Terenteva, is a 77-year-old citizen of Uzbekistan.

[4] The Applicant alleges that she is in very frail health because she has broken both hips and must walk with a cane, has high blood pressure, and has angina.

[5] She states that her entire immediate family is in Canada. Her daughter is a Canadian citizen and her son applied for refugee protection in Canada on January 5, 2012.

[6] She also claims that she has no pension, savings, or home in Uzbekistan and cannot work due to her age and poor health.

[7] On May 15, 2005, the Applicant alleges that Uzbek authorities asked her to sign a friend's death certificate stating that the friend died of a heart attack, even though her friend died in a massacre in Andijan. She claims that she refused to sign the certificate and the authorities

threatened, persecuted, detained, and starved her and that her neighbours, at the direction of the authorities, beat her.

[8] On August 14, 2009, the Applicant's husband died in a hospital in Uzbekistan. The Applicant alleges that a nurse told her that her husband did not die of natural causes but was instead killed by needle injection.

[9] The Applicant alleges that she subsequently received telephone calls from the authorities, who admitted to killing her husband and threatened to kill her.

[10] On November 5, 2009, the Applicant came to Canada and on November 30, 2009, filed for refugee protection on the basis that she had a well-founded fear of persecution because she is Jewish.

[11] On February 23, 2011, the Refugee Protection Division [RPD] of the Immigration and Refugee Board rejected the Applicant's claim because it was not supported by the documentary evidence and there were credibility issues.

[12] On May 18, 2011 the Applicant submitted her PRRA application which was rejected on February 6, 2012.

[13] On March 9, 2012, the Applicant was admitted to a hospital with chest pains.

[14] On March 12, 2012, the Canada Border Services Agency granted the Applicant a temporary deferral of removal until June 11, 2012, which would allow her daughter to accompany her back to Uzbekistan.

[15] On March 21, 2012, the Applicant filed an application for judicial review of the PRRA Officer's decision.

IV. Decision under Review

[16] The PRRA Officer found that the Applicant did not have a well-founded fear of persecution pursuant to section 96 of the *IRPA* because there was not a reasonable chance that she would be at risk of persecution in Uzbekistan. According to the PRRA Officer, the Applicant also was not a person in need of protection under section 97 of the *IRPA* because, on a balance of probabilities, she would not be personally subject to a risk to her life or to a risk of cruel and unusual treatment or punishment.

[17] The PRRA Officer accepted that the documentary evidence had established that government corruption and torture in prison exists in Uzbekistan. The PRRA Officer also gave weight to documentary evidence in regard to the Andijan massacre and government efforts to suppress public knowledge of the massacre.

[18] The PRRA Officer was prepared to give the Applicant's narrative the "benefit of the doubt" but did not accept that the documentary evidence was related to her alleged risk of persecution (PRRA Decision at p 5). The PRRA Officer reasoned that the documentary evidence did not

demonstrate that individuals in a situation similar to the Applicant were persecuted. Although there was evidence that direct witnesses and victims of the Andijan massacre were targeted, it did not demonstrate that friends of victims of the Andijan massacre were persecuted or that authorities routinely asked friends and family to identify the victims of the massacre.

[19] On general country conditions in Uzbekistan, the PRRA Officer accepted documentary evidence that: (i) law enforcement and security officers routinely beat and mistreated detainees to secure confessions or information and that government measures to curb these activities were not successful; (ii) the Uzbek government had increased the presence of security forces in response to the Arab Spring movements; (iii) members of minority religious and Islamic groups and human rights advocates were imprisoned after unfair trials; (iv) the Uzbek authorities rejected international calls for an independent investigation of the mass killings of protestors; (v) bribes are commonly paid for individuals seeking to relocate in a new city; and (vi) many Uzbeks (primarily men of working age) seek employment abroad.

[20] In rejecting the PRRA Application, the PRRA Officer determined that the Applicant had not established that she was persecuted by the Uzbek state due to her political beliefs or for any other reason. The PRRA Officer reasoned that there is little supporting evidence that the Applicant traveled to Andijan City, that her friend was killed in the Andijan massacre or even exists, or that the Uzbek authorities had persecuted her in the past. Nor was there any medical evidence or testimony from a friend or confidante to support her allegation that she was detained in a basement by Uzbek authorities after refusing to sign the fraudulent death certificate or that her husband was poisoned. The PRRA Officer supported this finding by observing that the documentary evidence did

not show that individuals in similar circumstances to those of the Applicant faced a risk of harm, persecution, or to life in Uzbekistan.

[21] The PRRA Officer also drew a negative inference from the Applicant's failure to seek international assistance or flee Uzbekistan in 2005 after her alleged detention. According to the PRRA Officer, her failure to explain this delay did little to establish a well-founded fear of persecution under section 96 of the *IRPA* or that she was a person in need of protection under section 97 of the *IRPA*.

V. Issues

[22] (1) Was the PRRA Officer's assessment of the evidence reasonable?

(2) Did the PRRA Officer reasonably require the Applicant to adduce documentary evidence that exactly replicated her own situation?

VI. Relevant Legislative Provisions

[23] The following legislative provisions of the *IRPA* are relevant:

Convention refugee	**Définition de « réfugié »**
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(*a*) is outside each of their countries of nationality and is unable or, by reason of	*a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du

that fear, unwilling to avail themself of the protection of each of those countries; or

fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

(*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Person in need of protection

Personne à protéger

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou

by other individuals in or from that country,	qui s'y trouvent ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
Person in need of protection	**Personne à protéger**
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

VII. Position of the Parties

[24] The Applicant submits that the PRRA Officer was unreasonable in finding that the documentary evidence did not show that individuals in similar-situations were at risk in Uzbekistan. Citing *Morales v Canada (Minister of Citizenship and Immigration)*, 2012 FC 49, the Applicant argues that the PRRA Officer had an obligation to consider the risks faced by individuals in similar circumstances.

[25] The Applicant notes one report stating that doctors in the Andijan morgue assisted in concealing the Andijan massacre by falsifying death records. According to the Applicant, this is analogous to how authorities attempted to coerce her to sign her friend's death certificate. Another report also describes how Uzbek authorities compelled family members of a person who died under arrest (in an incident unrelated to the Andijan massacre) to sign a document promising not to complain.

[26] The Applicant claims that a broader view of the documentary evidence supports her claim that she was at risk. Such a view, she contends, shows that Uzbek authorities undertook a campaign to eliminate witnesses of the Andijan massacre and persons challenging the official account of it. The Applicant submits that the documentary evidence was clear that these classes of persons are at risk in Uzbekistan. The Applicant also argues that she belongs to both classes by objecting to attempts to sanitize the death of her friend in the massacre. The documentary evidence also demonstrates that individuals advocating transparency generally in Uzbekistan have been persecuted (especially those who give evidence of human rights violations in Uzbekistan) and that relatives of former Andijan residents are under constant observation by security forces.

[27] The Applicant argues that the PRRA Officer was unreasonable in concluding that she did not identify with any of the risk groups in the general country conditions research on Uzbekistan. According to the Applicant, refusing to sign the death certificate at the compulsion of authorities qualifies her as a political dissident, a group that is identified as at risk of persecution. The Applicant asks this Court to apply *Mansuri v Canada (Minister of Citizenship and Immigration)*,

2009 FC 745, which held that a PRRA Officer was unreasonable in determining that an applicant was not a member of a group at-risk despite evidence that he was in fact a member of such a group.

[28] In the Applicant's view, the PRRA Officer took an unreasonably narrow approach to the evidence by distinguishing her situation from that of direct witnesses of the Andijan massacre. Documentary evidence demonstrated that authorities seeking to suppress memory of the massacre, persecuted, tortured, and killed its witnesses. The Applicant argues that she need not witness the massacre itself to qualify as a witness and that she became a witness when asked to identify her friend's body.

[29] The Applicant also submits that the PRRA Officer's decision was unreasonable because it focused on the absence of documentary evidence on the persecution of family and friends of Andijan massacre victims and on whether the authorities routinely invited family or friends to identify those victims at the expense of the Applicant's specific and core evidence that she had been persecuted. Citing *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35, the Applicant argues that the PRRA Officer had a high burden of explanation for disregarding her evidence in light of its relevance to her claim that she had been persecuted by authorities. The Applicant also cites *Nagaratnam v Canada (Minister of Citizenship and Immigration)*, 2010 FC 204, wherein this Court held that a PRRA decision was unreasonable because it had not assessed the documentary evidence against the specific risks stated by an applicant.

[30] Finally, the Applicant contends that the PRRA Officer applied the incorrect test by requiring her to adduce documentary evidence exactly replicating her own circumstances. She cites *Khodabakhsh v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1340, 382 FTR 105, wherein this Court held that the RPD was unreasonable in requiring an applicant to adduce documentary evidence on circumstances identical to his or her own. The Applicant submits that this problem emerges in her case because the PRRA Officer insisted on evidence demonstrating that friends of victims of the Andijan massacre had been persecuted and were routinely asked to identify bodies.

[31] The Respondent, relying on *Ferguson v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1067, asserts that the Applicant has the burden of proof in establishing that she has a well-founded fear of persecution or is a person in need of protection. Whether the Applicant's evidence meets the evidentiary burden depends on the weight that the decision-maker gives to the evidence. The Respondent argues that this Court must give deference as to how PRRA officers assign weight.

[32] The Respondent submits that the PRRA Officer's assessment of the evidence was reasonable because the Applicant did not provide specific evidence that she was personally persecuted by Uzbek authorities or neighbours and neither the general country conditions evidence nor the documentary evidence with regard to the Andijan massacre revealed that individuals in similar circumstances as the Applicant were at risk in Uzbekistan.

[33] The Respondent submits that the Applicant's situation was not analogous to that of doctors in the Andijan morgue. Although the Applicant stated that she was asked to identify a victim of the

Andijan massacre, there was documentary evidence that it was "very rare" that relatives would come to the morgue to claim bodies of victims (Applicant's Record at p 61).

[34] The Respondent also argues that the PRRA Officer was reasonable in finding that the Applicant was not a political dissident on the basis of her refusal to sign her friend's falsified death certificate. The Respondent submits that there was insufficient evidence to link her narrative statement with the risks of such persons or groups.

[35] The Respondent is of the view that the PRRA Officer did not apply the incorrect test by requiring that the Applicant adduce documentary evidence identical to her own circumstances. The Respondent submits that the PRRA Officer reviewed the country conditions evidence and reasonably concluded that the Applicant's situation could not be reasonably compared to the situations of persons or groups who had a well-founded fear of persecution or were persons in need of protection.

VIII. Analysis

Standard of Review

[36] The PRRA Officer's assessment of the evidence is reviewable on the standard of reasonableness (*Lakhani v Canada (Minister of Citizenship and Immigration)*, 2008 FC 656). Whether the PRRA Officer required evidence from the Applicant that was too specific is also reviewable on this standard (*Khodabakhsh*, above).

[37] Since the standard of reasonableness applies, the Court may only intervene if the Board's reasons are not "justified, transparent or intelligible". To satisfy this standard, the decision must also fall in the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

(1) Was the PRRA Officer's assessment of the evidence reasonable?

[38] In proceedings under section 112 of the *IRPA*, the Applicant has the burden of proving on a balance of probabilities that she has a well-founded fear of persecution or is a person in need of protection (*Ferguson*, above, at para 21 and 22).

[39] The Respondent argues that "[t]he determination of whether the evidence presented meets the legal burden will depend very much on the weight given to the evidence that has been presented" and that this Court must give deference as to how a PRRA officer weighed the evidence (*Ferguson*, above, at para 24). In the present case, the problems alleged by the Applicant do not relate merely to the weight that the PRRA Officer assigned to the evidence, rather the problems arise from the very reasoning that guided how the PRRA Officer assigned the weight.

[40] According to her narrative statement, the Applicant was in a similar (though not identical) situation as doctors in the Andijan morgue and witnesses of the actual Andijan massacre. It was unreasonable for the PRRA Officer to find otherwise. The Applicant witnessed the massacre differently than a person who actually heard gunshots. Since viewing the body led to her becoming a target of documented state efforts to suppress the memory of the massacre, her witness (for the purposes of establishing risk) of the massacre was materially the same as that of a direct witness.

[41] The PRRA Officer elected to give the Applicant's narrative "the benefit of the doubt" (TR, above at p 7); that is, the PRRA Officer accepted the Applicant's narrative statement that she refused to sign the falsified death certificate on seeing her friend's body, that she was detained and beaten for refusing, and that her husband died in suspicious circumstances. Since the PRRA Officer accepted that the Applicant had gone to the Andijan morgue, it was irrelevant that the documentary evidence showed it was rare for family members to go to the morgue after the massacre. If, as the PRRA Officer accepted, the Applicant had attended at the morgue and was under compulsion to sign a falsified death certificate, it would be unreasonable to find that her position was not comparable to that of the doctors in the same morgue under instruction to falsify the death records of victims of the Andijan massacre.

[42] It was also unreasonable for the PRRA Officer, after accepting the Applicant's account, to find that she was not in a similar situation as the witnesses of the Andijan massacre, who were at risk in Uzbekistan. The PRRA Officer accepted the Applicant's claim that she saw the body of her friend who died at the Andijan massacre. This was sufficient to make her a witness, even if she had not been present at the massacre itself. Given the documentary evidence that witnesses of the massacre were at risk in Uzbekistan and the Applicant's own testimony regarding her treatment by the authorities, it falls outside the range of possible and acceptable outcomes to find that she was not a person in need of protection.

(2) Did the PRRA Officer reasonably require the Applicant to adduce documentary evidence that exactly replicated her own situation?

[43] *Khodabkhsh*, above, holds that a decision-maker who insists that an applicant adduce documentary evidence on identical circumstances is unreasonable (at para 23). In *Khodabkhsh*,

the RPD required documentary evidence regarding lifelong Muslims who had been threatened because their daughter had lived outside Iran for two decades and had converted to the Baha'i faith. In the present case, the PRRA Officer required evidence of comparable specificity by finding that the Applicant needed to provide evidence on the risk of friends of victims of the Andijan massacre and evidence that such people were routinely asked to identify bodies of the victims of that massacre.

[44] This Court observes *in obiter* that much of the PRRA Officer's conclusions appear to be animated by an implicit adverse credibility finding. This point was not argued by the parties and this Court will not dispose of the PRRA Officer’s decision on that basis.

[45] Even though the PRRA Officer ostensibly accepted the Applicant's narrative statement, parts of the decision can lead to the inference that the PRRA Officer did not believe her. In particular, the PRRA Officer appears to seek out corroborative documentary evidence regarding friends of victims of the Andijan massacre for the purpose of testing the Applicant’s credibility. This Court has held, in *Strachn v Canada (Minister of Citizenship and Immigration)*, 2012 FC 984, that notwithstanding the distinction between an adverse credibility finding and a finding of insufficient evidence, it is possible for a decision-maker to have “improperly framed true credibility findings and findings regarding sufficiency of evidence” (at para 34). Indeed, the PRRA Officer’s insistence on evidence demonstrating that friends and relatives were routinely invited to the Andijan morgue to identify victims’ bodies strongly suggests that the PRRA Officer doubted the Applicant’s narrative statement. If the PRRA Officer had believed that the Applicant attended the Andijan morgue, such evidence would not be necessary.

[46] This aspect of the PRRA Officer's decision comes into greater relief in the PRRA Officer's comments that the Applicant's account is "[c]ontrary to her statements of risk put before the RPD" and that "credibility issues were at hand" in her proceedings before the RPD (PRRA Decision at p 4).

IX. Conclusion

[47] For all of the above reasons, the Applicant's application for judicial review is granted and the matter is remitted for determination anew (*de novo*) by a different Immigration Officer.

JUDGMENT

THIS COURT ORDERS that the Applicant's application for judicial review be granted and the matter be remitted for determination anew (*de novo*) by a different Immigration Officer. No question for certification.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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