Federal Court  Cour fédérale

Date: 20141016

Docket: IMM-1035-14

Citation: 2014 FC 984

Ottawa, Ontario, October 16, 2014

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

MARIAN CONKA, TATIANA CONKOVA, ROZALIA CONKOVA, MATUS CONKA, ZUZANA CONKOVA, BRANISLAV CONKA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicants are challenging the legality of a decision, dated January 6, 2014, by which a senior immigration officer [Officer] rejected their application for a pre-removal risk assessment [PRRA] under section 112 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act]. This application is being heard in concert with file IMM-3593-13, an application for judicial

review of the decision on humanitarian and compassionate [H&C] grounds made with regards to the same applicants (2014 FC 985).

[2] The applicants are all citizens of Slovakia of Roma ethnicity. Marian Conka and Tatiana Conkova are the parents of Rozalia, Matus, Zuzana and Branislav. They entered Canada on November 16, 3009 and filed a refugee claim upon arrival. The Refugee Protection Division [RPD] rejected the refugee claim on March 23, 2012 based on the availability of state protection and the application for leave of that decision was dismissed on May 30, 2012. Afterwards, the applicants applied for H&C on May 11, 2012. The application for H&C was refused on February 28, 2013 and the applicant subsequently filed an application for leave and judicial review of the H&C decision. The applicants also applied for a PRRA on April 6, 2013. A negative PRRA decision was made on January 6, 2014 and the applicants applied for leave and judicial review of the PRRA decision. The applicants were the subject of a removal order to be executed on March 17 and March 19, 2014, but they made a motion for an order to stay the execution of the removal order. While the motion pertaining to the H&C decision was denied, the motion for a stay pertaining to the PRRA decision was granted on March 13, 2014.

[3] With regards to the PRRA application, the Officer in this case found that the applicants had essentially reiterated the same material facts that were expressed before the RPD and had not rebutted any of its findings, including those on state protection. In addition, the Officer found that the documentary evidence submitted by the applicants was general in nature and did not establish a linkage directly to the applicants' personal circumstances and that in any case, the evidence did not show that new risk developments in country conditions or personal

circumstances had arisen since the decision by the RPD. The Officer did recognize that the Roma population in Slovakia faces discrimination but found that the government had put in place various measures to remedy that discrimination and that the state had the necessary institutions to adequately protect its citizens.

[4] In a nutshell, the applicants submit two grounds of review. First, the Officer ignored relevant evidence of a material change of facts in the country conditions since the RPD decision. Second, the Officer applied the wrong legal test for assessing the availability of state protection. The first point in issue raises questions of fact and mixed questions of fact and law, and the applicable standard of review is therefore that of reasonableness, while the second point in issue raises a question of law reviewable on the correctness standard (*Dunsmuir v New Brunswick*, 2008 SCC 9).

[5] Paragraph 113(a) of the Act is relevant with regards to the first point in issue:

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

[6] As established by the Federal Court of Appeal in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 [*Raza*], a PRRA officer must respect a negative refugee determination by the RPD unless there is new evidence under subsection 113(a) of the Act of facts that could have altered the RPD's conclusions if that evidence had been presented to the RPD (at para 13). The Court of Appeal goes on to explain what constitutes "new evidence" for the purpose of paragraph 113(a) of the Act:

> 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. (*Raza*, above at para 13).

The Court adds that to be considered, the evidence also has to be "material", in the sense that had it been made available to the RPD, the refugee claim would probably have succeeded (*Raza*, above at para 13).

[7] In this case, the applicants take issue with the Officer's treatment of what they submit is new evidence for the purposes of paragraph 113(a) as it contradicts the findings of the RPD on state protection and shows that since the RPD hearing, the situation for Roma in Slovakia has worsened. The applicants refer specifically to a January 2013 report by the Center for Civil and Human Rights and People In Need Slovak Republic that refutes the RPD's findings that there are remedies against police violence and that the anti-discrimination legislation is effective. This

report was not mentioned by the Officer. The applicants also refer to various responses of July 2012 to information requests on Slovakia from the RPD, as well as to the US DOS report of May 2012, which speaks to pervasive discrimination against Roma in Slovakia. The applicants' submits that this new evidence would have allowed the PRRA Officer to conclude that the serious violations of human rights and the cumulative effect of the discriminatory measures affecting the Roma amounted to persecution and the applicants had rebutted the presumption of state protection.

[8] The respondent replies that there was already extensive documentary evidence of general country conditions in Slovakia speaking to the same issues of fact in front of the RPD and that facts contained in the new evidence submitted by the applicants were not substantially different from the facts that had already been considered by the RPD, including evidence of police brutality, societal discrimination against Roma and racist climate, lack of effectiveness of anti-discrimination legislation, forced sterilization, and shortcomings in the government's measures. The respondent submits that there has been no finding of persecution by the RPD who nevertheless found that the state protection would be available. The respondent adds that the documentary evidence actually shows some improvements in the situation of Roma and that it is not the role of the Court in judicial review to re-evaluate the evidence, nor to review in a PRRA context the decision rendered by the RPD with respect to persecution and state protection.

[9] I must agree with the respondent that this Court cannot reweigh the documentary evidence and does not need to redefine the applicable legal tests with respect to persecution and state protection, at least in this case which turns on the interpretation of the evidence related to

country conditions. The applicants did not raise any new material fact related to their personal situation or individualized risk of return. The applicants have not demonstrated that the new evidence contradicts the findings of fact of the RPD, who concluded that there was discrimination against Roma but state protection existed, although it was not perfect. The new evidence simply adds to the evidence of discrimination that was already in front of the RPD, and it is debatable whether the situation of Roma in Slovakia has worsened to the point that it now amounts to persecution. I must assume that the Officer considered the totality of the evidence, and further, I am not satisfied that, in this case, the Officer's findings are based on a selective reading the evidence. Similar documentary evidence on the issues raised by the applicant, including evidence with regards to police violence, and remedies against police violence as well as criticism of the effectiveness of the anti-discrimination legislation, were already considered at length by the RPD. Although a different conclusion of fact was perhaps opened, it was not unreasonable for the Officer to find in this case that the new evidence of country conditions was not sufficient by itself to contradict the RPD's findings of state protection.

[10] As a subsidiary argument, the applicants also argue that the Officer applied the wrong test to the evaluation of state protection where he stated: "Consequently, I find the Slovakian government does not subject its citizens to a sustained and systemic denial of their core human rights." The reasons of the Officer must be read in their entirety. The Officer refers elsewhere to the measures put in place by the government to remedy the discrimination faced by the Roma. The Officer goes on to say that the government has effective control over the state's territory and the necessary institutions to adequately protect its citizens, and finally, concludes that the applicants would not face more than a mere possibility of persecution and that the applicants are

not more likely than not to face a danger of torture, a risk to life, or a risk of cruel and unusual treatment or punishment. Accordingly, I am satisfied that the Officer knew and applied the correct test and that the statement on the lack of sustained and systemic denial of the core human rights was not a determinative in the disposal of the PRRA application.

[11] For these reasons, the application must fail. Counsel did not raise a question of general importance.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

No question is certified.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	MARIAN CONKA, TATIANA CONKOVA, ROZALIA CONKOVA, MATUS CONKA, ZUZANA CONKOVA, BRANISLAV CONKA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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