Federal Court Cour fédérale

Date: 20150313

Docket: IMM-2499-14

Citation: 2015 FC 309

Ottawa, Ontario, March 13, 2015

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

JOYCE NAKATO NAKAWUNDE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review challenging a negative decision on Ms. Nakawunde's Pre-Removal Risk Assessment [PRRA] application.

[2] For the reasons that follow, I find that the decision under review is reasonable, and therefore this application must be dismissed.

Background

[3] The applicant is a citizen of Uganda. Her 22-year old son, father and two sisters live in Uganda and she has three siblings who are Canadian citizens.

[4] The applicant first came to Canada in January 1999 on a student visa, which was valid until June 2004. She was granted another student visa valid from December 2004 until October 2006. At no point did she seek refugee protection in Canada.

[5] In May 2003, Ms. Nakawunde gave birth to a daughter, Sanyu, in Canada. The child's father is a Ugandan who was living in Canada at the time, but he later returned to Uganda.

[6] Ms. Nakawunde has stayed in Canada since her visa expired in October 2006, without written authorization or attempting to regularize her status. The respondent became aware of her lack of status in March 2011, and a removal order issued on June 1, 2011.

[7] Ms. Nakawunde applied for a PRRA on June 15, 2011. The PRRA was refused on June 11, 2012, and the applicant was granted leave to judicially review this decision on February 22, 2013. The PRRA application was returned for redetermination by a different officer on consent of the respondent.

[8] In her PRRA application, Ms. Nakawunde asserts two bases for risk upon return to Uganda:

1. Sanyu's father wants Sanyu to undergo female genital mutilation [FGM] and he will kill the applicant because she has refused to do this; and

2. Ms. Nakawunde is homosexual and fears harm at the hands of Sanyu's father, the Ugandan government, and Ugandan society in general.

[9] The PRRA application was refused for the second time on June 7, 2013, because the officer concluded that there was insufficient evidence to establish that the facts asserted by the applicant would put her at risk in Uganda.

[10] The officer gave little weight to a letter from the applicant's sister stating that Sanyu's father has made multiple verbal threats to have Ms. Nakawunde killed if she refuses the FGM, because the letter was unsigned, the statements were unsworn, uncorroborated, and showed a poor level of detail. The officer also gave little weight to a letter from Ms. Nakawunde's brother in which he writes that his sister is a lesbian, she has told him she was not interested in men, and she had a child in 2003 to cover up her homosexuality and not embarrass her family. The officer noted that the brother's letter was unsigned and showed a poor level of detail. The officer made the following statement regarding the evidence of the applicant's sexual orientation:

> I find the reasons he has given for justifying the applicant's decision to have a child to be speculative. Notwithstanding, I find the existence of a past heterosexual relationship to be relevant to the matter at hand as it contradicts the claims made by the applicant regarding her sexual orientation. [emphasis added.]

[11] The officer gave no weight to a letter from Ms. Nakawunde's counsellor which described the threats from Sanyu's father and the treatment the applicant would receive in Uganda as a

lesbian woman and which further provided an explanation for her inability to provide proof of her sexual orientation. This letter was discounted because the counsellor's information was not first-hand information.

[12] The officer considered a letter authored by the applicant herself. The officer "did not discount the facts" it contained, but noted that the letter is not from a neutral source and "contains unsworn statements that have not been corroborated by independent evidence." The applicant stated that in Uganda there are no laws to protect lesbians, being a lesbian is a criminal act punishable by imprisonment or death, and society shuns lesbians. She stated that she fears Sanyu's father because he has threatened and harassed her while in Canada and in Uganda, he has harassed and threatened her sisters, and broken the windows in her father's home. He was arrested for the incident at her father's home but he paid a bribe to the police and was not charged. The officer noted that Ms. Nakawunde did not provide a police report with respect to that incident or any objective evidence to corroborate that Sanyu's father harassed her sisters. She also alleged in her letter that wealthy people, such as Sanyu's father, could get away with crimes in Uganda because of their money and connections. The officer found this to be purely speculative and not supported by any evidence.

[13] With regard to Ms. Nakawunde's sexual orientation, the officer made the following finding:

> The applicant has not recounted with a reasonable amount of detail any experiences or events that would support her discovery and/or realization of her sexual orientation. The applicant has not provided any documentary evidence to indicate any involvement, past or present, in a relationship with a member of the same sex.

[14] The officer gave little weight to Ms. Nakawunde's letter, as it was not "in and of itself sufficient objective evidence to establish any risk to the applicant from her daughter's father on the basis of her gender or from Ugandan society on the basis of her sexual orientation."

[15] Lastly, the officer rejected the country condition evidence from the applicant, specifically the United States Department of State report, because it was "generalized in nature and [did] not establish a linkage directly to the applicant's personal circumstances." The officer acknowledged that Uganda currently faces problems with regard to human rights and there is social intolerance and hostility toward homosexuals and the police are indifferent. The UK Home Office reports that "LGBT persons are subject to societal harassment, discrimination, intimidation, and threats to their well-being" and that this has been exacerbated by the Anti-Homosexuality Bill and surrounding rhetoric. The officer acknowledged that homosexual acts are illegal in Uganda and may be punishable by life imprisonment, but noted that no person has been convicted.

[16] On the application as a whole, the officer came to the following conclusion:

> In considering this application against the consolidated protection grounds, I do not challenge the applicant's credibility with regard to her sexual orientation. She may well be homosexual. However, I find that the applicant has not produced sufficient persuasive evidence that would discharge her legal burden. More specifically, I am not satisfied with the ability of evidence she has tendered to prove that, as required on a balance of probabilities, she is homosexual which would place her personally at risk on return to Uganda. [emphasis added.]

[17] On this basis, the officer concluded that Ms. Nakawunde did not meet the requirements of either section 96 or 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

Issues

[18] The applicant frames the issues in dispute, as follows:

1. Did the officer fail to consider the evidence cumulatively?
2. Is the reasoning on the applicant's sexual orientation incoherent or did the officer make veiled credibility findings on sexual orientation?
3. Did the officer breach the duty of fairness owed to the applicant by failing to convoke an oral hearing?
4. Was the right to protection from cruel treatment violated by imposing on the applicant a cruel choice?
5. Did the officer conduct a faulty analysis of the risk to the applicant from her refusal to submit her child to genital mutilation?

Analysis

1. Accumulation of Weight

[19] Ms. Nakawunde submits that the officer erred by dismissing each piece of evidence as having little or no weight without considering the cumulative effect. This, she submits is an error and renders the decision unreasonable: *Ozen v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 521, and *Tolu v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 334. It is submitted that the duty to consider evidence cumulatively is a general duty and decision-makers should consider documentary evidence as a whole.

[20] A full reading of the PRRA decision in the context of the facts before the officer satisfies me that the officer did not take a piecemeal approach. Rather, the officer considered each piece of evidence, made a finding about the probative value of it and then weighed all of the evidence together to conclude that it was insufficient to prove the allegations on a balance of probabilities.

[21] The applicant submits that the officer's statements of having given the individual bits of evidence little weight fails to regard the evidence cumulatively and observes that "a pound of feathers weighs the same as a pound of lead." This metaphor ignores that a collection of feathers may still not be sufficient to tip the balance of probabilities in favour of an applicant. That was the officer's conclusion in the decision under review.

2. Sexual Orientation

[22] Ms. Nakawunde submits that the officer's assessment of the evidence related to the risk due to her homosexuality was incoherent because the officer found both that the she "may well be homosexual" and that she had not proved she was homosexual. The applicant cites my earlier decision in *Ferguson v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1067 [*Ferguson*], and says that the court laid out three alternate means of approaching evidence (a credibility assessment, a weight assessment, or a combination of the two). The applicant submits that, since her statement that she is a lesbian is "first party information" (unlike the example given in *Ferguson*), there should be no distinction between rejecting the evidence based on either credibility or probative value. She submits that *Ferguson* is distinguishable because the only evidence of that applicant's sexual orientation was a statement by counsel and the officer made no reference to credibility, deciding the matter on the sufficiency of evidence. In the present

case, Ms. Nakawunde points out that she provided evidence herself and she says that the officer directly addressed her credibility by finding that she may be homosexual. She submits that the officer's reasoning is nonsensical because if the officer is prepared to assume that she is homosexual, there is nothing left to establish.

[23] Ms. Nakawunde further submits that in employing this reasoning, the officer made a veiled credibility finding. If the officer had believed her, then the officer would likely have found that she was at risk given the country condition evidence. She argues that her evidence that she had told her immediate family that she is a lesbian, that Sanyu's father resents the fact that she is gay, and that she sought assistance from a Canadian organization serving lesbians was not considered by the officer, and the officer had no regard to the counsellor's evidence that "many lesbians have children from heterosexual relationships." In short, she argues that if the court looks beyond the wording of the officer's decision, it is clear that the officer made a veiled credibility finding.

[24] I agree with the position of the respondent. What the applicant is really challenging here is the officer's assessment of the probative value of her evidence regarding her sexuality, there is no incoherence in the officer's reasons, and that the officer did not make a veiled credibility finding.

[25] As was held in *Ferguson*, an officer may deal with evidence by assessing credibility or by assessing its probative value regardless of credibility. In the present case, the officer clearly

stated that he was not making a credibility finding, but rather that applicant's evidence of her sexual orientation was rejected based on its probative value.

[26] At first blush it may appear that there is a difference between, for example, an officer finding that a claimant claiming to be an adherent of Falun Gong has not established that on the balance of probabilities, and an officer finding that a claimant claiming to be homosexual has not established that on the balance of probabilities. Perhaps that is because of the very personal nature of one's sexual orientation. However, as the respondent notes, there have been many cases where the court upheld a PRRA officer's finding that the applicant provided insufficient evidence about facts that were not external to them: See for example *Gao v Canada (Minister of Citizenship and Immigration)*, 2014 FC 59, *Ozomma v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1167, *Titfticki v Canada (Minister of Citizenship and Immigration)*, 2014 FC 43, and *Ferguson*.

[27] Notwithstanding the counsellor's letter asserting that many lesbians have children from heterosexual relationships, the evidence before the officer was that this applicant had two such children – a 22 year old son in Uganda and an 11 year old daughter in Canada. There was no objective or corroborative evidence of the applicant having any lesbian relationship, either in Uganda or Canada. There was no evidence of her sexual orientation other than her own statement and the unsigned and unsworn letter from her brother (which had been given little weight). In my view, the officer's assessment that she had failed to establish on the balance of probabilities that she was a lesbian is reasonable. As to the officer's statement that "she may

well be homosexual" that must be viewed in light of the decision as a whole and what the officer clearly means is "she may well be homosexual, but she has not proven it."

3. Convoking an Oral Hearing

[28] Section 113 of the Act and section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 mandates the requirement for an oral hearing where there is an issue of credibility. Having agreed with the respondent that the officer did not make a veiled credibility finding, there was no requirement to convoke an oral hearing.

4. Cruel Treatment by Imposing a Cruel Choice

[29] Ms. Nakawunde submits that the officer erred by failing to consider whether her removal would subject her to cruel and unusual treatment since it would present her with a "cruel choice" – to either bring Sanyu to Uganda where she would be at risk of FGM or to leave Sanyu in Canada and be separated from her child. She submits that harm incidental to removal falls within section 97 and that to force a person to make a cruel choice is cruel in and of itself including the mental harm that this choice will cause her.

[30] I agree with the respondent that this is not a prospective risk contemplated by section 97 of the Act; rather, these are considerations relevant to a humanitarian and compassionate application for relief under the Act. The PRRA officer's role is to assess risk and this does not involve consideration of other factors. In any event, there is no objective medical evidence to show that a separation from Sanyu will cause damage other than the usual difficulty caused by family separation, which is a natural consequence of deportation. Further, as the respondent

argues, the separation is not permanent because the applicant will be able to return to Canada without written authorization one year after removal.

5. Risk to the Applicant in Refusing to Submit her Child to FGM

[31] Ms. Nakawunde submits that the officer did not assess the risk posed by Sanyu's father due to her refusal to allow Sanyu to undergo FGM. She says that this risk will be present regardless of whether Sanyu goes to Uganda or not as leaving Sanyu in Canada would also be a form of refusal. She argues that the conclusion of the officer that the risk from Sanyu's father was "not supported by any evidence," disregards her own evidence.

[32] The respondent observes that the officer's findings in this regard "are not written with the clarity that would be required of a more formal tribunal," but says that they are sufficiently clear to allow the court to understand that the applicant's evidence was not sufficient to establish that Sanyu's father had threatened and harassed her and her family. Therefore, it is submitted, the officer's conclusion that he or she was not satisfied that the applicant faced a risk from Sanyu's father was within the range of possible, acceptable outcomes.

[33] I agree with the applicant that the officer does not make an express finding on this question; however, it is clear from the reasons as a whole and the assessment of the weight given, that the officer found that there was insufficient evidence to establish the risk in question.

Certified Questions

[34] The applicant proposed three questions for certification:

1. Does section 97(1)(b) of the *Immigration and Refugee Protection Act* encompass the harm of requiring a parent subject to removal to choose between leaving a child behind in Canada and subjecting the child to risk of harm on bringing the child with the parent to the country of removal?

2. Is section 97(1)(b) limited to the person to be removed in the country of removal or can it encompass harm in Canada to the person to be removed?

3. Is the requirement to consider evidence cumulatively restricted to considering evidence of harassment and discrimination, or does the requirement apply to evidence on any matter?

[35] I agree with the respondent that questions 1 and 2 are not serious questions because the Act and jurisprudence is clear that section 97(1)(b) of the Act looks to harm or risk in the country of removal – not to harm in Canada.

[36] I also agree with the respondent that question 3 cannot be certified. The law is established as the applicant suggests, namely that all evidence relevant to a factual issue is to be examined cumulatively. In any event, it has been found that the officer did so in this case and thus this question is not determinative of any appeal of this decision.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed and no question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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