Federal Court  Cour fédérale

Date: 20150514

Docket: IMM-7909-13

Citation: 2015 FC 635

Ottawa, Ontario, May 14, 2015

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

JOEL GAUAN GO (a.k.a. NIKKIE GO)

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter and Background

[1] The Applicant is a citizen of the Philippines who is biologically male, but presents herself as a woman. She originally came to Canada on December 28, 2008, but did not leave when her visitor's visa expired. She asked for refugee protection on February 13, 2012, claiming that her life would be at risk in the Philippines because she is transsexual and HIV positive. She alleged

that she had been harassed, assaulted, and sexually abused because of her gender identity by many people, including family members and police officers.

[2] Shortly after her arrival in Canada, immigration officials discovered that the Applicant had spent some time in the United States of America, where she had been convicted for possession of methamphetamine for the purposes of sale on October 24, 2002. Consequently, on March 12, 2012, the Immigration Division of the Immigration and Refugee Board [IRB] issued a deportation order, finding that the Applicant was inadmissible for serious criminality pursuant to paragraph 36(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*Act*].

[3] Initially, the deportation order did not affect the Applicant's refugee claim. Although paragraph 101(1)(f) of the *Act* now provides that persons who are inadmissible for serious criminality are ineligible to be referred to the Refugee Protection Division [RPD] of the IRB, the former subsection 101(2)(b) created an exception for those individuals like the Applicant whom the Minister did not consider to be a danger to the public. That exception was abolished on December 15, 2012, when section 34 of the *Protecting Canada's Immigration System Act*, SC 2012, c 17 [*PCISA*], came into force. Consequently, the Canada Border Services Agency [CBSA] notified the Applicant by letter dated February 21, 2013, that her refugee claim was ineligible to be referred to the RPD, and by letter dated February 25, 2013, the RPD notified the Applicant that the pending proceedings in the RPD in respect of her claim for refugee protection had been terminated.

[4] The Applicant therefore applied for humanitarian and compassionate [H&C] relief and for a pre-removal risk assessment [PRRA] on April 26, 2013. After both applications were refused, the Applicant sought leave from this Court to apply for judicial review. Her request for leave with respect to the H&C application was denied on March 27, 2014 (*Go v Canada (Minister of Citizenship and Immigration)*, IMM-7911-13 (FC)); but her request for leave to apply for judicial review of the decision by a senior immigration officer [Officer] which refused her PRRA application was granted. Pursuant to subsection 72(1) of the *Act*, the Applicant now asks the Court to set aside the Officer's decision and return her PRRA application to a new officer for re-determination.

II. Decision under Review

[5] The Applicant's PRRA application was refused by letter dated October 18, 2013, but the notes to file include more detailed reasons. The Officer stated in the notes that the Applicant's refugee claim was "rejected on the basis of section 1F of the Refugee Convention." Since the risks faced by the Applicant had not previously been assessed by the RPD, the Officer stated that all the evidence submitted by the Applicant would be considered. The Officer further determined that section 96 of the *Act* could not be considered since the Applicant was a person described in subsection 112(3) of the *Act* and inadmissible on grounds of serious criminality.

[6] Although the Officer did not question the Applicant's story, he or she nevertheless decided that the Applicant was not a person in need of protection under subsection 97(1) of the *Act*. After reciting evidence on the problems faced by lesbian, gay, bisexual and transgender [LGBT] persons in the Philippines and the response from the government there, the Officer

concluded that LGBT persons do face some discrimination, but not to such a degree as to put the Applicant "at risk to [her] life, at risk of torture or at risk of cruel and unusual treatment or punishment." The Officer also found that conditions in the Philippines were stable and slowly improving, and that "the Philippines has adequate, although imperfect, police services and an independent judicial body for criminal matters."

[7] The Officer concluded the reasons with the following passage:

> … I note that the onus is on the applicant to establish her risk and to support it with evidence. The applicant has not done so. Given the insufficiency of evidence provided by the applicant and given the generally stable conditions in the Philippines, I do not find that the applicant is at risk to be returned to the Philippines.

III. Issues

[8] In their written arguments, the parties focused on the following issues:

1. Did the Officer ignore evidence?
2. Did the Officer engage in a selective reading of the evidence?
3. Did the Officer fail to conduct an individualized inquiry?
4. Did the Officer err by relying on the state's serious efforts?

[9] At the outset of the hearing, the Court raised the issue of whether the Officer had possibly erred by failing to assess the Applicant's PRRA application under section 96 of the *Act*. After discussion among the Court and counsel for the parties, it was determined that post-hearing written submissions would be made with respect to this issue. The Respondent has since conceded that the Officer erred in this regard, so that issue will be addressed first.

IV. Analysis

A. *Did the Officer err by failing to assess the Applicant's PRRA application under section 96 of the* Act*?*

[10] On March 12, 2012, the Applicant was found inadmissible for serious criminality by reason of her criminal conviction in the United States. Subsequently, on February 25, 2013, after the *PCISA* was proclaimed in force, the RPD terminated the Applicant's refugee claim because it was advised by CBSA that her claim was ineligible due to paragraph 101(1)(f) of the *Act*.

[11] Undoubtedly, as the Officer correctly determined, paragraph 112(3)(b) applied to the Applicant because she is inadmissible for serious criminality, but that does not in and of itself mean that section 96 could not apply. On the contrary, which sections should be considered by a PRRA officer is governed by paragraphs 113(d) and (e) of the *Act*, the relevant portions of which provide as follows:

113. Consideration of an application for protection shall be as follows:	**113.** Il est disposé de la demande comme il suit :
…	…
(*d*) in the case of an applicant described in subsection 112(3) — other than one described in subparagraph (*e*)(i) or (ii) — 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) — sauf celui visé au sous-alinéa *e)*(i) ou (ii) —, 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	(i) soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un danger pour le public au

are a danger to the public in Canada, or	Canada,
…	…
(*e*) in the case of the following applicants, consideration shall be on the basis of sections 96 to 98 and subparagraph (*d*)(i) or (ii), as the case may be:	*e)* s'agissant des demandeurs ci-après, sur la base des articles 96 à 98 et, selon le cas, du sous-alinéa *d)*(i) ou (ii) :
…	…
(ii) an applicant who is determined to be inadmissible on grounds of serious criminality with respect to a conviction of an offence outside Canada 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, unless they are found to be a person referred to in section F of Article 1 of the Refugee Convention.	(ii) celui qui est interdit de territoire pour grande criminalité pour 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, sauf s'il a été conclu qu'il est visé à la section F de l'article premier de la Convention sur les réfugiés.

[Emphasis added]

[12] If the Applicant were captured by paragraph 113(d), her claim would be assessed and limited to "the factors set out in section 97"; but ever since section 39 of *PCISA* came into force on December 15, 2012, that paragraph expressly excludes anyone who is "described in subparagraph (*e*)(i) or (ii)." The claims of those individuals should instead be assessed "on the basis of sections 96 to 98 and subparagraph *(d)*(i)." The effect of this change is described in Citizenship and Immigration Canada's Operational Bulletin 440-H, dated December 17, 2012:

> For PRRA applicants who have been determined to be inadmissible on grounds of serious criminality, a PRRA will be conducted (assessed with respect to A96 and A97) but a positive decision will have the same result as a 'restricted' PRRA:
>
> - PRRA applicants who are inadmissible due to an in-Canada conviction punishable by at least 10 years imprisonment will receive a 'full' PRRA. This PRRA will be assessed further to A96 and A97, however, as with 'restricted' PRRAs, an approved application does not result in protected person status (rather, the person's removal order is stayed). Before December 15, 2012, a person would receive a 'restricted' PRRA (assessed with respect to A97 only, plus no refugee protection if approved) if inadmissible due to an in-Canada conviction that imposed a term of at least two years imprisonment.
>
> - PRRA applicants who are inadmissible due to a conviction outside Canada for an offence that, if committed in Canada, would constitute an offence punishable by at least 10 years imprisonment receive a 'full' PRRA (as described above) with a positive decision not resulting in protected person status but a stay of removal. Before December 15, 2012, such persons would have received a 'restricted' PRRA, as described above.
>
> [Footnotes and emphasis omitted]

[13] The second bullet point above applies to the Applicant, as she asked for her PRRA in April, 2013. Consequently, the Applicant is a person described in subparagraph 113(e)(ii) so long as she has never been found to have been excluded from refugee protection by article 1F of the *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150 [*Convention*], and the Applicant's refugee claim was terminated before any decision had been made.

[14] This is not a case like *Canada (Citizenship and Immigration) v Li*, 2010 FCA 75, [2010] 3 FCR 347 [*Li*]. Not only was *Li* decided before paragraph 113(e) was enacted, but there is no

indication in this case that the Officer independently determined that the Applicant was excluded under article 1F(b) of the *Convention*. Rather, there are only two minor references to article 1F in the Officer's decision, and they contradict each other: first, in section 2(c) of the notes to file, the Officer correctly checked off the "No" box in response to whether the Applicant had "made a claim to refugee protection that was rejected on the basis of section F of Article 1 of the Refugee Convention"; and then, in section 4, the Officer incorrectly stated that the Applicant's refugee claim "was rejected on the basis of section 1F of the Refugee Convention."

[15] The record shows that the Applicant has never been declared to be excluded from refugee protection under article 1F of the *Convention*. Moreover, such a declaration does not inevitably follow from a finding of inadmissibility for serious criminality. Meeting the criteria for serious criminality in paragraph 36(1)(b) of the *Act* only creates a presumption that the crime was serious for the purposes of article 1F(b) of the *Convention* (see *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68 at paragraph 62, [2014] 3 SCR 431). The Applicant is therefore a person described in subparagraph 113(e)(ii) of the *Act*.

[16] Accordingly, I agree with both parties that the Officer erred by failing to assess the Applicant's PRRA application under section 96 of the *Act*. This is reason alone to return the Applicant's PRRA application to a new officer for re-determination.

V. Conclusion

[17] In view of the foregoing, it is not necessary to address the other issues enumerated above.

[18] In the result, the Applicant's application for judicial review is granted and the matter is remitted to another immigration officer for re-determination. No serious question of general importance is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. the application for judicial review is granted;

2. the matter is remitted to another immigration officer for re-determination; and

3. no question of general importance is certified.

"Keith M. Boswell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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