Federal Court  Cour fédérale

Date: 20151204

Docket: IMM-1532-15

Citation: 2015 FC 1343

Ottawa, Ontario, December 4, 2015

PRESENT: The Honourable Mr. Justice Camp

BETWEEN:

PASHKO RAZBURGAJ
LULE RAZBURGAJ
KLAUDIA RAZBURGAJ
GYSTINA RAZBURGAJ
PREK RAZBURGAJ
JACOB RAZBURGAJ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

UPON hearing this application for judicial review in Ottawa, Ontario, on November 19, 2015;

AND UPON reviewing the materials filed with the Court, including the certified tribunal record, and hearing the arguments and submissions of the parties;

AND UPON concluding that this application for judicial review should be dismissed for the following reasons:

[1] This is an application for judicial review of a negative pre-removal risk assessment (PRRA) decision of a senior immigration officer (the Officer). The Officer's decision is dated January 30, 2015.

[2] The applicants are six members of a family of seven. The principal applicant is Pashko Razburgaj. He and his wife, Lule Razburgaj, have five children. Mr. and Ms. Razburgaj were born in Albania and are Albanian citizens, along with their oldest daughters Juljana and Klaudia. The family fled Albania for the United States. The youngest three children were born in the United States between 2000 and 2007. They are citizens of America and Albania. The oldest daughter, Juljana is not involved in this application as she is now married. Hearings before the Refugee Protection Division (RPD) of the Immigration and Refugee Board were held in late 2012.

[3] A PRRA application was filed on May 8, 2014, and an application for permanent residence based on humanitarian and compassionate grounds (H&C) was filed on September 2, 2014. It is decisions in those two applications which are now under review by this Court. This judgment deals with the PRRA. The decision regarding the review of the H&C decision is dealt with in a sister decision by this Court.

[4] The Officer determined that the applicants, if returned to Albania, would not be subject to a risk of persecution, danger of torture, risk to life, or risk of cruel and unusual treatment or punishment.

[5] In support of their PRRA application, the applicants submitted affidavits, letters from relatives, the death certificate of an uncle in Albania, and country-of-origin documentation. The applicants also submitted declarations from Razburgaj and Pepaj family members in Albania confirming the blood feuds. The Officer found the letters and declarations proffered on the application to be vague and lacking in detail. The Officer noted that the applicants were unable to obtain any official state recognition of their alleged blood feuds. In general, the Officer found that the evidence presented by the applicants was materially the same as that presented before the RPD. The Officer noted that the PRRA process is not an appeal or a rehearing of the RPD decision and the evidence to be considered on a PRRA is limited by subsection 113(*a*) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], which provides:

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] Ultimately, the Officer found that the applicants failed to overcome the prior findings of the RPD, failed to rebut the presumption of adequate state protection, and failed to establish a new risk development. The Officer found the likelihood that the applicants would face persecution to be no more than a mere possibility, and that it was unlikely the applicants, upon returning to Albania, would face risks or dangers. The Officer therefore concluded the applicants did not meet the definition of either Convention refugees or persons in need of protection under sections 96 or 97 of the IRPA.

I. ISSUES

[7] The applicants raise the following issues in respect of the PRRA Decision:

1) Did the Officer breach his duty of procedural fairness by denying the applicants' an oral hearing?
2) Were the applicants' denied procedural fairness because their former counsel failed to produce a document to the Officer?
3) Did the Officer err in concluding the applicants had presented insufficient evidence to corroborate their allegations of risk?
4) Did the Officer err in his assessment of adequate state protection in Albania?

[8] In my view there are two issues:

1) Were the applicants denied a fair hearing as a result of incompetence on behalf of the applicants' former counsel?
2) Was the PRRA decision reasonable?

II. STANDARD OF REVIEW

[9] The applicants submit that issues concerning the oral hearing and counsel incompetence are matters of procedural fairness, warranting a correctness standard of review. The applicants also raise procedural fairness concerns in respect of the Officer's assessment of adequate state protection, as they claim the Officer unfairly relied on extrinsic evidence.

[10] The respondent submits the applicable standard to review the PRRA decision is one of reasonableness, including the decision of whether or not to conduct an oral hearing: *Kulanayagam v Canada (Citizenship and Immigration)*, 2015 FC 101 at para 20; *Bicuku v Canada (Citizenship and Immigration)*, 2014 FC 339 at paras 16-20.

[11] The line of authority cited by the respondent supports the conclusion that the Officer's decision of whether or not to conduct an oral hearing warrants a reasonableness review, given the unique discretionary authority conferred by section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the *Regulations*]. In my view, aside from the applicants' submissions concerning counsel incompetence and reliance on country documentation without notice – both issues which raise fairness concerns – I agree with the respondent that a reasonableness review is appropriate for the PRRA decision.

III. POSITIONS OF THE PARTIES

A. *Were the applicants denied a fair hearing as a result of incompetence on behalf of their former counsel?*

[12] The applicants allege incompetence on behalf of their former counsel for failing to provide the Officer with a letter from Father Mikel Pllumaj, a priest from Albania, as evidence confirming one of the blood feuds. In this letter, dated February 26, 2013, Father Mikel writes that the Pepaj family is in a blood feud with the Sufaj family, and that his reconciliation attempts with the families have been as of yet unsuccessful.

[13] The applicants submit their former counsel's failure to submit the letter constituted incompetence, and that a miscarriage of justice occurred because the document affirmed the existence of the blood feuds and attempts at reconciliation. The applicants refer to the Officer's reasons on this very point:

> I further note that the applicants did not provide affidavits or letters from village elders, the police, parishes, or other organizations who family members state were aware of, or involved in, reconciliation attempts.

[14] The respondent submits the decision of counsel not to include the letter from Father Mikel was not negligent but deliberate and strategic. The respondent notes that counsel did include the letter in support of the H&C application, but chose not to include it in the PRRA application. The respondent notes that the applicants' former counsel did not include the letter because, in his view, it did not constitute new evidence of risk, and because its veracity could not be verified. Thus, according to the respondent, it is speculative to suggest the result would have

been different had this document been assessed by the Officer. Moreover, it is submitted that the letter would not have disturbed the Officer's finding with respect to state protection. As such, the respondent takes the position that no miscarriage of justice occurred.

B. *Was the PRRA decision reasonable?*

(1) Oral hearing

[15] As already noted, the Officer rejected the PRRA application because the evidence with respect to the blood feuds was insufficient, and because adequate state protection was available. The applicants submit that the Officer's first basis for rejecting their claim was, in effect, an acceptance of the RPD's negative credibility findings. They contend the Officer couched his credibility concerns in the language of insufficiency of evidence, a practice condemned by Justice Roger Hughes in *Uddin v Canada (Citizenship and Immigration)*, 2011 FC 1289 at para 3. Thus, it is submitted by the applicants that the only way they could have overcome these credibility findings was through an oral hearing. By relying on the negative credibility findings of the RPD without an oral hearing, it is submitted the Officer placed an onus on the applicants they could not possibly meet.

[16] The respondent submits the Officer was not entitled to provide the applicants with an oral hearing. The respondent submits that subsection 113(*b*) of the IRPA and section 167 of the *Regulations* provide that the circumstances warranting an oral hearing are exceptional, requiring a dispositive issue of credibility: *Matute Andrade v Canada (Citizenship and Immigration)*, 2010 FC 1074 at para 30. The respondent submits the Officer made no credibility finding in this case,

but rather rested his decision on the insufficiency of the applicants' evidence: *Ferguson v Canada (Citizenship and Immigration)*, 2008 FC 1067 at para 34. Moreover, the respondent submits the issue of state protection was determinative, thereby dispensing of the need for an oral hearing in any case: see also *Razburgaj v Canada (Citizenship and Immigration)*, 2014 FC 151 at para 22.

(2) Corroborating evidence of risk

[17] The applicants submitted six new letters from family members corroborating the existence of the blood feuds and attempts made at reconciliation. The applicants contend the Officer failed to consider the relevance of this evidence, particularly as it corroborates their claim of risk and rebuts the negative credibility findings of the RPD. As their claim turned on credibility, the applicants submit that it was illogical for the Officer to assign low weight to this evidence – either it ought to have been accepted as corroborating evidence that substantiated the claim, or assigned no weight at all.

[18] The respondent submits that the applicants' arguments invite the Court to reweigh the evidence, which is beyond the proper scope of a reasonableness review. As the applicants' PRRA application was based on, materially, the same submissions and evidence as that before the RPD, the respondent submits that it was open to the Officer to find the applicants' had failed to meet their onus to justify a positive PRRA result, even with the new supporting evidence. The respondent notes the Officer found the new evidence to be vague, lacking in detail, and ultimately of little probative value. This assessment of the evidence, according to the respondent, was reasonable, and rationally supports the Officer's decision to reject the application.

(3) Adequate state protection

[19] It is the position of the applicants that the Officer unfairly relied on documentary evidence regarding state protection in Albania. The applicants note that their submissions on the PRRA application were dated May 2014, but the Officer relied on a June 2014 report from the Home Office of the Government of the United Kingdom. While the applicants concede that the Officer has a duty to examine the most recent sources of country information in conducting a risk assessment, it is submitted that the Officer must disclose this information where the evidence is novel and significant, and where it discloses material changes in the general country conditions: *Rizk Hassaballa v Canada (Citizenship and Immigration)*, 2007 FC 489 at para 32. As the applicants provided new documentary evidence contradicting the availability of adequate state protection in Albania, they submit the Officer had a positive duty to disclose the updated country documentation to the applicants and provide them with an opportunity to respond.

[20] The applicants also submit the Officer's assessment of state protection was unreasonable. First, it is contended the Officer failed to give due consideration to the applicants' personal circumstances, and, in particular, the heightened risk that results from two blood feuds rather than one: *Gonzalez Torres v Canada (Citizenship and Immigration)*, 2010 FC 234 at para 37. Second, the applicants submit the Officer failed to address their evidence that adequate state protection is not available in Albania: *Junusmin v Canada (Citizenship and Immigration)*, 2009 FC 673 at paras 26-30; *Vigueras Avila v Canada (Citizenship and Immigration)*, 2006 FC 359 at para 36; *Rigg v Canada (Citizenship and Immigration)*, 2010 FC 341 at para 13; *Erdogu v Canada (Citizenship and Immigration)*, 2008 FC 407 at paras 30-32. By failing to refer to their

documentary evidence and explaining why it was discounted, the applicants submit that one is left to infer the Officer failed to consider the totality of the evidence in arriving at his decision.

[21] The respondent submits the Officer was entitled to find the country conditions had not changed since the decision of the RPD. According to the respondent, it was reasonable for the Officer to conclude, just as the RPD found, that adequate state protection in Albania was available. The respondent submits that no unfairness resulted from the Officer failing to provide notice to the applicants of the publically available documentary evidence that it relied on, especially since this evidence simply confirmed the findings of the RPD and did not introduce significantly new information.

IV. ANALYSIS

A. *Were the applicants denied a fair hearing as a result of incompetence on behalf of the applicants' former counsel?*

[22] The applicants rely on *El Kaissi v Canada (Citizenship and Immigration)*, 2011 FC 1234 at para 21 [*El Kaissi*], where Justice Near found that procedural unfairness results where the incompetence of counsel prevented the decision-maker from considering critical evidence, which then leads to a negative credibility finding that permeates the entire decision. The applicants point out that the Officer expressly noted the lack of evidence from parishes corroborating the allegations, and the letter from Father Mikel directly addressed this concern.

[23] In my view, following the direction of the Supreme Court of Canada in *R v GDB*, 2000 SCC 22 at para 29, this argument can be disposed of without having to decide the question of

whether the omission of counsel constituted incompetence. I am of the view the applicants fail to prove a reasonable probability that the decision would have been different but for the alleged incompetence. Unlike *El Kaissi*, it cannot be said that failure to provide the Officer with Father Mikel's letter led to a negative credibility finding. The applicants' claim failed on the basis of insufficiency of evidence, and it is unlikely, in my view, that this letter would have been sufficient to tip the balance in the applicants' favour. Nor does the letter rebut the presumption of state protection. Therefore, I am unable to agree with the applicants that the failure to provide this letter to the Officer resulted in a miscarriage of justice, even assuming the omission was owing to incompetence as the applicants allege. On this latter point, the respondent submits the decision by counsel to omit this letter was deliberate and strategic, given concerns with its reliability and because it did not constitute new evidence of risk. It is reasonably probable that the Officer would have had similar concerns.

B. *Was the decision reasonable?*

[24] Whether an applicant is entitled to an oral hearing on a PRRA is a matter of discretion, guided by subsection 113(*b*) of the IRPA and section 167 of the *Regulations*:

113. Consideration of an application for protection shall be as follows:	**113**. Il est disposé de la demande comme il suit :
…	[…]
(*b*) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;	*b*) une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;
167. For the purpose of determining whether a hearing	**167**. Pour l'application de l'alinéa 113*b*) de la Loi, les

is required under paragraph 113(*b*) of the Act, the factors are the following:	facteurs ci-après servent à décider si la tenue d'une audience est requise :
(*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;	*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*) whether the evidence is central to the decision with respect to the application for protection; and	*b*) l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;
(*c*) whether the evidence, if accepted, would justify allowing the application for protection.	*c*) la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

[25] Even if it can be said that the applicants' evidence raised serious and central issues of credibility, I am of the view that the decision not to grant an oral hearing was reasonable in light of subsection 167(*c*) of the *Regulations*. The Officer's finding that adequate state protection existed, notwithstanding the applicants' evidence to the contrary, was a dispositive competent of the PRRA application. In my view, this finding would not have been disturbed even with a positive credibility finding with respect to the blood feuds.

[26] With respect to the remaining arguments raised by the applicants, I am of the view that the decision of the Officer was fair and reasonable. Dealing first with the fairness argument, I agree with the respondent that the UK Home Office report was not novel and significant, and did not disclose any material change in the general country conditions unknown to the applicants. The Officer specifically noted that the report did not disclose any change in the country

conditions from the findings of the RPD. The fact that this documentary evidence might have contradicted the applicants' documentary evidence on state protection does not trigger any obligation of disclosure on behalf of the Officer.

[27] I am also of the view that the Officer's conclusion on state protection was reasonable. The Officer stated that he had considered the applicants' documentary evidence but ultimately found that the presumption of adequate state protection had not been rebutted. While the Officer did not explain why the applicants' documentary evidence was discounted specifically, the reasons disclose a preference for the documentation cited by the RPD and the June 2014 report of the UK Home Office. In preferring this evidence, the applicants' evidence was tacitly rejected. As such, I am unable to agree with the applicants that the Officer failed to consider the totality of the evidence in arriving at his decision.

[28] This leaves the applicants' arguments concerning the evidence of risk. The applicants submit the Officer's tendency to assign "low" weight to the evidence is simply a veiled method of adopting the negative credibility findings of the RPD. In light of the corroborating evidence provided to the Officer, it is submitted that the Officer should have either rejected their claim wholesale for want of credibility, or accepted their claim as substantiated. I agree, however, with the respondent that the Officer's role on the PRRA application was to assess whether new evidence justified protection. The Officer is entitled to consider the sufficiency of this evidence, particularly in the context of what was already presented to the RPD.

V. CONCLUSION

[29] To the credit of counsel, these applications were rigorously argued. I note that the incompetence of counsel arguments were narrowly argued, focusing on two discrete and specific examples, as the law requires, rather than on the overall tenor of the applicants' representation by their former lawyer. Ultimately, however, the question is whether a miscarriage of justice resulted from the incompetent representation. In the PRRA decision, the Officer found no sufficient evidentiary basis to substantiate the alleged blood feuds, and found that state protection was available in any event. In my view, given the evidence before the Officer, these conclusions were reasonable, and were not affected by the alleged incompetence. Accordingly, I dismiss this application for judicial review.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question to be certified.

"Robin Camp"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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