Federal Court  Cour fédérale

Date: 20151221

Docket: IMM-6935-14

Citation: 2015 FC 1405

Toronto, Ontario, December 21, 2015

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

GOWRY SUBRAMANIAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is a judicial review under subsection 72(2) of *the Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] of a pre-removal risk assessment [PRRA] by a Senior Immigration Officer [Officer] in which the Officer determined that the Applicant would not be subject to risk of torture, be at risk of persecution, or face a risk to life or risk of cruel and unusual punishment or treatment if removed to Sri Lanka, her country of nationality. The

decision is dated June 19, 2014 [Decision]. The Applicant was scheduled to be removed on December 3, 2014 but successfully sought a stay of removal, granted on November 28, 2014, in order to pursue this judicial review.

II. Facts

[2] The Applicant is a 30-year old Tamil from Northern Sri Lanka. She alleges that her brother was approached by both the Eelam People's Democratic Party [EPDP] and the Liberation Tamil Tigers of Eelam [LTTE] for financial support and that he refused both. In late 2006, the EPDP had him arrested by the Sri Lankan army. He was tortured and upon release fled to Australia where he was accepted as a Convention refugee.

[3] Once her brother fled, the Applicant alleges that she took over his business and subsequently became a target of both the EPDP and the army. She was regularly sexually harassed and assaulted from January 2007 to December 2007, when she ceased business operations.

[4] As the civil war in Sri Lanka escalated, the Applicant states that she tried to avoid any contact with the army or the EPDP. Even after the war ended, however, there were further abuses by both, including an EPDP militant who stalked and threatened her.

[5] On December 31, 2009, the Applicant alleges that she was sexually assaulted by two soldiers as two other soldiers held her parents at gunpoint. The day after the sexual assault, her

parents tried to visit her in the hospital and file a complaint but were threatened by members of the EPDP.

[6] The Applicant acquired a student visa for the United Kingdom and she left in February 2010. On January 16, 2011, she traveled to Toronto under her sister's passport and claimed refugee protection the next day.

[7] On February 12, 2013, her claim for refugee protection was rejected by the Refugee Protection Division [RPD] of the Immigration Review Board. The RPD took issue with her credibility, finding that there were fundamental differences between her Port of Entry allegations and her Personal Information Form [PIF] narrative. In addition, it found that she did not have a subjective fear of persecution given that she did not make an asylum claim in the United Kingdom. Leave to judicially review that decision was denied on July 8, 2013. The Applicant then filed an application for her PRRA under subsection 112(1) of the Act on February 25, 2014.

III. PRRA Decision

[8] The Officer first reviewed the Applicant's submissions and found that she was relying on her PIF narrative, which contained the same allegations set out in her rejected application to the RPD. As such, those allegations did not constitute new evidence under subsection 113(a) of the Act. Specifically, with respect to new evidence, the Officer concluded as follows:

> Subsequent to the applicant's RPD decision, the PRRA submissions rely on the same allegations as were advanced before the RPD. As this evidence was already advanced before the RPD, I am not satisfied that it constitutes new evidence under section 113(a) of [the Act]. I note that as stated in *Kaybaki*, the PRRA

> application cannot be allowed to become a second refugee hearing. The PRRA process is to assess new risk developments between the hearing and the removal date. (Certified Tribunal Record [CTR], pp 6-7)

[9] The Officer then turned to the current country conditions in Sri Lanka, reproducing in full the five-paragraph executive summary of the 2013 US Department of State Country Report on Human Rights Practices for Sri Lanka [the DOS Report]. In light of this excerpt, the Officer concluded that:

> [I]t is clear that conditions in Sri Lanka are far from ideal; still, the country conditions are similar to what they were at the time of the applicant's refugee decision. Accordingly, I am not satisfied that there is sufficient new evidence to show that the applicant would face more than a mere possibility of persecution. In addition, I am not satisfied that sufficient new evidence has been presented to show she is likely to face a danger of torture, or a risk to life, or a risk of cruel and unusual treatment or punishment in Sri Lanka. (CTR, p 8)

[10] In evaluating country conditions in Sri Lanka, the Officer did not explicitly discuss the Applicant's submissions other than to say that "[w]ith respect to documentary articles presented by the applicant, I have considered those articles in my analysis of the current country conditions" (CTR, p 7). Nor did the Officer mention any other country condition documentation, though the UK Home Office Operational Guidance Notes on Sri Lanka from July 2013 [the Home Office Notes] are listed as "Sources Consulted" at the end of the Decision.

IV. Parties' Positions

[11] The parties agree that the applicable standard of review is reasonableness, given that there were no errors of procedural fairness. They are correct that, in the absence of procedural

fairness concerns, a PRRA is a highly fact-driven inquiry warranting the application of the reasonableness standard of review (see for instance, *Korkmaz v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 1124 at para 9; *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 at para 3 [*Raza*]). A reasonableness analysis requires that this Court give considerable deference to the Decision. This Court may only interfere if it lacks justification, transparency, intelligibility, and falls outside the range of possible, acceptable outcomes, defensible in fact and in law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59).

[12] This is where the parties' agreement ends: the Applicant contends that the Officer failed to properly consider the country condition evidence (although concedes that no errors were made by the Officer with respect to the analysis of her personal circumstances, such as those relating to her PIF, which was included with her PRRA application). For this, the Applicant relies on *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 at para 17 [*Cepeda-Gutierrez*]:

> [T]he more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence"…Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact.

[13] The Applicant makes three arguments in support of her contention that the Officer erred unreasonably in failing to properly assess and consider this new evidence of risk. First, the Decision contains little more than a 'blanket statement' that the Officer had considered the

Applicant's submissions on country conditions; second, those submissions, along with the documentation the Officer independently consulted, contained new evidence that should have been considered; and third, that new evidence, ignored by the Officer, contradicted the ultimate finding that she faced less than a mere possibility of persecution.

[14] The Respondent disagrees with the Applicant, submitting that, per subsection 113(a) of the Act, PRRA Officers must limit their analysis to "new" evidence – evidence that was either published after the negative RPD decision was rendered (February 12, 2013) or that was not reasonably available at the time of the rejection. The Respondent argues that since the Applicant did not bring forward any "new" country condition evidence that differed substantially from the country condition evidence before the RPD, this Officer acted reasonably and consistently with *Cepeda-Gutierrez*, i.e., without needing to refer to every piece of contrary evidence.

V. Analysis

[15] I agree with the Applicant that the Officer made a reviewable error in failing to address certain key points which were material to the Applicant's profile. This new evidence contradicted key findings of fact by the Officer, namely that the young female Tamils from the north would not be at risk to the sexual assault that the Applicant claimed that she had already been subject to in the past. This Court must assess the reasonableness of a decision on the basis of what the decision-maker wrote, and if the decision-maker is sparing in the reasons, without explicitly addressing evidence that runs directly contrary to the conclusion, it is open to this Court to find the decision unreasonable (*Cepeda-Gutierrez* at para 17).

[16] The test to determine the newness of evidence under subsection 113(a) of the Act is set out in *Raza* at para 13:

> Newness: 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.

[17] "Newness", then, refers not only to evidence that demonstrates a change in country conditions since the RPD's decision. Newness also refers to evidence that was not available at the time of the RPD decision that confirms allegations made before the RPD or that provides a more fulsome, detailed picture of the circumstances in the country at issue. Several documents were before the PRRA Officer which fit the parameters of "new evidence":

i. a news article from "101 East", a current affairs programme on Al-Jazeera, dated December 27, 2013 (CTR, pp 105-07);

ii. a BBC News article dated November 9, 2013 (CTR, pp 107-11);

iii. The Home Office Notes (published July 2013) (CTR pp 39-90); and

iv. The DOS Report (published sometime after April 2013) (CTR, pp 11-38).

[18] Of these, the Officer explicitly focused only on the DOS Report. What I find particularly problematic is that the Officer excerpted the entire executive summary of the DOS Report, foregoing any analysis of the details in its significant body relating precisely to the particular fear

raised by the Applicant. There were specific sections of the DOS Report that addressed the risks surrounding sexual assault of women fitting the Applicant's profile:

i. That there were a number of credible reports of sexual violence against women, who did not lodge official complaints due to fear of retaliation, in which the alleged perpetrators were armed forces personnel, police officers, army deserters, or members of militant groups, and that human rights activists frequently complain about police and security force participation in acts of violence against women. (CTR, p 15).

ii. That police recorded 900 incidents of rape during the first six months of 2012, the most recent period for which data was available, but that this number was an unreliable indicator of the degree of this problem because many victims were unwilling to file reports (CTR, p 33).

[19] The Officer concluded that the DOS Report provided an unchanged country portrait to that which had been painted before the RPD. I find that this conclusion was unreasonable in light of the actual details of the DOS Report itself.

[20] The disturbing new evidence of sexual assault within the DOS Report before the PRRA Officer was buttressed by the new evidence provided in the Home Office Notes, issued in July 2013 (i.e., also after the RPD hearing, also raising "new" evidence). For example, the Home Office Notes highlighted the risk of sexual violence by referring to a Human Rights Watch report that was released on February 26, 2013 – shortly after the Applicant's RPD decision was rendered:

> In the report "We will teach you a lesson: sexual violence against Tamils by the Sri Lankan Security Forces", February 2013, Human Rights Watch stated [that] "[i]n March 2011, the report of the UN

> Secretary-General's Panel of Experts on Accountability in Sri Lanka noted "many indirect accounts reported by women of sexual violence and rape by members of government forces and their Tamils surrogate forces, during and in the aftermath of the final phases of the armed conflict." The panel added [that] "rapes of suspected LTTE cadre are also reported to have occurred, when they were in the custody of the Sri Lankan police (CID [Criminal Investigation Department] and TID [Terrorist Investigation Department] or SLA [Sri Lankan Army])". "Humanitarian workers present in northern Sri Lanka during the final months of the conflict described widespread rape of women by the Sri Lankan Army. A former UN field officer told Human Rights Watch that "a large number of women fleeing from the conflict areas during the peak of fighting were sexually assaulted". As a general rule, cases of sexual violence and rape by the security forces have been poorly investigated or not pursued at all. Complaints of rape, like other complaints of torture, are often not effectively dealt with by the police, magistrates, or doctors. Weaknesses in the early stages of the criminal investigation process have repeatedly contribution to the ultimate collapse of investigations of alleged rapes and other acts of sexual violence". (CTR, p 76)

[21] Like the DOS Report, this new evidence supports the Applicant's claim that she may be at risk of sexual violence. But it was not discussed in the Decision, even as it pointed strongly in the opposite direction of the Officer's finding. In reaching the conclusion that the Applicant "would not face more than a mere possibility of persecution", the Officer failed to mention this new evidence, instead relying on a cursory overview from one section of the DOS Report that only touched briefly on the Applicant's risk profile.

[22] In my view, both the DOS Report and the Home Office Notes constitute new evidence regarding the persecution which the Applicant feared, namely sexual abuse against young unmarried Tamil women from the North of Sri Lanka who may have been perceived to have ties with individuals opposed to the government. The Applicant based her PRRA on being a woman who fit this profile.

VI. Conclusion

[23] It is not the role of the Federal Court to intervene in an officer's PRRA decision and submit the conclusion that it feels is correct. However, this Court must, with deference, look to the reasons issued and the logic provided by the officer and determine whether the decision is reasonable. In this case, the Decision lacked sufficient consideration of two key documents which both shed new light on the Applicant's profile. Given the failure to address the new, compelling evidence in any meaningful way, the Decision is unreasonable, and must be sent back for reconsideration by a different officer.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. This application for judicial review is allowed.
2. The matter is to be sent back for reconsideration by a different PRRA Officer.
3. There are no questions for certification.
4. There is no award as to costs.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6935-14
STYLE OF CAUSE:	GOWRY SUBRAMANIAM v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 18, 2015
JUDGMENT AND REASONS:	DINER J.
DATED:	DECEMBER 21, 2015

APPEARANCES:

Max Berger	FOR THE APPLICANT
Modupe Oluyomi	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Max Berger Professional Law Corporation Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT