Federal Court  Cour fédérale

Date: 20170130

Docket: IMM-2563-16

Citation: 2017 FC 116

Ottawa, Ontario, January 30, 2017

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

TSEGEREDA NUGUS KAHSAY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Ms. Tsegereda Nugus Kahsay, claims to be a citizen of Eritrea. She arrived in Canada in October 2013 and immediately filed for refugee protection. Her refugee claim was rejected by the Refugee Protection Division [RPD] on February 24, 2014 on the basis that she had failed to establish her identity. The Refugee Appeal Division upheld the RPD's findings, and leave for judicial review was denied on September 17, 2014.

[1] The Applicant then filed a Pre-Removal Risk Assessment [PRRA] application on November 6, 2015. In her application, she states that she fled Eritrea because she had been arrested for failing to perform mandatory military service. She provided country condition information to support her position that she will also be at risk of persecution if she returns to Eritrea because she is a failed refugee claimant abroad and because she did not have permission to leave Eritrea.

[2] In a decision dated February 8, 2016, the PRRA Officer rejected the Applicant's PRRA application, finding that the risks alleged by the Applicant did not have a nexus to one of the five enumerated grounds of the Convention and that she had not adduced sufficient evidence to demonstrate that she faced a personalized, forward-looking risk if returned to Eritrea.

[3] The Applicant now seeks judicial review of that decision. She submits that the PRRA Officer made a veiled credibility finding and as a result, should have held an oral hearing pursuant to subsection 113(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The Applicant also submits that the PRRA Officer erred in assessing the alleged risk under section 97 of the IRPA.

II. Analysis

[4] The standard of review for a decision granting an oral hearing in the context of a PRRA application has been mixed. In some cases, the Court applies a correctness standard because the matter is viewed as a matter of procedural fairness, while in others the reasonableness standard is applied on the basis that the appropriateness of holding a hearing in light of a particular context

of a file calls for discretion and commands deference (*Negm v Canada (Citizenship and Immigration)*, 2015 FC 272 at paras 32-33; *Kulanayagam v Canada (Citizenship and Immigration)*, 2015 FC 101 at para 20; *Bicuku v Canada (Citizenship and Immigration)*, 2014 FC 339 at paras 16-19; *Adetunji v Canada (Citizenship and Immigration)*, 2012 FC 708 at para 24).

[5] A PRRA Officer's assessment of the evidence, involving questions of mixed fact and law, is reviewable on a reasonableness standard (*Mbaraga v Canada (Citizenship and Immigration)*, 2015 FC 580 at para 22; *Vijayaratnam v Canada (Citizenship and Immigration)*, 2015 FC 48 at para 24). When reviewing a decision against the reasonableness standard, the Court must consider whether the decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]). Deference is owed to the decision-maker. While there might be more than one reasonable outcome, "as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome" (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59).

A. *Preliminary matters*

[6] At the outset of the hearing, counsel for the Respondent indicated to the Court that the style of cause in this matter was incorrect. While the department was operating under a new name, the "Minister of Citizenship and Immigration" was still the responsible Minister under subsection 4(1) of the IRPA.

[7] Additionally, counsel for the Respondent reiterated the objection that was raised in the Respondent's Further Memorandum of Fact and Law regarding the inclusion of the Applicant's Basis of Claim form in her application record. While the document presumably formed part of the record before the RPD, it was not before the PRRA Officer. The Respondent properly noted and counsel for the Applicant agreed that the document could not be relied upon by this Court to impugn the PRRA Officer's decision.

[8] Counsel for the Applicant also requested that the Court consider the most recent version of the Immigration and Refugee Board of Canada [IRB]'s "Responses to Information Requests" [RIR] in relation to Eritrea, as it further corroborated the Applicant's contention of the risk faced by failed refugee claimants or people who left the country illegally upon their return to Eritrea. Counsel argued that while the September 10, 2014 version of the RIR had been included in the Applicant's submissions to the PRRA Officer, the PRRA Officer should have considered the most recent version dated November 18, 2015.

[9] There are a number of reasons why the Court will not entertain the Applicant's request.

[10] First, the November 2015 RIR is not one of the documents mentioned in the List of Documents in the National Documentation Package found in the Certified Tribunal Record. It is well-established that the judicial review of a tribunal decision is to be considered on the basis of the material that was before the tribunal when it made its decision (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright*), 2012 FCA 22 at para 19 [*Access Copyright*]). While there are a few recognized exceptions to the general

rule, the Applicant has not demonstrated that any of those exceptions apply in the present case. I cannot agree with the Applicant's proposition that this document might be admissible under the "general background" exception (*Access Copyright* at paras 19, 20(a), 26).

[11] Second, even if the document could have been adduced as evidence, it should have been put before the Court by means of an affidavit (*Canadian Copyright Licensing Agency (Access Copyright) v Alberta*, 2015 FCA 268 at para 20; *Kahnapace v Canada (Attorney General)*, 2010 FCA 70 at para 4). Moreover, the Applicant would have been required to seek an extension of time. The Order of Mr. Justice Roy granting leave in this matter required that any additional affidavits be served and filed by the Applicant on or before November 14, 2016.

[12] The November 2015 RIR was only provided to the Court and the Respondent on the morning of the hearing. It was not attached to an affidavit and was not the subject of prepared submissions by either party. The Court cannot accept that parties simply hand up evidence to the bench in this manner.

[13] Third, while the RIR report is dated November 18, 2015, the Applicant has not adduced any evidence demonstrating when it became available or when it was posted to the National Documentation Package. The date which appears on the updated RIR is not necessarily indicative of the date it became available to the PRRA Officer (*Ramos v Canada (Citizenship and Immigration)*, 2011 FC 15 at para 43).

[14] On a final note, I would add that the documentation contained in the Certified Tribunal Record and consulted by the PRRA Officer is as contemporaneous as the November 2015 RIR, which included the USDOS report *2014 Country Reports on Human Rights Practices – Eritrea*, dated June 25, 2015, the UK Home Office report *Country Information and Guidance Eritrea: Illegal Exit*, dated September 7, 2015, and the UK Home Office report *Country Information and Guidance – Eritrea: National (incl. Military) Service,* dated September 2015.

[15] Accordingly, the November 2015 RIR will not be considered by the Court.

B. *Did the PRRA Officer err in failing to hold an oral hearing?*

[16] The Applicant submits the PRRA Officer made a veiled credibility finding in stating that the "objective corroborative evidence" submitted by the Applicant did not overcome the credibility concerns of the RPD or demonstrate a forward-looking risk. The PRRA Officer was therefore required to hold an oral hearing pursuant to subsection 113(b) of the IRPA. Relying on the decision of this Court in *Liban v Canada (Citizenship and Immigration*), 2008 FC 1252 at para 14, the Applicant argued that when the PRRA Officer stated in his decision that there was "insufficient corroborative evidence" to support the Applicant's assertions, the PRRA Officer was in fact saying he did not believe her.

[17] The Respondent states that an oral hearing was not required because the Applicant's credibility was not at issue, nor was it central to the claim for protection. The fact that the PRRA Officer referred to the RPD's credibility finding does not also mean the PRRA Officer made a veiled credibility finding.

[18] Subsection 113(b) of the IRPA provides that "a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required." The prescribed factors for determining whether a hearing is to be held, set out in section 167 of the *Immigration and Refugee Protection Regulations,* SOR/2002-227, include whether there is evidence that raises a serious issue of the Applicant's credibility and whether the evidence is central to the decision. Thus, the Court must determine whether a credibility finding was made explicitly or implicitly and, if so, whether it was central to the decision (*Ibrahim v Canada (Citizenship and Immigration),* 2014 FC 837 at para 16).

[19] Regardless of the standard of review, I am not persuaded by the Applicant's argument that an oral hearing was required or that the PRRA Officer's use of the words "objective corroborative evidence" amounts to a credibility finding. While the Respondent conceded that the PRRA Officer's reference to the issues before the RPD in the decision's background information is confusing, I agree with the Respondent that credibility was not an issue for the PRRA Officer in his decision. Although the PRRA Officer made reference to the RPD's credibility finding with respect to identity, the operative conclusion was that the Applicant had not provided sufficient objective documentary evidence to establish a personalized, forward-looking risk upon return. When prompted by the Court, the Applicant was unable to identify any part of the decision, other than the use of the words "objective corroborative evidence", which could support her assertion that the PRRA Officer had made a credibility finding.

[20] The Applicant also suggested that, as the RPD did not deal with risk but only decided on the basis of identity, she should have been entitled to an oral hearing.

[21] The proper approach in such situations was discussed in *Chen v Canada (Citizenship and Immigration)*, 2009 FC 379, where Mr. Justice Russell stated at paragraph 55 that, notwithstanding identity problems, PRRA Officers are still obliged to assess risk in the country of removal. In these cases, an applicant is entitled to present to the PRRA Officer as "new" evidence the same evidence that was presented to (but not considered by) the RPD (*Yusuf v Canada (Citizenship and Immigration*), 2013 FC 591 at paras 31-32).

[22] Here, the PRRA Officer properly went on to assess the risk in Eritrea and ultimately found that the Applicant had failed to adduce sufficient evidence to establish a forward-looking risk.

C. *Did the PRRA Officer err in assessing the risk under section 97?*

[23] The Applicant submits that the PRRA Officer failed to consider objective evidence of the risk the Applicant would face if she returns to Eritrea. She also argues that the PRRA Officer did not consider evidence that she was arrested for failing to perform mandatory military service.

[24] The Respondent submits that the PRRA Officer considered each of the Applicant's alleged risks in light of country conditions and provided clear reasons as to why the alleged risks were not supported by the objective evidence. The Applicant is asking this Court to reweigh that evidence, which is inappropriate on judicial review.

[25] I agree with the Respondent here that the PRRA Officer carefully considered each of the risks alleged by the Applicant in light of country conditions in Eritrea and provided clear reasons as to why the alleged risks were not supported by the objective evidence.

[26] The PRRA Officer gave low probative weight to the Applicant's evidence in the form of general country condition documents. While the PRRA Officer acknowledged that the documents showed that Eritrea is plagued by corruption and basic human rights violations, the documents did not include any direct or personal reference to the Applicant, or otherwise demonstrate a personalized, forward-looking risk for her.

[27] The PRRA Officer then proceeded to address each of the risks alleged by the Applicant. With respect to her belief that she is personally of interest to the authorities for failing to apply for permission to leave Eritrea, the PRRA Officer referred to publicly available documentation, including a UK Home Office report which states that more recently not everyone who has left Eritrea illegally is detained on return. Some persons, including draft evaders, are able to return without punishment, provided they pay a 2% tax and sign a letter of apology or participate in the development of the country, including the National Service. The report also suggests that officials have become more relaxed towards young people who left the country without permission.

[28] Secondly, regarding the Applicant's alleged risk because she is a failed refugee claimant, the PRRA Officer accepted that failed refugee claimants returning to Eritrea are considered disloyal and could be detained or persecuted. However, the UK Home Office report states that if

failed asylum seekers return and have not committed a criminal offence, as in the Applicant's case, no action will be taken. The PRRA Officer found that in any event, there was insufficient information to demonstrate that Eritrea would be aware of the Applicant's failed refugee claim. As such, on a balance of probabilities, there was insufficient evidence to demonstrate that she would face a forward-looking risk in returning to Eritrea based on her failed refugee claim in Canada.

[29] Finally, with respect to her alleged risk because of her evasion of military service, the PRRA Officer found that there was insufficient evidence to establish that she would be considered anything more than an ordinary deserter. No evidence was provided to support the contention that she is of personal interest to the Eritrean authorities for having failed to complete her military duties. The PRRA Officer concluded that mandatory conscription is, in any event, not a risk defined by sections 96 or 97 of the IRPA unless an applicant can provide sufficient objective evidence such that it can be defined as persecution or that there is a personalized, forward-looking risk. The Applicant failed to provide such evidence.

[30] I disagree with the Applicant that the PRRA Officer failed to consider her evidence of personalized risk. The statement upon which she relies in her PRRA application is insufficient to establish a personalized risk. While she alleges having been arrested for failing to perform mandatory military service, she does not provide any more details on the circumstances surrounding the arrest. She also asked the Court to consider the statements she made in her submissions to the PRRA Officer. I fail to see how this letter substantiates her claim.

[31] For all of these reasons, I find the PRRA Officer's decision to be reasonable and to fall within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para 47). While the Applicant may disagree with the PRRA Officer's assessment of the evidence, it is not the role of this Court to reweigh the evidence before the PRRA Officer and to draw a different conclusion.

[32] Neither party proposed a question for certification nor does one arise.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;
2. The style of cause is amended to replace the "Minister of Immigration, Refugees and Citizenship" with the "Minister of Citizenship and Immigration"; and
3. No question is certified.

"Sylvie E. Roussel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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