Federal Court  Cour fédérale

**Date: 20170811**

**Docket: IMM-199-17**

**Citation: 2017 FC 767**

**Ottawa, Ontario, August 11, 2017**

**PRESENT: The Honourable Mr. Justice Southcott**

**BETWEEN:**

**LLANA MAGNOLA POMPEY**

**Applicant**

**and**

**MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. Overview

[1] This is an application for judicial review of a decision of a senior immigration officer [the Officer] dated November 30, 2016, rejecting the Applicant's application for a Pre-Removal Risk Assessment [PRRA].

[2] As explained in greater detail below, this application is allowed, because: (a) the Officer erred in giving minimal weight to the evidence of the Applicant's relatives, and in particular her daughter, in relation to the Applicant's forward-looking risk, on the basis that they were not unbiased sources disinterested in the outcome of the application; and (b) the Applicant was prejudiced by her former's counsel's inadvertent failure to forward to the Officer affidavit evidence which spoke to the details of her abuse and her efforts to seek state protection.

## II. Background

[3] The Applicant, Llana Magnola Pompey, is a 45 year old citizen of St. Vincent and the Grenadines. She states that she left the island to come to Canada in October 2010, to escape abuse from her husband, Ormiston King. Ms. Pompey says that her daughter, Omishca, witnessed the abuse. Ms. Pompey also says that she went to the police once to report the abuse, but that the nearest police station is managed by Mr. King's cousin. She alleges that she was beaten upon returning home and therefore felt she could not make any further police visits.

[4] Ms. Pompey entered Canada as a visitor and was authorized to stay for six months. She has remained in Canada continuously since then without legal status. As a result, she was issued an exclusion order, which she challenged by judicial review. During the course of that litigation, Ms. Pompey's former counsel sought deferral of her removal, supported by an affidavit from her daughter sworn August 7, 2015 and Ms. Pompey's own affidavit sworn November 23, 2015 [the 2015 Affidavits]. After her application for judicial review was dismissed by Justice Russell on July 22, 2016 (see *Pompey v Canada (Minister of Citizenship and Immigration)*, 2016 FC 862), her former counsel again sought deferral of her removal, pending a PRRA application which was

submitted on September 22, 2016. With that deferral request, Ms. Pompey's former counsel submitted an affidavit sworn by her sister on September 14, 2016 and a second affidavit sworn by her daughter on September 8, 2016 [the 2016 Affidavits].

[5] Ms. Pompey's request for a deferral of removal was refused, and she applied for judicial review of the deferral decision. While her removal was stayed by Order of Justice Harrington dated September 29, 2016, pending the outcome of that application, the application was subsequently discontinued.

[6] On November 30, 2016, the Officer issued the negative PRRA decision that is the subject of the present application for judicial review. Ms. Pompey now has new counsel and, among other arguments identified below, alleges ineffective assistance of her former counsel. She explains, and her former counsel and the Respondent acknowledge, that when her former counsel filed her PRRA application on September 22, 2016, he submitted copies of the 2016 Affidavits but inadvertently failed to include the 2015 Affidavits.

## III. Impugned Decision

[7] The Officer noted that Ms. Pompey's PRRA application was supported by affidavits from her sister and her daughter (i.e. the 2016 Affidavits). The Officer reviewed her submissions, in addition to conducting independent research on country conditions.

[8] The Officer considered the evidence of Ms. Pompey's sister, that the relationship between Ms. Pompey and her husband was quite violent and that she suggested Ms. Pompey

come to Canada. The Officer also considered the evidence of Ms. Pompey's daughter, that her father continues to look for Ms. Pompey and threatens to harm her if she returns to St. Vincent. However, the Officer noted that no other details surrounding the abuse Ms. Pompey suffered while in St. Vincent had been provided in her PRRA application. The Officer gave minimal weight to the affidavit evidence of Ms. Pompey's sister and daughter, because they were not from unbiased sources disinterested in the outcome of the PRRA application. The Officer also observed that these affidavits were not supported by any other corroborative evidence. The Officer noted that Ms. Pompey had not lived in St. Vincent for over six years and concluded that she had submitted insufficient objective evidence to establish that her husband would still be interested in harming her.

[9] The Officer then reviewed the current country conditions in St. Vincent and found that, although domestic violence is a serious concern in St. Vincent, the government of St. Vincent is making serious efforts to protect its citizens and, while the protection is not perfect, it is adequate. The Officer stated that Ms. Pompey did not seek protection from the police in her country and concluded that she had failed to demonstrate, with clear and convincing proof, that state protection is not available to her in St. Vincent.

[10] The Officer further noted that Ms. Pompey lived in Canada for more than six years without making a refugee claim and found this delay to be inconsistent with a person who flees persecution. In conclusion, the Officer determined that there was insufficient evidence to conclude that Ms. Pompey faced more than a mere possibility of persecution on any Convention

ground, or that she would face a risk of torture, a risk to life, or a risk of cruel and unusual treatment or punishment upon return to St. Vincent.

## IV. Issues and Standard of Review

[11] The Applicant describes the issues for the Court's consideration as follows:

A. Was the Applicant denied procedural fairness due to ineffective assistance of her former counsel?

B. Did the Officer unreasonably assess the evidence of the Applicant's relatives?

C. Did the Officer fail to conduct an independent state protection analysis and fail to consider relevant and specific information about the availability of state protection?

[12] The Applicant submits, and I concur, that the standard of review applicable to the first issue, being one of procedural fairness, is correctness (see *Srignanavel v Canada (Minister of Citizenship and Immigration)*, 2015 FC 584 [*Srignanavel*], at para 15) and that the standard applicable to the second and third issues, which relate to the Officer's assessment of the evidence, is reasonableness (see *Dunsmuir v New Brunswick*, 2008 1 SCR 190, at para 47).

## V. Analysis

[13] My decision to allow this application for judicial review turns on my analysis of the first and second issues raised by the Applicant. At the hearing of this application, the Respondent

took the position that there were two critical findings underlying the Officer's decision. The first such finding related to Ms. Pompey's forward-looking risk, i.e. that that there was insufficient objective evidence that Ms. Pompey's husband would still be interested in harming her six years following her departure from St. Vincent. The second critical finding was that that, even if it were to be accepted that Ms. Pompey's husband wished to harm her six years following her departure, she had not demonstrated that state protection was not available to her in St. Vincent.

[14] I agree with the Respondent's characterization of these conclusions as being the findings that are critical to the decision. The first of these findings engages the second issue raised by the Applicant, related to the Officer's treatment of the evidence of her relatives. My analysis therefore begins with that issue although, as explained below, it is the combination of the first and second issues which results in the Officer's decision being set aside.

A. *Did the Officer unreasonably assess the evidence of the Applicant's relatives?*

[15] Ms. Pompey argues that it was unreasonable for the Officer to give minimal weight and probative value to the affidavits of her daughter and sister simply because they are her relatives and therefore are not unbiased sources disinterested in the outcome of the PRRA application. The Respondent takes the position that the Officer's treatment of this evidence was reasonable, because that the evidence was not discounted solely on this basis. As submitted by the Respondent, Justice Kane explained the applicable principle as follows at paragraphs 27 to 28 of *Ali Gilani v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 243 [*Ali Gilani*]:

> [27] Other cases have looked at the particular circumstances and reiterated that evidence should not be discounted solely because it

> is self serving. An additional passage in *Ahmed*, is relevant, where Justice Mactavish applied that principle:
>
> > [32] That said, although there are problems with the Board's findings regarding the evidentiary value of the letter in assessing the nature of Mr. Ahmed's involvement with the Anjuman Hussainia, these findings were not patently unreasonable. The Board noted that the letter was written long after the alleged incidents took place, and made no reference to any of Mr. Ahmed's accomplishments or specific responsibilities within the Anjuman organization. Further, the Board's negative credibility finding regarding Mr. Ahmed's problems with the SSP did not hinge solely on this letter. The Board questioned several aspects of his claim, including the very existence of a tailor shop, and the extent of Mr. Ahmed's involvement in the rally. In these circumstances, it was not patently unreasonable for the Board to view this letter as being of little probative value.
>
> [28] Similarly in *Ray v Canada (Minister of Citizenship and Immigration)*, [2006] FCJ 927, at para 39, Justice Teitelbaum stated that while it is an error to attribute little probative value on the basis that the documents are self serving, other basis may support the low probative value attributed.

[16] Applying this principle, the Respondent argues that the Officer's assessment of the evidence of Ms. Pompey's relatives was not based solely on their relationship with her. Rather, the Officer's decision also refers to there being very little detail surrounding the abuse Ms. Pompey suffered while she lived in St. Vincent, and it refers to there being no corroborative evidence supporting the evidence of the relatives.

[17] While I accept the principle to be derived from *Ali Gilani*, my conclusion is that it does not assist the Respondent in the present case. With respect to the absence of corroborative evidence, this is not a legitimate basis for an adverse credibility finding, unless there are other credibility concerns and the absence of a reasonable explanation from the applicant for the lack

of corroborating material (see, e.g., *Magyar v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 750, at para 36; *Ndjizera v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 601, at para 34).

[18] The Respondent notes that the evidence before the Officer did not include corroborative documentary evidence, such as police or hospital reports. However, the Officer's analysis does not identify a basis for doubting the credibility of the relatives' evidence, and in particular the evidence in the September 2016 affidavit of Ms. Pompey's daughter that her father continues to ask about Ms. Pompey and has threatened to harm her if she returns to St. Vincent. Nor does the Officer refer to the absence of police or hospital reports or identify any particular corroborative evidence that the Officer considered that Ms. Pompey or her relatives would be expected to be able to submit in support of her husband's continued interest in her. In the absence of any such analysis, I cannot conclude the Officer's reference to the lack of corroborative evidence, in combination with the self-interest of the relatives, to represent a basis to discount their evidence.

[19] Turning to the Officer's observation as to the lack of detail of the abuse in the relatives' evidence, I accept that the absence of such detail could represent a legitimate basis to afford limited probative value to such evidence. Consistent with the Officer's observation, the affidavit of Ms. Pompey's sister refers only to the relationship between Ms. Pompey and her husband as being quite violent, and the affidavit of her daughter refers only to having witnessed some of his abuse. This is indeed very little detail. However, there was additional detail surrounding the abuse in the 2015 affidavits, which therefore requires analysis of the first issue raised by the Applicant, related to the ineffective assistance of her former counsel.

B. *Was the Applicant denied procedural fairness due to ineffective assistance of her former counsel?*

[20] This Court has held that, in order to establish a breach of procedural fairness on the basis of incompetent counsel, it must be established that the outcome would have been different but for the incompetence (see *Galyas v Canada (Minister of Citizenship and Immigration)*, 2013 FC 250, at para 84). In other words, an applicant must show not only that his or her counsel was incompetent or ineffective but also that there was resulting prejudice. In the present case, both Ms. Pompey's former counsel and the Respondent acknowledged the incompetence or ineffectiveness. Therefore the Court's analysis must turn on whether there was resulting prejudice.

[21] In *Brown v Canada (Minister of Citizenship and Immigration)*, 2012 FC 250, at para 56, this Court stated that incompetence of counsel will only constitute a breach of natural justice in "extraordinary circumstances" and that an applicant must demonstrate that there is a reasonable probability that the result would have been different but for the incompetence of the representative. In contrast, the Ms. Pompey refers to *Srignanavel*, a case where the alleged incompetence was an inadvertent clerical error, involving failure by the applicant's solicitor to file written submissions in support of his PRRA. Justice Brown held at paragraphs 18 to 21 that, for an error of this sort, it was not necessary to establish on the balance of probabilities that the applicant would have been successful but for the error. Rather, the applicant was required only to establish a fairly arguable case that, but for the error, the result might have been different. My conclusion is that the failure by Ms. Pompey's counsel in the present case is sufficiently similar to that in *Srignanavel* that the test articulated by the Court in that authority should be applied.

[22] Returning to the Officer's observation as to the lack of detail of the abuse in the relatives' evidence, there is more detail contained in the 2015 Affidavits than in the 2016 Affidavits. Ms. Pompey's affidavit refers to her husband assaulting her so many times that she cannot remember precisely how many. She states that that she suffered swollen eyes, bruises and slaps and refers to her husband having assaulted his uncle with a machete. Ms. Pompey also explained the sorts of circumstances that would prompt his abuse, such as if she asked about other women he had been with, if there was no food in the house, or if she talked back to him, and she noted that her daughter Omishca witnessed the beatings she received.

[23] The affidavit that Omishca swore in 2015 also provides additional detail. She recalls many times her father was out of control and violent. She refers to him striking her grandfather and attacking her cousin with a machete. She recalls him slapping her mother and beating her up because she asked him about being with another woman.

[24] The Court cannot know the extent to which the additional level of detail contained in the 2015 Affidavits would have affected the Officer's analysis of the evidence. However, given the Officer's express reference to lack of detail, which the Respondent argues as a basis to sustain the Officer's discounting of the relatives' affidavits, I am satisfied that Ms. Pompey has raised a fairly arguable case that, if her former counsel had not erred and had provided this evidence to the Officer, the result might have been different. The effect of the resulting prejudice to Ms. Pompey is that she was denied procedural fairness due to her former counsel's error. Therefore, the Officer's decision to afford little weight and probative value to the evidence of her relatives

cannot be sustained as reasonable based on the Officer's observation of the lack of detail in that evidence.

[25] As noted earlier in these Reasons, there were two critical findings underlying the Officer's decision. The second finding, that Ms. Pompey had not demonstrated that state protection is not available to her in St. Vincent, would have been dispositive of the PRRA application even if the Officer had accepted that Ms. Pompey faced forward-looking risk. However, the Officer's state protection finding was based at least in part on the Officer observing that Ms. Pompey did not seek protection from the police in her country. The Officer did not have the benefit of the evidence in the 2015 Affidavits, that Ms. Pompey did go to the police but that the station closest to her was managed by her husband's cousin. When her husband came home, he was aware she had reported him to the police. He beat her, and she determined she could not make any more visits to the police.

[26] In relation to this evidence, the Respondent argues that local failures of police protection are not sufficient to establish that state protection is unavailable. Indeed, the Officer noted that accessing the police is about more than just going to see an on-duty constable. While I accept the Respondent's assertion that a finding that state protection is unavailable requires analysis of more than localized failures, in the present case, the error by Ms. Pompey's former counsel deprived the Officer of the opportunity to consider the evidence of the efforts that Ms. Pompey did make to access police protection and the results of those efforts.

[27] As with the other critical finding, the Court cannot know precisely how consideration of that evidence may have affected the Officer's state protection analysis. However, particularly given the evidence that Ms. Pompey was abused as a direct result of the one police report she did make, I am again satisfied that she has raised a fairly arguable case that, if her former counsel had not erred and had provided this evidence to the Officer, the result might have been different.

## VI. Conclusion

[28] Having analysed the first two issues raised by the Applicant, I am satisfied that the combination of these issues represents a basis to set aside the Officer's decision and return her PRRA application for disposition by another officer. It is therefore unnecessary for the Court to reach a conclusion on the third issue, which raises additional arguments surrounding the Officer's state protection analysis.

[29] Neither party proposed any question for certification for appeal, and none is stated.

**JUDGMENT in IMM-199-17**

**THIS COURT'S JUDGMENT is that** this application for judicial review is allowed, and the matter is returned to another officer for disposition. No question is certified for appeal.

"Richard F. Southcott"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-199-17 |
| **STYLE OF CAUSE:** | LLANA MAGNOLA POMPEY V MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | JUNE 29, 2017 |
| **JUDGMENT AND REASONS:** | SOUTHCOTT, J. |
| **DATED:** | AUGUST 11, 2017 |

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| Stephen Jarvis | FOR THE RESPONDENT |

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