Federal Court  Cour fédérale

Date: 20170825

Docket: IMM-786-17

Citation: 2017 FC 788

Toronto, Ontario, August 25, 2017

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

GYULANE RUSZO

Applicant

and

THE 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 January 5, 2017, rejecting the Applicant's application for a Pre-Removal Risk Assessment [PRRA].

[2] As explained in greater detail below, this application is allowed, because the Officer's decision involved concerns about the credibility or genuineness of documentary evidence offered by the Applicant in support of her allegations, and the Officer was therefore required to consider giving the Applicant an oral hearing to afford her an opportunity to respond to those concerns.

II. Background

[3] The Applicant, Ms. Gyulane Ruszo, is a 57-year-old female citizen of Hungary. She first entered Canada on a visitor's visa on February 22, 2010, and on March 17, 2010, she made a refugee claim, along with various family members, based on fear of persecution due to their Roma ethnicity. On May 7, 2012, the Refugee Protection Division [RPD] rejected the refugee claims of Ms. Ruszo and her family, finding that they failed to rebut with clear and convincing evidence the presumption of adequate state protection in Hungary. Ms. Ruszo and her family applied for judicial review of this decision, leave for which was denied. They were removed from Canada on February 1, 2013.

[4] On March 1, 2016, Ms. Ruszo again entered Canada, this time with different family members (her daughter, son-in-law, grandson and two granddaughters, one of whom was born when the family was previously in Canada and is therefore a Canadian citizen). She initiated another refugee claim and, on March 3, 2016, was deemed ineligible to have her refugee claim referred to the RPD for consideration, because her claim had already been rejected by the RPD. On April 7, 2016, Ms. Ruszo and the members of her family who accompanied her to Canada applied for a PRRA, which was unsuccessful. The Officer's decision dated January 5, 2017, refusing Ms. Ruszo's PRRA application, is the subject of the present application for judicial

review. The rejection of the family members' PRRA applications was the subject of a separate decision by the Officer.

[5] In the decision under review, the Officer noted the evidence post-dating the RPD decision but found that Ms. Ruszo had not provided sufficient objective evidence to establish that, because she is of Roma ethnic descent, she would be persecuted if returned to Hungary. The decision also refers to consideration of country condition evidence, but the Officer found that country conditions in Hungary were similar to those that existed at the time of the RPD's rejection of Ms. Ruszo's refugee claim in May 2012. Having noted the state protection findings in the RPD's decision, the Officer also found that the situation in Hungary, in terms of the availability of state protection, had not changed significantly since May 2012. The Officer was not satisfied that the Hungarian state would be unable or unwilling to provide Ms. Ruszo with protection should she require it.

[6] On July 8, 2016, Ms. Ruszo also initiated an application for an exemption on humanitarian and compassionate [H&C] grounds, permitting her to apply for permanent residence from within Canada. The members of Ms. Ruszo's family who accompanied her to Canada also sought H&C relief. On December 28, 2016, Ms. Ruszo's family received a positive decision based on the medical condition of her Canadian born granddaughter, Amanda, who was born with multiple birth defects (hypotonia, congenital hypothyroidism, and a rare chromosome disorder which resulted in dysmorphic features). Ms. Ruszo's application, however, was rejected in a decision dated January 12, 2017. That decision is the subject of another application for

judicial review in Court file no. IMM-784-17, which was heard concurrently with the present application.

III. Issues

[7] The Applicant raises the following issues for the Court's consideration:

A. Whether the Officer breached procedural fairness by failing to provide notice that the Applicant's PRRA application would be severed from those of the members of her family and would be assessed separately;

B. Whether the Officer erred by failing to conduct an individualized assessment of the Applicant's risk;

C. Whether the Officer erred in the analysis of the Applicant's documentary evidence with respect to both risk and state protection;

D. Whether the Officer erred in failing to provide an oral hearing to the Applicant.

IV. Analysis

[8] My decision to allow this application for judicial review turns on the fourth issue raised by the Applicant, whether the Officer erred in failing to provide her an oral hearing. She argues that the Officer made a veiled credibility finding, requiring the Officer to provide her an oral hearing to allow her to respond to these concerns. In particular, she refers to the Officer's treatment of evidence intended to corroborate her alleged eviction from her home, along with other Roma, in the so-called "numbered streets" neighbourhood of Miskolc, Hungary.

[9] The Officer noted that the affidavit sworn by the Applicant's daughter indicated that in 2014 the city of Miskolc started mailing eviction notices to residents of the numbered streets neighbourhood. The Officer also acknowledged that, according to the objective country condition evidence, the mayor of Miskolc and city authorities engaged in the forced eviction of individuals living in this neighbourhood. However, the Officer found that the Applicant had failed to provide sufficient objective evidence to demonstrate that she and her family lived in this neighbourhood and were forced from their home. In reaching this conclusion, the Officer noted that neither the Applicant nor her daughter provided a copy of an eviction notice. Rather, they relied on a letter, with English translation, from the Roma Nationality Self – Government of County City Miskolc, signed by Vice-Chairman Ferenc Gulyas.

[10] The Officer observed that this letter indicated that the Applicant, her daughter and her daughter's family "had their home in the 'numbered street' of the Miskolc city Roma Ghetto (5, Sixth Street, Miskolc), which has become the object of 'slum' elimination and they have become victim of this process." The letter further stated that the applicants were "evicted by the City authorities, without offering them other housing solution" and not permitted to "resettle within 50 km area of Miskolc region, as they are not eligible for health care and social care too".

[11] In analyzing this letter, the Officer noted the following:

A. In the Background/Declaration provided by the Applicant in support of her H&C application, she provided her home address for the relevant time as 33 Szamos Utca, Miskolc, rather than 5, Sixth Street, Miskolc as set out in Mr. Gulyas' letter;

B. It was unclear whether Mr. Gulyas wrote the letter based on firsthand knowledge of the Applicant's personal situation or whether he based the content of the letter on information that was provided to him;

C. While the evidence included a translator's affidavit for the letter, there was no evidence of the translator's accreditation;

D. The first paragraph of the Hungarian language original version of the letter consisted of five sentences, while the first paragraph of the English translation consisted of two sentences;

E. The English translation included a parenthetical reference to the Applicant's family's address in the numbered streets neighbourhood, but the Hungarian language original did not;

F. No postmarked envelope was included with the letter to confirm that it originated in Miskolc and was sent by the Vice-Chairman of the Roma Nationality Self – Government of County City Miskolc.

[12] As a consequence of these observations, and the resulting inability to verify the letter's origin or the accuracy of the translation, the Officer found that it was difficult to assess the reliability of the source of the information in the letter and therefore gave the letter very little evidentiary weight.

[13] As noted above, the Applicant's position is that this analysis by the Officer represents a veiled credibility finding. She submits that the Officer failed to consider that an oral hearing was therefore appropriate in accordance with s. 167 of the *Immigration and Refugee Protection*

Regulations, SOR/2002-227 [IRPR], which prescribes factors to be considered in deciding whether an oral hearing of a PRRA is required. Section 113(b) of the *Immigration and Refugee Protection Act*, SC 2001, c.27 [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, and s. 167 of the IRPR prescribes the applicable factors to be the following:

(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.

[14] The Respondent's position is that the Officer's treatment of the letter involved a finding as to its weight and the sufficiency of evidence, not an assessment of its credibility. The Respondent relies on the decision of this Court in *Ferguson v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1067 [*Ferguson*], in which Justice Zinn explained that it is open to a trier of fact to move immediately to an assessment of weight or probative value of evidence without considering whether the evidence is credible, because the credibility is irrelevant if the evidence is to be given little or no weight in any event.

[15] The Applicant submits that this issue raises considerations of procedural fairness and is therefore reviewable on the standard of correctness. However, there is divergent jurisprudence from this Court on this question in the context of a PRRA. It has been characterized as a question of procedural fairness, reviewable on a standard of correctness (see *Zmari v Canada (Minister of Citizenship and Immigration)* 2016 FC 132, at paras 10-13). However, there is also substantial authority that the standard applicable to a PRRA officer's decision whether to hold an oral hearing is reasonableness (see *Ikeji v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1422, at para 20 [*Ikeji*]; *Sanchez v Canada (Minister of Citizenship and Immigration)*, 2016 FC 737, at para 4; *Ibrahim v Canada (Minister of Citizenship and Immigration)*, 2014 FC 837, at para 6, citing *Bicuku v Canada (Minister of Citizenship and Immigration)*, 2014 FC 339, at paras 16-20; *Ponniah v Canada (Minister of Citizenship and Immigration)*, 2013 FC 386 at para 24; and *Mosavat v Canada (Minister of Citizenship and Immigration)*, 2011 FC 647, at paras 7-10).

[16] The selection of the applicable standard of review appears to depend on whether the Court in a particular case characterizes the issue of whether an oral hearing should have been granted as a matter of procedural fairness, in which case the standard is correctness, or as involving interpretation of the IRPA, in which case the standard is reasonableness. In my view, when the issue is whether a PRRA officer should have granted an oral hearing, the appropriate standard is reasonableness, as the decision on that issue turns on interpretation and application of the officer's governing legislation, i.e. s. 113(b) of the IRPA and s. 167 of the IRPR. At paragraph 20 of the decision in *Ikeji*, Justice Strickland held that reasonableness is the standard of review for questions of veiled credibility findings and, while noting the divided jurisprudence on the standard of review applicable to a PRRA officer's decision respecting an oral hearing,

held that this is also reviewable on the reasonableness standard. Justice Strickland reached this conclusion because such a decision is made by the officer considering the requirements of s. 113(b) of IRPA and the factors in s. 167 of IRPR, which involves a question of mixed fact and law.

[17] I agree with this analysis and consider it to be applicable to the present case, where the Applicant's position surrounding the issue of an oral hearing turns on the argument that the Officer made what amounts to a veiled credibility finding. In reaching this conclusion, I am conscious that, in my decision in IMM-784-17, on the judicial review of the Applicant's H&C decision, I have followed case law applying the standard of correctness to a similar issue. The difference is that, unlike in IMM-784-17, the issue raised here involves application of the Officer's governing legislation and therefore deference to the Officer's consideration of the s. 167 factors. However, as the impugned decision in the case at hand does not disclose any consideration by the Officer whether to hold an oral hearing, there is no particular analysis to which to defer, and therefore little turns on the selection of different standards of review for this case and for IMM-784-17.

[18] My conclusion is that the Applicant has correctly characterized the Officer's treatment of the letter as involving credibility concerns. While I accept the legal principles explained in *Ferguson*, I do not consider them to assist the Respondent in the case at hand. There is an element of the Officer's analysis of the letter which could be characterized as an assessment of its weight or probative value, i.e. the uncertainty whether the author wrote the letter based on firsthand knowledge of the Applicant's personal situation or whether he based the content of the

letter on information that was provided to him. However, the Officer's other observations, as to inconsistencies between the addresses stated in the letter and in the Applicant's Background/Declaration, inconsistencies between the English and Hungarian versions of the letters, and the absence of a postmarked envelope, represent concerns about the credibility or genuineness of the evidence. Indeed, the Officer expressly referred to difficulty assessing the reliability of the source of the information. As noted by Justice Zinn at paragraph 25 of *Ferguson*, a finding that evidence is not credible represents a finding that the source of the evidence is not reliable.

[19] The Applicant offers various explanations for the inconsistencies identified by the Officer. However, as these explanations were not before the Officer, they do not assist the Court in analyzing the reasonableness of the Officer's decision. Rather, they support an argument that the Applicant should have been provided with an opportunity to respond to the Officer's concerns with Mr. Gulyas' letter, such that the Officer could have considered these explanations and reached a more fully informed conclusion as to the appropriate treatment of the evidence. The credibility concerns engage the provisions of s. 113(b) of IRPA and s. 167 of IRPR surrounding the availability of an oral hearing, and the Officer was required to consider the factors in s. 167 including whether the evidence to which the credibility concerns relates is central to the decision on the application for protection, including any impact upon the Officer's state protection analysis.

[20] It is therefore unnecessary for the Court to rule on the other issues raised by the Applicant. I note that, at the hearing of this application, the Applicant proposed a question for

certification for appeal related to the first issue raised by the Applicant, whether the Officer breached procedural fairness by failing to provide notice that the Applicant would be assessed separately from the members of her family. Her proposed question is as follows:

> Is it a breach of procedural fairness for an officer to sever an application in a manner that raises new issues without giving an applicant an opportunity to respond to the new issues raised by the severance?

[21] As my decision is to allow this application for judicial review for reasons unrelated to the Officer's severance of the Applicant's PRRA application from that of her family, the proposed question would not be determinative of an appeal. It is therefore not appropriate for certification. However, the Applicant is now aware that her family's H&C application has been granted and will be able to make any additional submissions which she considers relevant to her own application as a result of these circumstances before her application is considered by another PRRA officer.

JUDGMENT in IMM-786-17

THIS COURT'S JUDGMENT is that this application for judicial review is allowed and this matter is returned to another PRRA officer for consideration in accordance with the above Reasons. No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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