Federal Court  Cour fédérale

Date: 20180605

Docket: IMM-4539-17

Citation: 2018 FC 581

Ottawa, Ontario, June 5, 2018

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

GERELTUYA TOGTOKH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Gereltuya Togtokh, is a 48-year-old citizen of Mongolia who arrived in Canada in June 2010 and shortly after her arrival, claimed refugee protection on the basis of persecution by her abusive ex-husband. The Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada rejected her claim in a decision dated October 4, 2012, with credibility and state protection being the determinative issues. This Court dismissed

the Applicant's application for judicial review of the RPD's decision on February 5, 2014 in Court file IMM-11521-12.

[2] In June 2015, the Applicant submitted an application for a pre-removal risk assessment [PRRA] which was rejected in April 2016. After leave was granted for the Applicant's application for judicial review of the negative PRRA decision, the Minister of Citizenship and Immigration [the Minister] consented to having the matter sent back for redetermination by a different officer. Upon redetermination, a Senior Immigration Officer rejected the Applicant's PRRA application in a decision dated July 21, 2017. The Applicant has now applied under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [*IRPA*], for judicial review of the Officer's decision. She asks the Court to set aside the decision and have her PRRA application reconsidered by a different officer.

I. Background

[3] The Applicant married Munkhbat Bor in June 1991. They lived together in Ulaanbaatar, Mongolia. Munkhbat developed problems with gambling and drinking in 1998 and began physically abusing the Applicant. Over the next 11 years, the Applicant claims she experienced serious injury and two miscarriages as a result of the abuse and that, while the police assistance she received resulted in Munkhbat being jailed for short periods of time on two occasions, this was inadequate to protect her. The Applicant left Munkhbat in November 2009 and lived with her mother elsewhere in Ulaanbaatar until June 2010, when she fled to Canada.

[4] The RPD rejected the Applicant's claim, finding it not credible that the Applicant continued to live with Munkhbat until 2009 if her life was truly in danger as she claimed, and that she left him and lived elsewhere in Ulaanbaatar between November 2009 and June 2010 without incident. In this regard, the RPD stated:

> It would be reasonable to expect that the claimant, unless there are reasons to suggest otherwise, such as the claimant suffering from "battered wife syndrome" or any other type of explainable situation, would have moved out of the marital home much sooner than she did and reside with her mother for example who resided in the same city as the claimant. Quite frankly given the evidence as submitted, the panel does not find this area of the claimant's evidence as believable and makes a negative credibility finding as a consequence.

[5] The RPD also drew a negative credibility finding from the fact that the Applicant could not remember when she reported the domestic abuse to the police, and from her contradictory evidence about whether Munkhbat was still looking for her. The RPD assigned little weight to the Applicant's medical evidence and the police report, noting that Munkhbat was arrested on March 18, 2003, due to his abuse of the Applicant and jailed for 30 days, and was arrested again in March 2007 and released after a few days. For the RPD, these events illustrated adequate state protection available to victims of domestic abuse such as the Applicant.

[6] In June 2015, the Applicant applied for a PRRA on the basis of new evidence which she claimed was capable of overcoming the RPD's negative credibility findings. The new evidence included a police report dated June 17, 2015, in relation to Munkhbat's illegal entry into her mother's home; a psychiatric assessment report dated August 10, 2015, attesting to the fact that the Applicant suffers from Post-Traumatic Stress Disorder, depression, and "Battered Women's Syndrome"; expert affidavit evidence from Pamela Cross, a lawyer and specialist in issues

surrounding domestic violence, Battered Women's Syndrome, and domestic violence [the Cross Affidavits]; and information about the inadequacy of protection for victims of domestic violence in Mongolia. The Applicant's PRRA application was rejected in a decision dated April 19, 2016, but, after leave for judicial review of the negative PRRA decision was granted, the Minister consented to having the matter sent back for redetermination by a different officer.

II. Decision

[7] In rejecting the Applicant's PRRA application, the Officer stated:

> I do not give consideration to documents which pre-date the decision of the Refugee Protection Division (RPD) of 04 October 2012, where no explanation was provided as to why these documents were not reasonably available to be presented to the panel for its consideration, if in fact they were not presented, or why the applicant was prevented from providing them. These documents include but are not limited to Canadian jurisprudence dated in 1990, country condition documents, and reports, medical documents, affidavits of Pamela Cross dated in 2011, a 2010 article regarding refugee status determinations and the limits of memory, and a letter from the applicant's mother, dated 07 September 2012.

[8] The Officer also did not consider evidence as to humanitarian and compassionate factors where the Applicant had not linked these to her personal, forward-looking risk in Mongolia, including her assertion that she has nowhere to go to and no friendships in Mongolia. The Officer stated that all other written evidence had been considered.

[9] The Officer then proceeded to review the RPD's findings, and concluded that the risks cited by the Applicant were essentially the same as those considered by the RPD. After making this conclusion, the Officer considered a psychiatric assessment of the Applicant as well as her

explanation that this evidence was not reasonably available at the time of her refugee claim hearing because she could not have been expected to adduce expert evidence to corroborate "common sense principles" concerning "battered women" as recognized by the Supreme Court of Canada in *R v Lavallee*, [1990] 1 SCR 852, [1990] SCJ No 36.

[10] The Officer also considered other documentation submitted by the Applicant, including a redacted RPD decision from March 2016, a threatening Facebook message allegedly sent by Munkhbat in 2013, a translated police report dated June 17, 2015 concerning Munkhbat's invasion of the home of the Applicant's mother, country condition evidence from 2013 to 2015 attesting to levels of corruption and the inadequacy of Mongolian domestic violence law, and an affidavit sworn by the Applicant in November 2016. After reviewing this documentation, the Officer determined on balance of probabilities that there was adequate state protection for the Applicant in Mongolia, that there were no forward-looking risks which had not been contemplated by the RPD, and that her past treatment was not indicative of forward-looking risk warranting protection. Thus, the Officer concluded that there was less than a mere possibility the Applicant would face persecution as described in section 96 of the *IRPA*, and also that there were no substantial or reasonable grounds to believe she would face a danger of torture, a risk to her life, or cruel and unusual treatment or punishment as described in section 97.

III. Analysis

[11] Although the Applicant has raised several discrete issues concerning the Officer's decision, the determinative issue, in my view, is whether the incomplete Certified Tribunal Record [CTR] constitutes a breach of procedural fairness?

[12] The standard of review for an allegation of procedural unfairness is correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79, [2014] 1 SCR 502; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43, [2009] 1 SCR 339). The Court must determine whether the process followed in arriving at the decision under review achieved the level of fairness required by the circumstances of the matter (*Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 115, [2002] 1 SCR 3). The analytical framework is not so much one of correctness or reasonableness but, rather, one of fairness and fundamental justice. As the Federal Court of Appeal recently observed: "even though there is awkwardness in the use of the terminology, this reviewing exercise is 'best reflected in the correctness standard' even though, strictly speaking, no standard of review is being applied" (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54, [2018] FCJ No 382). This is particularly true in cases where the alleged breach is an unintentional omission rather than a deliberate procedural choice. In other words, a procedure which is unfair will be neither reasonable nor correct, while a fair procedure will be both reasonable and correct. Furthermore, a reviewing court will pay respectful attention to the procedures followed by a decision-maker and will not intervene except where they fall outside the bounds of natural justice (*Bataa v Canada (Citizenship and Immigration)*, 2018 FC 401 at para 3, [2018] FCJ No 403).

A. *Does the incomplete CTR constitute a breach of procedural fairness?*

[13] On July 15, 2015, the Applicant's counsel sent an email to the Backlog Reduction Office at Citizenship and Immigration Canada which attached her PRRA submissions [the 2015 Submissions] and a package of supplementary documentation. The text of the email and the supplementary documents are contained in the CTR, but her counsel's PRRA submissions are

not. These 2015 Submissions are 29 pages in length and are contained in the Applicant's record. The parties acknowledge that these submissions are absent from the CTR, something which counsel for the Respondent said at the hearing of this matter was "unfortunate and regrettable."

[14] The Applicant notes that the Officer stated several times throughout the decision that there was no explanation as to why certain documents submitted by the Applicant were not reasonably available prior to the RPD's decision. The Applicant cites Rule 17 of the *Federal Court Immigration and Refugee Protection Rules*, SOR/93-22 [the *Rules*] and the cases of *Li v Canada (Minister of Citizenship and Immigration)*, 2006 FC 498 at para 15, 148 ACWS (3d) 124 [*Li*], and *Vulevic v Canada (Citizenship and Immigration)*, 2014 FC 872 at para 6, 244 ACWS (3d) 411 [*Vulevic*], for the proposition that a decision is deficient where a complete application was not before the decision-maker. The Applicant concedes that the absence of a complete CTR does not automatically lead to a decision being quashed, but maintains that the Officer's comments about the absence of explanations for why documents pre-dating the RPD's decision were not available to be presented to the RPD show that her PRRA submissions were not fully considered.

[15] The Respondent contends there was no prejudice to the Applicant because of the submissions missing from the CTR. In view of *Torales Bolanos v Canada (Citizenship and Immigration)*, 2011 FC 388 at para 52, 199 ACWS (3d) 1267 [*Torales Bolanos*], the Respondent says an incomplete CTR is not necessarily grounds to set aside a decision, particularly where the decision-maker considered the material in question and the material is available to the Court. The key question, according to the Respondent, is whether the decision-maker considered all of the

relevant evidence. In this case, the Respondent notes that the Applicant provided multiple iterations of her submissions, including a documentary package dated November 14, 2016 [the 2016 Submissions], which incorporated the Applicant's previous submissions. The Respondent maintains that the 2016 Submissions include all relevant points from the 2015 Submissions. According to the Respondent, state protection was determinative in this case, and the Applicant's updated submissions on this issue in the 2016 Submissions subsumed the earlier evidence in the 2015 Submissions.

[16] As noted above, the determinative issue in this case is whether the deficiencies in the CTR constitute a breach of procedural fairness. The case law in this Court has dealt with at least three distinct types of scenarios raised by a deficient CTR, including the following:

1. A document does not appear in the CTR and it is unknown whether it was submitted by an applicant. In cases such as these, the Court will presume that the materials in the CTR were the materials before the immigration officer, barring some evidence to the contrary (see *Adewale v Canada (Citizenship and Immigration)*, 2007 FC 1190 at para 11; 161 ACWS (3d) 790; *Varadi v Canada (Citizenship and Immigration)*, 2013 FC 407 at paras 6 to 8, 431 FTR 198; *El Dor c Canada (Citoyenneté et de l'Immigration)*, 2015 FC 1406 at para 32, 263 ACWS (3d) 187; and *Ogbuchi v Canada (Citizenship and Immigration)*, 2016 FC 764 at paras 11 to 12, 268 ACWS (3d) 420).
2. A document is known to have been properly submitted by an applicant but is not in the CTR, and it is not clear whether that document, for reasons beyond an applicant's control, was before the decision-maker. In this situation, the case law

suggests that the decision should be overturned (see *Parveen v Canada (Minister of Citizenship and Immigration)* (1999), 168 FTR 103 at para 8 to 9, 88 ACWS (3d) 452 (Fed TD) [*Parveen*]; *Vulevic* at para 6; *Agatha Jarvis c Canada (Citoyenneté et de l'Immigration)*, 2014 FC 405 at paras 18 to 24, 240 ACWS (3d) 955 [*Jarvis*]).

3. A document is known to have been before the tribunal but is not before the Court and cannot be reviewed. In such a case, unless the document is otherwise available to the Court, such as in an applicant's record (see *Torales Bolanos* at para 52; *Patel v Canada (Citizenship and Immigration)*, 2013 FC 804 at paras 29 to 32, 437 FTR 138; and *Aryaie v Canada (Citizenship and Immigration)*, 2013 FC 469 at paras 19 to 27, [2013] FCJ No 498), the Court will be unable to determine the legality of the decision and the decision will be set aside if the missing document was central to the finding under review (see *Kong v Canada (Minister of Employment & Immigration)*, [1994] FCJ No 101 at para 21, 73 FTR 204 (Fed TD); *Ahmed v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 180 at paras 24 and 25, 120 ACWS (3d) 1023; *Gill v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1003 at paras 8 and 9, 125 ACWS (3d) 130; *Machalikashvili v Canada (Minister of Citizenship and Immigration)*, 2006 FC 622 at para 9, 149 ACWS (3d) 482; *Li* at para 15).

[17] This case falls into the second category of cases noted above. It is known that the Applicant included the 2015 Submissions as an email attachment. That email is contained in the

CTR but the 2015 Submissions are not. What is unknown is whether the 2015 Submissions were considered or even reached the Officer.

[18] In *Parveen*, in which the applicant asserted that she had provided several documents to a visa officer which were not in the CTR, and it was unclear whether they were before the officer, the Court set aside the officer's decision, observing that:

> [9] …the respondent controls the record that is put before the Court. Thus, any disputes that arise as a result of deficiencies in the record should, in general, be interpreted against the respondent rather than in her favour. Indeed, I think an incomplete record alone could be grounds, in some circumstances, for setting aside a decision under review. The respondent, as one of the parties before the Court, and being in control of how extensive a record is kept of these interviews, has a responsibility to ensure that the Court is provided with a complete and accurate record.

[19] *Vulevic* is also relevant with respect to this case and offers the following guidance:

> [5] It will suffice, for the purpose of this application, to reckon that an incomplete file ended up before the Respondent in the face of an absence of explanation for the incomplete record. In the best tradition of the bar, counsel for the respondent chose to avoid arguing that which should not be argued without a strong evidentiary basis. There was no attempt, and appropriately so, to show that the more than 100 pages missing from the CTR carried little weight. In the circumstances of this case, the Court can only come to the conclusion that a significantly incomplete record was presented to the decision-maker.
>
> [6] As a result, the application for judicial review, made pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27, is granted. At its most basic, procedural fairness requires that an applicant be heard (*audi alteram partem*). When the complete application is not before the decision-maker, it can hardly be argued that the party has been heard (*Nicholson v Haldimand-Norfolk Regional Police Commissioners*, [1979] 1 SCR 311). The five factors of *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 which are used to determine the content of the duty of fairness leave the Court closer

> to the judicial end of the spectrum than the political or legislative end. The standard of review on procedural fairness in most cases is correctness (see generally Brown and Evans, in *Judicial Review of Administrative Action in Canada* (Toronto, On: Carswell, 2013) at 7:1620) and, in this case, the process of adjudication followed was deficient in that the applicant was not heard if the full application was not before the decision-maker. Those who decide must hear. As a result, the matter is sent back to a different officer who will conduct a complete redetermination. [Emphasis added]

[20] In *Jarvis*, the applicant claimed the decision under review was unreasonable because the immigration officer did not consider a letter submitted by the applicant which directly contradicted a factual finding by the officer. The respondent argued that the missing letter could not have had a determinative effect given the officer's other findings. The Court rejected the respondent's arguments, finding as follows:

> [23] It is indeed possible that the son's letter, had it been considered by the officer, would not have affected his decision. However, I cannot be certain of this. After all, this is not a case in which the officer simply failed to consider a piece of evidence; on the contrary, the officer made a finding that contradicted the evidence submitted. There may be good reason to ascribe little weight to this letter, but it is not this Court's role to speculate on how it might be assessed. What is certain, however, is that the allegations of the applicant's son in his letter, which were corroborated by the statements of his sister, are central to the applicant's arguments and relevant to the analysis of an element expressly addressed by the officer in his reasons. I therefore adopt the reasoning of Justice Gauthier in *Machalikashvili v Canada (Minister of Citizenship and Immigration)*, 2006 FC 622, in which she wrote the following (at para 9):
>
> > As mentioned in several earlier decisions of the Court *(Kong v. Canada (M.C.I.)*, [1994] F.C.J. No. 101; *Gill v. Canada (M.C.I.)*, [2003] F.C.J. No. 1270; *Ahmed v. Canada (M.C.I.)*, [2003] F.C.J. No. 254; *Li v. Canada (M.C.I.,)* [2006] F.C.J. No. 634), a breach of Rule 17(b) will justify setting the decision aside when the evidence missing from the certified record was particularly material to the

> finding under review. There is no doubt that this is the case here.
>
> [24] For these reasons, I find that the application for judicial review must be allowed…
>
> [Emphasis added]

[21] Similarly, in this case, it is not clear whether the missing 2015 Submissions would have had a determinative effect upon the decision under review, and it is not for this Court to determine whether they would have altered the outcome of the Applicant's PRRA application.

[22] The 2015 Submissions are similar, but by no means identical, to the 2016 Submissions. The 2015 Submissions contain a considerable amount of information which is not contained in the 2016 Submissions and were not subsumed by the 2016 Submissions. For example, the 2015 Submissions contain six pages of argument which are not present in the 2016 Submissions on why the Applicant meets the tests for sections 96 and 97 of the *IRPA*. Additionally, the 2015 Submissions contain a statement of the test for new evidence under paragraph 113(a) of the *IRPA* as well as two full pages of explanation which are not contained in the 2016 Submissions as to why the two Cross Affidavits are relevant. The Officer rejected these affidavits and other documentation pre-dating the RPD's decision because "no explanation was provided as to why these documents were not reasonably available to be presented to the panel for its consideration, if in fact they were not presented, or why the applicant was prevented from providing them" (emphasis added). This, in my view, shows that the Officer did not have the 2015 Submissions before him or her.

[23] In my view, the decision-making process in this case was deficient and tainted by the absence of the Applicant's 2015 Submissions from the CTR. A complete application was not before the Officer. I cannot be certain whether the 2015 Submissions would have affected the Officer's decision, and it is not the Court's role to speculate on how these submissions may or may not have affected the Officer's decision. In these circumstances, it would not be fair to uphold a decision in which some of the Applicant's submissions were apparently not considered by the Officer. The Applicant's application for judicial review will therefore be allowed.

IV. Conclusion

[24] The Officer's decision in this case is quashed because it was rendered in an unfair manner. It is unnecessary to consider the parties' submissions as to whether the Officer incorrectly applied the test for new evidence under paragraph 113(a) of the *IRPA*, fettered his or her discretion to reassess previous risk allegations, or erred in assessing the evidence. The matter is returned for reconsideration by a different immigration officer in accordance with these reasons for judgment.

[25] No question of general importance is certified.

JUDGMENT in IMM-4539-17

THIS COURT'S JUDGMENT is that: the application for judicial review is allowed; the decision of the Senior Immigration Officer dated July 20, 2017, is set aside and the matter is returned for redetermination by a different immigration officer in accordance with the reasons for this judgment; and no question of general importance is certified.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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