Date: 20080221

Docket: IMM-3551-07

Citation: 2008 FC 217

Ottawa, Ontario, February 21, 2008

Present: The Honourable Mr. Justice Beaudry

BETWEEN:

OFELIA ZAKOYAN

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) of a decision by an immigration officer (officer) dated July 9, 2007, rejecting the application by Ms. Ofelia Zakoyan (applicant) for a pre-removal risk assessment (PRRA).

ISSUES

[2] This application raises the following issues:

1. Did the officer err in excluding documents submitted by the applicant because they did not constitute new evidence within the meaning of paragraph 113*(a)*?
2. Did the officer err in referring to the decision by the Refugee Protection Division (RPD)?
3. Did the officer err in referring to foreign guidelines?
4. Did the officer err when considering the documentary evidence?
5. Was the officer required, as part of the PRRA, to review the applicant's application for permanent residence based on humanitarian and compassionate considerations?

[3] For the following reasons, the application for judicial review will be dismissed.

BACKGROUND

[4] The applicant, a 71-year old widow, is of Georgian nationality but Armenian ethnicity. She arrived in Canada on December 30, 2005, as a temporary resident for a three-month period. She claimed refugee protection on April 4, 2006.

[5] She fears returning to Georgia because she believes that her life there is in danger due to her Armenian ethnicity and because she is a member of a religious minority. According to her story, she was attacked, beaten and had her hair pulled by a neighbour and that neighbour's boyfriend, who

forced her to leave her home. She received no assistance from her other neighbours or the local police who were at the scene.

[6] The day after the attack, two police officers went to her home and told her that she would need evidence to support her story but that her neighbours and the local police refused to testify on her behalf.

[7] She subsequently went to live with a friend before leaving for Canada.

[8] She also alleged that her son was killed in an anti-Armenian crusade in 1992 and that her daughter died in 1998 because she did not receive adequate medical care.

IMPUGNED DECISION

[9] The officer excluded a number of documents filed by the applicant because she [the officer] believed they predated the RPD decision. On the other hand, she accepted four documents that, in her view, constituted new evidence under the Act.

[10] However, having completed her analysis of these documents, she determined that the alleged risks were unfounded.

[11] The officer stated that the applicant's allegations were essentially the same as those she made before the RPD. The officer indicated that she gave no probative value to the additions and

details of the attacks submitted by counsel for the applicant because they contradicted the applicant's statements to the RPD.

[12] The officer stated that the documentation she consulted on the current situation of Armenians in Georgia showed that the main problem is their inability to communicate in Georgian (the official language of the state) and that they are under-represented in the various spheres of public life. The officer acknowledged certain incidents in 2005 that were caused by tensions between Armenians and Georgians, but none of these incidents occurred in the city where the applicant lived (Tbilisi). The officer determined that the documentation she consulted did not show that Armenians in Georgia were persecuted. She therefore found that the state could provide adequate protection to the applicant.

ANALYSIS

Standard of review

[13] I adopt the pragmatic and functional analysis that was done in *Kim v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 540, 2005 FC 437, paragraph 19, by Mr. Justice Richard Mosley. For questions of law, the standard of review is correctness, for questions of mixed fact and law, reasonableness *simpliciter*, and for questions of fact, patent unreasonableness.

1. *Did the officer err in excluding documents submitted by the applicant because they did not constitute new evidence within the meaning of paragraph 113(a)?*

[14] The applicant submits that the officer erred in excluding certain documents presented in support of her PRRA application. In fact, the officer excluded all the documents that predated the RPD's rejection of the application. The application of paragraph 113(*a*) of the Act to the documents in question is a mixed question of fact and law, which is reviewable against the standard of reasonableness *simpliciter*.

[15] Paragraph 113(*a*) of the Act provides as follows:

113. Consideration of an application for protection shall be as follows:	**113.** Il est disposé de la demande comme il suit:
(*a*) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection;	*a*) le demandeur d'asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'il n'était pas raisonnable, dans les circonstances, de s'attendre à ce qu'il les ait présentés au moment du rejet;

[16] First, the applicant submits that paragraph 113(*a*) refers to an applicant, not a decision-maker. In her supplementary memorandum, she maintains that paragraph 113(*a*) does not refer to documentary evidence on the situation of the country prior to the rejection of the application. She cites *Raza v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 1632, 2007 FCA 385, a decision of the Federal Court of Appeal.

[17] Second, she alleges that the RPD did not make a ruling on the persecution based on religion and, as a result, the officer was required to consider the documents that were submitted as new evidence. In the alternative, she says that the officer's failure to inform the applicant of the exclusion is a breach of procedural fairness.

[18] For her part, the respondent contends that the reasoning followed by the officer to determine whether the documents constituted new evidence was consistent with both the statute and the jurisprudence.

[19] I agree with the applicant that paragraph 113(*a*) refers to an applicant, not a decision-maker. On the other hand, the applicant seems to be indicating that the officer does not have the authority to exclude documents that do not fall within paragraph 113(*a*) because general evidence about a country cannot be excluded unless the RPD analyzed and considered it. This argument confuses the officer's power to exclude any evidence that does not fall within paragraph 113(*a*) with the officer's duty to research the particular situation in the applicant's country.

[20] In her supplementary memorandum, the applicant contends that excluding the documents based solely on their date is an error. She relies on paragraph 16 of *Raza*, above:

> [16] One of the arguments considered by Justice Mosley in this case is whether a document that came into existence after the RPD hearing is, for that reason alone, "new evidence". He concluded that the newness of documentary evidence cannot be tested solely by the date on which the document was created. I agree. What is important is the event or circumstance sought to be proved by the documentary evidence.

[21] However, the dispute before the Federal Court of Appeal dealt with documents that were dated after the rejection of the refugee claim. Confirming the opinion of Mosley J., the Court held that the test for new evidence is not based solely on the date of the document. An officer may refuse to consider documents created after the RPD decision as new evidence if those documents contain facts that are not materially different from the facts that were available when the RPD made its decision. This reasoning is based on paragraphs 16 and 17 of the *Raza* decision, above:

> [17] Counsel for Mr. Raza and his family argued that the evidence sought to be presented in support of a PRRA application cannot be rejected solely on the basis that it "addresses the same risk issue" considered by the RPD. I agree. However, a PRRA officer may properly reject such evidence if it cannot prove that the relevant facts as of the date of the PRRA application are materially different from the facts as found by the RPD.

[22] The case before us involves documents that were created prior to the RPD hearing. Since there was no evidence indicating that the impugned documents were not available to the applicant before the hearing, the officer did not err in excluding them.

[23] The PRRA's mandate to consult documentation about the country where a refugee claimant comes from is set out in paragraph 11.2 of chapter PP 3 Pre-removal Risk Assessment (PP 3 Manual):

> The PRRA officer will undertake independent research of the identified issues. The research sources consulted by the PRRA officer will vary with each individual case. A number of research sources exist and may include but are not limited by the following: Internet, Human Rights Package, Contextual Package, Indexed Media Review, "Weekly Media Review" covering the country or countries to which the applicant could be removed. The decision-maker may also use other annually published material such as the

> U.S. Department of State Country Report on Human Rights Practices, the Lawyers Committee for Human Rights Critique, Amnesty International Reports, Reporters without Borders, *L'État du monde*, Europa World and Human Rights Watch World Report.
>
> Although submissions may dictate the method of response a PRRA officer uses when conveying a decision, they should not limit the amount of research the PRRA officer does.

[24] The applicant also faults the officer for not ruling on the alleged persecution based on her religion.

[25] The respondent replies that the interview notes of an immigration officer made on April 4, 2006, when the refugee claim was filed, show that the applicant stated that she had not experienced any problems because of her religion (tribunal record, page 277). In any event, the RPD did not believe that the applicant had been persecuted in her country. Despite that observation, the officer consulted the documentary evidence about Armenians in Georgia and noted that their main problem was their inability to communicate in Georgian (official language of the state).

[26] With respect to the procedural fairness argument, the respondent submits that the officer was not required to inform the applicant about the documents she relied on in making her decision because they are public documents, available to everyone. The respondent cites *Chen v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 341, 2002 FCT 266:

> [22] The Federal Court of Appeal decision in *Mancia v. Canada (Minister of Citizenship and Immigration),* [1998] 3 F.C. 461 established a framework for approaching this issue. With respect to documents regarding general country conditions relied upon by the PCDO that were publicly available at the time the applicant's

> submissions were made, the duty of fairness does not require the PCDO to disclose the documents to the applicant in advance of rendering a decision. The onus is on the applicant to canvass the documentary evidence and to address any concerns in the submissions filed with the application.
>
> [23] With respect to documents relied upon by the PCDO that became publicly available after the filing of the applicant's submissions, the Court in *Mancia* identified two criteria that, if satisfied, would require disclosure. The duty of fairness would require the disclosure of the documents to the applicant "... where they are novel and significant and where they evidence changes in the general country conditions that may affect the decision."
>
> [Emphasis added]

[27] In this case, the documents that were consulted predate the applicant's submissions. Therefore there was no breach of procedural fairness by the officer.

Did the officer err in referring to the decision by the RPD?

[28] The applicant alleges that the officer should not have given so much weight to the RPD decision. She says that the fact that the application for judicial review of that decision was dismissed does not in any way confirm the tribunal's statements.

[29] A PRRA application is not an appeal. In *Isomi v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1753, 2006 FC 1394, Mr. Justice Simon Noël wrote the following:

> [17] In addition, the decision to adopt the same conclusions as the RPD seems to be warranted by the fact that the application for leave and for judicial review of the RPD's decision was dismissed by this Court, given the failure to file the record. I concluded in the following excerpt from *Jacques v. Canada*, *supra*, at paragraph 22, that a PRRA decision is not an appeal of a decision of the IRB:

> As the respondent argues, a PRRA officer does not sit on appeal or in judicial review and is therefore entitled to trust the IRB's findings in the absence of new evidence.
>
> [18] In concluding on this point, the PRRA officer did not make any error in adopting the conclusion of the IRB to the effect that the applicant is a person excluded from Canada under subparagraphs 1(F)(a) and (c) of the Convention.
>
> [Emphasis added]

[30] The officer did not give any probative value to the applicant's assertion that she had been humiliated in the past and that her neighbour had chased her and threatened her. This statement contradicts what she said before the RPD. This finding is not unreasonable given that the applicant did not provide any explanation about these contradictions.

Did the officer err in referring to foreign guidelines?

[31] The applicant submits that the officer should not have consulted the document *Operational Guidance Note: Georgia* published by the Country of Origin Information Service of the UK Home Office, a government department of Great Britain. The applicant believes that these foreign guidelines may have influenced the officer's decision.

[32] I agree with the respondent's response that this document is a source of information normally used to find out about general country conditions. Therefore, there is no reviewable error here.

Did the officer err when considering the documentary evidence?

[33] The applicant argues that the officer minimized the applicant's problems and objects to the officer's finding that the main problem is the Armenians' inability to communicate in the official language of the state.

[34] I believe that the applicant is asking this Court to reassess the evidence. The assessment of facts is completely within the officer's jurisdiction. The Court will only intervene if a patently unreasonable error has been shown. Here, the officer's findings are supported by the evidence.

Was the officer required, as part of the PRRA, to review the applicant's application for permanent residence based on humanitarian and compassionate considerations?

[35] The applicant submits that the officer was required to review the humanitarian and compassionate circumstances in accordance with paragraphs 18.1 and 18.2 of the PP 3 Manual.

[36] The respondent does not agree. Both parties cite the decision of Mosley J. in *Kim*, above, in support of their arguments. However, paragraph 70 seems very clear to me:

> [70] By the same logic, I find that PRRA officers need not consider humanitarian and compassionate factors in making their decisions. There is no discretion afforded to a PRRA officer in making a risk assessment. Either the officer is satisfied that the risk factors alleged exist and are sufficiently serious to grant protection, or the officer is not satisfied. The PRRA inquiry and decision-making process does not take into account factors other than risk. In any case, there is a better forum for the consideration of humanitarian and compassionate factors: the H & C determination mechanism. I do not find that the officer erred in law by refusing to consider humanitarian and compassionate factors in the context of the PRRA decision.

[37] Although the applicant filed an H & C application, that application is not the subject of this proceeding. In the history of the file, the PRRA officer noted that the application for permanent residence had been received and that it was following its course in accordance with the applicable rules. Therefore, in my view, the officer was not required to deal with this application in the context of the PRRA.

[38] The parties did not propose any serious question of general importance. This record does not contain any.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed. No question is certified.

"Michel Beaudry"
Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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