Federal Court  Cour fédérale

Date: 20100219

Docket: IMM-3222-09

Citation: 2010 FC 175

Ottawa, Ontario, February 19, 2010

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

HOA VAN TRAN, HUONG XUAN NGUYEN AND ANH DUC TRAN

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS THE MINISTER OF CITIZENSHIP AND IMMIGRATION, THE SOLICITOR GENERAL OF CANADA, THE ATTORNEY GENERAL OF CANADA

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), of a negative decision rendered by a Pre-Removal Risk Assessment Officer (the Officer) concerning Hoa Van Tran, Huong Xuan Nguyen and Anh Duc Tran (the Applicants).

Factual Background

[2] All of the Applicants in this case are citizens of Vietnam. The principal Applicant, Hoa Van Tran, made a claim for refugee status stemming from events that took place subsequent to his employment in Russia. Included in his application are his wife, Huong Xuan Nguyen, and his son, Anh Duc Tran, who have based their claims on that of Mr. Tran.

[3] Between 1992 and 1996, the principal Applicant claims to have been employed by a joint venture company. During that time, he lived in Russia with his family and he alleges that he was also part of a security group supported by the government of Vietnam. As such, he was responsible for identifying criminals in the Vietnamese community in Russia. He further claims that he reported many individuals, nine of whom were deported from Russia to Vietnam.

[4] While he was on vacation in Vietnam in December 1998, he was attacked and beaten. He also alleges that he received phone calls threatening physical violence and an attempt was made to kidnap his daughter. He believes that these incidents were carried out by persons he caused to be deported from Russia as revenge for his actions against them.

[5] The principal Applicant's wife and son entered Canada on December 19, 2003. The principal Applicant entered on October 19, 2004. The claim for refugee protection was made on November 16, 2004.

[6] On July 29, 2005, the Refugee Protection Division (RPD) rejected the claim for protection on the grounds of credibility and state protection. On February 12, 2006, the Applicants submitted an application for permanent residence on humanitarian and compassionate (H&C) grounds, which was denied on May 8, 2009. On November 5, 2007, the Applicants submitted an application for a Pre-Removal Risk Assessment (PRRA). This application was denied on May 7, 2009 and is now the subject of this judicial review. Both the PRRA and H&C applications were assessed by the same officer.

Questions at Issue

[7] The Applicants have raised many issues in the application for judicial review. I will address the issues that I have restated as follows:

a. Is the PRRA decision reasonable?

b. Was the Officer required to consider the best interests of the child in the context of the PRRA assessment?

c. Did the Officer violate a principal of natural justice?

d. Does paragraph 113(a) of the Act infringe on section 7 of the *Charter*?

[8] The application for judicial review shall be dismissed for the following reasons.

Relevant Legislation

[9] The relevant legislation can be found in Annex A at the end of this document.

Analysis

Standard of review

[10] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 62 (*Dunsmuir*), the Supreme Court of Canada held that jurisprudence should be examined in determining which standard of review should be applied to a particular category of question. Before *Dunsmuir*, it was well established that the appropriate standard of review for a question of fact was patent unreasonableness, reasonableness *simpliciter* for questions of mixed law and fact and correctness for questions of law (*Abdollahzadeh v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1310, 325 F.T.R. 226 at paragraph 21 (*Abdollahzadeh*)). As the standards of patent unreasonableness and reasonableness *simpliciter* have now been collapsed into one, questions of facts and mixed law and fact will be subject to the standard of reasonableness (*Dunsmuir*). I would add that a breach of procedural fairness is held to a standard of correctness (*Soares v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 190, 308 F.T.R. 280).

[11] Accordingly, the first question at issue will be addressed using the standard of reasonableness. The second and third issues will be held to a standard of correctness. The constitutional question will, of course, be answered in the usual manner.

Is the PRRA decision reasonable?

[12] First of all, it is important to clearly set out the goal of the PRRA application and the limited decision making power given to an officer assessing an application. The PRRA application is not meant to be an appeal of a negative refugee decision. Rather, it is meant to be an assessment of risk based on new facts or evidence. As stated in *Raza v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385, (2007) 370 N.R. 344 (*Raza*), the limitations imposed on the presentation of evidence under paragraph 113(a) of the Act must be respected by the PRRA officer.

[13] In *Raza*, above, the Federal Court of Appeal set out questions that a PRRA officer can consider in evaluating the evidence and deciding if it should be excluded under the Act. Those questions are as follows:

> 1. Credibility: Is the evidence credible, considering its source and the circumstances in which it came into existence? If not, the evidence need not be considered.
>
> 2. Relevance: Is the evidence relevant to the PRRA application, in the sense that it is capable of proving or disproving a fact that is relevant to the claim for protection? If not, the evidence need not be considered.
>
> 3. Newness: Is the evidence new in the sense that it is capable of:
>
> (a) proving the current state of affairs in the country of removal or an event that occurred or a circumstance that arose after the hearing in the RPD, or
> (b) proving a fact that was unknown to the refugee claimant at the time of the RPD hearing, or
> (c) contradicting a finding of fact by the RPD (including a credibility finding)?
>
> If not, the evidence need not be considered.
>
> 4. Materiality: Is the evidence material, in the sense that the refugee claim probably would have succeeded if the evidence had

been made available to the RPD? If not, the evidence need not be considered.

5. Express statutory conditions:

(a) If the evidence is capable of proving only an event that occurred or circumstances that arose prior to the RPD hearing, then has the applicant established either that the evidence was not reasonably available to him or her for presentation at the RPD hearing, or that he or she could not reasonably have been expected in the circumstances to have presented the evidence at the RPD hearing? If not, the evidence need not be considered.

(b) If the evidence is capable of proving an event that occurred or circumstances that arose after the RPD hearing, then the evidence must be considered (unless it is rejected because it is not credible, not relevant, not new or not material).

[14] In the case at bar, previous counsel for the Applicants prepared the submissions for the PRRA application. Those submissions contained three documents – written submissions in support of the PRRA application, a copy of the personal story as submitted in the refugee application and an article, written by that counsel, on H&C considerations. The written submissions simply restate the events that led to the Applicants' coming to Canada to seek protection. They also include statements about H&C factors that they claim should be part of the PRRA decision – all of those factors related to hardship and none of them address the issue of risk.

[15] Thus I cannot accept the Applicants' claim that both the personal and documentary evidence are new in that they demonstrate that the situation in Vietnam has deteriorated and that the Applicants would face a risk upon return. Moreover, as the Respondent pointed out, the Applicants

make this sweeping statement but fail to refer to any of the specific evidence which they allege comprised new evidence and how this evidence specifically related to new developments in their personal situation or the more general country conditions.

[16] Furthermore, the Officer noted that all evidence, other than that which pre-dated the RPD decision, was accepted as new evidence. The only evidence that was excluded was the evidence for which no explanation was provided as to why it was not, or could not have been, presented to the RPD. This is in complete conformity with the statutory requirement and the approach set out in *Raza*. The Officer did not err in her application of the test, nor did she err in her evaluation of which elements were new evidence.

[17] The Applicants also argue that it is in the best interest of justice that the latest and most relevant information on risk be assessed. As the Applicants did not submit any information on a new risk, other than what they had already claimed before the RPD, this argument has no foundation. Additionally, I note that the case law referred to in the submissions is distinguishable as it pertains to cases where new evidence of risk was submitted before the PRRA decision was communicated to an applicant and where new evidence was introduced before the Court in the context of a stay motion.

[18] The Officer made no error in relying on the RPD's findings of fact and credibility. It was the appropriate decision since the Applicants raised the same risk which was identified and thoroughly assessed by the RPD and it is not the role of the Officer to revisit credibility findings without new

facts or evidence (*Cupid v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 176, [2007] F.C.J. No. 244 at paragraphs 4 and 21 (*Cupid*)). I am satisfied that the Officer correctly assessed the risk in her decision.

Was the Officer required to consider the best interests of the child in the context of a PRRA assessment?

[19] The Applicants submit that the Officer erred as she did not consider the best interests of the minor child in making her decision. The Respondent relies on the decision in *El Ouardi v. Canada (Solicitor General)*, 2005 FCA 42, 332 N.R. 76 where, in the context on an application for a stay of a removal order pending appeal, it was stated that "there is no indication that the best interests of her child were raised on her risk assessment and it is not obvious to me that in the circumstances of this case, the risk assessment was the appropriate forum to have done so" (at paragraph 10).

[20] In *Varga v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 394, [2007] 4 F.C.R. 3 at paragraph 13 (*Varga*), the Federal Court of Appeal accepted that there is no requirement that the interests of affected children be considered under every provision of the Act. The Act sets out that consideration of a PRRA application is to be conducted on the basis of sections 96 and 97, thus risk is the only relevant consideration and the broad-ranging considerations of children's interests should not be contemplated (*Varga*, above, at paragraphs 7 to 9). There is a very narrow scope in which the PRRA officer can act in making an assessment. The Act provides an effective opportunity for the consideration of the best interests of the child, and that is under

section 25 through an H&C application. The Federal Court of Appeal also emphasized that the PRRA and H&C processes should not be confused, nor duplicated (*Varga*, above, at paragraph 12).

[21] In the present case, the Applicants made an H&C application in which they included the interests of their minor child. That application was rejected and the application for judicial review of that decision was rejected at the leave stage (see Court file IMM-3223-09). This is not the appropriate forum in which to revisit the decision on H&C considerations.

[22] Therefore, I find that the Officer was under no obligation to consider the best interests of the minor child in the PRRA application and did not err on this ground.

Did the Officer commit a breach of natural justice?

Reasons

[23] The Applicants allege that there has been a breach of procedural fairness as they were provided with inadequate reasons with regard to state protection. I disagree. I am satisfied that a review of the reasons in their totality shows that they are adequate. Furthermore, I am of the opinion that it would be inappropriate to expect reasons in the context of a PRRA application to be as elaborate as those expected of the RPD and it would certainly be inappropriate to hold them to the standard of judicial reasons as suggested by the Applicants (see *Ozdemir v. Canada (Minister of Citizenship and Immigration)*, 2001 FCA 331, [2001] F.C.J. No. 1646 (QL) at paragraph 11). In evaluating the adequacy of the Officer's reasons, one must take into account both the role of the Officer and the submissions made by the Applicants (*Cupid*, above at paragraph 12).

[24] The Officer was required to assess the information submitted by the Applicants in order to determine whether they are now facing a risk that was not identified by the RPD or has emerged since that time. I note that the Applicants did not make any submissions on new risk developments due to a change in their personal circumstances or changes in country conditions.

[25] In her reasons, the Officer explains that as the Applicants did not make any allegations as to a new risk since the RPD hearing, the only source of risk left to evaluate would be from a change in country conditions. She also mentions that the RPD was satisfied that state protection is available to the Applicants in Vietnam and that they had not presented any evidence to the contrary.

[26] The RPD held that state protection is available in Vietnam as the documentary evidence showed that there are police organizations, it established that it is a state willing and able to protect its citizens and there is effective control over the territory. Furthermore, the RPD did not find the Applicants' explanation credible as to why they could not be protected (RPD decision, Tribunal record at pages 91 and 92). The documentary evidence reviewed by the Officer did not indicate that this was no longer the case and, once again, the Applicants themselves did not allege that there had been any change, nor did they provide any new evidence as to why they can not be protected.

[27] The Officer described the process of review, she made reference to the documentation submitted by the Applicants and her treatment of it and she stated that there had not been a material change in conditions in Vietnam since the RPD decision.

Right to an oral hearing

[28] It is clear in the Act that the PRRA process is meant to be dealt with in writing and oral hearings are held only in exceptional circumstances. This Court has accepted that a hearing is not generally required where the RPD has heard a claim and made a determination on credibility. Further, the Court has held that a hearing is not required where the officer denies that application on the basis of objective evidence as that finding is a matter distinct from credibility (*Al Mansuri v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 22, 60 Admin. L.R. (4th) 228 at paragraph 43 (*Al Mansuri*)). The Applicants submit that a determination was made as to their credibility and they were entitled to an oral hearing. They alternatively submit that they were entitled to a hearing under either paragraph 167(*b*) or 167(*c*) of the Regulations.

[29] Paragraph 113(b) of the Act states that oral hearings will only be granted in the prescribed circumstances and those circumstances are set out in section 167 of the Regulations. The conditions set out in the section are cumulative and the Applicants must satisfy all factors, contrary to their submission. Through their submissions, the Applicants acknowledge that they do no meet the factor under paragraph 167(*a*). I am satisfied that there was no 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 in this case and an oral hearing was not required under the Act and the Regulations. Here, the Officer denied the application on the basis of objective evidence, as the determinative issue was state protection. As in *Al Mansuri*, above, this finding is a matter distinct from the Applicants' credibility.

Right to a fair hearing

[30] The Applicants contend that they were denied the right to a fair hearing because the Officer did not contact counsel and allow him to respond to the reports and cases relied on. They claim that this was a breach of natural justice since they were entitled to be informed of the case to be met.

[31] It is well established that there is no breach of procedural fairness when the officer does not inform the applicant of documentary evidence unless that evidence in not publicly available or was not available at the time that submissions were filed and it evidences novel and significant information with regard to country conditions which may affect the disposition of the case (*Mancia v. Canada (Minister of Citizenship and Immigration)*, [1998] 3 F.C. 461 (C.A.); *Al Mansuri*, above, at paragraph 52).

[32] The Officer relied on one decision from this Court and three pieces of documentary evidence. It is not disputed that all of these documents were publicly available and are documents that are commonly used in the PRRA process. The Applicants have not argued that any of these documents revealed novel or significant changes in the country conditions in Vietnam and after reviewing them I conclude that none of them do. Accordingly, I find that the documentary evidence was within the knowledge of the Applicants. The requirements of procedural fairness were met.

Does paragraph 113(a) of the Act infringe on section 7 of the Charter?

[33] The Court has no judicial obligation to respond to constitutional questions (*Abdollahzadeh*, above, at paragraph 31). I think that in this case, it is unnecessary for the Court to answer this question for the following reasons.

[34] This question has already been answered in a satisfactory manner in the case law. In *Doumbouya v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1187, 325 F.T.R. 143, the Applicant had argued that the restrictions under paragraph 113(a) have a direct impact on the right of PRRA applicants to life, liberty and security, which was not consistent with the principles of fundamental justice guaranteed in section 7 of the *Charter*. In that case, it was held that because the PRRA is not an appeal of the RPD decision and is limited to new developments paragraph 113(a), it does not deny an applicant the opportunity to present all evidence relevant to his PRRA, and therefore, is consistent with section 7 of the *Charter* (at paragraphs 92 to 94). In *Abdollahzadeh*, above, at paragraph 35, the Court held that:

> It is evident that the application for protection contemplates life, liberty and security of the applicant. Overall, the procedure provided by the IRPA according to the steps (the refugee claim and the RPD decision, the application for protection, the ultimate application to the removal officer) is indicative of concern for the principles of natural justice and fairness. Considering all of the IRPA procedure and the application for protection step, limiting the PPRA applications to new information under paragraph 113(a) of the IRPA does not breach the principles of justice and fairness guaranteed by the Charter.

The Applicants have not demonstrated that these decisions are wrong or raised an argument that suggests so.

[35] Although they have raised an argument that was not raised in previous jurisprudence, I am still not convinced that the Court need answer the question for the following reasons.

[36] The principles of administrative law are appropriate to answer the question raised by the Applicants and it is not necessary to engage in an analysis under the Charter. The Supreme Court has held that if it is possible to decide an issue by applying the principles of administrative law, it is not necessary to consider Charter issues (Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817; Chieu v. Canada (Minister of Citizenship and Immigration), 2002 SCC 3, [2002] 1 S.C.R. 84). I have conducted a review of the decision and have found that there was no breach of natural justice or the principals of procedural fairness in this case.

[37] Also, I also agree that the Applicants' arguments lack a clear evidentiary foundation and they have not submitted any evidence as to how the decision in this case might have been different, but for paragraph 113(a) of the Act. As stated by the Supreme Court of Canada, " [i]n general, any Charter challenge based upon allegations of the unconstitutional effects of impugned legislation must be accompanied by admissible evidence of the alleged effects. In the absence of such evidence, the courts are left to proceed in a vacuum, which, in constitutional cases as in nature, has always been abhorred" (*Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086 at page 1101).

[38] The applicants submit the following questions for certification:

1. In a case where police protection has been sought and refused and/or not provided, or where the claimant has refused to seek that protection, based on past refusals of protection to the claimant or those similarly situated:

(a) is the decision in *Villafranca(FCA)* effectively overturned by the Supreme Court of Canada in *Ward* with respect to state protection, particularly the issue of "perfect" protection not required under *Villafranca?* Put another way:

(b) is there a middle ground between "effective(adequate)" vs." perfect" protection; or

(c) is there a middle ground between "imperfect" vs. "ineffective(inadequate)" protection?

Or are the two terms and concepts janusly incapable of co-existence and applicability in any *particular, individual claim to refugee status?*

2. If the two terms and concepts are capable of co-existing and capable of being applied, what are the parameters of that middle ground? Put another way:

   (a) how is a claimant who has been denied "effective(adequate)" protection under *Ward*, have his claim denied on the basis that "perfect" protection cannot be expected under *Villafranca?* or

   (b) how can a claimant who has met the test under*Ward*, then have his claim denied under the "test" in *Villafranca?*

3. Is the Federal Court's decision in *Garcia* correct with respect to this issue?

It is respectfully submitted that this issue requires the attention and clarification of the Court of Appeal in light of the fact that *Villafranca* was decided before *Ward* and it *Villafranca* further relies on *Zalzali* which was *not* followed in *Ward.*

It is submitted that the discussion in *Ward* (at pages 20-22, particularly paragraph 50), makes clear that, absent complete breakdown of the state apparatus, a nation is presumed *willing* to protect its nationals. This presumption is rebuttable. The level of rebuttal required is set out by the Court, and the bar set is where "ineffective (inadequate)" protection is not available or forthcoming, then state protection is unavailable.

The Respondent holds that where protection is "ineffective (inadequate)", either through refusal or inability, then there is a basis of refusal possible on the premise that although ineffective, since nobody can expect "perfect" protection, therefore the claim is nonetheless defeated. This is an illogical and impossible hurdle, which erases *Ward* in that it begs the question:

> Absent the instances of complete breakdown of the state apparatus (whereby the presumption of state protection does not apply and therefore no evidence of unavailability of effective state protection is even required by the claimant), in what possible scenario is anyone, *ever*, a refugee in instances where the test to be met is that a claimant cannot expect "perfect" protection even though the protection has been "ineffective"? So, a claimant can be tortured or killed due to "ineffective" protection because nobody is to expect "perfect"?

It is submitted that *Ward* equally dismisses this illogical premise by stating that it would be illogical to send someone back to the risk of torture or death once "ineffective" protection has been established, *just to test the degree of that ineffectiveness*, wherein the Court in Ward, at p.22, paragraph 48, states:

> "…Moreover, it would seem to defeat the purpose of international protection if a claimant would be required to risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness."

And further as ruled in *Garcia:*

> "D. The impact of *Ward* on *Villafranca*
>
> [18] In my opinion, *Ward* amends the decision in *Villafranca* in a particularly important respect. *Ward* makes a clear statement on the quantity and quality of the evidence which a claimant must produce to rebut the presumption of state protection; that is, a claimant is only required to provide some clear and convincing evidence. Therefore, in my opinion, the statement in *Villafranca* that "it is not enough for a claimant merely to show that his government has not always been effective at protecting person in his particular situation" cannot any longer be applied as a point of law."
>
> *-De Araujo Garcia v. MCI* 2007 FC 79

It is lastly submitted that this issue arises both on the facts, as the PRRA officer rules on this very crucial issue, of not every state being able to provide "perfect protection",

- Decision of PRRA officer

> while relying on *Villafranca:*.
>
> - (*Decision of PRRA officer*)
>
> And which issue transcends the particular facts of this case, and is an issue of general importance, in every refugee claim, as effective state protection is always an issue.
>
> 4. Whether section 113(a), as interpreted and applied, infringes section 7 of the *Charter?*
>
> i. Is a hearing/interview required on a PRRA:
>
> (a) when credibility is impugned on new evidence? and/or
>
> (b) when a PRRA officer adopts negative credibility findings, of the RPD, with respect to, and applies them to, new evidence?

[39] I have reviewed the respondent's written objections to the proposed questions and the applicant's reply.

[40] Although very interesting, I am of the opinion that none of the above questions should be certified because they are too hypothetical. I also agree with the respondent that the questions do not raise serious issues of general importance which are determinative of the issues as applied to the facts in the case at bar.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be dismissed. No question is certified.

"Michel Beaudry"
Judge

Annex A

Immigration and Refugee Protection Act, S.C. 2001, c. 27.

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;
(b) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;	b) une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;

Immigration and Refugee Protection Regulations, SOR/2002-227 (the Regulations).

167. For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors are the following:	**167**. Pour l'application de l'alinéa 113b) de la Loi, les facteurs ci-après servent à décider si la tenue d'une audience est requise :
(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.

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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