Federal Court  Cour fédérale

Date: 20140617

Docket: IMM-6550-13

Citation: 2014 FC 564

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, June 17, 2014

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

INDIANA JENEZ ALVAREZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001 c 27 (Act), of a decision by the immigration officer, J. Bejar (PRRA officer), dated August 19, 2013 (decision), rejecting the applicant's pre-removal risk assessment application (PRRA application).

I. Factual background

[2] Indiana Jenez Alvarez (applicant) is a citizen of Cuba.

[3] The applicant submits that she had a difficult childhood.

[4] In 1980, when she was 24 years old, the applicant and her brother left Cuba for the United States for fear of reprisal from the Cuban government, which had targeted their father by reason of his political opinion. She alleges that her brother returned to Cuba and was killed there.

[5] The applicant remained in the United States until 2011 and alleges that she lived a difficult life there. She married a man who physically and psychologically abused her and from whom she separated. She experienced similar abuse at the hands of various other individuals. She then had a homosexual relationship with a woman who died of leukemia. She alleges that she then became depressed and lived between psychiatric facilities and the streets. She then had a relationship with a man and, during that period, committed a federal offence in the United States and served 24 months in prison there. The applicant has a history of mental illness and has tried to commit suicide on a number of occasions.

[6] The applicant arrived in Canada in July 2011. She filed a refugee protection claim, which was rejected by the Refugee Protection Division (RPD) because she was excluded from protection pursuant to Article 1F(b) of the Convention relating to the Status of Refugees

(Convention), because she had committed a serious non-political crime. An application for leave and judicial review of that decision was dismissed.

[7] The applicant filed a PRRA application in March 2013, alleging a fear of persecution by reason of her political opinion and her homosexuality were she removed to Cuba.

[8] According to the record before the Court, the applicant has two sisters (Personal Information Form (PIF), page 3 (Tribunal Record, page 39); Refugee Protection Claim, page 3 (Tribunal Record, page 53)), a daughter (PRRA Application, page 2 (Tribunal Record, page 17); PIF, page 3 (Tribunal Record, page 39)) and two grandchildren (PIF, Tribunal Record, page 47) who live in Cuba, with whom she does not have significant ties. She has no family in Canada.

II. Impugned decision

[9] The officer rejected the applicant's PRRA application on the ground that she has not discharged her burden of proving, on a balance of probabilities, that she faces a risk in her country pursuant to section 97 of the Act. He found that the evidence submitted in support of her application was insufficient.

[10] Considering that the applicant's refugee claim was rejected on August 21, 2012, when the RPD determined that she was excluded from refugee protection pursuant to Article 1F of the Convention and that she is subject to section 112(3) of the Act, the PRRA officer limited his analysis to the elements of section 97 of the Act to determine whether the applicant is likely to

face a danger of torture, or a risk to her life or a risk of cruel and unusual treatment or punishment if she were to return to her country of origin.

[11] First, the PRRA officer excluded from the evidence a letter dated February 8, 2013, by Dr. Beauregard detailing the applicant's mental health problems and medication because it was not related to the risks that she could face were she removed to Cuba, a requirement of section 97 of the Act.

[12] The PRRA officer then found that, despite the fact that she may have indeed left Cuba for political reasons, she did not submit any evidence demonstrating that the Cuban authorities are currently following or looking for her.

[13] Regarding her fear of being targeted because of her homosexuality, the PRRA officer noted that the applicant had boyfriends before and after that relationship.

[14] He also considered the evidence that her family members, who are still in Cuba, have never been arrested or mistreated because of their connection to the applicant.

[15] Thus, the PRRA officer determined that there was very little persuasive evidence suggesting that anyone in Cuba would want to or would plan to mistreat her for political reasons or because of her sexual orientation.

[16] Even though the PRRA officer concedes that Cuba is an authoritarian state where the political and economic climate is turbulent and where human rights violations still occur, he

found that the applicant did not meet the burden of establishing that she or her family members would be victims of persecution or negatively affected by those conditions in any way. She did not submit probative evidence showing, on a balance of probabilities, that she would face a personalized risk to her life or a risk of cruel and unusual treatment or punishment if she were to return to Cuba.

[17] Thus, the PRRA officer found that the applicant did not establish that she is likely to face a danger of torture, or a risk to her life, or a risk of cruel and unusual treatment or punishment in Cuba and that she is therefore not a person in need of protection under section 97 of the Act.

III. Issue and standard of review

[18] The issue raised in this application is as follows:

- Did the PRRA officer base his decision on erroneous findings of fact or law made in a perverse or capricious manner, without regard to the material before him?

[19] In *Selduz* v *Canada (Minister of Citizenship and Immigration)*, 2009 FC 361, the appropriate standard of review for decisions of a PRRA officer was described in paragraphs 9 and 10 as follows:

> The Court has held that the appropriate standard of review for a PRRA officer's findings of fact and on issues of mixed fact and law is reasonableness: see *Erdogu v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 407 (CanLII), 2008 FC 407, [2008] F.C.J. No. 546 (QL); *Elezi v. Canada*, 2007 FC 40 (CanLII), 2007 FC 40, 310 F.T.R. 59. In *Ramanathan v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 843 (CanLII), 2008 FC 843, 170 A.C.W.S. (3d) 140 at paragraph 18, I held that where an applicant raises issues as to whether a PRRA officer had proper regard to all the evidence when reaching a decision, the appropriate standard of review is reasonableness.

> Accordingly, the Court will review the PRRA officer's findings with an eye to "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." (*Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), 2008 SCC 9, 372 N.R. 1 at paragraph 47). However, where the PRRA officer fails to provide adequate reasons to explain why relevant, important and probative new evidence was not considered, then the court will consider that an error of law reviewed on the correctness standard.

[20] The standard of review in this case is reasonableness.

IV. Relevant provisions

[21] Article 1(F)(b) of the Convention reads as follows:

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:	F. Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser :
. . .	[...]
b. he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;	b) qu'elles ont commis un crime grave de droit commun en dehors du pays d'accueil avant d'y être admises comme réfugiés;
. . .	[...]

[22] The relevant sections of the Act read as follows:

Person in need of protection	Personne à protéger
97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality,	97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a

their country of former habitual residence, would subject them personally

pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Person in need of protection

Personne à protéger

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de

	protection.
Exclusion Refugee Convention	Exclusion par application de la Convention sur les réfugiés
98. A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.	98. La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.
Pre-removal Risk Assessment	Examen des risques avant renvoi
Protection	Protection
Application for protection	Demande de protection
112. . . .	112. […]
Restriction	Restriction
(3) Refugee protection may not result from an application for protection if the person	(3) L'asile ne peut être conféré au demandeur dans les cas suivants :
. . .	[…]
(b) is determined to be inadmissible on grounds of serious criminality with respect to a conviction in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years or with respect to a conviction outside Canada for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10	b) il est interdit de territoire pour grande criminalité pour déclaration de culpabilité au Canada pour une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou pour toute déclaration de culpabilité à l'extérieur du Canada pour une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;

years;	
(c) made a claim to refugee protection that was rejected on the basis of section F of Article 1 of the Refugee Convention; or	c) il a été débouté de sa demande d'asile au titre de la section F de l'article premier de la Convention sur les réfugiés;
. . .	[…]

[23] The application must be considered in the following manner:

Consideration of application	Examen de la demande
113. Consideration of an application for protection shall be as follows:	113. Il est disposé de la demande comme il suit :
. . .	[…]
(*d*) in the case of an applicant described in subsection 112(3) — other than one described in subparagraph (*e*)(i) or (ii) — consideration shall be on the basis of the factors set out in section 97 and	*d*) s'agissant du demandeur visé au paragraphe 112(3) — sauf celui visé au sous-alinéa *e*)(i) ou (ii) —, sur la base des éléments mentionnés à l'article 97 et, d'autre part :
(i) in the case of an applicant for protection who is inadmissible on grounds of serious criminality, whether they are a danger to the public in Canada, or	(i) soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un danger pour le public au Canada,
(ii) in the case of any other applicant, whether the application should be refused because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of Canada; and	(ii) soit, dans le cas de tout autre demandeur, du fait que la demande devrait être rejetée en raison de la nature et de la gravité de ses actes passés ou du danger qu'il constitue pour la sécurité du Canada;
. . .	[…]

V. Applicant's submissions

[24] The applicant states that the findings made by the PRRA officer are unreasonable. First, she claims that the finding that the risk that she faces is generalized rather than personalized is unreasonable; second, she claims that the finding that mental health is not a relevant element in the analysis of the PRRA application is erroneous.

[25] Essentially, the applicant bases her arguments on Justice Gleason's reasoning in *Portillo* v *Canada (Minister of Citizenship and Immigration)*, 2012 FC 678 at paragraphs 34 to 36 (*Portillo*), where she distinguished between a "personalized risk" and a "generalized risk" and highlighted the inherent contradiction made by the Board in finding that the existence of a certain personalized risk does not remove an individual from the generalized risk category. As stated by Justice Gleason, " . . . if an individual is subject to a personal risk to his life or risks cruel and unusual treatment or punishment, then that risk is no longer general" (*Portillo* at paragraph 36).

[26] The applicant argues that there was a personalized risk when she left Cuba in 1980 because her father was targeted by the government at that time and so were his children, by extension.

[27] The applicant also relies on *Loyo de Xicara* v *Canada (Minister of Citizenship and Immigration)*, 2013 FC 593 at paragraphs 11 to 21, which essentially reiterates the reasoning of Justice Gleason in *Portillo*.

[28] Finally, the applicant submits that she has struggled with mental health problems since losing her brother. Given that her condition is stable and she is receiving treatment in Canada, a return to Cuban soil would cause acute stress that would once again trigger the mental health problems and depression-related issues.

VI. Respondent's submissions

[29] The respondent is of the opinion that the findings made by the PRRA officer are reasonable and well founded and that there is no error warranting the intervention of the Court.

[30] The respondent submits that the applicant had the burden of demonstrating, on a balance of probabilities, that she would personally face a danger of torture, a risk to her life or a risk of cruel and unusual treatment or punishment were she removed to Cuba (*Bayavuge* v *Canada (Minister of Citizenship and Immigration)*, 2007 FC 65 at paragraph 43) and that she did not satisfy that burden.

[31] Essentially, the respondent maintains that the applicant's allegations that her father was targeted by the government and that her brother was killed when he returned to Cuba are insufficient. He also claims that submitting a letter from a doctor attesting to her psychological problems is of no assistance because, even if her return to Cuba could potentially impact her psychological condition, that is not a risk described in section 97 of the Act.

[32] Finally, the applicant's claim that the PRRA officer erred in finding that there was insufficient evidence is not itself supported by any evidence because her arguments were limited to vague and unfounded allegations.

VII. Analysis

[33] The Court must determine whether it was reasonable for the PRRA officer to find that the applicant would not face a personalized risk if she were to return to Cuba and that the evidence related to her mental health problems was not a relevant element in the analysis of the PRRA application.

[34] In my view, the PRRA officer did not commit any error that warrants the intervention of this Court.

[35] First, the applicant did not submit any evidence that she is or would be at risk in Cuba if she were to return there. The fact that she left Cuba in 1980 because her father was targeted by the authorities at that time and her brother was killed upon his return to Cuba does not prove the existence of a personalized risk. Furthermore, the fact that the applicant's sisters, daughter and grandchildren live in Cuba and that there is no evidence that they have been or are being bothered by the authorities weighs in favour of the position that the applicant is not, or is no longer, sought by reason of her father's political opinion.

[36] Concerning the risk involved because of her homosexuality, the PRRA officer was correct in finding that the applicant has not demonstrated, on a balance of probabilities, that she

would face a danger of torture, or a risk to her life, or a risk of cruel and unusual treatment or punishment if she were to return to Cuba. Not only does the fact that she had relationships with men before and after her homosexual relationship mitigate this factor, but she also did not present any evidence related to the treatment or situation of homosexuals in Cuba.

[37] Thus, the claims of a personalized risk are speculative at best given the lack of evidence to that effect.

[38] Finally, the applicant's claim that returning to Cuba would trigger her depression and worsen her mental state is not supported by any evidence in this case. It is speculation, to which the Court cannot given any weight in the assessment of section 97 of the Act.

[39] Under the circumstances and considering the evidence, the PRRA officer's finding was reasonable. The applicant did not meet her burden of proof.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed. There is no question of general importance to be certified.

"Martine St-Louis"

Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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