Federal Court  Cour fédérale

Date: 20140808

Docket: IMM-7701-13

Citation: 2014 FC 783

Ottawa, Ontario, August 8, 2014

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

ISILDA MARIA GRANDELA TEOFILIO AND BERNARDO FRANCISCO TEOFILIO FERREIRA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of a Senior Immigration Officer (the Officer), dated August 30, 2013, rejecting the applicants' pre-removal risk assessment application submitted pursuant to s 112 of the *Immigration and Refugee Protection Act* [the Act]. The applicants claim that the Officer's state protection analysis and conclusions are flawed and warrant intervention from this Court.

[2] For the reasons that follow, I shall dismiss the applicants' judicial review application.

I. Background

A. *The Applicants Arrival in Canada and the Failed Refuge Claim*

[3] The applicants are mother and son. They are from Portugal. They arrived in Canada, as temporary residents, in September 2009. Fifteen months later, in late December 2010, they claimed refugee status under s 96 and 97 of the Act, on the basis that they were victims of domestic violence on the part of the ex-husband and father and could not expect adequate state protection in Portugal.

[4] On April 18, 2012, the Refugee Protection Division of the Immigration and Refugee Board of Canada [the RPD] dismissed their claim on the ground that the evidence in areas crucial to their claim lacked reliable and credible support or, in the case of Portugal's alleged inability or unwillingness to protect them, was not clear and convincing.

[5] The RPD accepted that the applicants had been subject to forms of domestic violence but found that the applicants had failed to provide sufficient, independent and reliable evidence that they were under any prospective threats of serious harm by any persecutory agent. In particular, it was not satisfied that the applicants' allegations of attacks and attempted assaults in July and August of 2009 were credible.

[6] It also found that the applicants had failed to establish that their re-availment to Portugal at highly material time to their refugee claims, that is, in or around September 2009, was justified and reasonable in all the circumstances. It further held that the applicants had not credibly explained why it was only fifteen months after their arrival in Canada that they had filed their claims.

[7] Finally, the RPD concluded that the alleged refusal by the police to assist and protect the applicants had not been credibly established. In particular, it held that country condition documentation showed that Portugal was making serious efforts to protect its citizens from the forms of abuse set out in the applicants' claims, that the applicants themselves were able to avail of various mechanisms of protection and redress and that, in any event, the imperfection of state protection was not an adequate basis for a refugee claim.

B. *The RPD' Decision Upheld as being Reasonable*

[8] In February 2013, this Court, disposing of the applicants' judicial review application against the RPD's decision, saw no reasons to interfere with the RPD's findings (*Teofilo v The Minister of Citizenship and Immigration*, IMM-4901-12, February 21, 2013).

[9] In particular, on state protection, the Court stressed the fact that in a democracy such as Portugal, there is a significant burden on refugee claimants to establish that state protection would not be reasonably forthcoming. It also observed that the RPD had before it considerable country condition documentation that demonstrated that, while domestic violence was an ongoing problem in that country, police protection, if sought, would have been available.

C. *The Pre-removal Risk Assessment Application and the Decision under Review*

[10] On June 11, 2013, the applicants submitted to the Minister a Pre-removal risk assessment application identifying the same risks as those expressed in the refugee claims, that is, fear of serious harm from the ex-husband and father and absence of adequate state protection.

[11] This applicants' application was rejected on August 30, 2013. The Officer, acting on behalf of the Minister, first observed that no new information or supporting independent reliable evidence had been provided to support the applicants' allegations that they would be a target of serious harm or continue to be targeted or sought by the ex-husband and father in Portugal, and that adequate state protection would not be available for them in Portugal.

[12] As a result, the Officer found the applicants not to be persons in need of protection within the meaning of s 96 and 97 of the Act.

[13] After having so found, he also looked at current country conditions. He observed that Portugal is a constitutional democracy which generally upholds the human rights of its citizens through a defined system of law and order that is administered by security and police forces and enforced by an independent judiciary.

[14] He also noted that domestic violence is illegal and subject to criminal penalties in that country, but that it continues to be a serious concern due to societal attitudes which discourage victims from accessing the Portuguese justice system. In this regard, he found that the

Portuguese government was addressing the problem by encouraging complaints to be filed against alleged persecutors and by making serious efforts, through various initiatives, to provide protection for victims of domestic abuse.

D. *The Removal Order and its Subsequent Stay*

[15] On December 18, 2013, the applicants were served with a direction to report which indicated that they were to be removed from Canada on January 12, 2014.

[16] This removal order was stayed by Court order pending the outcome of the present judicial review application.

E. *The Applicants' Challenge to the Officer's Decision*

[17] The applicants do not challenge the Officer's findings that they failed to discharge the onus of providing evidence addressing the RPD's findings on the alleged risks of domestic violence and state protection.

[18] What they are challenging is that, even if he did not have to, the Officer, by looking at the current country conditions, was bound to come up with a reasonable finding, which he did not. For that reason, they claim the Officer's decision must be set aside.

II. Issue and Standard of Review

[19] The issue that stems from the applicants' attack on the impugned decision is whether the Officer committed a reviewable error in his analysis and findings regarding Portugal's current country conditions.

[20] It is well established that decisions taken on pre-removal risk assessments, including on state protection issues, attract deference as they are in large part the result of a fact-driven inquiry for which the Minister and his delegates have a specialized expertise. They are, therefore, to be reviewed on a standard of reasonableness (*Pozos Martinez v Canada (Citizenship and Immigration)*, 2010 FC 31, at para 18; *Navarro Canseco v Canada (Citizenship and Immigration)*, 2007 FC 73, at para 11 [*Navarro Canseco*]).

[21] This means that in the absence of a failure to consider relevant factors or reliance upon irrelevant ones, the weighing of the evidence lies within the purview of the Minister and his delegates and does not normally give rise to judicial review, (*Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385, at para 10 [*Raza*]).

[22] However, there is, in my view, a more fundamental question that first needs to be addressed. This question is whether it is even open to the applicants to dispute the Officer's findings on current country conditions in the absence of a challenge to his primary conclusion, that conclusion being that the applicants failed to provide evidence addressing the RPD's

findings, later confirmed by this Court, on the alleged risks of domestic violence and on the availability of police protection, should it be sought by the applicants.

[23] In other words, assuming the Officer was wrong in his assessment of an issue he no longer needed to decide, given that he had already concluded that the applicants were not persons in need within the meaning of s 96 and 97 of the Act, can his decision still be set aside without a challenge of his primary findings being initiated?

[24] I am of the view that it cannot.

III. Analysis

A. *The Absence of a Challenge to the Officer's Primary Finding is Fatal to the Applicants*

[25] The applicants' position is pretty clear. They concede that the Officer did not have to look at the country's current conditions but since he did, his conclusions had to be reasonable. The applicants contend that they were not, and that this vitiates the whole decision.

[26] The statutory authority for a pre-removal risk assessment is set out in s 112 of the Act. That provision enables the Minister - or his delegate - to determine whether a person who faces a removal order is in need of protection. That determination is conducted on the grounds set out in s 96 and 97 of the Act. These provisions are reproduced in the Annex to this decision.

[27] As the Federal Court of Appeal reminds us in *Raza*, above, the policy basis for assessing risk prior to removal is found in Canada's domestic and international commitments to the principle of non-refoulement which holds that a person should not be removed from Canada to a country where he or she would be at risk of persecution, torture, risk to life or risk of cruel and unusual treatment or punishment (*Raza*, at para 10).

[28] However, a person seeking Canada's protection bears the onus of establishing that he or she meets the conditions set out in s 96 or 97 of the Act (*Adetunji v Canada (Citizenship and Immigration)*, 2012 FC 708, at para 19; *Ferguson v Canada (Citizenship and Immigration)*, 2008 FC 1067, at para 22)

[29] When one looks at the structure of those two provisions, a person seeking Canada's protection must first establish that he or she would face one of the risks set out in these provisions if returned to his or her country of origin. If this is established, then the person must show that he or she would be unable, or, because of that risk, unwilling, to avail himself or herself of the protection of that country. Conversely, if the likelihood of such a risk is not established, then the issue of whether state protection is available to him or her becomes irrelevant.

[30] Here, although it was ready to accept that the applicants had been the subject of forms of abuse in the course of their domestic relationship with the ex-husband and father, the RPD found that the applicants have failed to establish they would face one of the risks identified at s 96 and 97 of the Act if they were to be removed to Portugal.

[31] When they appeared before the Officer following their failed refugee claim and judicial review proceeding, the applicants did not produce any new information or supporting independent and reliable evidence to corroborate the allegations that were before the RPD.

[32] This was enough for the Officer to conclude that the applicants were not persons in need of protection within the meaning of s 96 and 97 for the purposes of their pre-removal risk assessment request. More importantly, this was enough to dispose of the applicants' request. The applicants agree with that and they do not challenge the Officer's finding in this regard.

[33] The fact that the Officer then went on to look at current country conditions, presumably for the sake of completeness, does not, cannot and should not, alter the validity of his primary finding which, again, was dispositive of the applicants' request.

[34] In such context, the current country conditions analysis can only be characterised as an obiter or subsidiary finding with respect to an issue that had already been decided. I cannot see how, even assuming the Officer was wrong in his analysis, this could impact on the Officer's primary finding and on the decision as a whole.

[35] In *The Minister of Citizenship and Immigration v Flores Carrillo*, 2008 FCA 94, [*Carrillo*], the Federal Court of Appeal deplored the fact that the review judge had not address the primary finding of the RPD which, if he had done so, could have ended the litigation and prevented an appeal on a subsidiary ground for dismissing the refugee claim (*Carrillo*, at paras 14-15) and *Ortega v Canada (Citizenship and Immigration)*, 2012 FC 182 at para 26).

[36] Here, the applicants have not challenged the Officer's main reason for dismissing their pre-removal risk assessment request. Simply put, they have failed to establish that they are at risk. This is all it takes, in my view, to dismiss the present judicial review application.

[37] In any event, I am of the view that the applicants have failed to establish that the Officer's findings on Portugal's current condition are unreasonable.

B. *The Officer's Subsidiary Finding On Current Country Conditions Is, In Any Event, Reasonable*

[38] At this stage, it is worth repeating that the applicants are failed refugee claimants and that they unsuccessfully challenged the RPD's findings, including those related to state protection and country conditions. As Madam Justice Snider stated in dismissing the applicants' challenge to the RPD decision, it is well settled that in a democratic state there is a significant burden on refugee claimants to establish that state protection would not be reasonably forthcoming. In other words, the more democratic the state's institutions are, the more the claimant must have done to exhaust all available avenues. (*Navarro Canseco*, above, at para 15)

[39] This rule stems from the presumption of state protection which, as Mr. Justice Laforest stated in *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, "serves to reinforce the underlying rationale of international protection as a surrogate, coming into play where no alternative remains to the refugee claimant" (*Ward*, at para 51; *Carrillo*, above, at para 25).

[40] A refugee claimant coming from a democratic country, like Portugal, will therefore have "a heavy burden when attempting to show that he should not have been required to exhaust all of the resources available to him domestically before claiming refugee status" (*Carrillo*, above, at para 26). In practical terms, this means that the person seeking to rebut the presumption of state protection must adduce "relevant, reliable and convincing evidence which satisfies the trier of fact on balance of probabilities that the state protection is inadequate" (*Carrillo*, above, at para 30).

[41] When failed refugee claimants, such as the applicants, reach the stage of a pre-removal-risk assessment, they are not in the position of appellants of the RPD's decision. In *Raza*, above, the Federal Court of Appeal ruled that a pre-removal risk assessment by a failed refugee claimant is not an appeal or reconsideration of the decision of the RPD to reject the claim for refugee protection (*Raza*, at para 12).

[42] Although such an assessment may require consideration of some or all of the same factual and legal issues as a claim for refugee protection, the Act mitigates, at s 113, the obvious risk of wasteful and potentially abusive relitigation by limiting the evidence that may be presented to a Minister's delegate. This limitation means, as Madam Justice Sharlow stated in *Raza*, above, "that a negative refugee determination by the RPD must be respected by the PPRA officer unless there is <u>new evidence of facts that might have affected the outcome of the RPD hearing if this evidence had been presented to the RPD</u>" (*Raza*, at paras 12-13) [my emphasis].

[43] This "new evidence" can only be evidence that arose after the rejection of the refugee claim or that was not reasonably available at that time, or that the refugee claimant could not have been expected in the circumstances to have presented (*Yousef v Canada (Minister of Citizenship and Immigration)*, 2006 FC 864, 296 FTR 182, at para 20).

[44] As previously stated, Mme Justice Snider, in dismissing the applicants' judicial review application against the RPD decision, ruled that it was reasonable for the RPD, based on the considerable country condition documentation that was before it, to find that, while domestic violence was an ongoing problem in Portugal, police protection, if sought by the applicants, would have been available.

[45] The applicants concede that they did not provide any new evidence in support of their allegations that state protection would not be available to them if they were to return to Portugal. This, alone, would be sufficient to dismiss their challenge to the Officer's finding regarding current country conditions to the extent it relates to state protection available to victims of domestic violence.

[46] But there is more. The applicants' submissions in this regard cannot be upheld.

[47] They claim that it was not enough for the Officer to state that the Portugal government was making "serious efforts" to provide protection to victims of domestic violence. They submit he rather had to be satisfied that these efforts had actually translated into meaningful protection

and that in order to be meaningful, protection had to be provided by the police, not by non-law enforcement government institutions.

[48] However, the Officer's decision has to be read as a whole (*Pararajasingham v Canada (Citizenship and Immigration)*, 2012 FC 1416, para 27, *Sinnasamy v Canada (Citizenship and Immigration*), 2008 FC 67, at para 31). In the absence of new evidence, the analysis on country conditions cannot be divorced from the primary finding that the applicants have failed to address the previous RPD's conclusion on the availability of adequate state protection in Portugal for people in their particular situation.

[49] The applicants rely heavily on this Court's decision in *Henguva v Canada (Citizenship and Immigration)*, 2013 FC 912, to support their claim that the serious efforts' test is not the proper test in a state protection analysis However, that decision also reminds us that reference to these words in a state protection analysis will not automatically result in the analysis being set aside and that regard must be had to the decision as a whole in determining whether the proper test was applied (*Henguva*, at para 6) [my emphasis].

[50] Here, there is no doubt that taken as a whole, the state protection analysis was done in accordance with the proper test, considering the role of a Minister' delegate when seized with a pre-removal risk assessment request presented by a failed refugee claimant.

[51] Also, as the Respondent points out, the country conditions' documentation on the pre-removal risk assessment application's record, and therefore available to the Officer, was less

than 20 pages. It was even more limited with respect to the specific topic of domestic violence. However, the onus was not on the Officer, but on the applicants to provide new evidence on the unavailability of state protection for victims of domestic violence. They did not.

[52] Accepting the applicants' position would be equivalent to ignoring this Court's dismissal of their judicial review application against the RPD's decision. In its decision, the Court observed that the RPD had considered "considerable country condition documentation" and found that it had reasonably concluded from it that while domestic violence was an ongoing problem in Portugal, police protection, if sought by the applicants, would have been available.

[53] Bearing in mind the previous RPD's finding, the upholding of these findings by this Court, the presumption of state protection in a democratic country such as Portugal that the applicants had the onus of rebutting, and the lack of any efforts on their part to show the Officer that the situation in Portugal had deteriorated over a span of less than 2 years to a point where state protection in that country is now no longer available, the judicial review of the Officer's decision calls for even greater deference.

[54] For all these reasons, the present judicial review application is dismissed.

[55] Neither party has proposed a question of general importance. None will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The present application for judicial review is dismissed;

2. No question is certified.

"René LeBlanc"

Judge

ANNEX

***Immigration and Refugee Protection Act*, SC 2001, c 27**

Sections 96 and 97

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

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, their country of former habitual residence, would subject them personally

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

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

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

(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,

***Loi sur l'immigration et la protection des réfugiés*, LC 2001, ch 27)**

Articles 96 et 97

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

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

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

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

(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

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

(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.

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

(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.

FEDERAL COURT

SOLICITORS OF RECORD

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