Federal Court Cour fédérale

Date: 20160912

Docket: IMM-504-16

Citation: 2016 FC 1033

Ottawa, Ontario, September 12, 2016

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

ALY RIZA WHUDNE, MASSOOME KNOWEI
and MOHAMMAD REZA WHUDNE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review of a senior immigration officer's decision, dated December 18, 2015, rejecting the pre-removal risk assessment [PRRA] application of the three Applicants. The Applicants state that since they arrived in Canada in 2004, they converted to

Christianity and that as such, they would be at risk of persecution, should they be sent back to Iran.

[2] The main issue raised by this application is whether the PRRA officer found the Applicants to lack credibility or whether he simply gave the evidence adduced little probative value. This question has an impact on whether a hearing should have been held by the PRRA officer.

II. Facts

[3] Mr. Aly Riza Whudne, and his wife Ms. Massoome Knowei, are citizens of Iran. Their son, Mohammad Reza Whudne, is a citizen of the United States.

[4] The Applicants entered Canada on March 28, 2004, and made refugee claims shortly thereafter. The Refugee Protection Division [RPD] found the Applicants to be refugees in 2004. However, some 10 years later, the Minister of Citizenship and Immigration [the Minister] applied for those refugee claims to be vacated on grounds of misrepresentation. The RPD allowed the Minister's application, deeming that the Applicants' refugee claims should be rejected under subsection 109(3) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The Applicants' application for leave and for judicial review of that decision was denied on March 4, 2015 (file IMM-7617-14).

[5] In support of their PRRA applications, the Applicants submitted a letter from Pastor Andrew Dillon of the First Church of Pentecost in Chilliwack, British Columbia. Pastor Dillon

wrote that in 2013, the Applicants moved in next door to his child's home, and they became friends. Subsequently, the Applicants became involved with the Pentecostal Church, and Mr. Whudne was eventually baptized into the Christian faith. Pastor Dillon also stated that the Applicants regularly attended the Pentecostal Church assembly.

[6] In addition, the Applicants submitted two affidavits – one from Mr. Whudne and one from Ms. Knowei – stating that they had converted from Islam to Christianity while in Canada and that a return to Iran would place them at risk of persecution, since the Iranian authorities would view them as apostates. Mr. Whudne explains that his first exposure to a Christian religious service was when he went with his wife to the Jehovah's Witness Kingdom Hall in Coquitlam, BC, in approximately 2009. He states that he decided not to join that faith due to the strict rules it enforces, but that he respects his wife's freedom to choose that faith. He adds that he began attending the First Church of Pentecost in 2014, and became a regular attendee. On March 21, 2015, he was baptized.

[7] Ms. Knowei states that in 2009, she began attending the weekly Persian services on Saturday afternoons at the Jehovah's Witness Kingdom Hall. She also began weekly bible study classes on Fridays. She has not yet been baptized into the Jehovah's Witness faith, but is a true believer.

III. Impugned Decision

[8] On December 18, 2015, a senior immigration officer rejected the Applicants' PRRA application. The officer began by noting that a PRRA application by a failed refugee claimant is

not an appeal or reconsideration of the RPD's decision to reject the refugee claim (*Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 at para 12). A negative refugee determination by the RPD must be respected by a PRRA officer unless there is new evidence of facts that might have affected the outcome of the RPD hearing if that evidence had been before it.

[9] With respect to the letter from Pastor Dillon, the officer notes the absence of any documentary evidence, such as a baptismal certificate, to substantiate Mr. Whudne's alleged baptism. The officer finds that the statement in Pastor Dillon's letter that the two Applicants regularly attended the Pentecostal Church directly contradicts statements in Ms. Knowei's affidavit that she adheres to the Jehovah's Witness faith and regularly attends a Jehovah's Witness Kingdom Hall. The officer notes that none of the above facts were corroborated by objective, third party evidence.

[10] The officer found that the two affidavits were not probative and accorded them little weight, because they both contained unexplained contradictions and omissions. Mr. Whudne's affidavit, attesting to his baptism, was not supported by any objective documentary evidence that would be reasonable to expect under the circumstances. The officer found that Ms. Knowei's affidavit, when considered alongside Pastor Dillon's letter, suggested that she was "participating in concurrent religious services and/or activities with multiple denominations" which was contradictory. The officer concluded that the Applicants had produced insufficient persuasive evidence to discharge their legal burden.

[11] Finally, regarding the Applicants' submission of excerpts from the National Documentation Package on apostasy in Iran, the officer found they were generalized in nature and did not establish a direct link to the Applicants' personal circumstances.

IV. Issues and standard of review

[12] This application for judicial review raises the following issues:

A. *Did the PRRA officer err in basing his or her decision on veiled credibility findings without giving the Applicants a chance to respond in an oral hearing?*

B. *Was the PRRA officer's assessment of the evidence reasonable?*

[13] As, in my view, the first question should be answered in the affirmative, it will not be necessary to address the second question (See e.g. *Karimi v Canada (Citizenship and Immigration)*, 2007 FC 1010 at paras 2-3).

[14] The Applicants submit that this question is one of procedural fairness and thus, the applicable standard of review is correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Chekroun v Canada (Citizenship and Immigration)*, 2013 FC 738 at para 37; *Montesinos Hidalgo v Canada (Citizenship and Immigration)*, 2011 FC 1334 at para 11). They acknowledge, however, that in some cases this Court has found that the question of whether to convene an oral hearing should be determined according to the reasonableness standard (*Lopez Puerta v Canada (Citizenship and Immigration)*, 2010 FC 464 at para 10). They argue that the officer's treatment of this issue fails on both standards, but in the event the Court

does not agree with them, and the standard of review becomes determinative, they propose certifying the following question:

> Whereas certain decisions of the Court have indicated that the issue of whether an oral hearing is required in the course of an application for Pre-Removal Risk Assessment is a question of procedural fairness that should be reviewed pursuant to the standard of correctness, while certain other decisions of the Court have indicated that this issue is a question of mixed fact and law and have applied the deferential standard of reasonableness, what is the applicable standard of review for this issue?

[15] The Respondent argues that a PRRA officer's discretionary decision as to whether to hold a hearing is a question of mixed fact and law and thus, the applicable standard of review is reasonableness (*Oliveros Rubiano v Canada (Citizenship and Immigration)*, 2011 FC 106 at para 28; *Matano v Canada (Citizenship and Immigration)*, 2010 FC 1290 at paras 10-12; *Bicuku v Canada (Citizenship and Immigration)*, 2014 FC 339 at paras 16-17).

[16] The Respondent opposes certification of the proposed question and argues that the dispositive legal issue in this case is whether the PRRA officer made a credibility finding or not. He adds that this issue is fact driven and based on the tribunal record before the Court.

[17] I agree with the Respondent that the main issue in this case relates to whether the officer made a credibility finding. However, for the reasons given hereinafter, I am also of the view that the PRRA officer's treatment of this issue fails on both standards.

V. Analysis

> *Did the PRRA officer err in basing his or her decision on veiled credibility findings without giving the Applicants a chance to respond in an oral hearing?*

[18] I am of the view that all three factors in section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, which are required for an oral hearing as per subsection 113(b) of the IRPA, are met here. With respect to factor (a), the Applicants filed new evidence regarding their religious beliefs which would cause them to face persecution in Iran. This risk associated with apostasy in Iran is substantiated by objective evidence. As for factor (b), the evidence of the Applicants' religious conversion is central to their case, and if accepted, would justify allowing the application for protection, as per factor (c).

[19] The Applicants requested an oral hearing in their PRRA application, and the officer did not provide any explanation for his or her decision not to convene an oral hearing. This failure to deal with a central issue is in and of itself an error, aside from the issue of procedural fairness (*Chekroun*, above at para 72).

[20] In those circumstances, the officer erred by making credibility findings without calling a hearing. An applicant's testimony is presumed to be true unless there is a valid reason to doubt its truthfulness (*Chekroun*, above at para 65, citing *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 (FCA)). However, the officer essentially found Ms. Knowei to lack credibility, stating that Pastor Dillon's letter attesting to her regular attendance at the Pentecostal Church "directly contradicts" her affidavit alleging that she participates in Jehovah's Witness services. While the officer couched this finding in terms of the weight to be given to the evidence, "the Court must look beyond the express wording of the officer's decision to determine whether, in fact, the applicant's credibility was in issue" (*Ferguson v Canada (Citizenship and Immigration)*, 2008 FC 1067 at para 16). Findings based

on contradictions in sworn evidence should be defined as credibility issues (*Karimi*, above at para 19).

[21] In this case, the Applicants provided their evidence by way of sworn affidavits, which carry more weight than unsworn statements (*Ferguson,* above at para 32; *Ibrahim v Canada (Citizenship and Immigration)*, 2014 FC 837 at para 20; *II v Canada (Citizenship and Immigration)*, 2009 FC 892 at para 21). The Applicants also provided corroborative evidence by way of Pastor Dillon's letter. It is open to officers to require corroborative evidence to satisfy the evidentiary burden of proof, especially when the fact is central to the application (*II*, above at para 20; *Ferguson*, above at para 32). A partner's sworn statement can count as corroborative evidence (*Ferguson*, above at para 32), and thus to the extent that each Applicant's affidavit refers to the other, I find that the affidavits can also be counted as corroborative evidence.

[22] Nevertheless, the officer proceeded to largely dismiss the Applicants' affidavits and the Pastor's letter. The officer found that Pastor Dillon's letter directly contradicted Ms. Knowei's affidavit with respect to her attendance at Jehovah's Witness services. In making this finding, the officer was implicitly disbelieving her. The officer also found that Mr. Whudne's statement that he had been baptized should have been corroborated by documentary evidence, such as a baptism certificate. However, the officer does not explain why Pastor Dillon's letter cannot constitute corroborative documentary evidence of the baptism. I do not see how these findings could be based on anything other than plain disbelief of the Applicants and of Pastor Dillon.

[23] With respect to Ms. Knowei's Jehovah's Witness faith, the officer never discussed the corroboration offered by Mr. Whudne's affidavit. At paragraph 5 he states that he had decided not to follow the Jehovah's Witness faith, but that he fully respected his wife's choice to practice that faith. The officer also did not consider the possibility that Ms. Knowei could attend both Jehovah's Witness services on Saturdays (as stated in her affidavit at paragraph 11) as well as services at the Pentecostal Church on Sundays. This only further convinces me that the officer disbelieved both Applicants and thus, that "credibility was at the forefront of the decision" (*Karimi*, above at para 19), despite the reasons being couched in terms of insufficiency of evidence. These issues should have been canvassed in an oral hearing; therefore the officer's failure to hold a hearing was unreasonable.

VI. Conclusion

[24] This application for judicial review is allowed. Since the standard of review is not determinative of this case, the question proposed by the Applicants will not be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted;
2. The decision rendered by a senior immigration officer of Citizenship and Immigration Canada, dated December 18, 2015, rejecting the Applicants' pre-removal risk assessment application is set aside;
3. The file is remitted back to a different immigration officer for a redetermination;
4. No question of general importance is certified;
5. No costs are granted.

"Jocelyne Gagné"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-504-16
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