Federal Court  Cour fédérale

Date: 20170717

Docket: IMM-4055-16

Citation: 2017 FC 687

Ottawa, Ontario, July 17, 2017

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

AMANDA PAUL

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Amanda Paul, is a 33 year old citizen of Saint Lucia who arrived in Canada as a permanent resident in 2003 after having been sponsored by her mother. At the time of her arrival, she had a five month old son living in Saint Lucia, although she did not disclose this information in her permanent residence application. In October 2010, she was found inadmissible for misrepresentation for not disclosing that she had a child. A removal order was issued against the Applicant in November 2013, and that order was upheld by the Immigration

Appeal Division in October 2015. In a decision dated August 16, 2016, a Senior Immigration Officer rejected the Applicant's application for a pre-removal risk assessment [PRRA] because she failed to rebut the presumption of state protection. The Applicant has now applied under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [*IRPA*] for judicial review of the Officer's decision.

I. Background

[2] The Applicant grew up in Saint Lucia and, as a child, was subjected to physical and sexual abuse by her stepmother's nephews. After the Applicant's father discovered the abuse, he blamed the Applicant, assaulted her, and sent her to live with her grandmother. When she was approximately 14 years old, the Applicant's mother who was living in Canada called her and told her she wanted to sponsor her immigration to Canada. At the age of 17, while still in Saint Lucia, the Applicant began a relationship with a man named Frantz who, initially, was kind and caring towards the Applicant and, eventually, the couple moved in together. The Applicant says Frantz started to become possessive, controlling, and physically and emotionally violent. Although the Applicant asked her father for help, he refused to intervene and told her not to contact the police because they would not help and going to the police would only bring shame upon their family. The Applicant became pregnant with Frantz's baby and had her first son in December 2002.

[3] In May 2003, the sponsorship application was completed and the Applicant and her stepbrother received their permanent resident visas. The Applicant told Frantz she was going to Canada to visit her mother and never told him about the sponsorship application. The Applicant left her son behind in Saint Lucia and, upon arrival in Canada, never disclosed that she had a son.

While in Canada, Frantz threatened the Applicant by phone and demanded that she send him and their son money. Frantz and her son travelled to Canada and moved in with the Applicant who says, initially, Frantz was kind and considerate but eventually he became physically and emotionally abusive. The Applicant did not call the police because she feared Frantz and her son would be deported.

[4] In 2005, the Applicant became pregnant with her second child with Frantz. She later separated from Frantz and he returned to Saint Lucia. The Applicant began a relationship with another man, with whom she had her third child. The Applicant asked her father whether he could support her and her three children if she returned to Saint Lucia, but her father said he could not accommodate her and the three children and he called the Applicant a disgrace. He also informed the Applicant that Frantz had been appearing at his house and making threats against her.

II. The Officer's Decision

[5] On December 31, 2015, the Applicant submitted her PRRA application and her counsel submitted additional written submissions dated March 25, 2016. The Applicant outlined her personal history and circumstances, submitting to the Officer that she met the definition of a Convention refugee and a person in need of protection under the *IRPA*. She explained that the violence and discrimination she faces in Saint Lucia, based on her gender, constitutes persecution within the definition of section 96 of the *IRPA* and her subjective fear is based on her uncontested evidence of the trauma and violence she faced while living in Saint Lucia. The Applicant stated to the Officer that the objective evidence provided an objective basis of risk for

someone with her profile because the country conditions documentation recognizes the pervasive problem of gender-based violence in Saint Lucia and the threat it poses to a survivor of traumatic, long-term domestic and sexual violence.

[6] The Applicant also stated to the Officer that she was a person in need of protection under subsection 97(1) of the *IRPA* because her return to Saint Lucia would expose her to substantial danger and a risk of cruel and unusual treatment or punishment and death at the hands of her male family members and her ex-partner, Frantz. The Applicant submitted personal and country conditions documentation to establish the prior abuse and the likelihood of it recurring, and argued that Saint Lucia cannot provide her adequate state protection. The Applicant cited documentation to show state protection is not adequate for victims of gender-based violence, arguing that Saint Lucia's legislative efforts to curb domestic violence would not provide her with operationally adequate protection against her past abusers. The Applicant further submitted that there is no internal flight alternative in Saint Lucia because her past-abusers can easily locate her on the small island of approximately 174,000 people. The Applicant stated that her claim is credible; she requested an oral hearing if the Officer determined otherwise.

[7] In a decision dated August 16, 2016, the Officer rejected the Applicant's PRRA application, determining that the Applicant had not established she would face persecution in Saint Lucia or face a risk of death or a serious violation of her fundamental human rights upon return to Saint Lucia. The Officer reviewed the Applicant's submissions and generally accepted the Applicant's account of her personal circumstances including the abuse she had suffered in the

past. The Officer found, however, that the determinative issue was the Applicant's failure to rebut the presumption of state protection. The Officer stated:

> There is a presumption that, except in situations where the state is in complete breakdown, the state is capable of protecting its citizens. To rebut the presumption of state protection, the Applicant must provide "clear and convincing" evidence of the state's inability to protect its citizens adequately. Doubting the effectiveness of the protection offered by the state when one has not really tested it does not rebut the existence of a presumption of state protection.

[8] The Officer noted that the Applicant had suffered years of abuse from her ex-partner, Frantz, but had never contacted the police due to her belief based on her father's and friends' advice that the police could not help her. The Officer further noted that, while the Applicant claimed she fears her stepmother's nephews who abused her when she was a child, she did not explain why she still fears them today. The Officer acknowledged that "domestic violence is a very serious problem in St. Lucia," but stated that the Applicant was required to "show more than a subjective reluctance to engage the state."

[9] In the Officer's view, "there are mechanisms in place in St. Lucia to protect women from domestic or gender related violence." The Officer relied on the 2015 U.S. Department of State's Country Reports on Human Rights Practices for Saint Lucia [DOS Report] as well as documentation from the Immigration and Refugee Board, noting Saint Lucia's legislative measures to enable victims of domestic abuse to seek protection orders and the introduction of "marital rape" and workplace sexual harassment laws. The Officer referenced the difficulties in enforcing the legislation. The Officer also referenced the fact that: "Police and courts enforced laws to protect women against rape, but many victims were reluctant to report cases or press

charges due to fear of stigma, retribution, or further violence." The Officer further cited from the DOS Report that stated that, even though police were willing to arrest offenders, the government prosecuted crimes of violence against women only when the victim pressed charges, and that victims were often reluctant to press charges because of their financial dependence on an abuser. The Officer also referenced the efforts of both governmental and non-governmental organizations to assist victims of domestic abuse. The Officer finally reviewed Saint Lucia's other protective efforts, such as its Family Court's ability to issue protection orders and the police's vulnerable persons units that handle cases of domestic violence against women and children.

[10] The Officer concluded that:

> According to the objective documentary evidence, while sexual and domestic abuse is a serious problem in St. Lucia the state is taking serious measures to address this problem. There are laws in place and the police were generally not reluctant to arrest perpetrators of domestic and sexual abuse.
>
> Should the Applicant return to St. Lucia and should she experience threats or possible violence from Frantz George, any family member and/or the general public, I find that the Applicant can reasonably obtain police assistance. While the Applicant was young and fearful when she was abused as child and while she was with Frantz George, today she is a 33 year old woman and it would be her choice to report incidents of threats and/or abuse and press charges if a situation of mistreatment against her were to occur in St. Lucia.

III. Issues

[11] This application raises the following issues:

1. What is the appropriate standard of review?

2. Did the Officer use the wrong test for state protection?

3. Was the Officer's assessment of state protection unreasonable?

4. Did the Officer fail to consider relevant evidence?

IV. Analysis

A. *Standard of Review*

[12] It is well established that, absent any question of procedural fairness, the standard of review by which to assess a PRRA officer's decision is that of reasonableness (see: *Khatibi v Canada (Citizenship and Immigration)*, 2016 FC 1147 at para 11, 273 ACWS (3d) 156; *Shilongo v Canada (Citizenship and Immigration)*, 2015 FC 86 at para 21, 474 FTR 121; *Jainul Shaikh v Canada (Citizenship and Immigration)*, 2012 FC 1318 at para 16, [2012] FCJ No 1429).

[13] Under the reasonableness standard, the Court is tasked with reviewing a decision for "the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with 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 at para 47, [2008] 1 SCR 190. Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes": *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 S.C.R. 708 [*Newfoundland Nurses*].

[14] This Court's jurisprudence has established that a PRRA officer's identification, articulation, or understanding of the test for state protection is reviewed on the correctness standard, whereas the application of the test is reviewed on the reasonableness standard (*Dawidowicz v Canada (Citizenship and Immigration)*, 2014 FC 115 at para 23, 237 ACWS (3d) 194 [*Dawidowicz*]; *Ruszo v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1004 at para 22, 440 FTR 106; *Kristofova v Canada (Citizenship and Immigration)*, 2016 FC 415 at para 30, [2016] FCJ No 433; *Castro v Canada (Citizenship and Immigration)*, 2017 FC 13, [2017] FCJ No 9). As the Court noted in *Dawidowicz*, "where applicants allege that a board misunderstood the test, the standard is correctness and no deference is owed to the board's understanding of the relevant tests. However, where applicants challenge how the tests were applied to the facts, those are questions of mixed law and fact and the standard is reasonableness" (*Dawidowicz* at para 23).

B. *Did the Officer use the wrong test for state protection?*

[15] The Applicant maintains that, although the Officer initially articulated the correct test for state protection, the Officer focused on Saint Lucia's efforts to provide protection and did not assess or address the actual effectiveness or operational adequacy of the protection available to address domestic violence. According to the Applicant, the test for state protection is whether the state can actually provide adequate protection for its citizens, not whether it is making serious efforts to provide protection, and in this case the Officer's use of the wrong legal test can be inferred from the nature of the information cited in the course of the state protection analysis. The Applicant notes several instances where the Officer highlighted efforts and measures by the Saint Lucian government to address violence against women, and argues that the Officer failed

to consider and assess whether these measures translate into adequate protection for victims of domestic and gender-based violence.

[16] The Respondent says the Officer correctly stated the test for state protection and the Officer's application of the test was reasonable. According to the Respondent, it is not a categorical error for an officer to reference a state's efforts, such as legislation, since the existence of such legislation can be a precondition for adequate state protection. The Respondent states that the Officer consulted well-known sources such as the DOS Report to assess both the legislative and actual measures, noting that the evidence cited by the Officer shows that the police and courts enforce laws to protect women against rape and that the police operate a vulnerable persons unit to handle cases involving violence against women and children.

[17] I agree with the Applicant that the test for state protection requires an assessment of the adequacy of the protection at an operational level, not whether the state is making efforts to protect its citizens. In *Flores Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at para 38, [2008] 4 FCR 636, the Federal Court of Appeal stated that: "As for the quality of the evidence required to rebut the presumption of state protection, the presumption is rebutted by clear and convincing evidence that the state protection is inadequate or non-existent." Several decisions of this Court have held that a state's efforts to protect its citizens do not constitute adequate protection. For example, in *Kumati v Canada (Citizenship and Immigration)*, 2012 FC 1519 at para 27, [2012] FCJ No 1637, the Court stated that: "'adequate protection' and 'serious efforts at protection' are not the same thing. The former is concerned with whether the

actual outcome of protection exists in a given country, while the latter merely indicates whether the state has taken steps to provide that protection" (see also *Dawidowicz* at para 30).

[18] In this case, the Officer identified the correct test for state protection when stating that the Applicant had to provide evidence of the "state's inability to protect its citizens adequately." The Officer also cited country condition documents on how the state's efforts are operationalized in Saint Lucia, notably the DOS Report which outlines the legislative efforts to criminalize rape, states that the police and courts enforce these laws, and highlights the reluctance of victims to report cases. The Officer clearly referenced the state's efforts in this regard as a precursor to how the state operationalizes the efforts. The decision shows that the Officer identified the correct test for state protection.

C. *Was the Officer's assessment of state protection unreasonable?*

[19] The Applicant contends that she was not required to provide evidence of her personal efforts to seek out state protection, noting that she left Saint Lucia in 2003. According to the Applicant, she was entitled to rebut the presumption that adequate state protection exists in Saint Lucia by submitting evidence of the experiences of similarly situated individuals. The Applicant says she was not required to imperil herself for the sole purpose of establishing a lack of protection. The Applicant also says the Officer erred by focusing on services provided by non-state agencies in considering whether there was adequate state protection, pointing to the Officer's references to how Saint Lucia's Department of Gender Relations and various non-governmental organizations operate support centres for women and offer counselling and a helpline. The Applicant directs the Court's attention to *Flores Zepeda v Canada (Citizenship and*

Immigration), 2008 FC 491 at para 25, [2009] 1 FCR 237, where Justice Tremblay-Lamer stated that "the police force is the only institution mandated with the protection of a nation's citizens and in possession of enforcement powers commensurate with this mandate."

[20] The Respondent says the Applicant failed to provide sufficient evidence to rebut the presumption in favour of state protection. The Applicant did not, according to the Respondent, provide any direct evidence of her efforts to seek protection and only provided mixed evidence as to the country conditions. In the Respondent's view, it was reasonable for the Officer in this case to apply the presumption of state protection.

[21] I agree with the Applicant that a PRRA officer cannot rely on the services provided by non-governmental agencies when assessing state protection. In *Aurelien v Canada (Citizenship and Immigration)*, 2013 FC 707, [2013] FCJ No 752, the Court found:

> [15] The Officer erred in relying on non-government agencies such as the Saint Lucia Crisis Centre and the National Organization of Women, which offer advocacy, referrals and shelter. These organizations do not provide protection.
>
> [16] This Court has repeatedly emphasized that the police force is presumed to be the main institution responsible for providing protection and in possession of the requisite enforcement powers. Shelters, counsellors and hotlines may be of assistance, but they have neither the mandate nor the capacity to provide protection: *Katinszki v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1326, para 15; *Corneau v Canada (Minister of Citizenship and Immigration)*, 2011 FC 722, para 10; *Zepeda v Canada (Minister of Citizenship and Immigration)*, 2008 FC 491, paras 24-25.
>
> [17] It is exceedingly difficult, from an evidentiary standpoint, to determine whether a non-governmental organization can be a surrogate for the state to provide protection. This is one of the policy considerations that underlies the consistent requirement in the jurisprudence that the police provide protection. Agencies

> have diffuse mandates and their effectiveness is hard to measure. This case amply demonstrates the rationale that underlies the jurisprudence.

[22] The Applicant, however, dissects and parses the Officer's reasons to bolster her argument that the Officer unreasonably relied upon services offered by non-state actors to assess the adequacy of state protection. The Officer's decision "should be approached as an organic whole, without a line-by-line treasure hunt for error" (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at para 54, [2013] 2 SCR 458). The Officer cited an entire passage from the DOS Report which refers to the efforts of non-governmental organizations that assist victims of domestic abuse. This passage is contained in the midst of information about the police's willingness to arrest offenders and how victims are often reluctant to press charges. The Officer also cited evidence that the state provides similar services to victims. The Officer did not conclude that the Applicant's ability to access services offered by non-state organizations is relevant to her ability to seek adequate state protection. Although the Applicant did not provide first-hand evidence about her inability to access state protection, she was nonetheless required to provide some evidence as to the inadequacy of state protection. It was reasonable for the Officer to determine that the Applicant could not simply rely on the fact that her father and friends had advised her against contacting the police.

D. *Did the Officer fail to consider relevant evidence?*

[23] The Applicant says the Officer ignored relevant and contradictory evidence about the availability of state protection, The Applicant points to the fact that the Officer omitted passages from the DOS Report which state that police lack resources to respond to calls in a timely

manner and that the law does not criminalize spousal rape. The Applicant further notes that the Officer failed to consider the affidavit of Flavia Cherry, the Chairperson of the Caribbean Association of Feminist Research and Action. According to the Applicant, this affidavit directly addresses the situation faced by victims of domestic abuse in Saint Lucia and the lack of police and state protection, and it directly contradicts the Officer's finding of adequate state protection in Saint Lucia. The Applicant refers to decisions of this Court in *James v Canada (Citizenship and Immigration)*, 2015 FC 1279 at paras 18, [2015] FCJ No 1344, where the Court found that: "Given that the affidavit of Ms. Cherry appears to contradict the [RPD] member's conclusions in a very meaningful way, it was necessary to explain away that evidence." And in *Antoine v Canada (Citizenship and Immigration)*, 2015 FC 795 at para 17, 258 ACWS (3d) 153, where the Court determined that:

> Many of the Officer's findings were directly contradicted by Ms. Cherry's conclusions, yet the Officer's report did not mention the affidavit at all. An immigration officer commits a reviewable error when she engages in a selective analysis of the documentary evidence and ignores contradictory evidence without providing a reasonable explanation. [citations omitted]

[24] The Respondent says the Officer was not categorically obliged to refer to the 2012 affidavit of Ms. Flavia Cherry. According to the Respondent, the Officer acknowledged that domestic violence is a serious problem in Saint Lucia and the Officer was not obligated to expressly name and itemize all of the evidence. In addition, the Respondent says the Officer obviously and reasonably preferred to rely on more recent documents, such as the DOS Report and the Immigration and Refugee Board documents from 2015, rather than Ms. Cherry's affidavit from 2012.

[25] It is, of course, well-established that administrative decision-makers, including PRRA officers, do not have to reference every piece of evidence in their decisions. In *Newfoundland Nurses*, Justice Abella stated that a "decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion." Similarly, in *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 at para 16, 157 FTR 35 [*Cepeda-Gutierrez*], Justice Evans stated that administrative agencies are not "required to refer to every piece of evidence that they received that is contrary to their finding, and to explain how they dealt with it" as it will often be sufficient simply to make a statement "in its reasons for decision that, in making its findings, it considered all the evidence before it."

[26] However, the deference usually afforded to an administrative decision-maker dissipates and lapses when a key piece of evidence or a significant and material fact is not adequately addressed. If the evidence is highly relevant or appears to contradict other findings of facts, a reviewing court may be willing to infer that the administrative decision-maker ignored such evidence and made an "erroneous finding of fact 'without regard to the evidence'" (see: *Cepeda-Gutierrez* at para 15). A reviewing court should not supplement a PRRA officer's reasons when they fail to address an important or significant piece of evidence. By implication, a PRRA officer's reasons cannot satisfy the requirements of justification, transparency, and intelligibility, if they fail in this regard.

[27] Although the Officer in this case stated that "I reviewed the Applicant's objective documentary evidence and I have also conducted my own research," the Officer never referenced

Ms. Cherry's affidavit or the information it provided. In my view, the Officer should have referenced Ms. Cherry's affidavit because it was highly relevant and contradicted the findings about state protection. The Applicant included this affidavit in her PRRA application, and it directly addressed the adequacy of state protection for her in Saint Lucia. The information provided by Ms. Cherry's affidavit directly contradicted the other documentary evidence relied upon and cited by the Officer. At the very least, the Officer should have explained why he or she did not accept the evidence contained in Ms. Cherry's affidavit and what, if any weight, it warranted.

V. Conclusion

[28] The Applicant's application for judicial review is allowed. The Officer's decision is not reasonable and, therefore, it is set aside. The matter is returned for reconsideration by a different immigration officer in accordance with these reasons for judgment. No question of general importance is certified.

JUDGMENT in IMM-4055-16

THIS COURT'S JUDGMENT is that: the application for judicial review is allowed; the matter is returned for redetermination by a different immigration officer in accordance with the reasons for this judgment; and no question of general importance is certified.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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