Federal Court Cour fédérale

Date: 20190102

Docket: IMM-1960-18

Citation: 2019 FC 1

Toronto, Ontario, January 2, 2019

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

LILIANA FERNANDA VALENCIA MARTINEZ
JAIME ALEJANDRO FERNANDEZ VALENCIA
ISABELLA FERNANDEZ VALENCIA

Applicants

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] A pre-removal risk assessment, commonly referred to as a PRRA, is the last formal risk assessment given to qualifying individuals before they are removed from Canada. The PRRA process seeks to ensure that those individuals are not sent to a country where their lives would be

in danger or where they would be at risk of persecution, torture, or other cruel and unusual treatment or punishment, consistent with Canada's obligations under international law. In this case, a mother and her two teenaged daughters – the Applicants – applied for a PRRA, fearing that their lives would be at risk should they be forced to return to Colombia. Their PRRA application was denied.

[2] The Applicants now come to this Court seeking to reverse the PRRA denial, while the Minister argues that the decision was reasonable and should be upheld. After considering the arguments on both sides, I agree with the Applicants that certain key findings were indeed flawed, particularly as they relate to the assessment of a "new risk" and how the Officer looked at the new evidence in relation to the prior findings in the refugee decision. As a result, I will grant this judicial review and order that the PRRA be reconsidered, for the reasons that follow.

II. Background

[3] The Applicants, citizens of Colombia, fled their country in 2011 due to alleged harassment by members of the Revolutionary Armed Forces of Columbia [FARC]. The mother – and Principal Applicant – was wealthy. She claimed that FARC members threatened her and her family to extort money, and that they kidnapped her for a seventeen day period in 2009, and killed her cousin in 2011.

[4] In Canada, the Principal Applicant married a Canadian citizen and began a spousal sponsorship application. However, they later divorced and discontinued the application in March 2015.

[5] The Applicants brought a refugee claim before the Immigration and Refugee Board's Refugee Protection Division [Board] in January 2016. The Board found that the Principal Applicant's testimony was not credible.

[6] The family of three were readied for deportation, but obtained a stay of removal from this Court. The stay kept them in Canada past the 12-month bar on applying for a PRRA after a negative RPD decision. They submitted their PRRA in February 2017. It is that refused PRRA which led to this judicial review.

[7] In terms of the PRRA application, the Principal Applicant submitted new evidence to the Officer relating to three incidents that all occurred after the family's hearing at the Board: (i) a threatening letter her parents received on FARC letterhead; (ii) a subsequent shooting by FARC at her parents' car; and (iii) an attack a month later which resulted in the murder of another cousin and shooting of an uncle.

[8] These three events took place in a six-month period between late February and the end of August 2016. Brief summaries of that new evidence follow, although I make no findings regarding its credibility.

[9] In February 2016, the Principal Applicant's parents received a threatening letter from FARC shortly after returning to Colombia (they had stayed with her brother in Australia from 2009 until 2016). The FARC letter requested payment from the family and called them a "military objective". The Principal Applicant's parents reported this incident to the police.

[10] In July 2016, the Principal Applicant's parents were driving their car, when they were accosted by FARC members on a motorcycle. The members threatened the parents, saying that they still had not received money from their daughter (the Principal Applicant), that such payment "is long overdue" and "this is the last warning we give this year … the next time … we kill you two". The mother panicked and accelerated away, prompting one of the FARC members to open fire. The Principal Applicant's parents reported this incident to the police, formally requesting their protection, and sought medical treatment to help them cope with their anxiety resulting from the attack.

[11] In August 2016, the Principal Applicant's parents were shopping for a car with a cousin and an uncle at a car dealership when they were accosted by hooded FARC members once again. The members threatened them with a gun, instructing the family to pay money to avoid harm to their daughter. The cousin tried to intervene and was killed by four gunshots to his head. The FARC members also shot the uncle in his leg, and sped off when they ran out of ammunition.

III. Decision under review

[12] The Officer rejected the PRRA on the basis that the new evidence presented was not "essentially different from the information previously considered by the RPD" and related to "the same risk", in that the Principal Applicant had been threatened by FARC before, and her car had been shot at in the past. The Officer concluded that she was "presenting the same risk previously considered by the RPD".

[13] The Officer found, based on general country condition reports and documentary evidence presented by counsel, that while there are corrupt officials in Colombia, there is no breakdown of the state apparatus. The Officer stated the following:

> [i]n terms of the principal applicant's own personal circumstances, I find I have been provided with insufficient objective evidence to indicate that should she or any family members require assistance from the authorities in Colombia, that they would be denied. I note that according to the evidence before me, both the principal applicant and her parents have sought and were provided the assistance of the authorities (decision at p 15).

[14] The Officer also noted that as there had not been any follow-up with the police since the issuance of the police reports, and given the passage of time since the incidents, the Applicants had not rebutted the presumption of state protection in Colombia.

[15] In sum, the Officer concluded that there was insufficient evidence that the Applicants would be persecuted or suffer associated risks at the hands of FARC.

IV. Issues, and Standard of Review

[16] The Applicants raise three issues – namely whether the Officer unreasonably (a) assessed the new evidence, (b) ignored evidence in the state protection findings, and (c) denied the oral hearing request. Issues (a) and (b), in my opinion, are subject to the reasonableness standard (*Nwabueze v Canada (Citizenship and Immigration)*, 2017 FC 323 at para 7 and *Johnson v Canada (Citizenship and Immigration)*, 2017 FC 68, respectively). I recognize that there has been some divergence on the standard of review for issue (c), as described in *Lionel v Canada*

(Citizenship and Immigration), 2017 FC 1180 at paragraph 11. However, as the first two issues are determinative of the outcome in this case, the third issue need not be decided.

V. Analysis

[17] This case turns on the evaluation of new evidence. Subsection 113(a) of the Immigration and Refugee Protection Act, SC 2001, c 27 [IRPA] sets out the parameters for new evidence in a PRRA. This provision states that in situations where the Board rejected an applicant's refugee claim, s/he "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". The factors that guide a PRRA officer's determination of whether the evidence is "new" were established by the Federal Court of Appeal in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 at paragraph 13.

A. *Did the Officer unreasonably assess the new evidence?*

[18] The Applicants argue that the evidence is "new" and should be considered if it arose after the hearing and can be relied on to contradict a finding made at that hearing, even if the finding relates to credibility. The evidence, they submit, was provided precisely for that reason, namely that it proved that FARC was really pursuing the family, and the Principal Applicant in particular.

[19] Given its objective sources, including the police reports, the Principal Applicant submits that the new evidence both resurrects her credibility and repudiates the Board's findings and the

Officer unreasonably rejected this evidence in stating that it was "the same risk previously considered by the RPD". The Applicants liken the Officer's approach to that of the PRRA officer in *Chen v Canada (Citizenship and Immigration)*, 2015 FC 565, where Justice Phelan found fault with similar reasoning:

> [16] The Officer confused the issue of newness of evidence with whether that evidence established risk. The Officer's approach would sterilize a PRRA assessment and would result in ignoring evidence of current or continuing risk because the same type of risk had been dealt with earlier.

[20] The Respondent counters that the Officer did not reject the new evidence as occurred in *Chen*, where Justice Phelan found the wrong legal test was applied in doing so (see paragraph 7 of *Chen*). Rather, according to the Respondent, the Officer actively considered the new evidence, and ultimately found that it was insufficient to establish that the Applicants face an objectively founded fear if returned to Colombia, and therefore, *Chen* is not applicable.

[21] Here, the Officer admitted the new evidence, and thus turned to its impact. I therefore agree with the Respondent that the Officer did not commit the same legal error as occurred in *Chen.*

[22] However, I disagree with the Respondent's position that the Officer reasonably considered the new evidence, setting it aside simply because it spoke to similar issues raised at the Applicants' refugee hearing. The Officer ended up placing no weight on the new evidence, concluding that "I do not find [the new evidence] essentially different from the information previously considered by the RPD". In rejecting the new evidence because of its relation to the RPD evidence, the Officer effectively concluded that it was simply "more of the same".

[23] "More of the same" has been upheld as a valid concern for PRRA officers in other cases (see *Debnath v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 332 at para 47, and *Kulanayagam v Canada (Citizenship and Immigration), 2015 FC 101* at paras 33–36). *Debnath* and *Kulanayagam* are both distinguishable from this case, each for a different reason.

[24] First, in *Debnath*, the PRRA officer found that a subsequent attestation of a risk scenario previously determined not credible by the Board, unaccompanied by objective corroborative evidence, did not overcome the prior credibility concerns of the Board, or provide sufficient evidence of a forward-looking risk to the applicants. Furthermore, the Board found that the new country evidence was also not related to the applicants. *Debnath* found these conclusions to be reasonable.

[25] Second, in *Kulanayagam*, letters from relatives and country information were also the focus of the new evidence, or as the PRRA officer found there, "simply more of the same, even though it related to new events" (*Kulanayagam* at para 33). In *Kulanayagam*, the PRRA officer thus rejected the new evidence as not satisfying the *Raza* test, which this Court found to be reasonable on judicial review.

[26] The evidence presented to the Officer in this case, however, differs from the kinds of documents presented in both the *Debnath* and *Kulanayagam* PRRAs. Here, the evidence consisted of objective, third party documentation, including reports and photographs provided to the police in the aftermath of attacks. Supporting documents included vehicle information, hospital and medical reports, and a death certificate of the cousin who was shot when he tried to

intervene in the third incident. However, after the Officer purportedly accepted these documents as “new evidence”, s/he compared it to the evidence that had been provided to the Board, to determine its newness. The Officer concluded that the new evidence presented the “same risk previously considered”, was not “essentially different than the information previously considered by the RPD”, and “does not rebut the RPD panel’s finding regarding the principal applicant’s credibility as it does not address the matters raised by the panel”.

[27] In short, the Officer unreasonably failed to engage with the new evidence. Certainly, one outcome could have been, after assessing the substance of the objective third party evidence, to give it little weight or probative value, if the Officer had provided a reasonable explanation for such a conclusion. However, the “more of the same” conclusion was unreasonable in the circumstances, given the lack of any meaningful explanation.

[28] By accepting the evidence as new on the one hand, but simultaneously rejecting it outright on the other for being reminiscent of the evidence at the earlier refugee claim, the Officer did the equivalent of giving with one hand while taking away with the other. Finding that this new evidence was no different from the information previously considered by the Board was, in my view, at best a conflation of the newness with its probative value, and at worst, a disguised rejection of the new evidence by another name.

[29] It is worth noting that the Officer found another weakness in the new evidence because the police reports were approximately two years old, and lacked updates or progress reports from the police. While it is clear that applicants have the responsibility of updating a PRRA officer

until the time that a decision is made (see, for instance, *Palaguru v Canada (Citizenship and Immigration)*, 2009 FC 371 at para 28), there is no requirement to provide updates where there has been no progress in a police investigation. This is particularly the case here, where the police had been approached on three successive occasions in a six month period, and were provided with contact details. Yet new attacks continued to occur.

[30] There is a clear distinction between the need to update an officer with new information that changes the situation for an applicant, and the need to update an officer where there is the status quo, including "no progress" or "no new news", after the police have taken and filed a report. Presumably, had the police taken action, a prosecution been commenced, or an investigation otherwise progressing, then the complainant or other witnesses would have been contacted. However, there is no evidence that such circumstances occurred here. I see no obligation to have provided updates to the Officer vis-à-vis police non-action in this case.

B. *Did the Officer unreasonably ignore State Protection evidence?*

[31] The Applicants contend that the Officer's finding of adequate state protection was unreasonable, in that Colombia cannot protect them from FARC members pursuing them and their family.

[32] The Respondent counters that the Officer reasonably determined that the state could provide adequate protection to the Applicants. The Respondent notes that the state does not have to be perfect in this regard and it is allowed to fail the Applicants in situations where providing

protection would be too difficult, noting that the Applicants' family was unable to provide the police details of their attackers for either the July or August 2016 incidents.

[33] I am persuaded once again by the Applicants' position on this second issue. The Officer simply commented on the general country conditions, and the fact that the family went to the police. Again, the Officer did not engage with the assertion that they were attacked, and the direct evidence that followed from the first police report, regarding the shooting incidents that took place within the following six months which resulted in injury and death.

[34] Specifically, after the family reported the threatening FARC letter in February, FARC shot at them in July. The family members went to the police to seek formal protection, yet in the following month FARC killed their cousin and shot an uncle. Similar to the first issue (new evidence), the Officer's analysis in explaining the adequacy of state protection in light of the evidence was deficient and therefore unreasonable.

C. *Did the Officer unreasonably deny the Applicants an oral hearing?*

[35] Given my findings above, there is no need to comment on the need for an oral hearing.

VI. Conclusion

[36] The Officer's findings concerning the new evidence are unreasonably predicated on the relationship to the evidence that was before the RPD. The whole point of weighing the probative

value of new evidence, once deemed to be admissible, is to consider whether it has any impact on the Applicants' risk in returning to their country where they fear persecution, torture or death.

[37] In other words, if in light of the legislation and *Raza*, new evidence is admitted for a PRRA as being relevant and having at least some probative value, then an officer must engage with the evidence before deciding on its weight. S/he cannot simply take away with the one hand what the other has given, deeming that the new evidence has no weight simply because it does not rebut the RPD panel's credibility finding, or because it raises the same risk previously considered. Rather, an officer must explain why the new evidence has some or no weight, particularly if it comes from a third party or is more objective in nature, as occurred here.

[38] Neither party raised a question for certification and I agree that no question arises.

JUDGMENT in IMM-1960-18

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted.
2. The Officer's decision is set aside, and the matter remitted for redetermination by a different officer.
3. No questions for certification were argued, and none arise.
4. There is no award as to costs.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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