Federal Court  Cour fédérale

Date: 20220527

Docket: IMM-4277-20

Citation: 2022 FC 766

Ottawa, Ontario, May 27, 2022

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

IURII ATAMANCHUK
MARIANA ATAMANCHUK

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a negative pre-removal risk assessment decision [the PRRA Decision] made by a Senior Immigration Officer. This application was heard concurrently with the Applicants' application for judicial review of a negative humanitarian and compassionate decision [the H&C Decision] made by the same officer on the same date (see *Atamanchuk v Canada (Minister of Citizenship and Immigration)*, 2022 FC 767).

Background

[2] The Applicants, Iurii Atamanchuk [Iurii or the Principal Applicant] and Mariana Atamanchuk, are husband and wife. They have a son who was born in Canada in 2016.

[3] The Applicants fled Ukraine in 2016 due to persecution because of Iurii's past membership in the Party of Regions. Iurii says that he only joined the party when they were in power in order to register his brokerage company. Due to his membership in this organization, Iurii was accused of being a pro-Russian separatist. The Applicants faced death threats, and Iurii was assaulted multiple times.

[4] The Applicants made a refugee claim. The Refugee Protection Division [RPD] rejected their claim. The RPD found the Applicants credible but determined that they had an internal flight alternative [IFA] in Kyiv. The RPD's decision was upheld by the Refugee Appeal Division [RAD]. The Applicants were not represented by counsel in either proceeding.

[5] After the Applicants' refugee claim was refused, they made an application for permanent residence on humanitarian and compassionate [H&C] grounds. While their H&C application was pending, the Applicants were served with a pre-removal risk assessment [PRRA] application.

[6] Both the H&C and the PRRA applications were refused by the same officer on July 31, 2020. The Applicants applied for judicial review of both decisions.

The PRRA Decision

[7] In the PRRA, the officer reviewed and summarized the decisions in the Applicants' past refugee claims and then considered the new evidence provided for the PRRA.

[8] The officer considered letters from Artem Ievchenko, the acting director of the Principal Applicant's company in Ukraine, and Viktor Berehuliak, the co-founder of the Principal Applicant's company.

[9] The officer summarized the contents of the letter from Mr. Ievchenko. The officer noted that Mr. Ievchenko states that he has received threats from radical nationalists and unknown individuals have tried to obtain information about the Applicants. Mr. Ievchenko writes that former members of the Party of Regions are commonly assaulted. He writes that "[d]ue to the given circumstances, fearing for my life and health, as well as absence of protection from law-enforcement, I had to leave Ukraine." Since March 2019, he has been living in Poland.

[10] The officer found that while this letter corroborated the Applicants' history with radical nationalists in Ukraine, it did not "provide any pertinent information to overcome the findings of the RPD that [an] IFA is available" and gave the letter little weight.

[11] The officer noted that the letter from Mr. Berehuliak states that he experienced threats and violence due to his association with the Party of Regions. Mr. Berehuliak moved to Kyiv but still faced threats and an attempted assault, and his car was torched. He writes that "[a]fter

these circumstances, fearing for my life, I had to leave Ukraine in the search for safe place of residence." He now lives in Slovakia.

[12] The officer found that Mr. Berehuliak did not provide details of the threats or how he knew that radical nationalists were responsible for the threats and the attempted assault. The officer also found that the Applicants were "in a vastly different personal situation, having been away from Ukraine since 2016."

[13] The officer considered evidence that the Applicants had been unable to obtain police protection in their hometown. The officer found that this was irrelevant to the question of whether there was an IFA in Kyiv. The officer also considered documents from the United Nations discussing country conditions but found that these document did not link general country conditions to the Applicants' personal circumstances.

[14] The officer concluded that "on a forward looking basis, the applicants would not face more than a mere possibility of persecution in China [sic] nor are they more likely than not to face a danger of torture, or a risk to life, or a risk of cruel and unusual treatment or punishment."

Issue

[15] The Applicants raise a number of issues on this application. However, they all are different ways of articulating the same question: Is the officer's assessment of their risk because they have an internal flight alternative in Kyiv reasonable?

Analysis

[16] The Applicants submit that the officer erred by failing to consider the evidence of similarly situated individuals. They submit that this Court's decisions in *Mendoza v Canada (Minister of Citizenship and Immigration)*, 2015 FC 251, and *Ali v Canada (Minister of Citizenship and Immigration*), 2015 FC 814 mandate that decision makers must do so.

[17] The Applicants further submit that the officer failed to consider the case of the Applicants' friends, the Zaidel family, who were successfully accepted as refugees in Canada based on substantially similar claims. They say that at the very least the officer was obligated to consider the Zaidel family's claim.

[18] The Applicants further submit that the officer erred in giving little weight to the letters from Mr. Berehuliak and Mr. Ievchenko. The Applicants submit that the only reason the officer gave little weight to Mr. Berehuliak's letter is because the Applicants have been away from Ukraine since 2016. They submit that reasoning is absurd as, if the Applicants are returned, they will be in the same situation as Mr. Berehuliak.

[19] With respect to the letter from Mr. Ievchenko, the Applicants submit that the officer incorrectly asserted that this letter only speaks to the history of the threats, which was previously before the RPD. The Applicants submit that this letter provides evidence of ongoing threats and attacks against the persons like the Applicants and it directly contradicts the finding that the Applicants' risk has been mitigated because they left Ukraine.

[20] The Applicants also submit that the officer erred by not giving weight to an article about a businessman in a similar situation who was murdered by nationalists in Kolomyia.

[21] The Applicants submit that the officer's finding that it is unlikely that they will be targeted in Kyiv is pure speculation. They say that a finding that something is unlikely to occur amounts to a finding that a proposed scenario is implausible. The Applicants submit that plausibility findings must be made in only the clearest of the cases (see *Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 at para 7).

[22] The Applicants submit that it was established in *Mendoza v Canada (Minister of Citizenship and Immigration)*, 2014 FC 715 that, where an agent of persecution has a proven capacity to track someone throughout the country, it is pure speculation to assume that the claimants did not annoy the organization enough to be pursued. The Applicants submit that it is not enough for the officer to simply say that there is "insufficient evidence;" they are entitled to know why the officer does not believe that they will be targeted.

[23] The Applicants submit that the officer speculated as to the *modus operandi* of the agents of persecution by finding that they were unmotivated to pursue the Applicants to Kyiv. The Applicants submit that Mr. Berehuliak's letter shows that the persecutors seek out individuals beyond their locales, including in Kyiv. The Applicants further submit that, given that they were specifically targeted, any IFA analysis was required to address this without discounting the threat because the Applicants did not have a high enough profile (see *Qaddafi v Canada (Minister of Citizenship and Immigration)*, 2016 FC 629).

[24] The Applicants submit that they have provided clear evidence that they continue to face threats and there is nothing else they could provide to establish that they are still being pursued, short of obtaining an affidavit from the agents of persecution themselves.

[25] The Respondent submits that it was reasonable for the officer to find the two letters to be insufficient evidence to establish that Kyiv was not a viable IFA. The Respondent submits that the officer clearly explained why this was the case. The letter from Mr. Ievchenko did not speak to the forward-facing risk in Kyiv. The letter from Mr. Berehuliak did not contain sufficient details to demonstrate that the threats and attempted assault were perpetrated by radical nationalists. Moreover, Mr. Berehuliak was in a different personal situation from the Applicants, who are no longer party members and have been away from Ukraine since 2016.

[26] With respect to the Zaidel family, the Respondent notes while they were referenced in the affidavit accompanying the PRRA application, the Applicants provided no information establishing that they faced the same risk. I agree and this concern need not be further addressed.

[27] The Respondent submits that the Applicants' arguments regarding plausibility and speculation into the *modus operandi* of the agents of persecution are simply restatements of their arguments regarding the officer's treatment of the letters. The Respondent submits that the Applicants bore the onus of establishing a forward-facing risk in Kyiv and the officer's findings were those of insufficiency of evidence, not speculation or plausibility findings. The Respondent submits that, contrary to the Applicants' arguments, an officer may consider whether, due to a

claimant's profile, a persecutor would actually be motivated to track that claimant to an IFA (citing *Singh v Canada (Minister of Citizenship and Immigration)*, 2020 FC 807 at paras 20-30).

[28] I agree with the Respondent that the Applicants' arguments regarding plausibility and speculation are effectively the same arguments regarding the officer's treatment of the letters. The officer found the evidence to be insufficient and did not engage in speculation or make an implausibility finding.

[29] However, I agree with the Applicants that the officer's treatment of the two letters from the colleagues of the Principal Applicant is unreasonable. The officer looked at each letter in isolation and granted them no weight. However, when read together, each letter addresses the officer's concerns with the other.

[30] The officer rejected the letter from Mr. Ievchenko because it spoke to risk to the Applicants in their hometown and not in Kyiv. This is accurate. However, the letter does indicate that the agents of persecution have remained interested in the Applicants despite their departure from Ukraine in 2016.

[31] The officer rejected the letter from Mr. Berehuliak in part because the officer considered the Applicants to be in "a vastly different personal situation, having been away from Ukraine since 2016." However, this is exactly point that the letter from Mr. Ievchenko addresses. That letter appears to show how the Applicants' departure does not distinguish their personal situation from that of Mr. Berehuliak.

[32] The officer considered each of the letters in a vacuum, without regard for the other. This silo approach is unreasonable. The officer should have looked at the evidence as a whole. Together, the letters suggest that (1) the persecutors have the ability to track the Applicants to Kyiv and (2) the persecutors remain interested in the Applicants. This suggests that Kyiv is not a viable IFA.

[33] The officer also had concerns that the letter from Mr. Berehuliak does not detail the threats he received nor does it explain why he believes the threats and attempted assault in Kyiv were caused by radical nationalists. In so doing, the officer is taking issue with what the letter does not say, rather than considering what it does say. While the letter does lack detail, it still sets out that Mr. Berehuliak was subjected to threats and physical violence due to his association with the Party of Regions three times, including in Kyiv. It was established that the Applicants had faced risk in their hometown due to their association with the same political group. This letter suggests that the Applicants may face the same persecution, especially given the persecutors appear to still be interested in them.

[34] Lastly, the explanation the officer gives for discounting the letter from Mr. Berehuliak is insufficient. On its face, he appears to be a similarly situated person to the Principal Applicant. He co-founded a business with the Principal Applicants, joined the Party of Regions, and moved to Kyiv, where he was assaulted and had his Porsche torched. Much greater analysis is needed to satisfy the reasonableness test set out by the Supreme Court in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

[35] No question for certification was proposed.

[36] The circumstances in Ukraine have materially changed since the Applicants submitted their PRRA application and the officer rendered the decision. Fairness dictates that the Applicants be provided an opportunity to amend their application to address these changed circumstances, should they wish to do so.

JUDGMENT IN IMM-4277-20

THIS COURT'S JUDGMENT is that this application is granted, the officer's decision on the pre-removal risk assessment is set aside, the application is to be re-determined by a different officer after the Applicants are provided a reasonable opportunity to file further submissions, and no question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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