Date: 20081031

Docket: IMM-966-08

Citation: 2008 FC 1202

Montréal, Quebec, October 31, 2008

PRESENT: The Honourable Maurice E. Lagacé

BETWEEN:

IRINA VOLOSHINA

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The applicant is seeking the judicial review of the decision of a pre-removal risk assessment officer (PRRA officer), dated January 16, 2008, to the effect that the applicant would have no serious reason to fear a danger of torture or a risk to life or cruel or unusual treatment or punishment if she were to return to her country.

[2] The applicant's son, Vyacheslav Voloshin, abandoned a similar application on October 9, 2008, filed in docket IMM-967-08 against a decision of the same PRRA officer, dated January 16, 2008, with the same determination as the decision on his mother's PRRA application.

II The facts

[3] A citizen of Kazakhstan, the applicant arrived in Canada on May 10, 1997, with her son Vyacheslav, and both claimed refugee status.

[4] The applicant's story is quite long and complex. She claims that she wanted to flee with her son from the persecution of Kazakh nationalists in Kazakhstan based on their Russian nationality. They claim that they were beaten and threatened.

[5] Their refugee claim was refused on December 1, 1997, when the panel (IRB) determined that the threats against them came from people involved in organized crime and that their nationality was not at issue. An application for leave and for judicial review of this decision was refused.

[6] The applicant and her son then filed an application for admission in the Post-Determination Refugee Claimants in Canada Class (PDRCC). This application was not decided but rather led to the PRRA application dated March 7, 2005.

[7] In the interim, in 1998 the applicant married Ghislain Ouellette, a Canadian citizen, and on March 27, 1998, her husband filed a sponsorship application for the applicant and her son. This application was reviewed as an application by an immigrant in Canada based on humanitarian and compassionate considerations, in accordance with subsection 114(2) of the *Immigration Act, 1978*, and section 2.1 of the *Immigration Regulations, 1978* (former Act). In 1999, the applicant was granted a ministerial exemption from her obligation to obtain her visa from outside Canada**.**

[8] However, on September 8, 2000, in accordance with section 27 of the former Act, an inadmissibility report was made against the applicant on the grounds of serious criminality in Kazakhstan. This report indicates that in Kazakhstan an arrest warrant was issued against the applicant on July 9, 1997, for fraud involving $500,000 US, an act which would be punishable by a maximum term of 10 years in prison had it been committed in Canada.

[9] The applicant impugned this report and the review of her case based on humanitarian and compassionate considerations (HC application) continued pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act* (IRPA) which came into force in 2002. On February 28, 2003, an immigration officer dismissed the HC application on the grounds that the applicant was inadmissible for serious criminality under paragraph 36(1)(*b*) of the IRPA.

[10] The applicant appealed this decision before the Immigration Appeal Division (IAD), but the respondent challenged the IAD's jurisdiction to hear this appeal. Finally, on October 17, 2003, the

IAD dismissed the applicant's appeal of the refusal of her application based on humanitarian and compassionate considerations.

[11] The IAD's decision was not the subject of any application for judicial review and was followed by the PRRA application refusing the decision, which is contemplated in this judicial review proceeding.

III PRRA decision

[12] The PRRA officer summarizes the applicant's story and notes the absence of new information on the situation in Kazakhstan since the IRB's negative determination on the same risks. After that he determined that the applicant had not established that there were serious grounds to suggest that she would be personally subjected to torture within the meaning of article 1 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Convention against Torture) or to a risk of cruel or unusual treatment or punishment as described in section 97 of the IRPA.

[13] The PRRA officer points out that the PRRA must not be used to appeal the decision on an HC application such that [TRANSLATION] "despite the existence of police certificates" raised by the applicant in support of her innocence of the crimes of which she was accused, he could also not disregard the fact that there was [TRANSLATION] "also probative evidence … referring to a criminal

charge and the refusal of the HC application referring to a criminal conviction in Kazakhstan, contradicting the applicant's evidence."

[14] From there, the PRRA officer considered two possibilities:

a. In the event that there were no charge or conviction against the applicant in Kazakhstan this would not [TRANSLATION] "subject her to imprisonment or detention in Kazakhstan and she would not be subject to a risk to her life or a danger of torture or a risk of cruel and unusual treatment or punishment"
b. In the event where the warrant referred to in the HC decision involved [TRANSLATION] "the same fraud for which the applicant had been convicted in Kazakhstan in 2002 … even if the information and evidence do not indicate that it is necessarily likely that the applicant will be imprisoned or detained in Kazakhstan based on the old arrest warrant," but considering nevertheless the possibility of detention or imprisonment in Kazakhstan for this charge, it is unlikely that [TRANSLATION] "she will be subjected to persecution pursuant to the Convention … or … to a risk to her life, a danger of torture or a risk of cruel and unusual treatment or punishment."

IV Issue

[15] Was the PRRA officer's decision based on erroneous findings of fact, perverse or capricious, disregarding the evidence?

V Analysis

[16] The risk determination of the PRRA officer is essentially based on an assessment of the facts and for this reason, his decision must be afforded great deference so that the appropriate standard of review is that of "unreasonableness" (*Dunsmuir v. New Brunswick*, 2008 SCC 9).

Unreasonable decision

The applicant

[17] The applicant insists that there is an undue risk that she will be incarcerated and mistreated if she returns to Kazakhstan and insists on the fact that despite her many requests, she was never informed of the source of the information on which the Minister's decision was based to the effect that she was the subject of a charge and conviction for a serious criminal act in Kazakhstan. Accordingly, she does not have any available means to counter the charge or refute its existence.

[18] The officer allegedly required from the applicant incontrovertible evidence to establish the consequences of her removal, while accepting questionable evidence to justify her removal, failing to consider that the applicant denied that she had been charged in Kazakhstan, even though he acknowledged the uncertainty of these criminal charges.

The respondent

[19] The applicant never challenged the HC decision through an application for judicial review and cannot use the PRRA application to appeal this decision or to avail herself after it is too late of evidence tending to establish that natural justice was not respected because certain documents were not disclosed to her. The principle of *res judicata* must be applied in this case.

[20] The applicant did not establish the unreasonableness of the inferences made by the PRRA officer from the documentary evidence, even if she does not agree with them. It is not this Court's

responsibility to assess the evidence that the PRRA officer had to assess within his power and with the benefit of his expertise.

VI Analysis

[21] The applicant alleges that the PRRA officer breached the principle of natural justice because the evidence on which her inadmissibility to Canada was based was not disclosed to her. This is a serious allegation that should have been raised at the first opportunity, failing which it must be presumed that the individual making the allegation has waived this recourse (*Yassine v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 949 (F.C.A.)).

[22] In failing to file an application for leave and for judicial review of the HC decision refusing her application on humanitarian and compassionate considerations, the applicant waived her right to make a timely challenge of the alleged breach of procedural fairness now alleged against the PRRA officer to impugn his decision.

[23] The PRRA must not be used as an appeal of the HC application which now has the effect of *res judicata*. As the applicant did not use this recourse in a timely fashion or give reasons for her delay in so doing, her arguments on this point are inadmissible (*Singh v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 1572).

[24] Indeed, the PRRA officer's findings on the condition of women in Kazakhstan do not seem unreasonable given the evidence analysed by him, including the general reports on the detention conditions in Kazakhstan and the measures taken by government authorities to improve conditions for prisoners.

[25] It is not enough that the applicant indicated her disagreement with the inferences made from the documentary evidence by the PRRA officer, it also had to be established how these inferences were unreasonable and she failed to persuade the Court of this.

[26] It is the PRRA officer's responsibility to assess and weigh the evidence, not the Court's responsibility when it is sitting in judicial review (*Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1; *Ahani v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 2). Yet, through her arguments, the applicant is asking this Court to do no less than substitute its assessment of the evidence for that of the PRRA officer, which is not the role of the Court (*Oduro v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 560; *Mohimani v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 564 (F.C.A.)).

[27] The applicant complicated matters by the tardy submission of a ground that she could have raised against the HC decision, but before this decision became *res judicata*. A large part of the applicant's challenge before the PRRA officer involved the HC decision, which she never stopped challenging. Unfortunately for the applicant, the PRRA officer was entitled to point out to her that the PRRA must not be used to appeal the HC decision, and that the PRRA must only be used to

assess the risks that the applicant alleges she would be subject to if she were to her native country, and not to contradict the Department's observation of the fact that she was guilty of fraud. The PRRA officer's decision is far from being unreasonable.

[28] In his decision, the PRRA officer contemplated the potential consequences of the applicant's removal to her country, while the applicant did not establish before this Court how the findings of this decision were unreasonable. Indeed, the Court notes that the impugned decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law. It is therefore a reasonable decision, resulting in the dismissal of the application for review.

[29] As no serious question of general importance was proposed, no question will be certified.

JUDGMENT

FOR THESE REASONS, THE COURT:

DISMISSES the application for judicial review.

"Maurice E. Lagacé"
Deputy Judge

Certified true translation

Kelley A. Harvey, BCL, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-966-08
STYLE OF CAUSE:	IRINA VOLOSHINA v. MCI
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