Federal Court  Cour fédérale

Date: 20100107

Docket: IMM-3261-08

Citation: 2010 FC 18

Ottawa, Ontario, January 7, 2010

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

LYUDMYLA HNATUSKO
OLEKDSAMDR HNATUSKO

Applicants

And

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA or the Act) for judicial review of a decision by a pre-removal risk assessment (PRRA) officer (the officer), dated May 30, 2008 rejecting the applicants' PRRA application.

[2] The applicants request that the decision be set aside pursuant to subsection 18(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 and the matter referred back for redetermination by a different PRRA officer.

Background

[3] Lyudmyla Hnatusko and Olekdsamdr Hnatusko (the applicants) are citizens of the Ukraine. Olekdsamdr Hnatusko (the son) arrived in Canada on January 26, 2002 and filed a claim for refugee protection. Lyudmyla Hnatusko (the principal applicant and mother of the co-applicant) arrived in Canada on September 7, 2002 and also filed a claim for refugee protection.

[4] The refugee claims were heard jointly on July 19, 2004. A negative decision was rendered on August 25, 2004. The claim was refused because the Refugee Protection Division (the Board) found that on a balance of probabilities, the applicants did not suffer the harm alleged. The Board found the country documents did not support the allegations that Pentecostals are persecuted in the Ukraine, and found that the applicants were not credible in their claims of persecution based on religious belief. Leave for judicial review was denied.

[5] The allegations made by the applicants were that people treated them like betrayers because they were followers of an untraditional faith in the Ukraine. In addition, the principal applicant alleges their social life was ruined, they did not have citizen rights and the neighbours stared at them as though they were evil doers. The other allegations involved the UNA-USO threatening them and

calling them at home: an allegation that was dealt with in the Board decision. Complaints to the police were met with a hostile attitude. The grandfather of the principal applicant was persecuted during the Soviet era based on religion which the principal applicant claimed in the refugee hearing had not improved.

PRRA Officer's Decision

[6] The officer rejected considering a number of documents because they pre-dated the Board decision and no explanation was provided as to why they would not have been reasonably available at the time of the applicants' hearing. The documents were also rejected on the basis that they did not identify the specific circumstances of the applicants nor did they demonstrate evidence or new risk developments that are personal to the applicants. The documents discussed included a conscription letter to the principal applicant's son and a letter that subsequent incompliance with statutes regarding military service would subject him to criminal sanctions.

[7] Media articles relating to country conditions in the Ukraine were considered to be general in nature. Further, the articles did not rebut the findings of the Board and did not contain objective evidence of personalized risk.

[8] The officer noted however, the article "Nigerian pastor finds new flock" which describes the growing popularity of the Pentecostal Church in the Ukraine. The officer suggested that a growing popularity was indicative of greater acceptance in society, not less. The officer accepted that there

are instances of prejudice and isolated incidents of violence and harassment towards religious groups but was satisfied that the government in the Ukraine was addressing these issues. The officer also noted that there are various institutions in the Ukraine for the protection of human rights and particularly the freedom of religion.

[9] Finally, the officer found that on a forward looking basis, the applicants would not face more than a mere possibility of persecution in the Ukraine nor are they more likely than not to face torture, or a risk to life, or a risk of cruel and unusual treatment or punishment. There was not sufficient evidence produced that would suggest that the applicants could not practice their religion freely in the Ukraine without persecution.

Issues

[10] The applicants submitted the following issues for consideration:

1. Did the officer err for finding that the weight attributed to the supporting evidence and letters should be discounted because they were from interested parties?

2. Did the officer err by making adverse findings of credibility in an arbitrary or capricious manner or without regard to the evidence before her?

3. Did the officer err in law in not considering the objective and subjective evidence that was presented in support of the applicants' claim?

[11] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the officer err in her factual findings in relation to evidence provided from "interested parties"?

3. Did the officer err in her findings on credibility?

4. Did the officer err in not considering the objective and subjective evidence needed to establish Convention protection under section 96 of IRPA?

Applicants' Written Submissions

[12] The officer was overly reliant on the Board's findings and failed to treat the new evidence fairly and objectively and created a standard that was almost impossible for the applicants to meet. The fact that the new documents did not come from government officials should not preclude a fair evaluation of the evidence. Further, it is not correct to say that people with an interest in the applicants' claim will necessarily make incorrect or insignificant statements. The rejection of evidence that was seen to be "self-serving" because of a vested interest meant that the officer failed to consider the totality of the evidence before the officer. This approach constitutes a reviewable error.

[13] The officer erred further when she discounted evidence because it had been found not credible in the Board's decision, say the applicants. There would be no purpose in bringing forward new evidence in a PRRA application if it was to be simply discarded because it contradicted findings of the Board. New evidence may be capable of doing just that.

[14] The applicants further submit that it is an expression of bias for a tribunal to presume that evidence from a refugee must be self-serving and false. There was no basis for rejecting the evidence corroborating the applicants' membership in the Pentecostal church in Toronto. Because the Board erroneously dismissed the evidence that formed the basis of the claim, the whole decision should be set aside.

[15] The applicants also submit that according to the UNHCR Handbook, successful refugee claimants are not always those directly persecuted by state authorities but can also emanate from sections of the population. Evidence that can rebut state protection includes similarly situated individuals let down by state protection or past personal incidents. This type of evidence was provided in the PRRA application and did rebut the state's ability to protect the applicants' persecution from other citizens in the Ukraine. It was wrong for the officer not to consider it.

[16] Finally, the applicants submit that when important evidence is not mentioned specifically and analyzed, the Court may wonder whether the decision was based on an erroneous finding of fact. Current documentary evidence was significant to the extent that the officer's neglect of it was an error and warrants intervention. In particular, the totality of the evidence indicated that the applicants would be persecuted in the Ukraine.

Respondent's Written Submissions

[17] The officer's assessment of the evidence was thorough and clearly detailed. The arguments put forward by the applicants merely amount to a disagreement with the manner in which the officer assessed the evidence, and the applicants have not identified any error warranting this Court's intervention, says the respondent.

[18] The officer did not ignore evidence. Further, she mentioned the various documentary sources she consulted in making the decision. The applicants are essentially asking the Court to find error by re-weighing the evidence.

[19] The officer reviewed the Board decision in the refugee claim and noted that it was denied because of adverse credibility findings. Then the officer examined the PRRA application and documents including:

1. Birth and death certificates of the principal applicant's father;
2. Documentation relating to a complaint of her grandparents which was considered and dealt with in 1962;
3. A letter from the Prosecutor's office in the USSR stating that her grandfather was wrongfully convicted of anti-Soviet activity in 1937 and the Supreme Court closed the case in 1962;
4. A birth certificate of the principal applicant;
5. A conscription document regarding the principal applicant's son.

[20] The respondent submits that the officer was reasonable when she found that these documents pre-dated the refugee hearing and as such, should have been submitted at that time. Of further significance is that even if these documents were analyzed as post-hearing documents, they remain unhelpful. The officer ultimately found this information did not contain sufficient objective evidence of religious persecution.

[21] The respondent states that the documents allegedly sent to the son warning him about non-compliance with his military duty were also dealt with appropriately. The officer noted that the information in these documents did nothing to further the cause of the persecution based on religious beliefs.

[22] The respondent notes that the officer did recognize that there were difficulties experienced by certain religious groups in the Ukraine but reasoned that the state makes efforts to address these issues and the difficulties did not amount to persecution.

[23] Overall, the treatment of new evidence was not in error. The officer properly used the Board's decision as the starting point of her analysis. This was how she ascertained which evidence may be new evidence or new risk developments post this decision. A PRRA decision is a discretionary one, according to the respondent, and there is no basis for overturning it unless an error of law or a perverse or capricious finding of fact can be shown. The finding of risk is fact-driven; an exercise that is largely outside of the realm of the expertise of the reviewing court.

[24] All evidence is presumed to have been considered by a PRRA officer. The applicants have not demonstrated that the PRRA decision is not supported by the evidence or that it did not consider the evidence. With detail, the officer explained her findings of each piece of the evidence. The applicants' attempt to focus on the documents as coming from interested parties is one small point amongst a detailed and lengthy review of the evidence. The officer then properly rejected it as "insufficient to establish the risks alleged".

Analysis and Decision

[25] **Issue 1**

What is the appropriate standard of review?

The applicants have raised a number of issues with respect to the PRRA decision that all warrant a reasonableness standard of review. Before the instructive administrative law case of *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, this Court had found that a PRRA officer's decision generally should be assessed on a standard of reasonableness *simpliciter* (see *Figurado v. Canada (Solicitor General)*, [2005] F.C.J. No. 458). This standard was collapsed to the standard of reasonableness by *Dunsmuir* above, and subsequent cases have continued to adopt reasonableness as the correct standard (see *Christopher v. Canada (Minister of Citizenship and Immigration)* [2008] F.C.J. No. 1199). *Dunsmuir* above, instructs that when a specific type of decision has been associated with a particular standard of review, reliance can be paid on that standard in subsequent reviews of similar decisions. As in *Christopher* above, this review of the PRRA officer's decision involves questions of fact. The facts are particular to the applicants as well as what was presented in

the documentary evidence. Questions of mixed law and fact arise when these facts are applied to the governing statutory sections of the Act. This analysis must be reasonable and in accordance with the immigration laws in our country. What constitutes reasonable regard to all the evidence is discussed in many cases including *Ramanathan v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 843 and *Erdogu v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 407, [2008] F.C.J. No. 546 (QL).

[26] At paragraph 47 of *Dunsmuir* above, reasonableness was described as:

> [47] …a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with 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.

[27] **Issue 2**

Did the officer err in her factual findings in relation to evidence provided from "interested parties"?

I am not of the view that the officer's mention of documents coming from "interested parties" renders the decision unreasonable. The applicants argued that this created an unrealistic

standard and that just because a document may come from an interested party, does not necessarily mean that it is biased or unhelpful.

[28] If the documents were rejected outright on that basis, the decision would be flawed. However, the officer did evaluate the documents that she said were from interested parties for the new evidence of risk and did not find that they provided any new evidence of risk. The officer's comments suggest that she was not willing to give the same weight to the documents based on their source but this in itself is reasonable and part of the process of evaluating the evidence for its cogency, credibility, materiality and newness as enunciated in *Raza v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385. I would therefore not allow judicial review on this ground.

[29] **Issue 3**

Did the officer err in her findings on credibility?

I agree with the respondent that the officer did not make credibility findings unreasonably. It is appropriate for the officer to make mention of the findings of the Board as a starting point for establishing new risk developments. There was no indication that the officer used the adverse credibility findings as a baseline for considering the documents in the PRRA. I would therefore not allow judicial review on this ground.

[30] **Issue 4**

Did the officer err in not considering the objective and subjective evidence needed to establish Convention protection under section 96 of IRPA?

I disagree with the applicants' argument that the officer refused to consider new evidence of risk for the applicants. As mentioned above, I find that the officer canvassed each piece of evidence provided and offered reasonable explanations as to why the evidence did not establish sufficient risk.

[31] The officer acknowledged that there was mistreatment of some religious groups in the Ukraine and mentioned "instances of prejudice and isolated incidents of violence and harassment" towards religious groups but stated that she was not convinced it was to the extent of persecution. Further, the officer documented in detail the many institutions that were in place to uphold human rights. What is more, the officer did not find that there was a basis for the allegations of persecution. The military service issue for the son was rightly regarded as outside of the purview of religious persecution. Further, the documents about the principal applicant's father regarding his persecution during the era of Soviet control were in reference to an atmosphere of coercion and control that does not exist today.

[32] As to the issue of whether the applicants could practice their religion freely and openly in the Ukraine, the officer's findings were reasonable. The article on the Pentecostal faith suggested to the officer that this denomination of Christianity was becoming more high profile and as such, inviting less scrutiny and more acceptance. This was not an unreasonable conclusion to make and

was within the realm of possibilities of how one could interpret this information. I would therefore not allow judicial review on this ground.

[33] The application for judicial review is dismissed.

[34] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[35] **IT IS ORDERED that** the application for judicial review is dismissed.

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in these sections.

The *Immigration and Refugee Protection Act*, S.C. 2001, c.27:

112.(1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).	112.(1) La personne se trouvant au Canada et qui n'est pas visée au paragraphe 115(1) peut, conformément aux règlements, demander la protection au ministre si elle est visée par une mesure de renvoi ayant pris effet ou nommée au certificat visé au paragraphe 77(1).
(2) Despite subsection (1), a person may not apply for protection if	(2) Elle n'est pas admise à demander la protection dans les cas suivants :
(a) they are the subject of an authority to proceed issued under section 15 of the Extradition Act;	a) elle est visée par un arrêté introductif d'instance pris au titre de l'article 15 de la Loi sur l'extradition;
(b) they have made a claim to refugee protection that has been determined under paragraph 101(1)(e) to be ineligible;	b) sa demande d'asile a été jugée irrecevable au titre de l'alinéa 101(1)e);
(c) in the case of a person who has not left Canada since the application for protection was rejected, the prescribed period has not expired; or	c) si elle n'a pas quitté le Canada après le rejet de sa demande de protection, le délai prévu par règlement n'a pas expiré;
(d) in the case of a person who has left Canada since the removal order came into force, less than six months have passed since they left Canada after their claim to refugee	d) dans le cas contraire, six mois ne se sont pas écoulés depuis son départ consécutif soit au rejet de sa demande d'asile ou de protection, soit à un prononcé d'irrecevabilité, de

protection was determined to be ineligible, abandoned, withdrawn or rejected, or their application for protection was rejected.

désistement ou de retrait de sa demande d'asile.

(3) Refugee protection may not result from an application for protection if the person

(3) L'asile ne peut être conféré au demandeur dans les cas suivants :

(a) is determined to be inadmissible on grounds of security, violating human or international rights or organized criminality;

a) il est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée;

(b) is determined to be inadmissible on grounds of serious criminality with respect to a conviction in Canada punished by a term of imprisonment of at least two years or with respect to a conviction outside Canada for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years;

b) il est interdit de territoire pour grande criminalité pour déclaration de culpabilité au Canada punie par un emprisonnement d'au moins deux ans ou pour toute déclaration de culpabilité à l'extérieur du Canada pour une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;

(c) made a claim to refugee protection that was rejected on the basis of section F of Article 1 of the Refugee Convention; or

c) il a été débouté de sa demande d'asile au titre de la section F de l'article premier de la Convention sur les réfugiés;

(d) is named in a certificate referred to in subsection 77(1).

d) il est nommé au certificat visé au paragraphe 77(1).

113. Consideration of an application for protection shall be as follows:

113. Il est disposé de la demande comme il suit :

(a) an applicant whose claim to refugee protection has been rejected 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;

a) le demandeur d'asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'il n'était pas raisonnable, dans les circonstances, de s'attendre à ce qu'il les ait présentés au moment du rejet;

(b) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;

b) une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;

(c) in the case of an applicant not described in subsection 112(3), consideration shall be on the basis of sections 96 to 98;

c) s'agissant du demandeur non visé au paragraphe 112(3), sur la base des articles 96 à 98;

(d) in the case of an applicant described in subsection 112(3), consideration shall be on the basis of the factors set out in section 97 and

d) s'agissant du demandeur visé au paragraphe 112(3), sur la base des éléments mentionnés à l'article 97 et, d'autre part :

(i) in the case of an applicant for protection who is inadmissible on grounds of serious criminality, whether they are a danger to the public in Canada, or

(i) soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un danger pour le public au Canada,

(ii) in the case of any other applicant, whether the application should be refused because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of

(ii) soit, dans le cas de tout autre demandeur, du fait que la demande devrait être rejetée en raison de la nature et de la gravité de ses actes passés ou du danger qu'il constitue pour la sécurité du Canada.

Canada.

114.(1) A decision to allow the application for protection has

114.(1) La décision accordant la demande de protection a pour effet de conférer l'asile au demandeur; toutefois, elle a pour effet, s'agissant de celui visé au paragraphe 112(3), de surseoir, pour le pays ou le lieu en cause, à la mesure de renvoi le visant.

(a) in the case of an applicant not described in subsection 112(3), the effect of conferring refugee protection; and

(b) in the case of an applicant described in subsection 112(3), the effect of staying the removal order with respect to a country or place in respect of which the applicant was determined to be in need of protection.

(2) If the Minister is of the opinion that the circumstances surrounding a stay of the enforcement of a removal order have changed, the Minister may re-examine, in accordance with paragraph 113(d) and the regulations, the grounds on which the application was allowed and may cancel the stay.

(2) Le ministre peut révoquer le sursis s'il estime, après examen, sur la base de l'alinéa 113d) et conformément aux règlements, des motifs qui l'ont justifié, que les circonstances l'ayant amené ont changé.

(3) If the Minister is of the opinion that a decision to allow an application for protection was obtained as a result of directly or indirectly misrepresenting or withholding

(3) Le ministre peut annuler la décision ayant accordé la demande de protection s'il estime qu'elle découle de présentations erronées sur un fait important quant à un objet

material facts on a relevant matter, the Minister may vacate the decision.	pertinent, ou de réticence sur ce fait.
(4) If a decision is vacated under subsection (3), it is nullified and the application for protection is deemed to have been rejected.	(4) La décision portant annulation emporte nullité de la décision initiale et la demande de protection est réputée avoir été rejetée.

The *Immigration and Refugee Protection Regulations*, SOR/2002-227

161.(2) A person who makes written submissions must identify the evidence presented that meets the requirements of paragraph 113(a) of the Act and indicate how that evidence relates to them.	161.(2) Il désigne, dans ses observations écrites, les éléments de preuve qui satisfont aux exigences prévues à l'alinéa 113a) de la Loi et indique dans quelle mesure ils s'appliquent dans son cas.

FEDERAL COURT

SOLICITORS OF RECORD

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