

Federal Court



Cour fédérale

Date: 20100430

Dockets: IMM-2670-09

Citation: 2010 FC 474

Ottawa, Ontario, April 30, 2010

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

ANNA VALERIEVNA KLOCHEK

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] Ms. Anna Valerievna Klochek arrived in Canada from Belarus in 2004. She sought refugee protection on the basis that she had been forced into prostitution and was sought by criminal elements at home. Given the close association between criminals and the police in Belarus, she also feared being falsely charged with an offence. A panel of the Immigration and Refugee Board dismissed her claim, finding that her account of events was not believable.

[2] When Ms. Klocek tried to obtain permanent residence in Canada, she learned that she was inadmissible due to an outstanding Interpol warrant against her for larceny. She then filed an application for a pre-removal risk assessment (PRRA) and an application for humanitarian and compassionate relief (H&C). Both applications were denied in 2009 by the same officer. This judicial review relates to her PRRA. In a separate application (IMM-2672-09), I allowed her application for judicial review of her H & C.

[3] Ms. Klocek argues that the PRRA officer erred by failing to hold a hearing, ignoring evidence, and overlooking an important aspect of her application. I will grant her application for judicial review as I agree with Ms. Klocek on the latter point. It is unnecessary, therefore, to deal with her other arguments.

II. The Officer's Decision

[4] The officer accepted that Ms. Klocek had presented a new risk allegation based on the Interpol warrant. He described this as a matter of "lawful sanctions". As I interpret the officer's reasons, he was referring to s. 97(1)(b)(iii) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. (See Annex 'A' attached). According to that provision, a person who would otherwise be recognized as a person in need of protection because of a risk to his or her life, or a risk of cruel and unusual treatment or punishment, is not entitled to protection if that risk is "inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards".

[5] The officer then analyzed relevant documentary evidence relating to issues such as arrest and detention, the availability of fair trials, and conditions in Belarus prisons. Based on his review of the evidence, he could not conclude that sentences for larceny in Belarus are disproportionate to international standards.

[6] With respect to prison conditions, the officer referred to documentary evidence indicating that:

- prison conditions pose a threat to life and health;
- food, medicine, clothing and bedding are in short supply;
- communicable diseases are prevalent;
- overcrowding and forced labour are common;
- prisoners who complain are threatened, humiliated and blackmailed;
- many applicants for parole must bribe prison personnel;
- alternative correctional facilities exist.

[7] The officer acknowledged that there are problems with the correctional system in Belarus. However, he noted the availability of alternative facilities, amnesties and parole, and concluded that Ms. Klochek had not presented any new risk developments that were not tied to lawful sanctions in Belarus. Further, there was insufficient evidence “to demonstrate that country conditions have changed significantly since the date of the decision of the Immigration and Refugee Board”.

III. Did the Officer Overlook an Aspect of Ms. Klochek’s Application?

[8] As I read the officer's decision, he found that Ms. Klochek's main allegation was that she would suffer a risk to her life, or a risk of cruel or unusual treatment or punishment, if she returned to Belarus to face a charge of larceny. He concluded that this risk was tied to lawful sanctions. I will assume, for present purposes, that this was a reasonable way of characterizing her application.

[9] The question that must be addressed in respect of lawful sanctions is, as s. 97(1)(b)(iii) states, whether those sanctions accord with accepted international sanctions. The officer did consider whether the duration of any sentence Ms. Klochek might have to serve would be disproportionate with international standards and found there was insufficient evidence on the subject. He went on to consider prison conditions but, as described above, found that any risk arising from serving a prison term in Belarus was "tied to lawful sanctions" and, therefore, not an issue.

[10] If a person is to be denied protection because the risk to which he or she is subject derives from a lawful sanction, the next question is whether that sanction accords with accepted international standards. In my view, the officer did not answer that question and, therefore, the officer failed to deal with an important aspect of the risk to which Ms. Klochek would be subject if she returned to Belarus.

[11] The officer's failure to address this issue could be characterized as an error of law, being an incorrect application of s. 97(1)(b), or as an unreasonable dismissal of Ms. Klochek's application, based on a failure to take proper account of the evidence of prison conditions in Belarus. Either way, the Court must intervene.

IV. Conclusion and Disposition

[12] The officer failed to deal with an important question arising from Ms. Klocek's application. Accordingly, I must allow this application for judicial review and order another officer to reconsider it. Neither party proposed a question of general importance for me to certify, and none is stated.

JUDGMENT

THIS COURT'S JUDGMENT IS that

1. The application for judicial review is allowed. The matter is referred back to another officer for reconsideration.
2. No question of general importance is stated.

“James W. O’Reilly”

Judge

Annex 'A'

Immigration and Refugee Protection Act, 2001, c. 27

Loi sur l'immigration et la protection des réfugiés, 2001, ch. 27

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée:

...

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

[...]

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

...

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards

[...]

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2670-09

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PLACE OF HEARING: Toronto, ON.

DATE OF HEARING: February 1, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT:** O'REILLY J.

DATED: April 30, 2010

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