Federal Court  Cour fédérale

Date: 20101102

Docket: IMM-1309-10

Citation: 2010 FC 1074

[UNREVISED ENGLISH CERTIFIED TRANSLATION**]**

Ottawa, Ontario, November 2, 2010

PRESENT: The Honourable Madam Justice Bédard

BETWEEN:

REYNA ISABEL MATUTE ANDRADE

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), of a decision of an immigration officer (the PRRA officer) dated January 18, 2010, rejecting the applicant's pre-removal risk assessment (PRRA) application.

Background

[2] The applicant is a citizen of Honduras.

[3] She came to Canada for the first time on December 14, 1999, and claimed refugee status, alleging that she was the victim of domestic violence by her ex-spouse. In March 2000, she gave birth to her son. Her claim for refugee protection was rejected on June 15, 2000. On November 10, 2000, the Federal Court dismissed her application for leave and for judicial review.

[4] On March 3, 2003, the applicant's first PRRA was rejected.

[5] Knowing she was to leave soon and not wanting to force her son to return to her country, the applicant awarded legal custody of him to her sister, who, however, had learned in 2002 that she was HIV-positive.

[6] Having exhausted all courses of action open to her, the applicant returned to Honduras in April 2003.

[7] The applicant alleged that, after returning, she worked as a nanny for Ramon Lobos Sosa, an engineer who was at that point an elected official for the city of San Pedro Sula; more specifically, she cared for his then-18-year-old daughter, Margarita Lobos.

[8] She alleged that, at that time, Margarita Lobos had been seeing a man named Jorge Alberto Ramos Echevarria, nicknamed "El coque".

[9] She claimed that, on October 5, 2003, while she was accompanying Ms. Lobos and her boyfriend, Mr. Echevarria, to a party, Arnulfo Vargas, a member of a criminal group known as "Los Cachiros", tried to force her to dance with him, in spite of her refusal. Mr. Echevarria then allegedly intervened with his four bodyguards, hitting Mr. Vargas. She stated that, later, outside the site of this first incident, Mr. Echevarria coldheartedly cut the ear of Mr. Vargas, who responded by threatening to kill the applicant and declaring that she [TRANSLATION] "would be his" before he died.

[10] On October 18, 2003, while the applicant was travelling to San Padro Sula with Ms. Lobos and Mr. Echevarria, they were allegedly stopped by two cars and shot at by the occupants. They were allegedly all wounded and brought to the Cenesa de San Pedro Sula hospital.

[11] The applicant then left Honduras for Guatemala, where she stayed for approximately two years. While in Guatemala, she allegedly learned that Mr. Echevarria had been killed. She stated that she decided to leave Guatemala then, for the United States, where she lived illegally from June 2005 to May 2008.

[12] On May 16, 2008, the applicant returned to Canada and filed a claim for refugee protection that was deemed to be ineligible under paragraph 101(1)(*b*) of the IRPA, on the ground that her prior claim for refugee protection had already been rejected.

[13] The applicant then filed a PRRA application, which was processed on January 18, 2010. That decision is the subject of this application for judicial review.

Impugned decision

[14] The PRRA officer identified the risks alleged by the applicant as follows:

> [TRANSLATION]
> The applicant feared being raped and murdered by Honduras drug traffickers, just as "El Coque, Jorge Echevarria" and several of his family members had been.
>
> She could not rely on the protection of her country's authorities, as they were corrupt and scared of drug traffickers. Moreover, she would not have been protected, being a woman and mere citizen.
>
> The applicant added that, besides for protection, she had come to Canada to join her son, whom she had left in the custody of her sister, Ada, who has AIDS. She would like to be able to care for her and for her Canadian son. If something were to happen to her sister, she would not know to whom she could leave her son and would not want to put his life in danger were they to return to Honduras.

[15] The PRRA rejected the application for the following reasons:

- The officer attached little probative value to the applicant's allegation regarding her employment with the elected official Lobos Sosa, given that she had adduced no evidence and provided no details attesting to the job that she had allegedly held for several years, and given that this job alleged contradicted her Personal Information Form, in which she had stated that she had been a merchant during that same period.
- The officer attached little probative value to the applicant's allegation that she had been the victim of a shooting, given that the applicant's documentary evidence in support of her allegation consisted of a partially translated newspaper article, which the officer found he

could not assess in its entirety, and given that he had been unable to find on the Internet the second article that had been filed and that had been taken from the Internet.

- The applicant produced no medical or police report to corroborate the shooting incident.
- The risk that the applicant was subjected to was not personalized and represented the risk faced by the entire population of Honduras.
- The applicant could have obtained protection from the authorities.

Issues

[16] The applicant's allegations against the PRRA officer raise the following issues:

1) Did the PRRA officer err by not calling the applicant to a hearing under paragraph 113(*b*) of the IRPA?

2) Did the PRRA officer assess the evidence in an unreasonable manner, such as by refusing to accept the two newspaper articles submitted by the applicant, not taking into consideration the applicant's medical report and finding that the applicant had failed to reverse the presumption of state protection?

Analysis

[17] For the reasons below, I am of the opinion that the application for judicial review should be dismissed.

Standards of review

[18] The standard of review applicable to decisions of a PRRA officer differs according to the nature of the issues raised.

[19] The case law is divided on the standard of review that applies to a PRRA officer's decision whether or not to hold a hearing. In some judgments, the Court applied the standard of correctness, because hearings raise an issue of procedural fairness (*Hurtado Prieto v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 253, [2010] F.C.J. No. 307; *Zemo v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 800, [2010] F.C.J. No. 981; *Latifi v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1388, [2006] F.C.J. No. 1738; *Lewis v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 778, [2007] F.C.J. No. 1042).

[20] In other judgments, the Court adopted an approach that varied depending on the nature of the issue and found that a PRRA officer's failure to consider the appropriateness of a hearing was a breach of procedural fairness and that the decision was therefore reviewable on a correctness standard.

[21] However, analyzing the appropriateness of a hearing on the basis of the specific context of a case and the factors prescribed in section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations), involves an exercise of discretion that attracts deference and is subject to the standard of reasonableness (*Kazemi v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1010, [2007] F.C.J. No. 1289; *Iboude v. Canada (Minister*

of Citizenship and Immigration), 2005 FC 1316, [2005] F.C.J. No. 1595; *Puerta v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 464, [2010] F.C.J. No. 546).

[22] Here, I am of the view that whether the PRRA officer made findings on the applicant's credibility and, if so, whether he was required to hold a hearing based on the factors prescribed in section 167 of the Regulations are questions of mixed fact and law that are subject to the standard of reasonableness (*Borbon Marte v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 930, [2010] F.C.J. No. 1128).

[23] The second issue involves the PRRA officer's assessment of the evidence. In this regard, it is well established that the Court's role is not to substitute its own appreciation for that of administrative decision makers and that it must show deference to their weighing of the evidence and assessment of credibility. The standard of review that applies to findings of administrative decision makers is also reasonableness, and the Court will intervene only where a finding of fact is erroneous and made in a perverse or capricious manner or where a decision was made without regard for the evidence (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Martinez v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 798, [2009] F.C.R. No. 933; *Allinagogo v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 545, [2010] F.C.R. No. 649.

Analysis

1) Did the PRRA officer err by not calling the applicant to a hearing under paragraph 113(b) of the IRPA?

[24] The applicant submitted that, as the PRRA officer questioned her credibility, he should have called her to a hearing before making his decision, in accordance with paragraph 113(*b*) of the IRPA and the factors prescribed in section 167 of the Regulations.

[25] The respondent argued that the PRRA officer had not called the applicant's credibility into question but, rather, had found that her evidence in support of her allegations was insufficient.

[26] Alternatively, the respondent contended that, even if the PRRA officer had impugned the applicant's credibility, he was not required to hold a hearing, as her credibility was not central to his decision.

[27] I agree with the respondent's alternative contention.

[28] Generally, PRRA applications are processed on the basis of written submissions and documentary evidence submitted by the applicant. Moreover, paragraph 113(*b*) of the IRPA provides that a hearing may be held if the Minister, "on the basis of prescribed factors, is of the opinion that a hearing is required".

[29] Section 167 of the Regulations sets out the factors to be considered in determining whether a hearing is required:

Hearing —prescribed factors	**Facteurs pour la tenue d'une audience**
167. For the purpose of determining whether a hearing is required under paragraph 113(*b*) of the Act, the factors are the following:	**167.** Pour l'application de l'alinéa 113*b*) de la Loi, les facteurs ci-après servent à décider si la tenue d'une audience est requise:
(*a*) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;	*a*) l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur;
(*b*) whether the evidence is central to the decision with respect to the application for protection; and	*b*) l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;
(*c*) whether the evidence, if accepted, would justify allowing the application for protection.	*c*) la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

[30] It is well established that, for a hearing to be required, the applicant's credibility must be called into question and must be a determinative factor in the issue that the PRRA officer is to decide (*Tekie v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 27, [2005] F.C.J. No. 39; *Abdou v. Canada (Solicitor General)*, 2004 FC 752, [2004] F.C.J. No. 916.

[31] To determine whether a PRRA officer's decision was based on credibility, the Court must analyze the decision by looking beyond the words used by the officer himself or herself. For example, while an officer may state that the decision was based on the insufficiency of the evidence, the officer may in fact have called into question the applicant's credibility (*Hurtado Prieto* (above); *Ferguson v. Canada (Citizenship and Immigration)*, 2008 FC 1067, [2008] F.C.J. No. 1308.

[32] Conversely, even when a PRRA officer states in the decision that the officer questioned the applicant's credibility, the Court must identify the true basis of the decision before determining whether it turned on lack of credibility or insufficient evidence (*Wang v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 799, [2010] F.C.J. No. 980; see also *Zemo* (above)).

[33] Thus, the decision may have been based on the insufficiency of the evidence, even though the officer nonetheless doubted the applicant's credibility. See paragraph 33 of *Hurtado Prieto.*

[34] In *Ferguson* (above), Justice Zinn suggested a method for making a distinction between decisions based on credibility and those based on insufficient evidence. I endorsed this method in *Borbon Marte.* At paragraph 25 of *Ferguson*, Justice Zinn argued that a finding that a decision is not credible may in truth be a determination that the evidence is not reliable.

[35] In addition, an officer's findings that previous statements of the witness contradict or are inconsistent with the new evidence, that the applicant failed to tender this important evidence at an

earlier opportunity or that the documentary evidence (such as self-serving reports) is unreliable may be findings based on credibility.

[36] In this case, while the PRRA officer did not refer to the applicant's "credibility" in so many words, a thorough analysis of his decision nevertheless reveals that he did, in fact, call it into question.

[37] The officer found that the applicant had contradicted herself, for her new allegation that she had been employed by deputy Ramon Lobos was inconsistent with the allegation that she was self-employed from 1990 to 1999, made in her Personal Information Form submitted for her initial application for protection.

[38] He also found that, in addition to this contradiction, there was a lack of objective and reliable evidence supporting her version.

[39] Moreover, the PRRA officer attached very little probative value to the two newspaper articles submitted by the applicant as evidence corroborating her allegations. It is my view that, here, by taking issue in this way with the probative value of the documentary evidence adduced by the applicant to corroborate her allegations, the PRRA officer implicitly called into question her credibility.

[40] I also understand from reading the decision as a whole and, more specifically, the passages referring to previous decisions in the applicant's file, that the PRRA officer did not believe the applicant. Therefore, the first condition for the application of section 167 has apparently been met.

[41] However, a hearing is required only if credibility was central to the officer's decision. In other words, a hearing is necessary only if the applicant's PRRA application might likely have had a different outcome, had the applicant's credibility not been called into question. Here, the doubts as to the applicant's credibility did not, in and of themselves, warrant a hearing.

[42] In *Beca v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 566, [2006] F.C.J. No. 714, Justice Strayer observed the following, at paragraph 9:

> . . . The factors to be taken into account in determining if a hearing on the new evidence is required are cumulative: there must be "a serious issue of the applicant's credibility"; the evidence must be central to the decision; and the evidence if accepted would justify allowing the application for protection.

[43] In *Sylla v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 475, [2004] F.C.J. No. 589, Justice Noël wrote the following:

> [6] The right to a hearing in the context of PRRA proceedings exists when credibility is the key element on which the officer bases his or her decision and without which the decision would have no basis. . . .

[44] This interpretation of the notion of serious issue was also endorsed in several other decisions of this Court (*Karimi v. Canada (Minister of Citizenship and Immigration)*, 2007 FC

1010, [2007] F.C.J. No. 1289; *Selliah v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 872, [2004] F.C.J. No. 1134; *Lewis*, *Latifi* and *Tekie*).

[45] Here, in my opinion, the fact that the applicant's credibility was at issue was not determinative, as the PRRA officer also found that the applicant's risk was not personalized and that state protection had been available to her. Each of these issues alone was determinative and enough to reject the application.

[46] Therefore, there is no basis for intervening on this ground.

2) Did the PRRA officer assess the evidence in an unreasonable manner?

[47] I will begin with the last two alleged errors, which, in my view, involve determinative issues.

Absence of a personalized risk

[48] It is well established that, to be considered a "person in need of protection" within the meaning of section 97 of the IRPA, a person must be subjected to a personalized risk, that is, a risk that is more significant than the one faced generally by the population of the country of origin (*Prophète v. Canada (Citizenship and Immigration)*, 2008 FC 331, [2008] F.C.J. No. 415; *Innocent v. Canada (Citizenship and Immigration)*, 2009 FC 1019, [2009] F.C.J. No. 1243, and *Gonzalez*).

[49] The PRRA officer found that the applicant had not proved that she was subjected to a personalized risk that was more acute than the risk faced generally by the Honduras population. He wrote the following:

> [TRANSLATION]
> The reference documents do report problems of violence, corruption, abuse, impunity and drug trafficking in Honduras. However, this is a general situation borne by the entire Honduras population, not a personal situation of the applicant.
>
> . . .
>
> After reviewing the applicant's file and the documentary evidence consulted, I find that there is no serious possibility or reasonable chance that, upon her return to Honduras, she would be subjected to personalized risks of persecution that would not be faced generally by other individuals in or from that country.
>
> In addition, I find that there are no substantial grounds for believing that she would be personally subjected to a danger of torture, to a risk to her life or to a risk of cruel and unusual treatment or punishment that would not be faced generally by other individuals in or from that country.

[50] This finding seems reasonable in light of the evidence, even assuming that all of the events described by the applicant were true.

[51] The applicant referred to the following passage in support of her allegation that the PRRA officer called into question her credibility, because of his use of the words [TRANSLATION] "there is no reason to believe":

> [TRANSLATION]
> Given the events described by the applicant, and all of the other evidence, including country conditions at the time of the decision, there is no reason to believe that she would be personally targeted by drug traffickers, corrupt police officers or any other group . . . .

[52] With respect, when these words are read in the context of the above-quoted passages from the decision and in the overall context of the paragraph in which they were used, I find that their meaning is rather “there is no reason to think” and that, to draw this conclusion, the PRRA officer assumed that the facts alleged were true. Moreover, he begins his sentence with [TRANSLATION] “the events described” and then refers to the conditions in Honduras. In my opinion, it indicates that he accepted as fact the applicant’s allegations. My view is reinforced by the above-quoted passages from the decision.

[53] Therefore, in my opinion, the PRRA officer’s finding that the applicant was not subjected to a personalized risk greater than the risk faced generally by the Honduras population was reasonable and warranted in and of itself the rejection of the application in accordance with section 97 of the IRPA.

[54] Even though the PRRA officer did not conduct a separate analysis of the application from the standpoint of section 96, and the applicant did not claim membership in a social group, the officer stated that he had carried out an analysis under both sections. I will therefore analyze the issue of the presumption of state protection.

Presumption of state protection

[55] The applicant submitted that the Board undertook a superficial and selective analysis of the evidence on Guatemala’s ability to protect its citizens and that it failed to consider the documentary

evidence that was submitted and that constituted clear and convincing proof of Honduras' inability to protect her.

[56] In *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, at page 725, the Supreme Court clearly established that, except where there has been a complete breakdown of the state apparatus, there is a presumption that a country is capable of protecting its citizens and that individuals must avail themselves of the protective measures in their countries before seeking asylum in foreign countries. The PRRA officer must analyze the application in light of the evidence submitted by the applicant, and the application for judicial review must be made in light of the evidence before the PRRA officer (*Gosal v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 620, [2010] F.C.J. No. 773).

[57] The presumption of the availability of state protection can be rebutted only when applicants advance "clear and convincing" proof of their country of origin's inability to offer them effective protection (*Ward*). In *Carillo v. Canada (Minister of Citizenship and Immigration)*, 2008 CAF 94, [2008] F.C.J. No. 399, the Federal Court of Appeal addressed the quality of the evidence that was required and specified the following at paragraph 30:

> . . . In other words, a claimant seeking to rebut the presumption of state protection must adduce relevant, reliable and convincing evidence which satisfies the trier of fact on a balance of probabilities that the state protection is inadequate.

[58] Generally, individuals must seek help from the authorities before concluding that the State is unable to offer them adequate protection, but this is not necessary in all cases, as the Supreme Court noted in *Ward*, at paragraph 48:

> A refugee may establish a well-founded fear of persecution when the official authorities are not persecuting him if they refuse or are unable to offer him adequate protection from his persecutors . . . however, he must show that he sought their protection when he is convinced, as he is in the case at bar, that the official authorities -- when accessible -- had no involvement -- direct or indirect, official or unofficial -- in the persecution against him. (*José Maria da Silva Moreira*, Immigration Appeal Board Decision T86-10370, April 8, 1987, at 4, *per* V. Fatsis.)
>
> This is not true in all cases. Most states would be willing to attempt to protect when an objective assessment established that they are not able to do this effectively. Moreover, it would seem to defeat the purpose of international protection if a claimant would be required to risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness.

[59] However, to justify their failure to seek their country's protection, applicants bear the burden of showing that it was unreasonable to require them to do so.

[60] Here, the applicant justified her failure to seek help from the authorities by stating that they were corrupt, feared drug traffickers and were unable to protect her as a woman.

[61] In my opinion, the applicant's documentary evidence does not constitute clear and convincing proof of the State's inability to protect her, considering her allegations.

[62] The applicant's documentary evidence refers to general problems in Honduras and, more specifically, sexual violence against women. The PRRA officer acknowledged these problems. However, the applicant feared drug traffickers, and her explanations refer to very general allegations. The applicant's documentary evidence does not constitute clear and convincing proof that the authorities were corrupt, that they feared drug traffickers and that, as a woman, she would not be protected.

[63] Nor does the documentary evidence contradict the PRRA officer's findings. He recognized that, while there were problems, the evidence showed that Honduras was an independent, constitutional and democratic republic, with an independent judicial system and institutions.

[64] PRRA officers are presumed to have considered all of the evidence and need not mention all of the documentary evidence before them (*Florea v. Canada (Minister of Employment and Immigration) (F.C.A.)*, [1993] F.C.J. No. 598; *Ramirez Chagoya v. Canada (Citizenship and Immigration)*, 2008 FC 721, [2008] F.C.J. No. 908).

[65] My opinion here is that this is not a case where the officer had to specifically address the applicant's evidence, as is required by case law whenever applicants submit evidence on an important element, which evidence contradicts the conclusions drawn by the decision maker (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425, 157 F.T.R. 35).

[66] Therefore, in my view, the PRRA officer's finding that state protection was available to the applicant falls within the range of reasonable outcomes with respect to the evidence.

[67] As the issue of state protection is determinative, it does not seem necessary to pursue the analysis of the applicant's other allegations.

[68] For these reasons, the application for judicial review will be dismissed.

[69] The parties did not propose any important questions for certification, and no question will be certified.

JUDGMENT

THE COURT ORDERS that the application for judicial review be dismissed. No question is certified.

"Marie-Josée Bédard"
Judge

Certified true translation
Tu-Quynh Trinh

FEDERAL COURT

SOLICITORS OF RECORD

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