Federal Court  Cour fédérale

Date: 20120203

Dockets: IMM-4421-11
IMM-4532-11

Citation: 2012 FC 147

Ottawa, Ontario, February 3, 2012

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

JANE JULIETTA FORDE
CARLEEN DARYNA FORDE
ALLAN JOSHUA MONTEL HYPPOLYTE
NATALIE CHANTEE ALBERT

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants are challenging two decisions: the first is a negative Pre-Removal Risk Assessment (PRRA) (Court file IMM-4421-11) and the second is a refusal to defer removal

(Court file IMM-4532-11). These applications were heard together and one set of reasons will issue and a copy shall be placed in each file.

Background

[2] The principal applicant, Ms. Jane Juliette Forde and her three children: Carleen Forde, Allan Hyppolyte, and Natalie Albert are all nationals of St. Lucia. Ms. Forde alleged a fear for herself and her children of serious injury or death from her former partner, Nathaniel Albert, as she would be unable to obtain adequate protection in St. Lucia.

[3] Ms. Forde entered into a relationship with Mr. Albert in 2002 and in July 2003 they had their daughter Natalie. When Natalie was about three years old, Mr. Albert started to become increasingly violent with Ms. Ford. He allegedly beat her physically, sexually and mentally. One time he hit her with a post and split her lip. On another occasion he struck her and she lost two teeth. The police in St. Lucia declined to intervene as they labelled the abuse as a domestic dispute.

[4] In 2007, Mr. Albert had relocated to Montreal and demanded that Ms. Forde join him as he could give their daughter a better life. Both Ms. Forde and Natalie arrived in Canada on December 21, 2007 as visitors. Shortly thereafter it is alleged that the abuse resumed.

[5] The record suggests that Ms. Forde resided with Mr. Albert before moving out and taking Natalie with her. On one occasion, Mr. Albert went to Ms. Forde's residence to allegedly abduct their daughter. He was unsuccessful because no one was home. Ms. Forde's brother suggested

that the two relocate to Toronto as that is where he lived. An affidavit filed in the proceeding suggests that a restraining order against Mr. Albert was obtained in the summer of 2008.

[6] Ms. Forde and Natalie moved to Toronto and then filed a claim for refugee protection on August 14, 2008. On December 14, 2008, they were joined by Carleen and Allan; Ms. Forde's two children who had remained in St. Lucia. The Refugee Protection Division (RPD) refused their claim on August 4, 2010, finding several inconsistencies and contradictions. Leave to judicially review that decision was denied by this Court on December 1, 2010. The applicants filed a PRRA application on March 22, 2011 which was also refused.

[7] On July 2, 2011, three police officers went to the applicants' apartment saying that they had received a report from Montreal Police that Natalie was being sexually abused in the home. The family was questioned and the officers accepted that there was no abuse. The police officers told Ms. Forde that Mr. Albert had called the Montreal Police and made the complaint. The applicants were told to be careful and to make sure that Natalie knew how to dial 911 if she saw Mr. Albert or if she was ever afraid. It was also suggested that they move to a different location.

[8] The next day, Ms. Forde contacted the Montreal Police which confirmed that the restraining order that had been issued against Mr. Albert had expired. She was told that she could obtain a copy through an online service but it would take at least 30 days.

[9] On July 10, 2011, two different Toronto police officers went to Ms. Forde's home. They again said they had received a call from Montreal Police relating to Nathalie's wellbeing and

immigration problems. Ms. Forde explained the situation to the officers who told Ms. Forde to be careful.

[10] Later that day, one of the officers called back and told Ms. Forde that the Children's Aid Society (CAS) would visit in the week to come. A CAS worker did go to investigate and told the applicants that they were at risk from Mr. Albert.

[11] On July 13, 2011, the applicants filed a humanitarian and compassionate (H&C) application, a judicial review of the PRRA decision with a motion to extend the time and a request for deferral of their removal. The request for deferral asked for 45 days so that they could gather the evidence relating to the recent harassment by Mr. Albert and the impact on the best interests of the child; or until the H&C application for permanent residence had been decided. On July 18, 2011 the request was refused.

The PRRA Decision

[12] The PRRA officer reviewed the RPD decision, noting that inconsistencies and contradictions were made between the Personal Information Forms (PIF) and the oral testimony. The RPD found that the applicants lacked subjective fear in addition to having adequate state protection available to them should they return to St. Lucia.

[13] The PRRA officer noted that a PRRA is not intended to be a review of the RPD's decision, reinforcing his position by citing *Perez v Canada (Minister of Citizenship and*

Immigration), 2006 FC 1379. Accordingly, the officer decided to not consider "arguments made by counsel with regard to possible errors made by the RPD."

[14] The applicants were found to be materially restating the same facts that were articulated to the RPD at the refugee hearing. The documentary evidence filed by the applicants both pre-dated and post-dated the RPD decision. As for the documents that pre-dated the RPD decision, the officer noted that no explanation was given as to why the documents could not have been presented to the RPD; they were not considered to be new evidence and were not considered in the risk assessment. The documents that post-dated the RPD decision consisted of letters from the YWCA, a walk-in counselling report and the US Department of State *2010 Human Rights Report: St. Lucia*.

[15] The first letter from the YWCA dated March 17, 2011, was found to attest to events that took place in the fall of 2009, which was over six months prior to the RPD hearing. There was no explanation why a similar letter could not have been presented to the RPD and it was therefore not considered as new evidence. The PRRA officer held that, in any event, it did not address the issue of state protection.

[16] The walk-in report dated March 15, 2011, reflected a discussion regarding how Allan was dealing with the domestic violence that occurred to his mother. The PRRA officer noted that the report provided some coping strategies for Allan and recommended that he "continue to come for walk-in." The second letter from the YWCA dated June 16, 2011, indicated that Ms. Forde had

attended further counselling sessions. According to the letter, Ms. Forde had a fear of returning to St. Lucia and would not be able to access state protection.

[17] The two YWCA letters were found to rely on the self-reporting of the applicants. The officer stated that: “In light of the fact that the applicant has not provided a satisfactory explanation for the inconsistencies in her testimony noted by the RPD, I am not satisfied that these documents are sufficient to overcome the credibility issues that were found by the RPD.” The officer further found that even if the letters established a subjective fear, there was insufficient evidence to rebut the presumption of state protection.

[18] The officer also noted that it is not within the area of expertise of a family counsellor to determine whether a person would be at risk or would be able to access state protection should they return to St. Lucia. As such, the documents were not found to be clear and convincing evidence that the applicants would be unable to access state protection in St. Lucia.

[19] The *2010 Human Rights Report: St. Lucia* was reviewed by the officer and was found to contain no information that was novel or significant compared to the 2009 report which was used at the RPD hearing.

[20] In sum, the new evidence did not satisfy the PRRA officer that the applicants would be unable to access state protection in St. Lucia and the applicants were therefore found not to be at risk if removed to St. Lucia.

Deferral Decision

[21] The removal officer noted his limited discretion and considered the best interests of the children. He noted that the children resided the majority of their lives in St. Lucia and that they would be relocating with their mother. As such, they would be able to relocate relatively naturally with her love and support. The removal officer was confident that they would have every opportunity to grow up to be capable individuals. He stated that there was insufficient evidence to demonstrate that the family would face exceptionally difficult circumstances that would justify a deferral.

[22] The removal officer then considered the outstanding H&C application which was filed on July 13, 2011. He noted that the processing time for such an application is four to five months and is therefore not imminent. He also noted that the H&C was only very recently filed and it was concluded that the application had not been made in a timely manner.

[23] Finally, the officer considered the request to defer so that this Court to make a decision on the judicial review of the PRRA. He noted that the mere filing of an application does not affect the normal immigration proceedings and does not preclude the Minister from enforcing an execution of removal. He stated that very little evidence was provided to show why the PRRA was made in error.

[24] The removal officer then noted that a motion to stay removal had been filed. He also noted counsel's arguments that "[t]he importance of pursuing documentation relating to these incidents, and to co-operating with Children's Aid, cannot be underestimated. The abuser,

Nathaniel Albert, is a violent man who has beaten the applicant repeatedly, causing both her and her children serious psychological harm." In response to this submission, the removal officer referenced the finding in the PRRA decision relating to the availability of state protection in St. Lucia. A deferral of the execution of the removal order was found to not be appropriate in the circumstances of the case and the request was denied.

Issues

[25] The applicants raise two issues respecting the PRRA decision:

1. Did the officer err in his treatment of the new evidence before him and make an unreasonable decision?
2. Did the officer err in law by making a disguised credibility finding and/or by failing to make a determination of subjective risk?

The applicants raise the following issue respecting the refusal to defer:

3. Did the officer err in his treatment of the best interests of the children?

Analysis

[26] The first and third issues involve factual findings and are reviewed under the reasonableness standard. The second issue is a question of law and is reviewed under the correctness standard.

1. <u>New evidence and unreasonableness of PRRA decision</u>

[27] The officer rejected the walk-in counselling report and the YWCA report because they were self-reporting and provided no satisfactory explanation for the inconsistencies in the RPD testimony.

[28] The applicants submit that although the report is based on Allan's self-reporting, he was not found to lack credibility by the RPD, nor did the PRRA officer point to any evidence to support that Allan was not credible. Accordingly, it is submitted that his evidence should have been presumed credible and the rejection of the letter was perverse and unreasonable. Furthermore, they say, given the absence of a previous negative finding regarding Allan's credibility, an interview was warranted: Section 167 of the *Regulations*, *Latifi v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1388 and *Tekie v Canada (Minister of Citizenship and Immigration)*, 2005 FC 27.

[29] The applicants also submit that they had provided an adequate explanation for the inconsistencies, but the officer refused to take it into account. They point to the PRRA officer's statement that "a PRRA is not meant to be a review of the RPD's decision. … Accordingly, I will not be considering arguments made by counsel with regard to possible errors made by the RPD" and say that the officer is trying to have it both ways. In their memorandum of argument, they put their submission this way: "[The PRRA officer] refuses to consider the proffered explanation for the perceived inconsistencies at the RPD hearing, but then proceeds to reject the new evidence submitted with the PRRA as adequate because there's been no explanation of the inconsistencies." They say that this is perverse and is a reviewable error.

[30] I do not agree with the applicants' submission that the PRRA officer made a negative credibility finding against Allan. I agree with the submission made by the respondent that the officer was merely weighing the self-reporting evidence made to a third party. Evidence of third parties who have no means of independently verifying the facts to which they testify is likely to be ascribed little weight whether it is credible or not: *Ferguson v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1067 at para 26.

[31] The PRRA officer reasonably ascribed little weight to the evidence of a family counsellor who had no means of independently verifying the facts reported to him or her. Also, since no negative credibility finding was made by the PRRA officer, no hearing was required under section 167 of the *Regulations*.

[32] In my assessment, the officer was not imposing a double standard on the applicants by (i) not considering arguments made by counsel with regard to possible errors made by the RPD and then (ii) finding that the applicants did not provide a satisfactory explanation for the inconsistencies in the testimony noted by the RPD.

[33] The applicants' written submissions filed for the PRRA were, in part, as follows:

> The Board should have considered that the Applicant's initial statements to an Immigration Officer were consistent with her statements at her hearing.
>
> The Board should have considered that the Applicant testified when asked about the discrepancy in her PIF narrative, that people told her not to say anything about Nathaniel abusing her in Canada. The Board ignored the Applicant's testimony that she "had these things hidden inside me, and I could not talk about it, until I got some counselling later on."

> The Board should have considered that the Applicant was traumatized and in crisis and that this affected her ability to make rational decisions when preparing her PIF narrative.

[34] These are clearly not relevant submissions in a PRRA application; they are directly seeking that the RPD decision be reviewed or ignored. The PRRA officer was correct in refusing to consider these arguments. The PRRA officer could presume that the RPD properly concluded that there were inconsistencies which led to credibility concerns. What was relevant was new evidence which could overcome those inconsistencies. That is what the PRRA officer reasonably found was lacking in the present matter. No double standard was imposed.

2. Disguised Credibility Finding

[35] The applicants submit that the finding that there was available state protection was misplaced because the PRRA officer should first have made a finding on the subjective component of the refugee claim. The applicants cite several authorities to argue, as it was stated in *Velasquez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1201 [*Velasquez*], at para 18, that "in the context of a state protection analysis, it is an error of law for the Board to conclude that state protection is available if it fails to make any findings about the applicant's personal circumstances."

[36] The applicants submit further that the PRRA officer erred in law by failing to make a clear credibility finding, at least with respect to Allan: *Armson v Canada (Minister of Employment and Immigration) (FCA)*, [1989] FCJ No 800 and *Hilo v Canada (Minister of Employment and Immigration) (FCA)*, [1991] FCJ No 228.

[37] The PRRA officer did not fail to make a finding about the applicants' personal circumstances as is alleged. There is no suggestion in their submission that the nature of their fear was not specifically identified. That was the fundamental error in *Velasquez*, above, cited by the applicants. Justice O'Reilly at para 17 of that decision wrote:

> The first question the Board must answer when a proposed IFA is in issue is whether, on a balance of probabilities, there is a serious possibility that the claimant will be persecuted in the location proposed by the Board. Generally speaking, that question cannot be answered if the nature of the person's fear has not been specifically identified [emphasis added].

[38] In this case, the nature of the applicants' alleged fear was clearly identified in the PRRA decision, as follows:

> Jane Julietta Forde ("the applicant") fears her former partner, Nathaniel Albert. She states in her PRRA submissions:
>
> > I am afraid of returning to Saint Lucia. I do not believe that I can obtain adequate protection from Nathaniel in Saint Lucia. I fear that I will be seriously injured or killed if I have to return there, I also fear for the safety of my children.
>
> Carleen Daryna Forde states in her PRRA application:
>
> > I fear my mother's former partner Nathaniel Albert. Please see her written statement. Nathaniel also made threats to me.

[39] The applicants are correct in stating that a proper identification of the subjective fear is required to assess the availability of state protection. However, I am not persuaded that the PRRA officer failed to do so. The analysis of state protection in the present matter was an

additional factor made in regard to the alleged subjective fear. The applicants presented no evidence that the PRRA officer misconstrued or failed to identify their alleged fear.

3. Best Interests of the Children

[40] The applicants rely on the Court's Order dated July 20, 2011, wherein it is stated that the removal officer "did not direct his mind to new evidence before him, from both the Toronto Police and the CAS and the implications of this on the discharge of his duty to remove the applicants as soon as practicable."

[41] It is submitted that the request to the removal officer "was relatively straightforward: defer removal for 45 days so that they could gather the evidence relating to the recent harassment by Nathaniel and the impact on the best interests of the child; or defer until the [H&C] application for permanent residence, in light of the new issues affecting that had arisen relating to the best interests of the children which had never been assessed." The applicants presented evidence that the abuser had recently resumed an active and continuing interest in the family and had dramatically increased his harassment and they note that there is no mention in the officer's reasons either of the CAS letter or of the police documents. Therefore, they say, the officer breached his duty to be alert, alive and sensitive to the short term interests of the children affected by the removal order.

[42] I agree with the Court's observation on the stay motion that a removal officer must "have regard to cogent new evidence when it is put to him;" however, there is nothing in the record that

leads me to the view that either the police documents or CAS letter were “cogent new evidence” or that the officer had failed to consider them.

[43] Had there only been a finding that there was no risk from Mr. Albert, then the CAS and police evidence would likely have constituted “cogent new evidence” as it would have directly addressed and contradicted that finding. However, here there was a finding that even if Mr. Albert was persecuting the applicants, state protection was available in St. Lucia. The purported new evidence does nothing to address or contradict that finding. Accordingly, it was not the sort of evidence that the enforcement officer had to directly reference and discuss. As such, even if the removal officer did fail to consider the police report or the CAS report, the applicants would not have been entitled to refugee protection under either section 96 or 97 of the *Act* because of the state protection finding.

[44] Neither party proposed a question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed and no question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4421-11
STYLE OF CAUSE:	JANE JULIETTA FORDE ET AL v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
DOCKET:	IMM-4532-11
STYLE OF CAUSE:	JANE JULIETTA FORDE ET AL v. THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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