Federal Court  Cour fédérale

Date: 20140107

Docket: IMM-9693-12

Citation: 2014 FC 13

Ottawa, Ontario, January 7, 2014

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

BRANISLAV DJORDEVIĆ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application to review a negative Pre-Removal Risk Assessment [PRRA] decision.

[2] There are a number of discrepancies and inconsistencies in the record before the Court as to the dates and timing of certain events. The officer begins the decision with this statement: "The applicant is a 29-year old applicant from Serbia." However, Mr. Djordevic was born on June 10, 1976, and at the date of the PRRA decision, was 36 years-old.

[3] The Court would be remiss if it did not point out the extremely lengthy and unexplained delays on the part of Citizenship and Immigration Canada [CIC] in dealing with this and other applications filed by Mr. Djordevic.

[4] Mr. Djordevic fled Serbia and entered Canada on August 19, 2002, and filed a claim for protection. It was denied on February 19, 2004, and an application for leave to review was denied by this Court on June 23, 2004.

[5] More than 9 years passed before CIC served Mr. Djordevic with the PRRA Notification on October 28, 2010. He filed his PRRA application promptly on November 10, 2010. The application then languished until the three-page decision under review was rendered more than 21 months later on August 1, 2012.

[6] During this extended period, on December 19, 2005, Mr. Djordevic filed an application for permanent residence in Canada on humanitarian and compassionate grounds [H&C application]. Processing of the H&C application commenced April 5, 2006, and it was referred to the Etobicoke office on April 24, 2006. Nearly eight years have passed since it was filed, and yet CIC has not rendered any decision on his H&C application.

[7] For the reasons that follow, this application must be allowed and Mr. Djordevic's PRRA application determined by a different officer. CIC may wish to consider processing Mr. Djordevic's

H&C application first. Based on the record before this Court, and the fact that Mr. Djordevic has now spent 11 of his 37 years in Canada, it appears likely to be a deserving application.

Background

[8] Mr. Djordevic is Serbian (formerly a citizen of Yugoslavia). On September 4, 1999, he was kidnapped and held for ransom for approximately 20 hours. During his captivity, he was driven around in the trunk of a car. At some point he was let out, only to be raped, beaten, and have anti-Semitic slurs yelled at him. He was released after his family paid a ransom.

[9] The kidnappers were eventually caught; one of them was killed in a police shootout. At the Refugee Protection Division [RPD], Mr. Djordevic testified that three members of the criminal gang who abducted him were sentenced to twelve, nine, and four years imprisonment. Eight others were convicted and sentenced to periods of imprisonment ranging from six months to three and one-half years.

[10] After testifying against his kidnappers, Mr. Djordevic fled to Canada and filed a claim for refugee protection. He alleged he was kidnapped because he was Jewish and because of the affluence of his family.

[11] The RPD accepted that Mr. Djordevic was kidnapped, but was not convinced that the kidnapping was primarily related to his Jewish ethnicity. It found that the affluence of his family "played the most significance [*sic*] in the decision to kidnap the claimant" (emphasis added). The RPD was also not convinced that the kidnappers posed an on-going threat to him or that they

blamed him for the death of their companion. Finally, the RPD considered whether there were compelling circumstances that would permit granting refugee status under subsection 108(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, given that the Applicant had contracted HIV, which he claimed was a result of being raped by his kidnappers. The RPD ultimately determined that "while abhorrent, his experiences did not meet the high standard of atrocious and appalling" and that the compelling circumstances exception in subsection 108(4) of the *Act* did not apply.

[12] In his PRRA application, Mr. Djordevic set out three grounds of risk:

> The evidence submitted in this PRRA discloses that Mr. Dordevic [*sic*] would face numerous and serious breaches of his fundamental human rights in Serbia on account of past persecution, his Jewish ethnicity, and HIV positive status. Most seriously, Mr. Dordevic [*sic*] would face discrimination in employment and in assessing health care on the basis of his HIV-status. The evidence, as discussed below, also reveals a host of other societal abuses and discrimination against the vulnerable groups Mr. Dordevic [*sic*] belongs to. We submit that even if the discrimination he might face on any single ground might not amount to persecution, certainly the cumulative effect of discrimination on the separate grounds amounts to persecution. This is particularly so given that he would be ostracized from the community because of his HIV positive status. (emphasis in original)

[13] The officer determined that paragraph 113(a) of the *Act* applied to the evidence submitted by Mr. Djordevic. It reads as follows:

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	*a*) le demandeur d'asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui

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;	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;

Issues

[14] A number of issues were raised by Mr. Djordevic; however, the determinative and intertwined issues are the officer's interpretation of paragraph 113(a) of the *Act* and his assessment of the evidence submitted with the PRRA application.

Analysis

[15] Mr. Djordevic submits that the PRRA Officer mistakenly believed that he could only consider new risks that he identified, and not new evidence of old risks that came to light after the RPD hearing. A PRRA Officer can consider new evidence that arose after, or could not have reasonably been presented at the RPD hearing, even if that new evidence goes to risk factors considered by the RPD: *Raza v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385, 289 DLR (4th) 675 at paras 12-13 [*Raza*].

[16] The Respondent submits that the PRRA Officer applied the *Raza* test but determined that "the new evidence before the officer did not present a risk that could not have been contemplated at the RPD hearing."

[17] *Raza* says that a PRRA application cannot be rejected solely because it addresses the same risk considered by the RPD. The restriction, as clearly set out in paragraph 113(a) of the *Act*, is that an applicant "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" (emphasis added).

[18] The Respondent points out that twice the officer expressed the correct test: "I find that he has not presented new evidence or evidence of a new risk development that would lead me to arrive at a different conclusion from that of the RPD" and "I find that the applicant has not provided new evidence or evidence of new risk developments since the RPD rejected his claim."

[19] However, between those two correct statements of the law, one finds the following inaccurate statement of the law which Mr. Djordevic submits shows that the officer applied an incorrect test by looking at whether he had raised a new ground of risk or a risk that could not have been raised before the RPD:

> I find that the risks identified by the applicant in his PRRA application could have reasonably been presented to the RPD at his hearing or at the time his claim was rejected. This includes his risk pertaining to his Jewish ethnicity and HIV positive status. Both of these issues were known to the applicant at the time of his hearing. I have not been presented with a reasonable explanation as to why he did not present the risks to the RPD; nor have I been presented with an explanation as to why he reasonably could not have been expected to present his risks to the RPD. (emphasis added)

[20] *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, instructs that a court may review the record before the administrative decision-maker to determine whether the decision is

justified. *Dunsmuir* does not require or permit a court to perform the analysis that the decision-maker failed to perform. In this case, the officer provides no analysis or commentary whatsoever of the 350 pages of submissions and evidence Mr. Djordevic filed with his PRRA application, other than the conflicting statements above. Because of the complete lack of analysis by the officer, this Court and the parties are left to guess which formulation of the test was used by the officer. This is reason alone to set aside his decision as not being transparent or intelligible.

[21] To the extent that it can be said that the officer did assess the evidence, I agree with Mr. Djordevic that he erred. There was new evidence before the officer going to the issue of whether Mr. Djordevic faces an ongoing threat from those who kidnapped and raped him; namely, the evidence that they have all since been released from prison and the affidavit from Mr. Djordevic's mother that the family continues to receive anonymous phone calls asking for Mr. Djordevic, and a refusal on the part of the police to take any proactive measures.

[22] Although the RPD knew of the sentences meted out to the kidnappers, I agree with Mr. Djordevic that his mother's affidavit and the recent release of the last of the kidnappers (Mr. Dejan and Mr. Oljeg) was evidence that could not reasonably have been available to be put to the RPD because they relate to events that happened after the RPD hearing. Furthermore, they are relevant evidence because they might contradict the RPD's finding that the criminal organization that kidnapped Mr. Djordevic does not pose an ongoing risk to him.

[23] There is no basis on which the PRRA Officer could have excluded the evidence related to when Mr. Dejan and Mr. Oljeg were released from prison. The evidence was credible - they were

official documents from the Municipal Court in Novi Sad. The evidence was relevant - it is capable of showing that Mr. Djordevic faces a risk that he did not face at the time of the RPD hearing in 2004; and the evidence is new for the same reason. The evidence is material because, had these two kidnappers in particular been released from prison at the time of the RPD hearing, the RPD may have found that Mr. Djordevic was a person in need of protection.

[24] Mr. Dejan and Mr. Oljeg received the longest sentences of all of the kidnappers; although speculative and not argued by counsel, it is likely that they were the two most significant players in the kidnapping. Mr. Djordevic attests that Mr. Dejan was "one of the captains of the criminal organization" in his affidavit. Therefore, while there may not have been an increased risk to him from the lower level players being released from prison, the RPD may have found that the release of the directing minds or leaders of the kidnapping would constitute an increased risk such that he is a person in need of protection.

[25] Despite this, the PRRA Officer does not refer to this evidence at all in the decision. He does not even refer to the risk of an ongoing threat to Mr. Djordevic from the criminal organization. The closest the PRRA Officer comes to addressing this risk specifically is when he says "I find that the risks identified by the applicant in his PRRA application could have reasonably been presented to the RPD at his hearing or at the time his claim was rejected. This includes his risk pertaining to his Jewish ethnicity and HIV positive status."

[26] The Respondent submits that the word "includes" signaled that Jewish ethnicity and HIV+ status were only examples of the claims that could have reasonably been presented to the RPD and therefore, the PRRA Officer must have considered the risk from the kidnappers as well.

[27] I disagree. As Mr. Djordevic pointed out at the hearing, if the word "includes" connotes that the risk from the kidnappers was also considered, then the PRRA Officer's finding that it could have reasonably been presented to the RPD is nonsensical - for it was the principal risk that was presented to the RPD.

Conclusion

[28] For these reasons the decision of the PRRA Officer is set aside. The PRRA application is to be determined by another officer who, if he finds paragraph 113(a) applies to disallow the 350 pages of evidence presented, is instructed to provide reasons why he or she so finds, particularly in light of the 10 years that have passed since the decision of the RPD.

[29] No question was proposed for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is allowed, the Applicant's PRRA application is to be determined by a different officer in keeping with these Reasons, and no question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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