Federal Court Reports
Nikolayeva v. Canada (Minister of Citizenship and Immigration) (T.D.) [2003] 3 F.C. 708

Date: 20030226

Docket: IMM-1335-02

Neutral citation: 2003 FCT 246

BETWEEN:

OLENA NIKOLAYEVA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

GIBSON J.:

INTRODUCTION

[1] The Applicant seeks judicial review of a decision of a Post-Claim Determination Officer (the "PCDO") wherein the PCDO determined that the Applicant is not a member of the post-determination refugee claimants in Canada class (the "PDRCC class") as that expression is defined in subsection 2(1) of the *Immigration Regulations, 1978*[1]. The decision under review is dated the 1st of March, 2002.

BACKGROUND

[2] The Applicant was born in Odessa, Ukraine, at a time when Ukraine was part of the Union of Soviet Socialist Republics. Since the breakup of the USSR, the Applicant has been a citizen of Ukraine.

[3] The Applicant recounted the following background to her flight to Canada.

[4] Beginning in1974, the Applicant was employed by "Aeroflot". In 1990, while continuing her work within Aeroflot, the Applicant started her own small business. She bought items of clothing and footwear in Romania, Poland and Turkey and sold them at a market in Odessa, eventually at a kiosk that she rented in the

market. At the end of 1995, the Applicant was approached by an individual who apparently held a relatively senior position at a retail store in Odessa. He offered the Applicant financial assistance in her private business in return for the Applicant's agreement to sell goods that he would supply to her. The arrangement contemplated that she would receive those goods in Turkey and sell them along with her own goods from her kiosk in Odessa. The Applicant agreed to this arrangement. After several trips to Turkey following which the Applicant brought back into Ukraine goods of her collaborator that were intermixed with her own wares, she began to suspect that she was supporting her collaborator in smuggling goods into Ukraine.

[5] The Applicant sought to sever her relationship with her collaborator. She was threatened with economic retaliation. The Applicant did not disclose her situation to the police as she had become concerned that she was now involved with racketeers who might assault her or kill her if she reported to the police.

[6] The Applicant was subjected to extortion. She finally advised her collaborator, directly or through his representatives, that she would report the extortion to police and advise the police of her suspicion that her collaborator was involved in smuggling. The next day, two young men came to the Applicant's house. The Applicant recognized one of the young men as an employee of her collaborator. They asked her to continue her business arrangement with her collaborator. She refused. They assaulted the Applicant's brother and physically and sexually assaulted the Applicant. The Applicant lost consciousness. When she regained consciousness, the men had left. She fled to the house of a friend in the outskirts of Odessa. She went to a hospital where she underwent a physical examination which confirmed she had been sexually assaulted. The Applicant stayed at the home of her friend for a month.

[7] The Applicant reported the assault on her to the police. She described those who had assaulted her and named one of them. She did not report her suspicion regarding smuggling by reason of fear of her collaborator and his colleagues. While the Applicant was staying at the home of her friend, her kiosk at the Odessa market was burned down and all of her goods were destroyed.

[8] A month after her report to the police, the Applicant was advised by them that the person she had named as one of her assailants was not registered as a resident in the city of Odessa or in the Odessa region. The police advised that they could not locate the people whom she had described as her assailants.

[9] To escape her former collaborator and his colleagues, the Applicant sold her house, married her boyfriend, changed her last name and moved to Krementchug, another city in Ukraine. After her marriage, the Applicant went to Krementchug to find employment and housing while her husband stayed in Odessa. The Applicant's brother also left Odessa after once again being assaulted, this time by persons attempting to find the whereabouts of the Applicant.

[10] The Applicant's husband, while still in Odessa, was threatened by persons seeking the whereabouts of the Applicant. The last time they visited him, they beat him and demanded that he sell his house and pay back the money that the Applicant allegedly had borrowed from them.

[11] The Applicant determined to leave Ukraine. Her husband refused to leave and demanded a divorce. The Applicant and her husband divorced on the 24th of September, 1997.

[12] The Applicant moved to her son's home in Latvia and obtained temporary status in that country. She discovered that her former husband was in prison on what she considered to be "trumped up charges". She was advised that the real purpose of incarceration of her former husband was to find out her own whereabouts. She once again became afraid and left her son's home. She took up residence at a summer home owned by her son's in-laws.

[13] While the Applicant was in residence at the summer home, her son's home was visited and enquiries were made of her son as to her whereabouts. On learning of this development, the Applicant fled Latvia to Canada.

[14] After coming to Canada, the Applicant was advised that persons continued to visit her son's home and to maintain surveillance on it. The Applicant's ex-husband was "forced" to move.

[15] In December 1999, the Applicant learned that her brother was found hanged in a cemetery in Odessa.

[16] The Applicant made a claim to Convention refugee status in Canada.

THE DECISION ON THE APPLICANT'S CONVENTION REFUGEE CLAIM

[17] The Convention Refugee Determination Division of the Immigration and Refugee Board determined that the Applicant was not a Convention refugee. In its reasons for decision, the CRDD wrote:

> With regard to credibility, the panel found the claimant to be generally credible. Her testimony was reasonably consistent and straightforward. The report and testimony of Dr. Marc Nesca state that he believes that she has suffered a traumatic incident which has led to symptoms of Posttraumatic Stress Disorder (PTSD). Dr. Nesca testified that during his two hour interview with the claimant he found her to be credible, as her reported symptoms were consistent with her behaviour. The panel accepts his diagnosis that she suffers from PTSD, likely triggered by a traumatic incident such as the rape she described.
>
> The panel further accepts that the claimant was threatened by individuals with whom she had been doing business, and that given the seriousness of their retribution against her, the harm she suffered does amount to persecution.
>
> However, the panel does not find there is a nexus between the persecution she suffered at the hands of Mr. Bulackh [the Applicant's collaborator] and his "representatives" and any of the grounds enumerated in the Convention refugee definition.[2]

[18] In summary then, the CRDD found the claimant to be credible, found the psychological report tendered on her behalf, supported by the testimony of the author of that report, to be persuasive, accepted the author's diagnosis that the Applicant suffered from post-traumatic stress disorder and that that condition was "...likely triggered by a traumatic incident such as the rape [the applicant] described." The CRDD accepted that the Applicant was threatened by persons with whom she had been doing business and that she had suffered persecution. The CRDD found the Applicant not to be a Convention refugee on the basis that the persecution that she had suffered bore no "nexus" to a Convention ground.

THE DECISION UNDER REVIEW

[19] The PCDO, in his or her "Risk Analysis and Decision"[3], noted information before him or her relating to violence against women in the Ukraine. The PCDO concluded that he or she "...cannot find that this generalized information is compelling in itself to make a finding of risk for the Applicant." [emphasis added]

[20] The PCDO noted the evidence before him or her in documentary material that "...violence against women in Ukraine is pervasive." He or she noted that the same documentary source described police corruption in the Ukraine as remaining "...a serious problem."

[21] The PCDO wrote:

> While I note the pervasiveness of organized crime in Ukraine and the evidence of police corruption in that country, the applicant has advanced no credible persuasive evidence to link the two in her situation.
>
> [emphasis added]
>
> I note in passing the distinction between this finding and that of the CRDD. The PCDO would appear to have found the failure of Odessa police to pursue the investigation of the Applicant's complaint made to them, based upon the fact that the suspected rapist did not reside in or near Odessa, to be persuasive. He or she concluded:
>
> ... I cannot agree that there is a causal connection between the police being unable to proceed further with their investigation and corruption that links the police with the criminal element in Ukraine.

[22] The PCDO noted that "...specific information is scarce relating to state protection available to persons in Ukraine in fear of organized crime groups." Flowing from this, the PCDO concluded that there was "...insufficient factual evidence ... provided by the applicant to convince me that this was the reality of her situation."

[23] The PCDO further noted:

> No independent evidence has been offered to link these events [that is, threats against her husband, strangers appearing at her son's house in Latvia and third-party information from the applicant's friend regarding her husband's imprisonment] definitively and taken as a whole, in my opinion they do not constitute an objectively identifiable risk to the applicant.

[24] With regard to the psychological report referred to by the CRDD and letters from the Applicant's son, the PCDO wrote:

> I have taken into consideration the letters supplied by the applicant's son, relating to the threats and can give these letters no probative weight. In addition, I have read the psychological report provided by Dr. Marc Nesca. I note the panel was satisfied with the doctor's diagnosis that the applicant suffers from post-traumatic stress syndrome, but this information in itself is not enough for me to find the applicant faces an objectively identifiable risk upon return to Ukraine. [emphasis added]

[25] The PCDO concluded in the following terms:

> Based on a careful analysis of the evidence and circumstances before me, I find the applicant has not provided a link between her own particular situation and the country conditions to conclude she would be subjected to a risk as outlined in the PDRCC definition if removed to Ukraine. The applicant is not a member of the PDRCC class.

THE ISSUES

[26] In terms of priority, the first issue that I was asked to consider was whether or not the decision under review is moot given the coming into force in June 2002 of the *Immigration and Refugee Protection Act*[4] and the resultant elimination of the PDRCC class.

[27] If I were to determine this application for judicial review not to be moot or to consider the application regardless of mootness, the Applicant raised the following issues: first, whether the PCDO erred in law by ignoring cogent and relevant evidence and in failing to provide reasons for doing so; secondly, whether the PCDO exceeded his or her jurisdiction by reassessing the Applicant's refugee claim rather than determining if there was an objectively identifiable risk to the Applicant if she were returned to the Ukraine; and thirdly, whether the PCDO breached the duty of fairness that he or she owed to the Applicant by failing to provide the Applicant with a copy of her risk assessment before issuing it and therefore failing to provide the Applicant with an opportunity to respond to the risk assessment.

ANALYSIS

a) Mootness

[28] In *Borowski v. Canada (Attorney General)*[5], Justice Sopinka, for the Court, wrote at page 353:

> The approach in recent cases [to mootness] involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

[29] Before me, counsel for the respondent urged that, in light of the coming into force of the *Immigration and Refugee Protection Act* which resulted in the elimination of the PDRCC class, no "live controversy" continues between the Applicant and the Respondent with respect to the decision under review because whether or not the Applicant might have been a member of PDRCC class is no longer relevant. Counsel urged that this was reinforced by evidence before me that the Respondent views the Applicant as entitled to a "Pre-Removal Risk Assessment" ("PRRA") under the *Immigration and Refugee Protection Act* which would essentially afford her a new opportunity to make her case as a person in need of protection. I adopt the Respondent's submissions in this regard, but that is not the end of the matter. I turn to the second element of what Justice Sopinka described as the "two-step analysis", that is, the question of whether or not the circumstances of this matter warrant considering this application for judicial review on its merits, notwithstanding its mootness.

[30] In *Ramoutar v. Canada (Minister of Employment and Immigration)*[6], Justice Rothstein wrote at page 377:

> In this case, a decision very damaging to the applicant is now part of the applicant's record for immigration purposes. That decision could have an adverse effect on the applicant in any further proceedings he may wish to bring under Canada's immigration laws.

[31] Justice Rothstein continued at page 378:

> Even if the case were moot, I would exercise my discretion to decide it. The adversarial relationship between the parties continues. There are collateral consequences to the applicant if the decision appealed from is allowed to stand. And this is not a case in which a decision by this Court could reasonably be considered to be an intrusion into the functions of the legislative branch of government.

[32] While it is questionable whether there is an "adversarial relationship" between the Applicant and the Respondent in the circumstances of this matter, I am satisfied that that is not the issue. I am satisfied that the decision under review is a decision "...very damaging to the Applicant..." and that that decision is now part of the Applicant's record for immigration purposes. To the extent that it remains unreviewed, it is entirely possible that it might influence the thinking of an officer who undertakes a PRRA in respect of the Applicant. If the decision is not reviewed,

and therefore is allowed to stand, there are at least potential "collateral [negative] consequences to the applicant".

[33] In the result, while I am satisfied that the decision under review is in fact moot, I determined at hearing to nonetheless consider this application for judicial review.

[34] I will proceed to a brief analysis of the first two (2) issues raised on behalf of the Applicant, which I will consider together.

b) Ignoring of cogent and relevant evidence without providing reasons for doing so and exceeding jurisdiction

[35] Earlier in these reasons, I outlined the analysis of the PCDO in some detail. It is worthy of note that the CRDD, when it considered the Applicant's Convention refugee claim, had the advantage of oral testimony by the Applicant and apparently also by the psychologist who considered and reported on the Applicant's psychological state. It was not in dispute before me that the PCDO did not have the advantage of hearing the oral testimony of the Applicant and the psychologist. The CRDD determined the Applicant to be "generally credible". It found her testimony was "reasonably consistent and straight forward". The psychologist testified that he as well found the Applicant to be credible. On the basis of the material before it and the testimony before it, the CRDD accepted the psychologist's diagnosis and its likely source. It further accepted that the Applicant was threatened and that the harm she suffered did amount to persecution. It is trite law that past persecution is evidence of the risk of future persecution if the persecuted individual is returned to the conditions where he or she suffered persecution.

[36] Despite the foregoing, the PCDO minimized the weight given to the material submitted by and on behalf of the Applicant that was before it and isolated the evidence of the psychologist when it wrote:

> ... but this information in itself is not enough for me to find the applicant faces an objectively identifiable risk upon return to Ukraine.

[37] In essence the PCDO, for whatever reason, appears to have refused to consider the psychologist's evidence in the context of all of the other evidence that was before it.

[38] Despite acknowledging the substantial weight of documentary evidence before him or her regarding adverse conditions in the Ukraine for persons such as the Applicant, the PCDO once again minimized the impact of that evidence. It isolated the evidence regarding violence against women. Once again the PCDO noted that he or she could not find this "generalized information" to be compelling "in itself".

[39] The PCDO appeared to determine that the refusal of the Odessa police to proceed further with an investigation when it found that the suspected rapist of the Applicant did not reside in Odessa or in the Odessa region, to be an acceptable reaction. In essence, the PCDO concluded that a rapist, to use the PCDO's term, could

immunize himself from police investigation simply by living outside the jurisdictional area of the Odessa police. I find this to be a strange outcome.

[40] While the PCDO acknowledged that "specific information is scarce relating to state protection available to persons in Ukraine in fear of organized crime groups", it nonetheless found that the Applicant had failed to provide sufficient factual information. The PCDO provided no indication of what he or she would have regarded as "sufficient" factual evidence. In the next paragraph of his or her reasons, the PCDO was critical of the fact that the Applicant provided no "independent evidence" to support an identifiable risk to the Applicant.

[41] The PCDO determined to give letters from the Applicant's son that were before him or her "no probative weight". The PCDO provided absolutely no explanation as to why he or she so decided.

[42] Based upon the foregoing considerations, I am satisfied that the PCDO exceeded his or her jurisdiction by effectively contradicting conclusions of the CRDD that were arrived at with the benefit of oral testimony and erred in placing on the Applicant a burden far exceeding what she could reasonably be expected to discharge, given conditions in Ukraine, in her efforts to establish that she remained in need of protection.

[43] In *Ahmed v. Canada (Minister of Citizenship and Immigration)*[7], my colleague Justice Tremblay-Lamer wrote at paragraph 23:

> In the present case, it appears that the PCDO has in fact substituted her opinion for that of the Refugee Division. In my view, the PCDO conducted a new refugee determination analysis rather than a risk analysis, re-evaluating the applicant's credibility, and thus exceeding her jurisdiction.
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> While the foregoing is, I am satisfied, an overstatement on the facts before me, it is nonetheless applicable in substance with regard to elements of the PCDO's analysis here under review. Justice Tremblay-Lamer continued at paragraph 25 of her reasons:
>
> The present case is an ideal illustration of the PDRCC process operating as a safety net. The applicant's fear may have been outside the scope of protection offered by the Convention, nevertheless, there may very well be a risk to his life if he were to return to Bangladesh.

[44] I am satisfied that the foregoing quotation is directly applicable on the facts of this matter with a reference to Ukraine substituted for the reference to Bangladesh. I am satisfied that the PCDO simply lost sight of the fact that the PDRCC process is a "safety net", particularly in circumstances where this Applicant's fear was determined by the CRDD to be outside the scope of protection offered the Convention, but nonetheless to have been based on persecution.

c) Breach of Fairness

[45] Counsel for the Applicant relied on *Soto v. Canada (Minister of Citizenship and Immigration)*[8] for the proposition that failure by a PCDO to disclose his or her protection analysis in advance of finalizing it and to provide the Applicant an opportunity to respond to it amounts to a breach of the duty of fairness.

[46] In *Mia v. Canada (Minister of Citizenship and Immigration)*[9], Justice McKeown wrote at paragraph 11:

> With respect, I disagree that the principles of fairness require a PCDO conducting a risk assessment to determine if the applicant is a member of the PDRCC class to disclose the risk assessment prior to making his decision. In my view, this would be tantamount to a decision-maker being required to provide its reasons for the decision for comment prior to making the final decision. This is a case where the person who reviewed the evidence made the decision. No one else was involved. This is not a case where the decision maker is receiving input from other persons than the applicant. ...
>
> I prefer the decision of Justice McKeown on this issue. I find no reviewable error on the part of the PCDO in the nature of breach of the duty of fairness owed by him or her to the Applicant.

CONCLUSION

[47] Based upon the foregoing analysis, this application for judicial review will be allowed. Since there no longer exists authority in law to determine the Applicant's membership in the PDRCC class, my decision will simply set aside the decision under review. The Applicant's application will not be referred back for redetermination.

[48] When advised at hearing of what the outcome of this application for judicial review would be, neither counsel recommended certification of a question. I am satisfied that no serious question of general importance arises. No question will be certified.

[49] There will be no order as to costs, notwithstanding that counsel for the Respondent sought costs in the event that I determined this application for judicial review to be moot, as indeed I have.

ADDITIONAL CONSIDERATIONS

[50] It is this judge's understanding that many of the officers in the Respondent's Ministry who formerly acted as PCDO's now carry responsibility for performing pre-removal risk assessments under the *Immigration and Refugee Protection Act*. If I am correct in this regard, I suggest for the Respondent's consideration that the pre-removal risk assessment to which the Respondent acknowledges the Applicant is entitled be conducted by an officer other than the officer who produced the decision that is here under review.

[51] The opening words of section 113 of the *Immigration and Refugee Protection Act* and paragraph (a) of that section read as follows:

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

> (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;
>
> ...
>
> 113. Il est disposé de la demande comme il suit_:
>
> 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; ...

[52] If I interpret the foregoing provision correctly, when the Applicant receives the pre-removal risk assessment that the Respondent acknowledges she is entitled to, the officer conducting the pre-removal risk assessment will be entitled to rely only on new evidence that arose after the rejection of the Applicant's refugee claim or evidence that was not reasonably available or that the Applicant could not have reasonably have been expected in the circumstances to have presented at the time her refugee claim was considered.

[53] In the context of the scheme of the *Immigration and Refugee Protection Act*, paragraph 113(a) make eminent sense since a panel of the Convention Refugee Determination Division that considers a Convention refugee claim is required also to consider whether or not the person is a person in need of protection. That was not the case when the Applicant in this matter had her Convention refugee claim considered. Thus, consideration of the Applicant's need of protection and the evidence of such need, while such evidence was before the CRDD, was not considered in that context by the CRDD but rather was considered by the PCDO who arrived at the decision here under review, a decision that I have determined to be flawed. While I am deeply cognizant of the fact that it is not my role to suggest to the Respondent that paragraph 113(a) of the *Immigration and Refugee Protection Act* should be ignored, I cannot help but comment that if it is applied in its strictest terms to the Applicant's pre-removal risk assessment, the result will be that the Applicant will in effect have received no valid and meaningful determination of whether she is a person in need of protection from a return to Ukraine.

J.F.C.C.

Ottawa, Ontario

February 26, 2003

FEDERAL COURT OF CANADA

TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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REASONS FOR ORDER OF GIBSON, J

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[1] SOR/78-172.

[2] Applicant's Record, page 088.

[3] Applicant's Record, pages 007 to 009.

[4] S.C. 2001, c. 27.

[5] [1989] 1 S.C.R. 342.

[6] [1993] 3 F.C. 370 (T.D.).

[7] [2001] 1 F.C. 483 (T.D.).

[8] [2001] F.C.J. No. 1207 (online: QL) (F.C.T.D.).

[9] [2001] F.CJ. No. 1584 (online: QL) (F.C.T.D.).