Date: 20081222

Docket: IMM-2855-08

Citation: 2008 FC 1401

Ottawa, Ontario, December 22, 2008

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

PRISCILLA MOOKETSI
SAMUEL MOOKETSI
DAVID JOEL

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The principal Applicant, Ms. Priscilla Mooketsi, a citizen of Botswana, came to Canada in 2005 with her husband and two of her children. After her husband returned to Botswana, Ms. Mooketsi and her two children applied for refugee protection on the basis of abuse by her husband. In a decision dated February 15, 2007, a panel of the Refugee Protection Division of the Immigration and Refugee Board (RPD) rejected the claim. Subsequently, the family applied for a pre-removal risk assessment (PRRA) for which they presented extensive submissions. The basis of

the PRRA application was the abuse suffered by all members of the family. In a decision dated May 15, 2008, a PRRA Officer rejected their claim for protection. The Applicants seek judicial review of the decision.

II. Preliminary Matters

A. *The minor Applicants' claims*

[2] The situation with respect to the minor Applicants was clarified at the hearing of this matter.

[3] Samuel is a citizen of both the United States and Botswana. The Applicants concede that any PRRA would be made against the United States. Accordingly, there is almost no likelihood that he could demonstrate the need for protection in the United States. Accordingly, the application for judicial review will be dismissed against Samuel.

[4] On the other hand, David is only a citizen of Botswana. The Respondent acknowledges that the reasons of the PRRA Officer, insofar as they relate to David, are inadequate. I agree and the application for judicial review will be allowed in respect of David.

B. *H&C approval in principle*

[5] Since the commencement of this application for judicial review, the Applicants have received approval-in-principle for permanent residence in Canada on humanitarian and compassionate (H&C) grounds. Consequently, a negative decision in this judicial review will not result in a removal of the Applicants to Botswana. I questioned whether the H&C approval renders the judicial review moot or, if not, why I would not simply adjourn the hearing. I was persuaded by the Applicants' counsel that I should deal with this application in spite of the approval-in-principle.

[6] The main reason for doing so relates to the age of a daughter who currently resides in the United States. It will take one to two years to finalize the medical, security and criminality clearances for permanent residence under the H&C class. During that time, the daughter in the United States will turn 22 and, thus, be ineligible for sponsorship. However, should Ms. Mooketsi be successful in this judicial review and in reconsideration of her PRRA, she may obtain protected person status prior to the daughter's 22nd birthday and, accordingly, be able to sponsor her daughter.

[7] While I express no view of whether the foregoing is an accurate summary of the immigration procedures in play, I am persuaded that I have sufficient reason to consider Ms. Mooketsi's application on its merits.

III. Issues

[8] The issues raised by this application, in respect of Ms. Mooketsi are as follows:

1. Did the Officer err by ignoring and misapprehending the "new evidence" that countered the credibility findings of the RPD?

2. Did the Officer err by rejecting certain of the evidence submitted on the basis that it was not "new evidence" under s. 113(a) of *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (IRPA)?

IV. Analysis

A. *General*

[9] In making an application for protection under the PRRA process, a rejected refugee claimant may submit "new evidence". Section 113(a) of IRPA provides that:

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 rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances	*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

to have presented, at the time of the rejection;	s'attendre à ce qu'il les ait présentés au moment du rejet;

[10] The leading authority on the assessment of evidence submitted in a PRRA application is *Raza v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385, 370 N.R. 344. As stated by Justice Sharlow, in that decision at paragraph 12, "A PRRA application by a failed refugee claimant is not an appeal or reconsideration of the decision of the RPD to reject a claim for refugee protection".

[11] The *Raza* decision clarifies the limits on "new evidence" that may be considered under s. 113(a). In paragraph 13, Justice Sharlow observes the overarching principle that a negative RPD decision must be respected by the PRRA Officer "unless there is new evidence of facts that might have affected the outcome of the RPD hearing if the evidence had been presented to the RPD". She follows this with a list of questions or "grounds" upon which evidence submitted for a PRRA may be rejected. In paragraph 15, Justice Sharlow states the following:

> I do not suggest that the questions above must be asked in any particular order, or that in every case the PRRA Officer must ask each question. What is important is that the PRRA Officer must consider all evidence that is presented, unless it is excluded on one of the grounds stated in paragraph [13] above. [Emphasis added]

[12] In this case, the Applicants submitted extensive evidence to refute the conclusion of the RPD that the Applicants' claim of domestic violence was not credible. This evidence was reviewed by the Officer who determined that some of the evidence was "new" and that some of it did not qualify under s. 113(a). The Applicants raise issues with respect to both categories of evidence.

B. *Did the PRRA Officer misapprehend the evidence accepted as "new"?*

[13] As noted above, the RPD rejected the Applicants' claim for protection. In short, the RPD, based on numerous implausibilities and inconsistencies, did not believe the Applicants' claim of domestic abuse. One piece of evidence that was before the RPD was a US court order related to custody of the principal Applicant's other three children who were (and remain) in the United States. In its decision, the RPD commented on the lack of information underlying this order. The underlying documents were presented in the submissions to the PRRA Officer and accepted as new evidence.

[14] In dealing with this evidence, the PRRA Officer wrote:

> I give minimal weight to the documents used in support of the custody order as they detail accounts of the abuse suffered by the children at the hands of their father, however there is insufficient objective evidence there was abuse toward the principal applicant. Furthermore, although the RPD was not aware of all the details they were informed of the Court's decision to grant custody of the children to the court, and were also aware the applicant provided testimony about the husband's abuse toward the children (in the USA).
>
> I do note in the eldest daughter, Prudence's affidavit she stated "my mother has also been the focus of my father's wrath and thus she has never been able to protect us from him." However, the affidavit provides no other details and this statement on its own is insufficient objective evidence to rebut the findings of the RPD.

[15] In my opinion, the Officer's conclusion was reasonable based on the evidence. Apart from the affidavit evidence of Ms. Mooketsi's sister, in which she claimed to have witnessed the abuse, there was little direct evidence that Mr. Mooketsi had been physically abusive towards the principal Applicant. Rather, the evidence was directed towards the severe abuse that the three U.S.-based

daughters had endured, Ms. Mooketsi's inability to prevent this and the multitude of instances in which the daughters had been abandoned by their parents.

[16] Based on this new evidence, it was open for the Officer to conclude that there was insufficient objective evidence to rebut the findings of the RPD. The decision fell, in my view, within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law." (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 47).

C. *Did the Board err by rejecting evidence?*

[17] The Officer rejected much of the evidence filed because it did not qualify as "new evidence". The Applicants assert that much of the rejected evidence contradicts the credibility finding – a finding of fact – of the RPD. This is one of the grounds, the Applicants submit, upon which evidence ought to be admitted as "new", as found in *Raza*, above, at paragraph 13(3)(c).

[18] In my view, the Applicants have misapplied the Court of Appeal decision in *Raza*. I do not read the decision and, in particular paragraph 13, as a statement to the effect that, if any one of the questions posed can be answered in the positive, the evidence is "new". As noted in paragraph 15 of *Raza* decision, evidence must be considered "unless it is excluded on <u>one</u> of the grounds stated in paragraph [13] above". Thus, if the "new" evidence could have been presented at the RPD hearing, then s. 113(a) requires that such evidence be rejected, even if it contradicts a finding of fact by the RPD. This is reinforced by paragraph 13(5)(a) of the *Raza* decision.

[19] After examining each and every piece of the rejected evidence which has been raised on this juridical review, I find that the PRRA Officer's application of s. 113(a) to the evidence was reasonable. Ms. Mooketsi's submissions were not new. They did not indicate a new risk apart from repeating Ms. Mooketsi's own claims of the spousal abuse, which the RPD had found to be not credible. Furthermore, the evidence from various third parties either repeated Ms. Mooketsi's own claims as were told to them or was evidence that could have reasonably been made available to the RDP.

[20] I conclude that the Officer's rejection of the newly submitted evidence was reasonable.

V. Conclusion

[21] In summary, I conclude that the application for judicial review of the decision of the PRRA Officer:

1. Will be allowed in respect of David Joel; and

2. Will be dismissed in respect of Samuel Mooketsi and Priscilla Mooketsi.

[22] Neither party proposes a question for certification and none will be certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application for judicial review of the decision, in respect of the Applicant, David Joel; this matter will be referred back to a different PRRA Officer for reconsideration;

2. The application for judicial review, in respect of Priscilla Mooketsi and Samuel Mooketsi, is dismissed; and

3. No question of general importance is certified.

"Judith A. Snider"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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