Federal Court  Cour fédérale

Date: 20151019

Dockets: IMM-292-15
IMM-368-15

Citation: 2015 FC 1177

Ottawa, Ontario, October 19, 2015

PRESENT: The Honourable Mr. Justice Fothergill

Docket: IMM-292-15

BETWEEN:

NOOR DEIAN AZIMI

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: IMM-368-15

AND BETWEEN:

NOOR DEIAN AZIMI

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Noor Deian Azimi has brought two applications for judicial review pursuant to s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA]. The first application concerns the adverse decision of a senior immigration officer regarding Mr. Azimi's Pre-Removal Risk Assessment [PRRA]. The second application concerns the refusal of an enforcement officer with the Canada Border Services Agency to "cancel" Mr. Azimi's removal to Afghanistan.

[2] Both the PRRA Officer and the Enforcement Officer found that Mr. Azimi is a person referred to in Article 1(F)(a) of the United Nations *Convention Relating to the Status of Refugees* [the Convention], and that they lacked jurisdiction to overcome this status. Article 1(F)(a) of the Convention excludes claimants from refugee protection if they are found to have been complicit in war crimes or crimes against humanity. The Refugee Protection Division of the Immigration and Refugee Board [the Board] made such a determination respecting Mr. Azimi on June 9, 2009.

[3] Subsequent to the Board's decision, the law of complicity was significantly changed by the decision of the Supreme Court of Canada in *Ezokola v Canada (Citizenship and Immigration)* 2013 SCC 40 [*Ezokola*]. In his submissions to both the PRRA Officer and the Enforcement Officer, Mr. Azimi sought to be exempted from the Board's finding that he was excluded from refugee protection due to the change in the law.

[4] For the reasons that follow, I have determined that the PRRA Officer and the Enforcement Officer reasonably concluded that their jurisdiction did not extend to revisiting the Board's finding that Mr. Azimi is a person described in Article 1(F)(a) of the Convention. The PRRA Officer reasonably concluded that Mr. Azimi would not be at risk in Afghanistan within the meaning of s 97 of the IRPA. The applications for judicial review are therefore dismissed.

II. Background

[5] Mr. Azimi sought refugee protection in Canada on the basis that he faced a risk of persecution in Afghanistan due to his service in the Afghan Presidential Guard from 1985 to 1992. In his first Personal Information Form [PIF], Mr. Azimi stated that he was a palace guard from 1983 to 1985 and that he was assigned to protect the President. He said that he had engaged in combat, and had paramilitary and security training. In his second PIF, Mr. Azimi stated that he had not engaged in combat, but was responsible only for protecting the radio and television station within the Presidential compound. He said that when the Mujahedeen took over Afghanistan in 1985, he was detained and tortured. Mr. Azimi fled Afghanistan and lived in various countries before making his way to Canada in May, 2006.

[6] On June 9, 2009, the Board found that Mr. Azimi was excluded from refugee protection pursuant to Article 1F(a) of the Convention. The Board determined that as a member of the Afghan Presidential Guard, Mr. Azimi was "complicit in the commission of crimes against humanity, even if he did not actually commit the crimes himself". The Board found that Mr. Azimi's testimony regarding his level of involvement in the Afghan Presidential Guard was not

credible. However, given the law of complicity at the time, the Board did not consider it necessary to make a definitive finding regarding Mr. Azimi's level of involvement.

[7] The Board acknowledged that, were it not for Mr. Azimi's exclusion from refugee protection under Article 1(F)(a) of the Convention, he would have been granted refugee status. The Board accepted the refugee claims of Mr. Azimi's wife and children pursuant to s 96 of the IRPA. Mr. Azimi applied to this Court for leave and for judicial review of the Board's decision, but this was refused on November 23, 2009.

[8] On July 19, 2013, the Supreme Court of Canada rejected "a concept of complicity that leaves any room for guilt by association or passive acquiescence" (*Ezokola* at para 81). The Supreme Court established a new test for complicity that requires an evaluation of whether there are "serious reasons for considering that the claimant has voluntarily made a significant and knowing contribution to the organization's crime or criminal purpose" (*Ezokola* at para 84).

III. The PRRA Officer's Decision

[9] Because Mr. Azimi was excluded from refugee protection under Article 1(F)(a) of the Convention, he was eligible for only a "restricted PRRA" pursuant to s 112(3)(c) of the IRPA, *i.e.*, one that assessed only the risks described in s 97 of the IRPA rather than the less onerous risks described in s 96. The PRRA Officer concluded that she could not revisit the Board's decision concerning Mr. Azimi's exclusion from refugee protection, notwithstanding the change in the law of complicity following the Supreme Court's decision in *Ezokola*. The PRRA Officer

acknowledged that Mr. Azimi would face risks upon returning to Afghanistan, but concluded that they did not rise to the standard of "more likely than not," as required by s 97 of the IRPA.

IV. The Enforcement Officer's Decision

[10] The Enforcement Officer rejected Mr. Azimi's request to cancel his removal to Afghanistan, notwithstanding the Minister's issuance of a Temporary Suspension of Removals [TSR] pursuant to s 230(1) of the *Immigration and Refugee Protection Act Regulations* [the Regulations]. In terse reasons, the Enforcement Officer noted that the Board had found Mr. Azimi to be a person referred to in Article 1F(a) of the Convention, and pursuant to s 230(3)(e) of the Regulations he could not therefore benefit from the TSR.

[11] On June 30, 2015, this Court granted Mr. Azimi's motion for a stay of his removal pending determination of his applications for judicial review of the decisions of the PRRA Officer and the Enforcement Officer.

V. Relevant Legislative Provisions

[12] The following provisions of the IRPA are relevant to the application for judicial review of the PRRA Officer's decision:

112. (1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they	112. (1) La personne se trouvant au Canada et qui n'est pas visée au paragraphe 115(1) peut, conformément aux règlements, demander la protection au ministre si elle

are subject to a removal order that is in force or are named in a certificate described in subsection 77(1)	est visée par une mesure de renvoi ayant pris effet ou nommée au certificat visé au paragraphe 77(1).
[…]	[…]
Restriction	Restriction
[3] Refugee protection may not be conferred on an applicant who	(3) L'asile ne peut être conféré au demandeur dans les cas suivants :
[…]	[…]
[c] made a claim to refugee protection that was rejected on the basis of section F of Article 1 of the Refugee Convention	*c*) il a été débouté de sa demande d'asile au titre de la section F de l'article premier de la Convention sur les réfugiés;
[…]	[…]
Consideration of application	Examen de la demande
113. Consideration of an application for protection shall be as follows:	113. Il est disposé de la demande comme il suit :
(d) in the case of an applicant described in subsection 112(3) — other than one described in subparagraph (e)(i) or (ii) — consideration shall be on the basis of the factors set out in section 97	*d*) s'agissant du demandeur visé au paragraphe 112(3) — sauf celui visé au sous-alinéa *e*)(i) ou (ii) —, sur la base des éléments mentionnés à l'article 97
Humanitarian and compassionate considerations — Minister's own initiative	Séjour pour motif d'ordre humanitaire à l'initiative du ministre
25.1 (1) The Minister may, on the Minister's own initiative,	25.1 **(**1) Le ministre peut, de sa propre initiative, étudier le cas

examine the circumstances concerning a foreign national who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	de l'étranger qui est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 — ou qui ne se conforme pas à la présente loi; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

VI. Issues

[13] These applications for judicial review raise the following issues:

A. Was the PRRA Officer's decision reasonable?

B. Was the Enforcement Officer's decision reasonable?

VII. Analysis

A. *Was the PRRA Officer's decision reasonable?*

[14] The risk assessment of an immigration officer who conducts a PRRA is subject to review against the standard of reasonableness. The officer's findings of fact and assessment of country conditions fall within her specific expertise, and should therefore be accorded significant deference (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47-48 [*Dunsmuir*]; *Moreno Corona v Canada (Minister of Citizenship and Immigration)* 2012 FC 759 at para 10; *Burton v Canada (Minister of Citizenship and Immigration)* 2014 FC 910 at para 34).

[15] The assessment by an immigration officer of the limits of her jurisdiction is also subject to review by this Court against the standard of reasonableness. In the words of the Supreme Court of Canada, "unless the situation is exceptional, and we have not seen such a situation since *Dunsmuir*, the interpretation by the tribunal of "its own statute or statutes closely connected to its function, with which it will have particular familiarity" should be presumed to be a question of statutory interpretation subject to deference on judicial review" (*A.T.A v Alberta (Information and Privacy Commissioner)*, 2011 SCC 61 at para 34). However, where a decision-maker engages in statutory interpretation the range of reasonable outcomes may be narrow (*Canada (Attorney General) v Canada (Human Rights Commission)*, 2013 FCA 75 at paras 13 and 14).

[16] Mr. Azimi argues that the PRRA Officer wrongly applied the doctrine of *res judicata* to the Board's finding that he was excluded from refugee protection. He relies on this Court's decision in *Hamida v Canada (Minister of Citizenship and Immigration)*,2014 FC 998 [*Hamida*].

Hamida concerned an application for permanent residence on humanitarian and compassionate [H&C] grounds. Justice Annis found that a visa officer has a sufficiently broad discretion to revisit a Board's finding that an applicant is excluded from refugee protection for complicity in crimes against humanity (*Hamida* at para 47). Justice Annis recognized that a Board's finding that an applicant is inadmissible is normally considered to be *res judicata*, and therefore final and binding. However, given the change in the law of complicity resulting from *Ezokola*, Justice Annis concluded that it would be in the interests of justice to return the matter to the visa officer and direct him to take the *Ezokola* decision into account when assessing H&C considerations (*Hamida* at para 79).

[17] According to Mr. Azimi, the PRRA Officer improperly fettered her discretion by refusing to revisit the Board's finding that he was excluded from refugee protection pursuant to Article 1(F)(a) of the Convention. Mr. Azimi says that the PRRA Officer should have considered whether to invoke the discretion found in s 25.1 of the IRPA and, on her own initiative, examined his circumstances and granted him an exemption from the applicable criteria on H&C grounds.

[18] The Minister says that s 25.1 has no place in a PRRA, and in any event the provision does not assist Mr. Azimi because he is inadmissible under s 35 of the IRPA. The Minister relies on s 15(b) of the Regulations, which states that the findings of fact set out in a decision of the Board respecting exclusion from refugee protection are considered to be conclusive. However, in *Johnson v Canada (Minister of Citizenship and Immigration)*, 2014 FC 868 at paras 24 and 25,

Justice Mactavish said the following about the effect of s 15(b) on a finding of inadmissibility under s 35:

> [24] Subsection 15(b) of the *Regulations* stipulates that the *findings of fact* made by the Board in an exclusion proceeding are to be considered as conclusive findings of fact in an admissibility determination under section 35 of *IRPA*. This makes sense, as it limits the potential for re-litigation of factual matters that have already been assessed by an expert tribunal in the context of an oral hearing.
>
> [25] Nothing in subsection 15(b) of the *Regulations* suggests that officers are bound by *findings of mixed fact and law* that have been made by the Board. Rather the task of immigration officers making admissibility determinations is to take the findings of fact that have been made by the Board and consider them in light of the provisions of section 35 of *IRPA* in order to determine whether or not the individual in question is admissible to Canada.

[19] In this case, the Board did not consider it necessary to make a final determination regarding Mr. Azimi's level of involvement in the commission of crimes against humanity. There are therefore few findings of fact that could now be considered conclusive for the purpose of determining whether Mr. Azimi is inadmissible to Canada pursuant to s 35 of the IRPA.

[20] I nevertheless agree with the Respondent that the IRPA does not grant an immigration officer who conducts a PRRA the same broad discretionary powers as those granted to a visa officer who considers an application for permanent residence on H&C grounds. Unlike a visa officer who considers an H&C application, the PRRA Officer's discretion was limited to assessing Mr. Azimi's allegations of risk at the time the decision was made. As Justice Lagacé held in *Yansane v Canada (Minister of Citizenship and Immigration)* 2008 FC 1213 at para 31, "the purpose of the PRRA is not to repeat the same exercise or to sit on appeal of an RPD

decision which has the effect of *res judicata* after the Court's refusal to grant leave to submit the decision to judicial review".

[21] Mr. Azimi points out that Item 44 of the Minister's Instrument of Designation and Delegation provides that a senior immigration officer may exercise the powers conferred on the Minister by both ss 112 and 25.1 of the IRPA. However, s 113 of the IRPA clearly provides that a PRRA application must be considered on the basis of ss 96 to 98 of the IRPA: "a PRRA Officer must assess risk allegations, not humanitarian and compassionate considerations" (*Eid v Canada (Minister of Citizenship and Immigration)* 2010 FC 369 at para 2). In the words of Justice Mosley in *Kim v Canada (Minister of Citizenship and Immigration)*, 2005 FC 437 [*Kim*] at para 70:

> PRRA officers need not consider humanitarian and compassionate factors in making their decisions. There is no discretion afforded to a PRRA officer in making a risk assessment. Either the officer is satisfied that the risk factors alleged exist and are sufficiently serious to grant protection, or the officer is not satisfied. The PRRA inquiry and decision-making process does not take into account factors other than risk. In any case, there is a better forum for the consideration of humanitarian and compassionate factors: the H&C determination mechanism. I do not find that the officer erred in law by refusing to consider humanitarian and compassionate factors in the context of the PRRA decision.

[22] Mr. Azimi has not demonstrated a basis upon which the PRRA Officer could invoke the Minister's discretion under s 25.1 of the IRPA and, on her own initiative, examine his circumstances and grant him an exemption from s 113(d) on H&C grounds. The PRRA Officer's conclusion that the PRRA was limited to a consideration of risk factors under s 97 of the IRPA was reasonable.

[23] In *Kasturiarachchi v Canada (Minister of Citizenship and Immigration)*, IMM-5486-14, July 21, 2015 [*Kasturiarachchi*], a case that arose in circumstances very similar to this one, Justice Hughes made the following observations before adjourning the proceedings *sine die*:

> THE MATTER before me involves a further determination of a PRRA application where the Applicant has urged that consideration be given to the effect of the change in the law made by *Ezokola*. The Respondents argue that a PRRA hearing is not the place for such argument rather a Humanitarian and Compassionate (H&C) application is the appropriate vehicle for that purpose.
>
> THE APPLICANT'S Counsel has undertaken to file such an H&C application forthwith. I urge the Minister's Officials to give it an immediate robust consideration particularly in the unique circumstances of this case brought about by the *Ezokola* case.

[24] Mr. Azimi has not made an application for permanent residence based on H&C considerations pursuant to s 25(1) of the IRPA. However, the Court was advised that his wife has made an inland spousal sponsorship application to permit him to remain in Canada. Counsel for the Respondent acknowledged that this is a forum in which the Board's previous finding that Mr. Azimi is excluded from refugee protection pursuant to Article 1(F)(a) of the Convention may be overcome by H&C considerations. Like Justice Mosley in *Kim*, I find that this is a better forum for the consideration of H&C factors in Mr. Azimi's circumstances.

[25] Mr. Azimi also argues that the PRRA Officer conducted a flawed analysis of the risks he faces in Afghanistan. I disagree. The PRRA Officer considered whether there was sufficient evidence to demonstrate that someone would identify Mr. Azimi as a former member of the Afghan Presidential Guard during the Communist regime and, if so, whether he would come to harm. The PRRA Officer referenced recent country condition reports and documentary evidence.

She noted that although some former members of the Communist regime had been threatened, others currently play active roles in the government in Afghanistan. The PRRA Officer reasonably concluded on the balance of probabilities that Mr. Azimi would not be at risk within the meaning of s 97 of the IRPA.

B. *Was the Enforcement Officer's decision reasonable?*

[26] The decision of an enforcement officer is reviewable by this Court against the standard of reasonableness (*Tovar v Canada (Minister of Citizenship and Immigration),* 2015 FC 490 at para 14); *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 at para 25 [*Baron*]). Deference is owed to an enforcement officer's exercise of discretion. This Court will intervene only if the officer's findings lack justification, transparency and intelligibility, or fall outside the range of possible, acceptable outcomes (*Dunsmuir* at para 47).

[27] Mr. Azimi says that he may be deprived of the benefit of the TSR to Afghanistan pursuant to s 230(3)(e) of the Regulations only if an enforcement officer concludes that he "is a person referred to in Article 1(F)(a) of the Refugee Convention" at the time of his scheduled removal. Mr. Azimi emphasizes the present tense of the provision, and argues that the application of s 230(3)(e) cannot be based on a previous finding of the Board, particularly when that finding is six years out of date and is inconsistent with the current state of the law. He maintains that, given the change in the law of complicity, he is not presently "a person referred to in Section F of Article 1 of the Refugee Convention".

[28] An enforcement officer's authority to defer the execution of a valid removal order is very limited. An enforcement officer has no authority to make determinations pursuant to the Convention, and his discretion is limited to determining when a removal order will be executed (*Baron* at paras 49-51).

[29] Pursuant to s 48(2) of the IRPA, removal orders must be enforced "as soon as possible". The functions of enforcement officers are limited and relatively narrow. They are "not intended to make, or to re-make, PRRAs or H&C decisions" (*Shpati v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FCA 286 at para 45). Given the Enforcement Officer's limited discretion, it was reasonable for him to find, on the strength of the Board's previous decision, that Mr. Azimi is a person referred to in Article 1F(a) of the Convention and to refuse to stay his removal on this basis.

[30] In his submissions to the Enforcement Officer, Mr. Azimi requested that his removal to Afghanistan be "cancelled", and that he be given the benefit of the TSR to Afghanistan due to the change in the law of complicity brought about by the Supreme Court's decision in *Ezokola*. He did not ask the Enforcement Officer to defer his removal pending the determination of his inland spousal sponsorship application or another identified process that would be completed within a finite period of time. Given Justice Annis' judgment in *Hamida* and Justice Hughes' order in *Kasturiarachchi*, a request to defer in these circumstances may well have produced a different result. It is in the interests of justice that the *Ezokola* decision be taken into account when determining whether Mr. Azimi should be permitted to remain in Canada based on H&C considerations (*Hamida* at para 79).

[31] For the foregoing reasons, the applications for judicial review are dismissed.

VIII. Certified Question

[32] Both parties acknowledged that this case may give rise to a certified question for appeal. However, the number of refugee claimants who are "caught between the decision of the Federal Court of Appeal in *Ramirez* [1992] 2 FC 306 and the change in the law as to complicity made by the Supreme Court of Canada in *Ezokola* [2013] 2 SCR 678" (*Kasturiarachchi*) is small and getting smaller. The legal principles that underlie this decision are well-established and do not require further elucidation by the Court of Appeal. I am not satisfied that this case raises a serious question of general importance that transcends the interests of the parties in this case. I therefore decline to certify a question for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

No question is certified for appeal.

"Simon Fothergill"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-292-15
STYLE OF CAUSE:	NOOR DEIAN AZIMI v MINISTER OF CITIZENSHIP AND IMMIGRATION
AND DOCKET:	IMM-368-15
STYLE OF CAUSE:	NOOR DEIAN AZIMI v MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 22, 2015
REASONS FOR JUDGMENT AND JUDGMENT:	FOTHERGILL J.
DATED:	OCTOBER 19, 2015

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