Federal Court  Cour fédérale

Date: 20161014

Docket: IMM-118-16

Citation: 2016 FC 1147

Ottawa, Ontario, October 14, 2016

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

ZEHRA KHATIBI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION, THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

JUDGMENT AND REASONS

[1] The Applicant, Zehra Khatibi, is a 70 year old citizen of Iran whose husband died in 2000. She has family in both Canada and Iran. She visited with her family members in Canada on two occasions prior to her third visit with them in August 2011. During her third visit, she made a claim for refugee protection on the basis of fear for her safety in Iran because of her conversion to Christianity. However, the Refugee Protection Decision [RPD] of the Immigration

and Refugee Board of Canada rejected her claim for Canada's protection in a decision dated February 26, 2014.

[2] After the rejection of her claim by the RPD, the Applicant requested permanent resident status on humanitarian and compassionate [H&C] grounds under section 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*Act*]; she also applied for a pre-removal risk assessment [PRRA] under section 112(1) of the *Act*. However, in separate decisions each dated November 13, 2015, both the Applicant's H&C request and her PRRA application were refused by the same Senior Immigration Officer [the Officer]. Consequently, the Applicant applied for and obtained leave for judicial review of the negative H&C decision pursuant to subsection 72(1) of the *Act*; but after leave was granted, the Minister of Citizenship and Immigration obtained an order quashing the H&C decision and remitting the matter to a different immigration officer for reconsideration. The Applicant also applied for and obtained leave for judicial review of the negative PRRA decision, and it is that decision which is presently under review.

I. Background

[3] Although born into a Muslim family, the Applicant converted to Christianity during her first visit to Canada from August 2004 to February 2005, and during her second visit from February to December 2009 she was introduced to the Spirit of Truth, an evangelical Farsi-speaking church. Prior to her first visit to Canada, the Applicant and members of her family encountered problems with the Islamic regime in Iran; one of her brothers was executed by the regime after he refused to attack civilian Iranian Kurds, and the family home was raided

numerous times by the Revolutionary Guards. Eventually, some members of the Applicant's family fled Iran. The Applicant's two daughters now live in the Toronto area as does her eldest son; her other son still resides in Iran. The Applicant's youngest brother lives in Toronto; her two sisters and other brother are still in Iran.

[4] The Applicant's claim for refugee protection was heard by the RPD alongside that of her oldest son who, like his mother, had converted to Christianity. Since she had twice returned to Iran after allegedly converting to Christianity during her visit to Canada in 2004, the RPD determined that the Applicant did not have a real or subjective fear of persecution in Iran. Ultimately, the RPD found that the Applicant's evidence was not credible and that she was not a true Christian since she came to Canada for family reunification purposes; the RPD made a similar determination with respect to her son's claim for protection.

[5] Following the RPD's decision, the Applicant's son applied for permanent resident status on H&C grounds. In a letter dated January 27, 2015, his application was conditionally approved to allow processing of the application from within Canada. This fact was contained in the Applicant's PRRA application, which included written submissions from her counsel, materials previously submitted to the RPD, the Applicant's personal narrative, as well as other documents that post-dated the RPD's decision. The Applicant submitted to the Officer that removal from Canada would mean that she would be returning to Iran alone, given her son's approval in principle for permanent residence, and that this was a "new factor that not only did not exist at the time of the refugee decision but was not contemplated or addressed in the refugee decision." She further submitted that she relied upon her son in place of her deceased spouse and pointed

the Officer to the risk for single women living in a Muslim country without the protection of a close male relative.

[6] The Applicant also provided a psychological report with her PRRA application to show that a return to Iran would have a negative psychological impact on her. In addition to the psychologist's report, the Applicant also submitted several articles from the internet that post-dated the RPD's decision, one of which showed that under Iranian law a Muslim who converts to another religion could be charged with the crime of apostasy. The Applicant also requested an oral hearing pursuant to paragraph 113(b) of the *Act* and section 116 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227.

II. The Officer's Decision

[7] In rejecting the Applicant's PRRA application, the Officer indicated that he had reviewed the application and all of the documentary evidence. The Officer also indicated that he had reviewed the internet articles and the psychological report. The Officer made no mention whatsoever of the fact that the Applicant's son had been approved for permanent residence and would not be returning to Iran with his mother.

[8] The Officer assigned the internet articles no weight because they did not contradict any of the RPD's findings. Specifically, the Officer stated that these documents did not explain "the numerous re-availments of the Applicant to Iran, if it were such a dangerous country for her." The Officer thus found that these documents were insufficient evidence to rebut the RPD's

findings. With respect to the psychological report, the Officer noted that the psychologist's opinion was based on information as recounted by the Applicant, and further stated:

> In *Danailov*, the court held that a psychiatric report cannot possibly serve as a cure-all for any and all deficiencies in a claimant's testimony and where such a report is submitted and there are concerns regarding the claimant's testimony, opinion evidence is only as valid as the truth of the facts on which it is based. I therefore assign little weight to this report.

[9] The Officer did not explicitly address the Applicant's request for an oral hearing but, at least implicitly, this request was refused since no oral hearing was held. The Officer concluded by stating that: "…country conditions have not deteriorated since the Board's rejection so as to place the applicant at risk of persecution, at risk of torture, or risk to life, or at risk of cruel and unusual treatment or punishment in Iran."

III. Issues

[10] The issues raised by the parties may be rephrased as follows:

1. What is the appropriate standard of review?
2. Was the Officer's decision reasonable?
3. Should the Officer have convoked an oral hearing?

IV. Analysis

A. *What is the appropriate standard of review?*

[11] It is well established that, absent any question of procedural fairness, the standard of review by which to assess a PRRA officer's decision is that of reasonableness (see: *Shilongo v*

Canada (Citizenship and Immigration), 2015 FC 86 at para 21, 474 FTR 121; *Jainul Shaikh v Canada (Citizenship and Immigration)*, 2012 FC 1318 at para 16, [2012] FCJ No 1429). Accordingly, the assessment of the evidence before the Officer in this case is entitled to deference (see: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 53, [2008] 1 SCR 190 [*Dunsmuir*]).

[12] Moreover, although the Court can intervene "if the decision-maker has overlooked material evidence or taken evidence into account that is inaccurate or not material" (*James v Canada (Attorney General)*, 2015 FC 965 at para 86, 257 ACWS (3d) 113), the Officer's decision should not be disturbed so long as it is justifiable, intelligible and transparent, and "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para 47). Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708 [*Newfoundland Nurses*]).

[13] As to the standard of review applicable to whether an oral hearing is required in a PRRA determination, the jurisprudence in this regard is unsettled. In *Zmari v Canada (Citizenship and Immigration)*, 2016 FC 132, 263 ACWS (3d) 177, the Court observed that:

> [10] The appropriate standard of review applicable to whether an oral hearing is required in a PRRA determination is open to some question. The Court's recent decisions in this regard diverge and follow one of two paths.
>
> [11] One path finds the applicable scope of review to be a standard of correctness with no deference accorded to the decision-

> maker, because the issue of whether an oral hearing is required is a question of procedural fairness. See, e.g.: *Suntharalingam v Canada (Citizenship and Immigration)*, 2015 FC 1025 (CanLII) at para 48, 257 ACWS (3d) 924; *Antoine v Canada (Citizenship and Immigration)*, 2015 FC 795 (CanLII) at para 12, 258 ACWS (3d) 153; *Matinguo-Testie v Canada (Citizenship and Immigration)*, 2015 FC 651 (CanLII) at para 6, 254 ACWS (3d) 149; *Vargas Hernandez v Canada (Citizenship and Immigration)*, 2015 FC 578 (CanLII) at para 17, 254 ACWS (3d) 912; *Negm v Canada (Citizenship and Immigration)*, 2015 FC 272 (CanLII) at para 33, 250 ACWS (3d) 317; *Micolta v Canada (Citizenship and Immigration)*, 2015 FC 183 (CanLII) at para 13, 249 ACWS (3d) 826; *Fawaz v Canada (Citizenship and Immigration)*, 2012 FC 1394 (CanLII) at para 56, 422 FTR 95; and *Ahmad v Canada (Citizenship and Immigration)*, 2012 FC 89 (CanLII) at para 18, 211 ACWS (3d) 409.
>
> [12] The other path applies a deferential standard of reasonableness because the application of paragraph 113(b) of the *Act* and section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*] is a question of mixed law and fact. See, e.g.: *Thiruchelvam v Canada (Citizenship and Immigration)*, 2015 FC 913 (CanLII) at para 3, 256 ACWS (3d) 394; *Kulanayagam v Canada (Citizenship and Immigration)*, 2015 FC 101 (CanLII) at para 20, 248 ACWS (3d) 921; *Abusaninah v Canada (Citizenship and Immigration)*, 2015 FC 234 (CanLII) at para 21 249 ACWS (3d) 843; *Ibrahim v Canada (Citizenship and Immigration)*, 2014 FC 837 (CanLII) at para 6, 244 ACWS (3d) 177; *Kanto v Canada (Citizenship and Immigration)*, 2014 FC 628 (CanLII) at paras 11-12, 242 ACWS (3d) 912; *Bicuku v Canada (Citizenship and Immigration)*, 2014 FC 339 (CanLII) at paras 16-17, 239 ACWS (3d) 723; *Chekroun v Canada (Citizenship and Immigration)*, 2013 FC 737 (CanLII) at para 40, 436 FTR 1; *Ponniah v Canada (Citizenship and Immigration)*, 2013 FC 386 (CanLII) at para 24, 229 ACWS (3d) 1140; and *Adetunji v Canada (Citizenship and Immigration)*, 2012 FC 708 (CanLII) at para 27, 218 ACWS (3d) 616.

[14] In my view, whether an oral hearing is required in a PRRA determination raises a question of procedural fairness. As noted by the Supreme Court in *Mission Institution v Khela*, 2014 SCC 24 at para 79, [2014] 1 SCR 502, “the standard for determining whether the decision maker complied with the duty of procedural fairness will continue to be ‘correctness’.”

Accordingly, the Officer's determination in this case not to convoke a hearing should be reviewed on a standard of correctness. This requires the Court to determine if the process followed by the Officer achieved the level of fairness required by the circumstances of the matter (see: *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 115, [2002] 1 SCR 3). It is, therefore, not so much a question of whether the Officer's determination not to convoke an oral hearing was correct as it is a question of whether the process followed by the Officer in making the decision under review was fair (see: *Hashi v Canada (Citizenship and Immigration)*, 2014 FC 154 at para 14, 238 ACWS (3d) 199; and *Makoundi v Canada (Attorney General)*, 2014 FC 1177 at para 35, 249 ACWS (3d) 112).

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

[15] The Applicant contends that the Officer's decision is not reasonable because it completely ignored the fact that the Applicant's son would not be returning with her to Iran. According to the Applicant, the Officer should have reassessed the Applicant's personal narrative in light of this new fact, taking into consideration the Applicant's age and all other potential risk factors, because this new fact was a material change in circumstances that occurred subsequent to the RPD hearing.

[16] The Respondent says that the Officer's decision is reasonable. According to the Respondent, the Officer did not ignore the Applicant's evidence about her son and was aware of this fact because it was "obvious on the record." The fact the Applicant would be returning to Iran alone is, in the Respondent's view, merely a background or contextual factor to assess her

religious-based risk, and that does outweigh the RPD's negative credibility findings concerning the Applicant's claim of having converted to Christianity.

[17] In my view, the Officer's decision in this case cannot be justified and, consequently, it is not reasonable because it failed to even mention, let alone discuss, the potential risks faced by the Applicant should she return to Iran without her oldest son. Although a PRRA application is not a reconsideration of a decision of the RPD, the primary purpose of a PRRA application is to consider the new circumstances and changes that have occurred after the rejection of an applicant's refugee claim (see: *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 at para 12, 289 DLR (4th) 675 [*Raza*]). As Justice Sharlow stated in *Raza* (at para 13): "a negative refugee determination by the RPD 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" [Emphasis added].

[18] In this case, it was not so much that the Applicant faced any increased or new risk in Iran by reason of her conversion to Christianity but, rather, that as a widow she would be a single woman living in a Muslim country without the protection afforded by her eldest son. In this regard, the Applicant specifically directed the Officer to the Court's decision in *Nahimana v Canada (Minister of Citizenship and Immigration)*, 2006 FC 161 at para 26, 146 ACWS (3d) 330, a case where it was determined that the RPD erred by not taking into account the fact that the claimant was a single Muslin woman from an area where "female adults and children are treated very differently than in Western culture." For whatever reason, the Officer's decision in this case failed to mention or discuss the potential risks faced by the Applicant in this regard.

[19] It is, of course, well-established that administrative decision-makers, including PRRA officers, do not have to reference every piece of evidence in their decisions. In *Newfoundland Nurses*, Justice Abella stated that a "decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion." Similarly, in *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 at para 16, 157 FTR 35 [*Cepeda-Gutierrez*], Justice Evans stated that administrative agencies are not "required to refer to every piece of evidence that they received that is contrary to their finding, and to explain how they dealt with it" as it will often be sufficient to simply make a statement "in its reasons for decision that, in making its findings, it considered all the evidence before it."

[20] However, the deference usually afforded to an administrative decision-maker lapses when a key piece of evidence or a significant and material fact is not adequately addressed. If the evidence is highly relevant or appears to contradict other findings of facts, a reviewing court may be willing to infer that the administrative decision-maker ignored such evidence and made an "erroneous finding of fact 'without regard to the evidence'" (see: *Cepeda-Gutierrez* at para 15). A reviewing court should not supplement a PRRA officer's reasons when they fail to address an important piece of new evidence or a new fact that *might* have affected the outcome of the RPD hearing. By implication, a PRRA officer's reasons cannot satisfy the requirements of justification, transparency, and intelligibility if they fail in this regard.

[21] In this case, the record is clear that the Applicant raised her son's permanent residence status as an issue in her written PRRA submissions. She referenced her son's case file number,

pointed the Officer to a new risk faced as a single woman in a Muslim country without male protection, and clearly stated that her son's positive permanent residence application was "a new factor that not only did not exist at the time of the refugee decision but was not contemplated or addressed in the refugee decision." Furthermore, while it is true that the Applicant did not submit a copy of the letter which conditionally approved her son's H&C application, that omission is not fatal because "statements of fact made by counsel may constitute evidence in informal proceedings such as a PRRA application and they may be given weight" (see: *Ferguson v Canada (Citizenship and Immigration)*, 2008 FC 1067 at para 29, 170 ACWS (3d) 397). It is also true, as the Respondent points out, that the Applicant has a brother who is still in Iran and he could offer protection for the Applicant as a widow in Iran. However, this is speculative, to say the least, as there is no evidence in the record as to the nature of the Applicant's relationship with this brother and, in any event, the record shows it is the Applicant's eldest son who has replaced her deceased husband as her male protector.

[22] Even though the Officer indicated that "all of the documentation provided" had been considered, the Officer did not discuss or even mention the Applicant's son or attempt to make any assessment of a new risk faced by the Applicant if she returned to Iran without her son. In view of the RPD's findings, the Officer framed the Applicant's claim for protection to be one based merely on persecution for conversion to Christianity and whether country conditions in Iran had deteriorated since the RPD's decision. The Officer's limited view of the matter was not justifiable and hence unreasonable in view of the Applicant's submissions about her son's positive permanent resident status; this evidence was not simply a background or contextual factor to assess against religious-based persecution. On the contrary, this fact underpinned the

Applicant’s claim of a new risk factor of being a single woman without male protection in a Muslim country, and the Officer’s reasons in this regard - or lack thereof - are not sufficiently justifiable, transparent, and intelligible to explain why the Applicant was not so at risk.

[23] For the reasons stated above, the Officer’s decision is unreasonable. It must be set aside and the matter remitted to a different immigration officer for reconsideration.

C. *Should the Officer have convoked an oral hearing?*

[24] It is not necessary to address this issue because of my determination above that the Officer’s decision was not reasonable.

V. Conclusion

[25] The Applicant’s application for judicial review is allowed. The Officer’s decision is not reasonable and, therefore, it is set aside. The matter is returned for reconsideration by a different immigration officer in accordance with these reasons for judgment. No question of general importance is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that: the application for judicial review is allowed; the matter is returned for redetermination by a different immigration officer in accordance with the reasons for this judgment; and no question of general importance is certified.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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