Federal Court  Cour fédérale

Date: 20170424

Docket: IMM-4471-16

Citation: 2017 FC 403

Ottawa, Ontario, April 24, 2017

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

VELU NADARAJAN

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is a judicial review of the decision [Decision] of a Senior Immigration Officer [Officer] denying the Applicant's Pre-Removal Risk Assessment [PRRA] application. The Officer concluded that the Applicant had not established that he faced a serious possibility of persecution as described in s 96 or that he faced danger of torture, risk to life, or risk of cruel and unusual punishment as described in s 97 of the *Immigration and Refugee Protection Act*, SC

2001, c 27 [IRPA], if returned to Sri Lanka. This conclusion was reached without conducting an oral hearing.

II. Background

[2] The Refugee Protection Division [RPD] had refused the Applicant's claim for protection based on his failure to establish his identity as a Sri Lankan citizen and his lack of credibility.

[3] The Refugee Appeal Division [RAD] had dismissed the Applicant's appeal, concluding that the Applicant had not submitted sufficient trustworthy evidence establishing his identity. As with the RPD, the RAD focussed on the Applicant's ears (which appeared to be different in old photographs), the Applicant's lack of pertinent geographical knowledge, and the lack of corroborating documents.

Leave to judicially review the RAD decision was denied.

[4] The Applicant's PRRA application was denied on September 2, 2016 and leave for judicial review was granted on January 31, 2017.

The Officer found the Applicant to be a citizen of Sri Lanka despite the fact that he had entered Canada on an Indian passport.

[5] The Applicant's PRRA narrative was that he was a Tamil from Chilaw in the North Western Province of Sri Lanka. He had been discriminated against, beaten, and arrested by the army, after which he moved to the Eastern Province. From there he went to India, where he ran into problems with romance and employment (that is, he got his employer's daughter pregnant).

After being beaten by police and by his lover's father and brother-in-law in India, he returned to Sri Lanka.

[6] He returned to live with an aunt in Chilaw but his problems with the Sri Lankan authorities were resurrected. He was beaten, mistreated, and generally harassed because of his alleged ties to the Liberation Tigers of Tamil Eelam [LTTE]. He then fled to Canada using an Indian passport.

[7] In the PRRA proceedings, the Officer noted the Applicant's explanations for the identity problems raised at the RPD and the RAD and ultimately accepted that the Applicant was a Sri Lankan citizen, despite the findings of the RPD and the RAD.

[8] The Officer went on to consider the new evidence submitted on country conditions. The Officer conducted the analysis of risk without holding an oral hearing.

[9] The Officer did give some weight to the Applicant's affidavit but found that there was little evidence corroborating the events described. The Officer also examined the general risk to Tamils in Sri Lanka and the conflicting documentary evidence concerning such risk, ultimately concluding that on balance being Tamil living in areas previously controlled by the LTTE was not enough, in itself, to expose an individual to risk.

[10] The Officer reached two controlling conclusions:

- The Applicant had not submitted sufficient evidence that he would face risk upon return to Sri Lanka simply because he was a Tamil from abroad; and,
- The Applicant had not submitted sufficient evidence to demonstrate that he would face a risk of torture from state agents.

The PRRA application was denied.

III. Analysis

[11] The issues in this judicial review are:

1. Did the Officer err in not holding an oral hearing?
2. Is the Decision reasonable?

A. *Standard of Review/Oral Hearing*

[12] There appears to be some confusion or disagreement in this Court as to the standard of review in respect to holding an oral hearing. Justice Boswell clearly summarized that divergence in *Zmari v Canada (Citizenship and Immigration)*, 2016 FC 132, 263 ACWS (3d) 177 [*Zmari*]:

> [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 at para 48, 257 ACWS (3d) 924; *Antoine v Canada (Citizenship and Immigration)*, 2015 FC 795 at para 12, 258 ACWS (3d) 153;

Matinguo-Testie v Canada (Citizenship and Immigration), 2015 FC 651 at para 6, 254 ACWS (3d) 149; *Vargas Hernandez v Canada (Citizenship and Immigration)*, 2015 FC 578 at para 17, 254 ACWS (3d) 912; *Negm v Canada (Citizenship and Immigration)*, 2015 FC 272 at para 33, 250 ACWS (3d) 317; *Micolta v Canada (Citizenship and Immigration)*, 2015 FC 183 at para 13, 249 ACWS (3d) 826; *Fawaz v Canada (Citizenship and Immigration)*, 2012 FC 1394 at para 56, 422 FTR 95; and *Ahmad v Canada (Citizenship and Immigration)*, 2012 FC 89 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 at para 3, 256 ACWS (3d) 394; *Kulanayagam v Canada (Citizenship and Immigration)*, 2015 FC 101 at para 20, 248 ACWS (3d) 921; *Abusaninah v Canada (Citizenship and Immigration)*, 2015 FC 234 at para 21 249 ACWS (3d) 843; *Ibrahim v Canada (Citizenship and Immigration)*, 2014 FC 837 at para 6, 244 ACWS (3d) 177; *Kanto v Canada (Citizenship and Immigration)*, 2014 FC 628 at paras 11-12, 242 ACWS (3d) 912; *Bicuku v Canada (Citizenship and Immigration)*, 2014 FC 339 at paras 16-17, 239 ACWS (3d) 723; *Chekroun v Canada (Citizenship and Immigration)*, 2013 FC 737 at para 40, 436 FTR 1; *Ponniah v Canada (Citizenship and Immigration)*, 2013 FC 386 at para 24, 229 ACWS (3d) 1140; and *Adetunji v Canada (Citizenship and Immigration)*, 2012 FC 708 at para 27, 218 ACWS (3d) 616.

[13] 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 Director'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 Director 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).

[13] The relevant provisions are s 113 of IRPA and s 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations]:

Immigration and Refugee Protection Act

113 Consideration of an application for protection shall be as follows:	**113** Il est disposé de la demande comme il suit :
…	[…]
(b) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;	**b)** une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;

Immigration and Refugee Protection Regulations

167 For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors are the following:	**167** Pour l'application de l'alinéa 113b) de la Loi, les facteurs ci-après servent à décider si la tenue d'une audience est requise :
(a) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;	**a)** l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur;
(b) whether the evidence is central to the decision with respect to the application for protection; and	**b)** l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;
(c) whether the evidence, if accepted, would justify allowing the application for protection.	**c)** la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

[14] I concur with Justice Boswell as I have found in decisions such as *Zemo v Canada (Citizenship and Immigration)*, 2010 FC 800, 372 FTR 292, and *Tekie v Canada (Minister of Citizenship and Immigration)*, 2005 FC 27, 136 ACWS (3d) 884, that the right to an oral hearing is firstly a matter of procedural fairness. As a general proposition, an oral hearing is not always required as a matter of the "right to be heard". It becomes a right where it would be unfair to decide a matter, particularly of credibility, without affording a party an opportunity to address the matter orally. This is particularly the case in the context of PRRA proceeding.

[15] Section 113(b) of IRPA and s 167 of the Regulations fleshes out statutorily that which is created at common law. Those provisions cannot be read as an attempt to curtail procedural fairness rights. Nor should they be read narrowly as the rights granted are for the protection of the individual not for the benefit of the government official.

[16] While s 113(b) is phrased as "may" hold a hearing, s 167 makes it clear that the "may" is directory. Section 167 provides that a hearing is required when the three enumerated factors are present: credibility, centrality to the decision, and justification for decision.

[17] Given the importance of procedural fairness, it is for the reviewing court to determine whether those factors truly exist. A claim of insufficiency cannot be used to mask a rejection of the truth of the claim.

[18] However, the term "credibility" is often used in a broader sense of unpersuasiveness or insufficiency. Justice Zinn in *Ferguson v Canada (Citizenship and Immigration)*, 2008 FC 1067,

170 ACWS (3d) 397, provided an excellent synopsis of the interplay between weight, sufficiency, and credibility:

> [27] Evidence tendered by a witness with a personal interest in the matter may also be examined for its weight before considering its credibility because typically this sort of evidence requires corroboration if it is to have probative value. If there is no corroboration, then it may be unnecessary to assess its credibility as its weight will not meet the legal burden of proving the fact on the balance of probabilities. When the trier of fact assesses the evidence in this manner he or she is not making a determination based on the credibility of the person providing the evidence; rather, the trier of fact is simply saying the evidence that has been tendered does not have sufficient probative value, either on its own or coupled with the other tendered evidence, to establish on the balance of probability, the fact for which it has been tendered. That, in my view, is the assessment the officer made in this case.

[19] I see no merit in the argument that every time an applicant claims risk, a negative finding is tantamount to an adverse credibility finding. Such an argument disregards the analysis Justice Zinn described.

[20] In the present case, the Officer made her conclusions on the basis of insufficiency, not credibility. Not only does the Officer specifically mention insufficiency but an objective analysis of the reasons shows that this is a case of insufficiency.

[21] Therefore, the Officer did not err in not holding an oral hearing.

B. *Reasonableness of Decision*

[22] The parties concur that apart from the issue of the oral hearing, the standard of review for a PRRA determination is reasonableness (*Zmari* at para 14).

[23] It is inaccurate to suggest that the Officer failed to engage with the Applicant's evidence. The Officer accepted the Applicant's evidence of Sri Lankan citizenship despite the findings of the RPD and the RAD in part because the Applicant had produced better evidence. However, the Officer found that the Applicant's evidence of risk was insufficient.

[24] The Officer acted within her area of expertise in weighing the competing evidence on country conditions. That exercise is precisely what a PRRA officer (as they have been called) is required to do. I can see nothing unreasonable in the Officer's analysis, the approach to the facts, or the test to be applied.

[25] The Applicant simply wishes the Court to reweigh this evidence – a task which it should not and will not do (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 61, [2009] 1 SCR 339).

IV. Conclusion

[26] For all these reasons, this judicial review will be dismissed. I concur with the parties that there is no issue for certification.

JUDGMENT

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

"Michael L. Phelan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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