Federal Court Cour fédérale

Date: 20171102

Docket: IMM-1100-17

Citation: 2017 FC 986

Ottawa, Ontario, November 2, 2017

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

ENAYAT SHARIATY

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act,* SC 2001, c 27 [IRPA] of a decision made by the Minister's Delegate (the "Delegate") to refuse the Applicant's Pre-Removal Risk Assessment ("PRRA") application.

II. Background

[2] The Applicant was born in Afghanistan in 1989 and is an Afghan citizen. He came to Canada at the age of 11 as a permanent resident, after being sponsored with his father by his older brother, who was a refugee in Canada.

[3] The Applicant's mother died when he was a child, he never met his brother before moving to Canada and did not have a close relationship with his father. In Canada, relationships with his family broke down and he ended up in foster care and group homes. He was addicted to drugs at a young age and began selling drugs to make a living.

[4] As a result, by 2010 the Applicant had a lengthy criminal record including convictions for: possession of a controlled substance; possession for the purposes of trafficking (5 convictions); failure to comply with a recognizance (2 convictions); failure to stop at the scene of an accident; failure to comply with a disposition; escaping lawful custody; failure to attend court; flight while being pursued; dangerous operation of a motor vehicle; unauthorized use of a loaded restricted firearm; unauthorized possession of a prohibited device; and assault causing bodily harm.

[5] In 2010, the Applicant was reported for inadmissibility on grounds of serious criminality. In February 2011, a deportation order was issued against the Applicant. He submitted a PRRA application but that application was refused in November, 2012.

[6] In September 2013, the Applicant was convicted of assault and assaulting a peace officer. In December 2013, he was convicted of two counts of robbery.

[7] In November 2014, the Applicant was placed in immigration detention and scheduled for removal.

[8] In December 2015, the Applicant submitted a deferral of removal request and a second PRRA application. The deferral was granted and a positive PRRA opinion was rendered.

[9] In January 2016, the positive PRRA opinion was forwarded to the Delegate for a "Restriction Assessment" under paragraph 112(3)(b), subparagraph 113(d)(i) and paragraph 114(1)(b) of the IRPA. Those provisions provide that, since the Applicant was inadmissible for serious criminality, his risk would be assessed only under section 97 of the IRPA and a positive decision would not result in refugee status, but only in a stay of removal.

[10] As well, the Applicant's inadmissibility made him an exception to the moratorium on removals to Afghanistan, pursuant to section 230 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPA Regulations].

[11] The basis of the Applicant's PRRA application was that his life would be at risk should he be removed to Afghanistan, due to a combination of personal characteristics: he is an ethnic Hazara, an atheist and a westernized individual.

[12] As part of the December 2015 PRRA application, the Applicant submitted an expert report from Professor Brian Williams ("Prof. Williams") regarding the risks faced by the Applicant in Afghanistan due to his identity as an ethnic Hazara and a western, non-believer in Islam (the "Expert Report").

[13] In October 2016, as part of his response to a request for further submissions, the Applicant submitted evidence showing nothing had improved in Afghanistan since the PRRA application was filed in December 2015 and in fact there had been a deterioration of conditions.

[14] On February 21, 2017, the Delegate rejected the PRRA application and found there was insufficient evidence to show the Applicant was likely to face death, torture or cruel or unusual treatment or punishment if returned to Afghanistan.

[15] The Delegate's reasons contained quotes from the Applicant's written submissions and the Expert Report, which focused on the deteriorating situation in Afghanistan, threats faced by Hazara, and that the Applicant's risk is compounded by being a westernized atheist.

[16] The Delegate accepted the history of persecution of the Hazara and that the Applicant was visibly identifiable as part of that ethnic group. However, the Delegate found it was difficult to distinguish whether the Hazara are targeted for their ethnicity, or the fact they practice Shiite Islam. Therefore, the Applicant's lack of interest in religion would likely diminish his risk of becoming a victim of sectarian violence directed towards Shiites.

[17] The Delegate also accepted the Applicant as a non-believer in Islam, but found there was no evidence of non-believers being at risk in Afghanistan, as a distinct risk factor.

[18] The Delegate found that the most serious risks came from Anti-Government Elements (“AGEs”) such as the Taliban and ISIS. Both the Applicant’s western mannerisms and Hazara identity put him at risk from AGEs. Therefore, the crux of any threats to the Applicant’s safety would be how and why he would be identified by AGEs, whether areas existed where he could reside in safety and whether state protection existed.

[19] The Delegate found there was little to suggest the Applicant had a profile of significance to AGEs. He was not employed by an international organization, a member of a political or social group, nor a journalist or activist. As well, measures could be taken to diminish the perception of being western, such as not travelling with documents or symbols that link him to the Afghan government or western countries. Furthermore, the style of dress in Afghanistan is such that it would be normal for the Applicant to not show his forearm, which has a western-style tattoo.

[20] The Delegate accepted that the Applicant’s Hazara ethnicity put him at risk of AGEs, but state protection from AGEs existed in government controlled areas. The Delegate noted that 57 percent of the country’s districts were under government control, including Kabul. In areas where the government was in control, they were receiving support from US and Coalition forces as well as the UN. Furthermore, urban areas were safest and internal relocation was possible for low-profile individuals.

[21] The Delegate concluded that the Applicant was not likely to face death, torture, or cruel or unusual treatment or punishment if returned to Afghanistan. The Afghan government had made efforts to protect civilians in government controlled areas, including the Hazara. While those measures were imperfect and AGEs continued to target civilians in government controlled areas, there was little to suggest that they would have any particular interest in targeting the Applicant given he did not have a profile of significance. Should the Applicant reside in Kabul, he would be in a populous environment where ethnic and religious groups were mixed, including the Hazara. Furthermore, if he adapted quickly and behaved appropriately, there was little to suggest he would be targeted for being associated with western beliefs and customs.

[22] On March 9, 2017, the Applicant applied to this Court for judicial review of the Delegate's decision.

III. Issues

[23] The issues are:

A. Was there a denial of nature justice by the Delegate failing to give the Applicant an opportunity to respond to his concerns about the Expert Report?

B. Did the Delegate err by ignoring the Expert Report and relying selectively on the rest of the evidence?

IV. Standard of Review

[24] The standard of review for procedural fairness related to a denial of natural justice is correctness.

[25] The standard of reasonableness applies to the consideration of the evidence in respect of the Applicant's PRRA application

V. Analysis

Legislation

[26] The Minister of Citizenship and Immigration has imposed a stay on removals to Afghanistan pursuant to paragraph 230(1)(a) of the IRPA Regulations; however, the stay does not apply to the Applicant pursuant to paragraph 230(3)(c) of the IRPA Regulations:

Stay of Removal Orders	**Sursis**
Considerations	**Sursis : pays ou lieu en cause**
230 (1) The Minister may impose a stay on removal orders with respect to a country or a place if the circumstances in that country or place pose a generalized risk to the entire civilian population as a result of	230 (1) Le ministre peut imposer un sursis aux mesures de renvoi vers un pays ou un lieu donné si la situation dans ce pays ou ce lieu expose l'ensemble de la population civile à un risque généralisé qui découle :
(a) an armed conflict within the country or place	a) soit de l'existence d'un conflit armé dans le pays ou le lieu
Exceptions	**Exception**
(3) The stay does not apply to a person who	(3) Le paragraphe (1) ne s'applique pas dans les cas suivants :
(c) is inadmissible under subsection 36(1) of the Act on grounds of serious criminality or	

under subsection 36(2) of the Act on grounds of criminality;

c) il est interdit de territoire pour grande criminalité ou criminalité au titre des paragraphes 36(1) ou (2) de la Loi

[27] Paragraph 112(3)(b), subparagraph 113(d)(i) and paragraph 114(1)(b) of the IRPA provide that where an applicant is inadmissible for serious criminality, his or her risk is assessed only under section 97 of the IRPA and a positive decision does not result in refugee status but only in a stay of removal:

Protection

Application for protection

Restriction

112 (3) Refugee protection may not be conferred on an applicant who […]

(b) is determined to be inadmissible on grounds of serious criminality with respect to a conviction in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years or with respect to a conviction outside Canada for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years;

Consideration of application

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

(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 and

(i) in the case of an applicant for protection who is inadmissible on grounds of serious

Protection

Demande de protection

Restriction

(3) L’asile ne peut être conféré au demandeur dans les cas suivants :

b) il est interdit de territoire pour grande criminalité pour déclaration de culpabilité au Canada pour une infraction à une loi fédérale punissable d’un emprisonnement maximal d’au moins dix ans ou pour toute déclaration de culpabilité à l’extérieur du Canada pour une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d’un emprisonnement maximal d’au moins dix ans;

Examen de la demande

113 Il est disposé de la demande comme il suit :

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 et, d’autre part :

criminality, whether they are a danger to the public in Canada	(i) soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un danger pour le public au Canada
Effect of decision	**Effet de la décision**
114 (1) A decision to allow the application for protection has (b) in the case of an applicant described in subsection 112(3), the effect of staying the removal order with respect to a country or place in respect of which the applicant was determined to be in need of protection.	114 (1) La décision accordant la demande de protection a pour effet de conférer l'asile au demandeur; toutefois, elle a pour effet, s'agissant de celui visé au paragraphe 112(3), de surseoir, pour le pays ou le lieu en cause, à la mesure de renvoi le visant.

A. *Was there a denial of nature justice by the Delegate failing to give the Applicant an opportunity to respond to his concerns about the Expert Report?*

[28] The Applicant's counsel acknowledged at the hearing that only if the Court finds the Delegate's treatment of the Expert Report was unreasonable should there be a determination of whether there has been a breach of natural justice.

[29] The Applicant argues that the Delegate breached procedural fairness by denying him the chance to respond to concerns regarding the Expert Report. That Report was central to the Applicant's case, and the expert has unassailable credentials and would've provided rebuttal evidence. Given this breach of procedural fairness, the Applicant asks the Court to now accept rebuttal evidence from the expert.

[30] The Respondent argues that the Delegate's reasons do not indicate specific problems or concerns with the Expert Report. The Delegate weighed all the evidence, including that Report,

and came to a reasonable conclusion. Furthermore, the Delegate provided the Applicant with an opportunity to submit updated submissions on risk prior to making a decision.

[31] I agree with the Respondent. In a PRRA application, the Applicant bears the burden of proof. The Delegate was only obliged to consider evidence that was submitted and was not required to solicit the Applicant for better or additional evidence (*Ormankaya v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1089 at paras 31-34).

[32] The cases cited by the Applicant are distinguishable. The Court in *Muliadi v Canada (Minister of Employment and Immigration),* [1986] 2 FC 205, dealt with evidence from a third party that was not put to the applicant. The Court in *Malala v Canada (Minister of Citizenship and Immigration),* [2001] FCJ No 290 (QL), dealt with a finding that the applicant was evasive and not plausible due to anomalies and contradictions in her evidence.

[33] However, even if I accept the expert rebuttal report as evidence, I do not find that there has been a breach of natural justice.

B. *Did the Delegate err by rejecting the Expert Report and relying selectively on the rest of the evidence?*

[34] The Applicant argues that the Expert Report was the central piece of evidence in this case and was the only evidence that addressed the risk to someone with the Applicant's particular characteristics. However, the Delegate implicitly rejected that Report by ignoring significant portions of the Report, picking and choosing among its contents, preferring more general

information and reaching conclusions that contradict the import of the report, without explanation.

[35] The Respondent argues that the Delegate's reasons indicate that the Delegate was aware of the contents of the Expert Report and it was given fair consideration. The Delegate cited other reliable documentary sources in support of the decision and was entitled to prefer those sources over the conclusions in the Expert Report. Essentially, the Applicant is asking the Court to re-weigh the evidence.

[36] The Delegate failed to address important portions of the Expert Report, including its conclusion that the Applicant would face significant risks if deported to Afghanistan. At best, the Delegate effectively minimizes the value and import of the Expert Report. Furthermore, the Delegate chose to rely selectively on generic, documentary evidence to come to a contrary decision to what the Expert Report actually supports.

[37] Decision-makers are assumed to have considered and weighed all the evidence presented to it unless the contrary is shown; however, the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing the Court may be to infer from the silence that the agency made an erroneous finding of fact without regard to the evidence (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] 157 FTR 35 at para 17).

[38] This Court has held that where expert evidence is put forward and considered by the decision-maker, it deserves thoughtful and comprehensive analysis if it is to be rejected (*Naeem v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1375 at para 24).

[39] As well, this Court has held that decision-makers cannot selectively rely on evidence presented to the detriment of an applicant, or ignore pertinent evidence supporting the claim (*Zaatreh v Canada (Minister of Citizenship and Immigration),* 2010 FC 211 at paras 53-57). Indeed, in the refugee context, this Court has held on several occasions that a decision-maker failed to properly account for the conditions faced by Hazaras in Afghanistan (*Barat v Canada (Minister of Citizenship and Immigration)*, 2016 FC 443; and *Hossain v Canada (Minister of Citizenship and Immigration)*, 2016 FC 313).

[40] The author of the Expert Report, Prof. Williams, is Professor of Islamic History at the University of Massachusetts. He has travelled throughout Afghanistan, been consulted by the US and Afghan governments, published books on history, politics and war in Afghanistan and written academic articles about the repression of ethnic minorities in that country. This Court has previously recognized his qualifications (*Re Harkat*, 2010 FC 1241 at para 46; and *Re Almrei*, 2009 FC 1263 at paras 268 and 349-361).

[41] While the Delegate recognizes Prof. William's Expert Report, he or she omits relevant portions of the Expert Report, such as the statement that "extreme perils" await the Applicant in

Afghanistan. An example of the Delegate's selective editing is shown by comparing a portion of the Delegate's reasons to the corresponding portion of the Expert Report:

> Delegate's reasons:
>
> …the Taliban fanatics declared a war on Hazaras in both Afghanistan and Pakistan. (…) While that story made headlines, most massacres of Hazaras do not because they have become so routine in the last few year [sic] (…).
>
> Original statement:
>
> ...the Taliban fanatics declared a war on Hazaras in both Afghanistan and Pakistan. **Hundreds of Hazara "infidels" were systematically hunted down and killed by the Taliban in both countries. The press was routinely filled with stories of Hazaras who were pulled off buses at Taliban checkpoints and gunned down or beheaded, of suicide bombings of Hazara gatherings, etc. As recently as mid-November 2015 seven Hazaras, including a nine year old girl, were beheaded in the Afghan province of Zabul.** While that story made headlines, most massacres of Hazaras do not because they have become so routine in the last few years **and especially in the last few months.**
>
> [Emphasis added]

[42] More significantly, the Delegate fails to make any reference to the conclusion and recommendation of the Expert Report, which contradicts the Delegate's finding:

> To put it mildly, [the Applicant's] case is fraught with **tremendous risk** and, should he be deported back to his ancestral land, **he will find himself in considerable danger** on both a personal and ethnic level as a Westernized Hazara who may well be declared an infidel not only [sic] the Taliban fanatics who are conquering much of the country, but by the close-minded and often fanatical mullahs or priests who dominate the lives of his own Shiite ethnic group…
>
> In these circumstances **I would strongly advise against deporting** [the Applicant] to the warzone known as Afghanistan as it faces the prospect of a further drawdown of US troops next year and further conquests by a resurgent Taliban.
>
> [Emphasis added]

[43] The Delegate chose to rely selectively on general, documentary evidence to reach a conclusion that contradicted the essence of Expert Report. For example, the Delegate cited a UK Home Office report for the fact the Afghan government controls portions of the country, internal relocation may be possible for individuals with a low-profile and urban rather than rural areas are safest. However, the Delegate neglected to refer to that report's section on state protection. In particular, the Delegate does not mention this statement from that section:

> In Kabul, and other districts, cities and towns controlled by the government, **the authorities may be willing but will usually be unable to offer effective protection** given the structural weaknesses in the security forces and the justice system…
>
> (United Kingdom: Home Office, *Country Policy and Information Note – Afghanistan: Fear of anti-government elements (AGEs),* 29 November 2016, Version 2.0 at 2.4.3 [*UK Home Office Report*])
>
> [Emphasis added]

[44] Finally, the Expert Report is consistent with the documentary evidence. The reports by the UK Home Office, UNHCR and Immigration and Refugee Board, which were all cited at length by the Delegate, support the proposition that Hazaras, non-believers and westernized individuals are among the highest risk profiles in Afghanistan – the unique combination of these three characteristics by the Applicant puts him at an increased risk, not a minimized risk as found by the Delegate.

[45] The decision is unreasonable.

JUDGMENT in IMM-1100-17

THIS COURT'S JUDGMENT is that:

1. The application is allowed and the matter is referred to a different Delegate for reconsideration;
2. There is no question for certification.

"Michael D. Manson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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