Federal Court  Cour fédérale

Date: 20190215

Docket: IMM-2616-18

Citation: 2019 FC 197

Ottawa, Ontario, February 15, 2019

PRESENT: THE ASSOCIATE CHIEF JUSTICE

BETWEEN:

ALI SUFYAN ANSAR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] Ali Sufyan Ansar is a 30-year-old citizen of Pakistan who disagrees with the decision of a Senior Immigration Officer rejecting his Pre-Removal Risk Assessment [PRRA] application. The Officer found that he had no well-founded fear of persecution on Convention grounds, and that he had not demonstrated that he would personally be at risk of torture, would face a risk to

his life or be subject to a cruel and unusual treatment or punishment if returned to Pakistan. The main issue raised by this application concerns the Officer's finding of insufficient evidence.

II. Facts

[2] In 2014, the Applicant applied for refugee protection in Canada. His personal history is unclear as he changed his story extensively throughout the course of his claim before the Immigration and Refugee Board. When he first arrived in Canada, he stated that he had fled Pakistan because he is a Shia Muslim. He then changed his story to say that he feared persecution due to his sexual orientation after beginning a homosexual relationship in 2013, although he was married and had children. Later, he claimed that he realized he was homosexual while growing up and that he had a homosexual relationship with the son of the mayor of his village in December 2011.

[3] In his amended Basis of Claim Form, dated September 8, 2014, he claims that in 2011, he travelled from Pakistan to the United Kingdom [UK] on a student visa and made an unsuccessful refugee claim based on his sexual orientation. He then transited through Belgium and arrived in Canada in March 2014 on a false British passport.

[4] In Canada, the Applicant made a refugee claim alleging that he would be persecuted if he was returned to Pakistan on the basis that he is homosexual. On October 14, 2014, his refugee claim was denied by the Refugee Protection Division [RPD] on the grounds that he had not credibly established his allegations due to the many contradictions and discrepancies in his

different narratives. The RPD further found that the Applicant's actions indicated a lack of subjective fear of persecution.

[5] On June 22, 2015, the Refugee Appeal Division [RAD] confirmed the RPD's decision also on the basis of serious credibility concerns. Leave to apply for judicial review of the RAD's decision was denied by this Court.

[6] In July 2016, the Applicant submitted a PRRA application in which he presented the same allegations as the ones contained in his amended Basis of Claim Form submitted to the RPD on September 8, 2014. He added that if he is returned to his village in Pakistan, he will be killed by the villagers because he has been sentenced to death due to his homosexuality. Even his friends and family are in danger. He could also be arrested and raped by the police anywhere in Pakistan. He explains his lack of credibility due to the bad advice he received; he was allegedly advised to lie to the Canadian authorities.

III. Impugned Decision

[7] The Officer found, just like the RPD and the RAD, that the Applicant had not credibly established a well-founded fear of persecution. The risks alleged in the PRRA application were the same as the ones presented in his amended Basis of Claim Form dated September 8, 2014. In addition, the Officer considered the following new allegations of risk related to factors set out in section 96 and section 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]:

> His family and friends in his village will still not speak with him for fear of being killed by the village Molvi and Numberdar;

> A First Information Report (FIR) was registered against him in December 2015;
>
> A fatwa was issued against him in January 2016, in which he was found guilty of homosexuality and sentenced to be stoned to death;
>
> Posters with his face on them were put up in his village offering a reward for his death;
>
> In February 2016, the village Molvi, Numberdar, and other villagers attacked his family members in their home;
>
> His former partner Azhar Hussain died in 2013 and his father, the Numberdar, blames him for his son's death and wants to get revenge by killing him;
>
> The Molvi and other villagers want to stone him to death in the name of honour and Islam; and
>
> He will be arrested and raped by the police anywhere in Pakistan.

[8] The Officer deemed the documentary evidence in support of these allegations to either predate the RAD's decision or to be materially similar to the facts as presented to the RPD and the RAD.

[9] Regarding the evidence supporting the Applicant's allegations that does not predate the RAD's decision, the Officer found that it related to events that the RPD and the RAD had already found not credible. As a result, the Officer gave this evidence little or no probative value.

[10] Two affidavits submitted by people familiar with the Applicant were also considered by the Officer. In the first affidavit, the affiant stated he was aware of the Applicant's homosexual relations, and that a police complaint, a fatwa ordering the Applicant's death and wanted posters had been issued against the Applicant. In the second affidavit, the affiant described the rumours

concerning the Applicant's affair with the son of the village's mayor and that son's death due to a suspected honour killing. He also explained that the Applicant's family was attacked in their home. The second affiant was also aware of the police complaint, the fatwa and the wanted posters.

[11] Yet, the affidavits were given little probative value because they did not explain how the affiants became aware of the events described, whether or not the affiants had firsthand knowledge of them, and how they communicated with the Applicant. Neither of the affiants submitted details confirming their identity or explained why they were willing to help the Applicant. Furthermore, the affiants described a continuation of the events which had already been determined by the RPD and the RAD not to have occurred.

[12] The Applicant also submitted a legal opinion letter written by a Pakistani lawyer who stated that he knew the Applicant. His legal opinion, considering the police report, the fatwa and the wanted posters, was that the Applicant would be in danger if he returned to Pakistan. The lawyer added that criminal charges had been laid against the Applicant. Once again, the Officer gave little weight to this statement, pointing out that the lawyer did not explain how he knew the Applicant and adding that he had no firsthand knowledge of the events. Furthermore, the lawyer's opinion was based on documents which had already been deemed to be of little or no probative value, and on events which had been found not credible by the RPD and the RAD.

[13] The Applicant also filed a letter from his UK lawyer and an appeal questionnaire concerning his refugee claim in the UK, which confirm he had made it on the grounds of his

sexual orientation. As the RAD had already considered that letter and found that it did not alleviate the credibility concerns with the Applicant's version of events, the Officer gave it no weight.

[14] The Applicant alleges that since he arrived in Canada, he has had many homosexual relationships and has become a member of two homosexual associations. The Officer found that this was not sufficient to alter the RPD and the RAD's negative credibility findings and gave it no weight. Furthermore, this evidence could have been presented to the RAD.

[15] The Officer also dismissed three letters submitted by the Applicant's friends in Montréal attesting that he is gay and has had difficulties in Pakistan. Since the friends do not attest having any firsthand knowledge of these events and since the RAD found that the documents submitted by the Applicant had no probative value, the Officer gave them no weight.

[16] Lastly, the Applicant submitted documentary evidence regarding the negative treatment of homosexuals in Pakistan. However, since the Officer rejected the Applicant's allegations that he is homosexual, on a balance of probabilities, he did not believe that the Applicant would face any risk of return as described in section 96 and section 97 of the IRPA. As all the risks alleged by the Applicant were a continuation of the allegations he made in support of his refugee claim, they were found not credible.

IV. Issues

[17] This application for judicial review raises the following issues:

A. *Did the Officer err in failing to hold an oral hearing?*

B. *Did the Officer err in assessing the evidence submitted by the Applicant in support of his PRRA application?*

[18] The jurisprudence of this Court is divided regarding the standard of review applicable to the first issue. Certain cases hold that the appropriate standard is correctness, since the issue of whether an oral hearing is required is one of procedural fairness (*Zmari v Canada (Citizenship and Immigration)*, 2016 FC 132 at paras 11, 13; *Micolta v Canada (Citizenship and Immigration)*, 2015 FC 183 at para 13). Other cases hold that the applicable standard of review should be reasonableness because deciding whether or not to hold an oral hearing turns on the interpretation and application of the Officer's governing legislation (*Farah v Canada (Citizenship and Immigration)*, 2018 FC 1162 at para 7; *Huang v Canada (Citizenship and Immigration)*, 2018 FC 940 at paras 10-17).

[19] The right to a hearing in the course of a PRRA application is not automatic. In fact, holding a hearing is the exception rather than the norm. In order to hold a hearing, the Officer must have found, based on the evidence presented, that there is a good reason to do so. In my opinion, no existing procedural right is taken away from the Applicant when the Officer makes a determination, based on the evidence and according to the IRPA, that no hearing is warranted. As Justice Peter B. Annis explains in *Mavhiko v Canada (Citizenship and Immigration)*, 2018 FC 1066 at para 19:

> [19] In addition, it would seem analytically illogical to distinguish between the Officer's discretion to apply a standard of correctness (1) to what is basically a *prima facie* mixed question of fact and law conclusion [whether the new evidence raises a serious

> issue of credibility that is central to the decision, and would justify allowing the application], and if accepted (2) to conduct a hearing to determine whether the PRRA application should be allowed based upon the same three criteria to be reviewed on a standard of reasonableness.

[20] Therefore, the issue of whether the Officer should have granted an oral hearing is reviewable on the standard of reasonableness.

[21] It is trite law that the standard of reasonableness also applies to the second issue (*Belaroui v Canada (Citizenship and Immigration)*, 2015 FC 863 at para 10; *Pararajasingham v Canada (Citizenship and Immigration)*, 2012 FC 1416 at para 21; *Jainul Shaikh v Canada (Citizenship and Immigration)*, 2012 FC 1318 at para 16; *Haji v Canada (Citizenship and Immigration)*, 2018 FC 474 at paras 9-10).

V. Analysis

A. *Should the PRRA Officer have held an oral hearing?*

[22] Section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR] sets out the three-part test to be considered in determining whether an oral hearing is required. These three factors are cumulative (*Ponniah v Canada (Citizenship and Immigration)*, 2013 FC 386 at para 37):

Hearing – prescribed factors	**Facteurs pour la tenue d'une audience**
167 For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors	167 Pour l'application de l'alinéa 113b) de la Loi, les facteurs ci-après servent à décider si la tenue d'une

are the following:	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.

[23] Paragraph 167(a) of the IRPR requires the evidence to raise a serious issue about an applicant's credibility and to be related to risks identified in section 96 or section 97 of the IRPA. This requirement calls for two comments.

[24] First, it is open to the Officer to assign little weight to the documentary evidence submitted by the Applicant without this constituting a credibility finding (*Ferguson v Canada (Citizenship and Immigration)*, 2008 FC 1067 at para 26; *Mosavat v Canada (Citizenship and Immigration)*, 2011 FC 647 at para 13). If the Officer determines that the evidence, even if believed, does not meet the burden of proof, the case is not decided on credibility, but on the sufficiency of evidence. Conversely, if the evidence offered satisfies the burden of proof but is dismissed on other grounds, the Officer is making a credibility finding (*Csoka v Canada (Citizenship and Immigration)*, 2016 FC 653 at para 17).

[25] Second, the Applicant's own credibility needs to be at issue and not the credibility of third parties who may have provided the evidence (*Firdous v Canada (Citizenship and Immigration)*, 2012 FC 1261 at paras 7-9; *Borbon Marte v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 930 at paras 62-63; *Palanivelu v Canada (Citizenship and Immigration)*, 2017 FC 1044 at para 21). It is difficult to imagine how the Applicant could have testified about a statement provided by someone else and how this could have been of any value to the Officer (*Haji,* above at paras 26-27; *Sing v Canada (Citizenship and Immigration),* 2007 FC 361 at para 79).

[26] The two other parts of the section 167 test require the evidence submitted to be central to the decision and to be sufficiently material, such that the claim for protection would succeed if the evidence were to be accepted. In my opinion, these two factors are closely related to the factors of "relevance" and "materiality" identified in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 at para 13.

[27] In the present case, all of the evidence considered by the Officer and described in pages 8 to 13 of his or her reasons was given little or no weight. The Applicant contends that the Officer could not reach this conclusion without making a credibility finding with respect to his homosexuality and that consequently, an oral hearing was required.

[28] I agree that in certain cases, a finding that there is insufficient evidence can constitute a veiled credibility finding. Here, the Officer gives little weight to the evidence tendered in support of the PPRA application either because it is not corroborated, because it lacks sufficient detail, or

because it is insufficient to refute the credibility findings of the RPD and the RAD. The lack of corroboration, in particular, is generally indicative of a credibility finding.

[29] However, in this case, no credibility findings are made with respect to the Applicant. To the extent it can be argued that credibility findings are made by the Officer, these findings are made with respect to documents in support of the PPRA application that do not originate from the Applicant. These documents describe events that are not personally known to the Applicant. As such, convoking the Applicant to an oral hearing would not have cured any of the credibility concerns with respect to the information contained in these documents.

[30] Finally, paragraph 113(b) of the IRPA clearly sets out that the decision to hold a hearing is discretionary. Since I have found that holding a hearing would have served no useful purpose in the Applicant's circumstances, I find that the Officer reasonably exercised his or her discretion.

B. *Did the Officer err in assessing the evidence submitted by the Applicant in support of his PRRA application?*

[31] Having decided that no oral hearing was required, the Officer was nevertheless required to reasonably assess all of the evidence submitted by the Applicant in order to determine whether or not he faced a risk among those described in section 96 and section 97 of the IRPA.

[32] First, it is important to recall that a PRRA application is not an appeal or a reconsideration of the decisions rendered by the RPD and the RAD (*Raza*, above at para 12). It is meant to assess new risks since the dismissal of the refugee claim.

[33] In order to limit the risk of wasteful and potentially abusive relitigation, paragraph 113(a) of the IRPA imposes certain conditions in order to admit new evidence (*Raza*, above at paras 12-13). In *Raza*, these conditions have been summarized by the Federal Court of Appeal as follows:

> 1. Credibility: Is the evidence credible, considering its source and the circumstances in which it came into existence? If not, the evidence need not be considered.
>
> 2. Relevance: Is the evidence relevant to the PRRA application, in the sense that it is capable of proving or disproving a fact that is relevant to the claim for protection? If not, the evidence need not be considered.
>
> 3. Newness: Is the evidence new in the sense that it is capable of:
>
> (a) proving the current state of affairs in the country of removal or an event that occurred or a circumstance that arose after the hearing in the RPD, or
>
> (b) proving a fact that was unknown to the refugee claimant at the time of the RPD hearing, or
>
> (c) contradicting a finding of fact by the RPD (including a credibility finding)?
>
> If not, the evidence need not be considered.
>
> 4. Materiality: Is the evidence material, in the sense that the refugee claim probably would have succeeded if the evidence had been

made available to the RPD? If not, the evidence need not be considered.

5. Express statutory conditions:

   (a) If the evidence is capable of proving only an event that occurred or circumstances that arose prior to the RPD hearing, then has the applicant established either that the evidence was not reasonably available to him or her for presentation at the RPD hearing, or that he or she could not reasonably have been expected in the circumstances to have presented the evidence at the RPD hearing? If not, the evidence need not be considered.

   (b) If the evidence is capable of proving an event that occurred or circumstances that arose after the RPD hearing, then the evidence must be considered (unless it is rejected because it is not credible, not relevant, not new or not material).

[34] While the Applicant alleges risks arising after the RPD and the RAD rendered their decisions, all of these risks are premised on facts that were found to be not credible by the RPD and the RAD. The Applicant was entitled to present evidence addressing the risks already considered by the RPD and the RAD. However, in order to be successful, the Applicant needed to provide credible and relevant new evidence contradicting the findings of the RPD and the RAD, such that his refugee claim would probably have succeeded if that evidence had been made available to them. In his or her assessment, the Officer was entitled to reject evidence that was not materially different from the facts as found by the RPD (*Raza*, above at paras 13, 17-18).

[35] The PRRA Officer found that the evidence provided by the Applicant was insufficient to meet this burden. In my opinion, this conclusion is reasonable since the RPD and the RAD would likely have reached the same conclusion even if that evidence had been presented to them. First, the evidence does not cure all the credibility concerns with the Applicant's testimony (*Ponniah*, above at para 40). Second, the RAD had assigned no probative value to the documentary evidence attesting to the Applicant's homosexuality because of the serious credibility concerns with his testimony and the prevalence of fraudulent documents in Pakistan:

> [29] Since the appellant is not credible, the RAD assigns no probative value to the many documents he has presented from friends and partners attesting to his homosexuality. Regarding the document presented showing that his alleged former partner was a victim of an honour killing, the RAD also gives this document no probative value. The documentary evidence on Pakistan states that that [*sic*] there is a high level of corruption in Pakistan and that it is possible to obtain many types of fraudulent documents or documents that are fraudulently authenticated by a bona fide stamp or authority. The appellant has shown that he was able to obtain a fraudulent passport to come to Canada and his credibility was impugned by his continual alterations to his story. The RAD concludes that the appellant is not credible in his allegations of homosexuality and confirms the decision of the RPD.

[36] The Officer nevertheless conducted his or her own assessment of the evidence and identified several deficiencies with the documents submitted, leading to the conclusion that they lacked sufficient details and reliability to allow him or her to overturn the RPD and the RAD's credibility determinations.

[37] Moreover, all of the evidence submitted as part of the PRRA application is a continuation of the events already found not to be credible by the RPD and the RAD. As stated by Justice Richard Mosley, "it is not just the date of the document that is important, but whether the

information is significant or significantly different than the information previously provided" (*Raza v Canada (Citizenship and Immigration)*, 2006 FC 1385 at para 22). As such, the Officer reasonably found that the risks alleged in the PRRA application were not materially different from those alleged before the RPD and the RAD (*Micolta v Canada (Citizenship and Immigration)*, 2015 FC 183 at paras 17-20; *Kulanayagam v Canada (Citizenship and Immigration)*, 2015 FC 101 at paras 32-33; *Ponniah*, above at paras 31-34).

VI. Conclusion

[38] The PRRA Officer reasonably determined that no oral hearing was required pursuant to section 167 of the IRPR. Furthermore, the PRRA Officer did not err in assessing the evidence presented by the Applicant and reasonably concluded that the Applicant had not presented any new, relevant facts that were materially different from the facts as found by the RPD and the RAD and that would lead to conclude that he would face any risk of return as described in section 96 and section 97 of the IRPA.

[39] This application for judicial review is therefore dismissed. The parties have proposed no question of general importance for certification and none arises from the facts of this case.

[40] Finally, as requested by the Respondent, the style of cause is amended to remove the Minister of Public Safety and Emergency Preparedness as a Respondent.

JUDGMENT in IMM-2616-18

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed;

2. No question of general importance is certified;

3. The style of cause is amended to remove the Minister of Public Safety and Emergency Preparedness as a Respondent.

"Jocelyne Gagné"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2616-18
STYLE OF CAUSE:	ALI SUFYAN ANSAR v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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APPEARANCES:

Dan Bohbot	FOR THE APPLICANT
Éloïse Eysseric	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Dan Bohbot Lawyer Montréal, Quebec	FOR THE APPLICANT
Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT