Federal Court Cour fédérale

Date: 20210917

Docket: IMM-362-20

Citation: 2021 FC 963

[ENGLISH TRANSLATION]

Ottawa, Ontario, September 17, 2021

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

FABRICE JOVIAN PAMEN MBEUTKEU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] The applicant is a citizen of Cameroon. He was admitted to Canada as a student, first in 2011 for a period of one year, and again in 2014. After extending his student status on a number of occasions, the status expired on September 30, 2018. In November 2018, the applicant was

admitted as a temporary resident under the Post-Graduation Work Permit Program. In February 2019, the applicant was issued a Québec Selection Certificate [CSQ], which authorized him to apply for permanent resident status under the Programme de l'expérience québécoise category.

[2] In April 2019, the applicant was found inadmissible on grounds of criminality in accordance with paragraph 36(2)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], as a result of an impaired driving conviction. A deportation order was issued against him on April 30, 2019.

[3] On May 16, 2019, the applicant submitted an application for a pre-removal risk assessment [PRRA], based on his fear of returning to Cameroon because of his sexual orientation. He alleged, among other things, threats received from members of his family following the death of his father, and the criminalization and suppression of homosexual relationships in Cameroon. He explained that he had not considered it useful to claim refugee protection in Canada given his diploma and the fact that he could file an application for permanent residence under the Programme de l'expérience québécoise.

[4] On November 7, 2019, a PRRA Officer rejected the application. He concluded that the applicant had failed to establish that he would face the risks set out in sections 96 and 97 of the IRPA if he returned to Cameroon. The Officer noted that the applicant's conduct was inconsistent with that of a person who fears for his life or safety and found that the evidence

provided by the applicant was insufficient to establish his sexual orientation and the alleged threats against him by family members in his home country.

[5] The applicant is seeking judicial review of that decision. He criticizes the Officer for making veiled credibility findings without granting him an oral hearing pursuant to section 167 of the *Immigration and Refugee Protection Regulations,* SOR/2002-227 [IRPR], to allow him to address the Officer's concerns. The applicant also submits that the PRRA Officer's findings with respect to the assessment of the evidence submitted were unreasonable.

II. Analysis

[6] The standard of review applicable to the assessment of evidence by PRRA officers is that of reasonableness (*Minister of Citizenship and Immigration v Vavilov,* 2019 SCC 65 [*Vavilov*] at paras 10, 16–17).

[7] The case law of this Court on decisions as to whether or not a hearing should have been held on a PRRA application is divided. Some decisions apply the standard of correctness because the issue is considered to be one of procedural fairness (*Allushi v Canada (Citizenship and Immigration)*, 2020 FC 722 at paras 17–18; *Mudiyanselage v Canada (Citizenship and Immigration)*, 2018 FC 749 at para 11; *Nadarajan v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 403 at paras 12–14). Others associate it with an issue involving the interpretation of the enabling legislation, which requires the standard of reasonableness *(Garces Canga v Canada (Citizenship and Immigration)*, 2020 FC 749 at para 23; *Haji v Canada (Citizenship and Immigration)*, 2018 FC 474 at para 9; *AB v Canada (Citizenship and*

Immigration), 2017 FC 629 at paras 13–17). In this case, the Court is of the view that the outcome would be the same, regardless of which standard of review applies.

[8] Where the standard of reasonableness applies, the Court's focus is "on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" (*Vavilov* at para 83). To make this determination, the reviewing court asks whether "the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99).

[9] With respect to matters of procedural fairness, the role of this Court is to determine whether the procedure was fair considering all the circumstances (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 54–56; *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35).

[10] The applicant submits that the Officer breached his right to procedural fairness by making veiled credibility findings on essential elements of his application without ordering a hearing. He alleges that the questioning of his credibility is constant throughout the decision:

i. the Officer did not believe the applicant's assertion that he preferred to apply for permanent residence rather than claim refugee protection;

ii. the Officer did not believe the applicant's statement that he developed a preference for persons of the same sex during his previous studies in Tunisia;

iii. the Officer questioned the identity of the applicant's lover and the identity of his family members in Cameroon who allegedly threatened him;

iv. the Officer questioned the parent-child relationship between the applicant and his late father, despite proof of death and the father's identity document filed in the record; and

v. the Officer found some of the applicant's statements inconsistent and contradictory.

[11] According to the applicant, the Officer attempted to conceal his lack of credibility findings by relying on the insufficiency of the evidence or its low probative value. The applicant argues that these veiled credibility findings justify the decision being set aside.

[12] The Court agrees with the applicant.

[13] In his decision, the Officer found that the applicant's conduct, namely his choice not to claim refugee protection given the possibility of applying for permanent residence through the Programme de l'expérience québécoise, [TRANSLATION] "[was] inconsistent with that of a person who fears for his or her life or safety". He stated as such regarding a key element in the assessment of an applicant's credibility, as a failure to claim refugee protection at the first reasonable opportunity to do so has consistently been held to indicate a lack of subjective fear and thus undermines an applicant's credibility (*Mirzaee v Canada (Citizenship and Immigration)*, 2020 FC 972 at para 51; *Kayode v Canada (Citizenship and Immigration)*, 2019 FC 495 at para 29).

[14] In this case, the fact that the applicant chose to go through one immigration process over another is not necessarily inconsistent with fear. The CSQ was issued on February 1, 2019, a few months after he received the alleged threats. The applicant may have thought that this process would allow him to become a permanent resident more quickly than a claim for refugee protection.

[15] The Court further finds that the Officer drew veiled credibility inferences while giving little probative value to some of the evidence submitted by the applicant in support of his PRRA application. The applicant had produced excerpts from conversations dated January 2019 from the Badoo dating site as well as excerpts from the applicant's conversations with his father and an uncle on WhatsApp dated October and November 2018. These excerpts were intended to corroborate his allegations of risk. The Officer stated that [TRANSLATION] "the identity of the authors of the messages [had not been] established, and in the absence of any other reliable evidence that could support the applicant's personal circumstances, [he] therefore [gave] them little probative value". The Officer was of the opinion that this evidence in itself did not establish the applicant's sexual orientation or corroborate the applicant's allegations.

[16] The mention of [TRANSLATION] "lack of any other reliable evidence" on two occasions suggests that the Officer was not concerned with the sufficiency of the evidence but rather the credibility of its authenticity. In this case, the applicant's sexual orientation and story was corroborated by excerpts from intimate conversations with a man named [J.B.] and conversations on WhatsApp with people identified as [TRANSLATION] "Daddy" and [TRANSLATION] "Uncle [T.]". As the Court noted in *Ayeni v Canada (Citizenship and Immigration)*, 2019 FC 1202 at

paragraph 28, it is useful in this case to ask what other evidence could reasonably have been produced to prove the identity of the people the applicant was chatting with. The Officer could not reasonably have expected the deceased father to produce an affidavit to establish the authenticity of the conversations he had with his son. The same is true of the uncle who was threatening him.

[17] It is important to reiterate the Court's warnings against the practice of giving "little weight" to documents without making an explicit finding as to their authenticity (*Sitnikova v Canada (Citizenship and Immigration)*, 2017 FC 1082 at para 20, citing *Marshall v Canada (Citizenship and Immigration)*, 2009 FC 622 at paras 1–3, and *Warsame v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 1202 at para 10).

[18] The Officer also criticized the applicant for not having submitted any proof of parentage when he provided the evidence of his father's death. In requiring proof of parentage, the Officer appeared to question the authenticity of the evidence submitted in that respect.

[19] Finally, by pointing out the inconsistencies between the facts alleged by the applicant regarding when he shared his sexual orientation with his father and what is reported in his WhatsApp conversations, the Officer questioned the applicant's credibility.

[20] The Court recognizes that the burden of proof is on applicants to show, by way of probative evidence, that they would be at risk should they return to their country. It is also up to officers to determine whether the evidence is sufficient. However, the Court is of the opinion that

in this case, the elements raised by the Officer in relation to the applicant's credibility are material to the decision and could justify the PRRA application being accepted, in accordance with the requirements of section 167 of the IRPR. The Officer should have provided the applicant with an opportunity to address the Officer's concerns in a hearing.

[21] Given this conclusion, it is not necessary to consider the other arguments raised by the applicant.

[22] For these reasons, the application for judicial review is allowed. The decision is set aside and the matter is referred back to another officer for reconsideration.

[23] No question of general importance was submitted for certification, and the Court is of the view that this case does not give rise to any.

JUDGMENT in IMM-362-20

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is allowed;

2. The decision of the Pre-Removal Risk Assessment Officer dated November 7, 2019, is set aside;

3. The matter is referred back to another officer for reconsideration; and

4. No question of general importance is certified.

"Sylvie E. Roussel"
Judge

Certified true translation
Johanna Kratz

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Alain-Guy Sipowo	FOR THE APPLICANT
Edith Savard	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Alain-Guy Sipowo Saint-Jean-sur-Richelieu, Quebec	FOR THE APPLICANT
Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT