Federal Court  Cour fédérale

Date: 20220210

Docket: IMM-4762-20

Citation: 2022 FC 179

Ottawa, Ontario, February 10, 2022

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

SALVADOR ISRAEL LOZANO CACERES

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] Salvador Israel Lozano Caceres [Applicant] applies for judicial review of a March 21, 2020 decision [Decision] of a Senior Immigration Officer's [Officer] Pre-Removal Risk Assessment [PRRA]. The Officer refused the Applicant's PRRA application. The Officer refused to conduct a section 108(4) analysis under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] because the Applicant was deemed inadmissible due to serious criminality.

[2] The application for judicial review is dismissed.

II. Background

[3] The Applicant is a citizen of El Salvador. In 1999, he left El Salvador and entered the United States [US] claiming that he feared for his life after a gang had tried to break into his house. The Applicant states that he injured one of them while holding a gun and that they seek retaliation against him.

[4] The Applicant received temporary permission to work in the US in 2001. In August 2008, while in the US, the Applicant was convicted of conspiracy to import over 50 kilograms of marijuana with intention to distribute. If committed in Canada, the Applicant would have been charged under section 465(1)(c) of the *Criminal Code*, RSC 1985, c C-46 and section 6 of the *Controlled Drugs and Substances Act*, SC 1996, c 19. In Canada, the offence is punishable by a term of up to life imprisonment. When the police interrogated the Applicant about this crime, the Applicant gave information about two leaders of a Mexican drug cartel, Luque Camacho [Camacho] and Heinrich Letkeman [Letkeman]. The Applicant served a sentence of 4 years and 2 months in the US. He was subsequently deported to El Salvador on April 13, 2012.

[5] In El Salvador, a group of men abducted and tortured the Applicant on April 28, 2012. The men accused the Applicant of betraying Camacho and Letkeman. The Applicant escaped and received medical treatment at a private medical clinic. The Applicant submits a medical report dated May 2, 2012 that describes his injuries. After recovering, on May 25, 2012, the Applicant fled to the Dominican Republic. In January 2013, in the Dominican Republic, a man

allegedly sent by Camacho held the Applicant at gunpoint. The Applicant briefly returned to El Salvador prior to returning to the US on February 20, 2013 without a visa. While in the US, the Applicant saw a mental health counsellor, who diagnosed the Applicant with post-traumatic stress disorder.

[6] The Applicant entered Canada from the US on March 24, 2017 and made a refugee claim stating that he has feared for his life since November 1999. On June 26, 2017, a Canada Border Services Agency [CBSA] Officer issued a report pursuant to section 44(1) of the *IRPA* determining that the Applicant is inadmissible for serious criminality outside of Canada. That same day, a Minister's delegate referred the section 44(1) report to the Immigration Division [ID] for an admissibility hearing.

[7] On November 6, 2017, the ID issued a deportation order against the Applicant on the basis that he is inadmissible to Canada for serious criminality. Accordingly, pursuant to section 101(1)(f) of the *IRPA*, the Applicant is ineligible to have his refugee claim referred to the Refugee Protection Division [RPD].

[8] The Applicant subsequently applied for his first PRRA, which was refused on March 26, 2018. The Applicant applied for leave and judicial review of that decision on the basis that the Officer did not consider sections 108(1)(e) and 108(4) of the *IRPA*. The Court granted leave.

[9] On October 4, 2018, the Respondent sent the Applicant's counsel a letter, advising that the Respondent would reconsider the Applicant's first PRRA application if he discontinued his application for leave and judicial review. The offer is reproduced in its entirety below:

> Dear Sir:
>
> Re: Salvador Israel LOZANO Caceres v MCI / IMM-1675-18
>
> Please be advised that the Respondent is willing to reconsider the Applicant's application for pre-removal risk assessment. The Respondent agrees to do so on the following terms:
>
> - That the Applicant first discontinue the above-noted application for judicial review on a no costs basis;
> - That the Officer's April 2, 2018, decision be set aside; and
> - That the Applicant's application for pre-removal risk assessment be remitted to a different officer for reconsideration.
>
> Please contact me should you wish to discuss this further.

[10] The Applicant agreed and his PRRA application was re-determined by a different officer. On March 31, 2020, the Officer refused the Applicant's second PRRA application. That refusal is the subject of this application for judicial review.

III. Legislative Provisions

[11] The relevant provisions of the *IRPA* are set forth below:

> **Examination of Eligibility to Refer Claim**
>
> …
>
> **Ineligibility**
>
> 101 (1) A claim is ineligible to be referred to the Refugee Protection Division if

…

(f) the claimant has been determined to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality, except for persons who are inadmissible solely on the grounds of paragraph 35(1)(c).

Serious Criminality

(2) A claim is not ineligible by reason of serious criminality under paragraph (1)(f) unless

…

(b) in the case of inadmissibility by reason of a conviction outside Canada, the conviction is 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.

Cessation of Refugee Protection

Rejection

108 (1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances:

…

(e) the reasons for which the person sought refugee protection have ceased to exist.

…

Exception

(4) Paragraph (1)(e) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment.

IV. The Decision

[12] In refusing the PRRA, the Officer concluded that the Applicant did not provide sufficient evidence demonstrating that "he will be subject to risk of persecution, danger of torture, risk to life or risk of cruel and unusual treatment if returned to El Salvador." The Officer found that the Applicant did not establish that he has a personalized, forward facing risk in El Salvador.

[13] The Officer noted that there was no indication of threats in recent years and that no one is seeking the Applicant, either directly or through his family. Further, while organized crime is a problem in El Salvador, this risk is general in nature.

[14] The Officer also considered the compelling reasons consideration in section 108(4) of the *IRPA*, but concluded that an analysis was not required because section 108(4) does not apply unless the applicant has been granted Convention refugee or protected person status (*Krishan v Canada (Citizenship and Immigration)*, 2018 FC 1203 [*Krishan*]). The Officer reasoned that the Applicant was excluded from making a refugee claim due to serious criminality and therefore, a section 108(4) analysis was not required.

V. Issues

[15] The issues are:

(1) Did the Officer reasonably conclude that section 108(4) of the *IRPA* does not apply to the Applicant's circumstances?

(2) Was the Respondent's conduct during the course of the Applicant's judicial review applications fair and appropriate?

VI. Standard of Review

[16] The Applicant implicitly agrees that the standard of review for the first issue is reasonableness. The Applicant does not make submissions regarding the standard of review for the second issue nor does the Applicant state whether he seeks to challenge the reasonableness of the alleged conduct or that such alleged conduct breached his rights to procedural fairness. However, in reply submissions, the Applicant relies on *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*].

[17] The Respondent submits that the first issue pertains to a decision maker's interpretation of their home statute. Therefore, it should be interpreted on the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 25 [*Vavilov*]). The Respondent does not make submissions regarding the standard of review for the second issue.

[18] I agree with the parties that the standard of review for the first issue is reasonableness (*Vavilov* at para 25). The second issue is not a matter of procedural fairness nor is it a function of judicial review. It does not engage a specific standard of review.

VII. Parties' Positions

A. *Did the Officer reasonably conclude that section 108(4) of the* IRPA *does not apply to the Applicant's circumstances?*

(1) Applicant's Position

[19] The Officer should have undertook a compelling reasons analysis pursuant to section 108(4) of the *IRPA*. The Officer concluded that section 108(4) does not apply because the Applicant has not been threatened recently and has not produced evidence indicating that he is being sought. Accordingly, the Officer's refusal to apply section 108(4) is because of a change in circumstance (i.e., the absence of threats). This "guts the proviso of any meaning" since the purpose of section 108(4) is to address a situation where there is a change of circumstances (where a person was persecuted but no longer has a well founded fear of persecution).

[20] The Officer and the Respondent rely on *Krishan*, *Nyiramajyambere v Canada (Citizenship and Immigration)*, 2015 FC 678 [*Nyiramajyambere*], and *Castillo Mendoza v Canada (Citizenship and Immigration)*, 2010 FC 648) [*Castillo Mendoza*]. These cases are distinguishable on two bases. First, the refusal to apply section 108(4) in those cases was not based on a change of circumstance. Second, those cases involved applicants that were denied refugee or protected person status at the RPD. *Cardenas v Canada (Citizenship and Immigration)*, 2018 FC 262 similarly involved an applicant that was denied refugee status. In comparison, the PRRA Officer in this case refused to apply section 108(4) due to change in circumstances. Further, in this case, no determination about the Applicant's refugee status was made by the RPD or by the PRRA officer.

[21] *Farah v Canada (Citizenship and Immigration)*, 2018 FC 1162 [*Farah*], relied on by the Respondent, is similarly distinguishable. In *Farah*, the applicant was inadmissible due to serious criminality and ineligible to make a refugee claim at the RPD. Accordingly, this Court held that the PRRA officer did not have to consider section 108(4) (*Farah* at paras 1, 24-25). The

Applicant submits, however, that section 108(4) was not applicable in that case because the applicant failed to establish that he was ever at risk – not because of a change in circumstance. In this case, the PRRA "officer does not find the applicant was never at risk. Indeed, in light of his past suffering, such a finding would have been impossible to make." In the present matter, the only reason there was a finding against the Applicant on risk was because of a change in circumstance, which is the very trigger needed for section 108(4) to apply.

(2) Respondent's Position

[22] The Applicant has not challenged the Officer's findings with respect to whether he is at risk in El Salvador.

[23] The Officer reasonably concluded that section 108(4) of the *IRPA* does not apply. In the context of an RPD decision, the RPD has an obligation to conduct a compelling reasons analysis and consider whether an applicant was at one time a Convention refugee or a person in need of protection. However, "[i]n a PRRA application, a compelling reasons analysis may not be conducted unless the RPD had previously found the Applicant to be a Convention refugee or a person in need of protection, and that the risk to the applicant has ceased to exist." In this case, the Officer did not err because the Applicant is ineligible for refugee protection by virtue of section 101(1) of the *IRPA*.

[24] The Respondent relies on *Farah*, which has the exact same facts as the case at bar. The applicant in *Farah* was inadmissible to Canada for serious criminality, ineligible to apply for refugee protection pursuant to section 101(1) of the *IRPA*, and refused a PRRA. This case holds

that where an applicant is ineligible for refugee protection due to serious criminality, a PRRA Officer may not conduct a section 108(4) analysis (*Farah* at paras 24-25). The Officer's decision was consistent with existing jurisprudence and, therefore, reasonable.

[25] Contrary to the Applicant's submissions, *Farah* is not meaningfully distinguishable. While the Officer did not expressly doubt that the Applicant was a victim of crime, being a victim of a crime is entirely different than ever qualifying or being able to qualify for refugee status – which is the first condition for a section 108(4) analysis. The second condition is that there has been a change in country conditions that render the refugee claim unnecessary (*Krishan* at para 76). The Officer did not conclude that any of the dangers the Applicant faced actually ceased to exist. Rather, there was insufficient evidence to establish risk.

[26] Finally, section 108(4) is an extension of the *IRPA*'s cessation provisions, which require a positive finding that pre-existing risk has actually ceased to exist. The PRRA officer found that the Applicant failed to establish that he faced any risk and made no finding regarding the cessation of any risk.

B. *Was the Respondent's conduct during the course of the Applicant's judicial review applications fair and appropriate?*

(1) Applicant's Position

[27] The Respondent is acting unfairly in the present case. The only argument the Applicant raised in the 2018 application was that the PRRA officer failed to consider section 108(4) of the *IRPA*. The Respondent acceded to the Applicant's position by consenting to a redetermination of

the first application. It is unfair for the Respondent to resile from that agreement and now argue that the Officer's refusal to conduct a section 108(4) analysis is reasonable. The Respondent should be bound by their initial waiver.

[28] The Applicant essentially submits that he had a legitimate expectation that the Respondent would concede that the Officer had a duty to consider section 108(4). Legitimate expectations are one factor in determining the scope of procedural fairness owed to an applicant. In addition, the Respondent's actions have delayed a determination of whether the Applicant is a protected person. The Applicant has actually been prejudiced because the Applicant acted on the prior agreement by discontinuing the 2018 application. Finally, the Respondent's actions stifle the administration of justice by creating multiplicity of proceedings and inefficiency.

(2) Respondent's Position

[29] The Respondent's conduct during the course of the two applications for judicial review has been entirely fair and appropriate. The Respondent's consent to the Applicant's first judicial review application did not constitute agreement with any legal or factual position of the Applicant. The Respondent's offer did not indicate that the Respondent agreed with any of the Applicant's arguments, nor did the Respondent indicate why the offer was made. The Respondent is entitled to offer reconsideration of a PRRA application for its own reasons, which are privileged, and which may not align with the arguments of the Applicant.

[30] Additionally, there is a difference between the 2018 and 2020 PRRA refusals. In the 2018 PRRA refusal, the officer did not address the compelling reasons proviso at all. However, in the

2020 Decision, the issue was addressed but not to the satisfaction of the Applicant. The second PRRA refusal is reasonable, and accords with the facts and the law.

VIII. Analysis

A. *Did the Officer Reasonably Conclude that section 108(4) of the* IRPA *does not apply to the Applicant's Circumstances?*

[31] I am persuaded by the Respondent's submissions on this issue. Unlike the 2018 PRRA decision, the 2020 Decision considered section 108(4) of the *IRPA* and applied the relevant jurisprudence to the facts of this case. The Officer's conclusion that section 108(4) was inapplicable was reasonable.

[32] The Applicant misconstrues why the Officer declined to conduct a section 108(4) analysis by stating that the Officer declined to do so because the Applicant has not recently received threats and has not produced evidence indicating that people are looking for him. In other words, the Officer did not conduct a section 108(4) analysis *because* of a change of circumstances, which is the exact precondition set out in section 108(1)(e).

[33] This submission fails. In my view, the Officer considered these factors (absence of threats, etc.) in relationship to the risk assessment. However, the Officer reasonably declined to conduct a section 108(4) analysis on the basis that the Applicant is inadmissible to Canada due to serious criminality. The Officer's reasons make this clear:

> I note that the Federal Court of Canada has held that s. 108(4) does not apply unless the person has previously been granted convention refugee or protected person status... Mr. Lozano has

> not previously been granted convention refugee status or protected person's status. Rather, Mr. Lozano was excluded from making a refugee claim. This PRRA is the first assessment of the applicant's risk. For these reasons, I do not find s. 108(4) of IRPA applies to the applicant and I will not be undertaking a compelling reasons analysis.
>
> [Emphasis added.]

[34] The Applicant's submission ignores the first requirement for the application of section 108(4). That is, it is a "condition precedent" that an applicant be a Convention refugee or a person in need of protection (*Castillo Mendoza* at para 28). Refugee status is a condition precedent because section 108(4) is an exception to the cessation provisions in the *IRPA*, which take away refugee status (*Pazmandi v Canada (Citizenship and Immigration)*, 2020 FC 1094 at para 46; *Canada (Minister of Employment and Immigration) v Obstoj*, [1992] 2 FC 739 (CA) at paras 13-14, 93 DLR (4th) 144). For section 108(4) to apply, section 108(1) must be engaged. As a matter of logic, it makes sense that an exception to the cessation provisions cannot apply to someone who is ineligible for refugee status in the first place.

[35] In this case, the Officer concluded that the Applicant was ineligible for refugee or protected person status because he was inadmissible due to serious criminality. Therefore, the Applicant failed to meet the condition precedent to the application of section 108(4).

[36] I agree with the Respondent that *Farah* is directly on point. In *Farah*, this Court held that section 108(4) does not have to be considered by a PRRA officer when the applicant is inadmissible due to serious criminality. The applicant submits that *Farah* is distinguishable because the PRRA officer in *Farah* found that the Applicant did not establish that he was at risk.

The Applicant asserts that in this case, "in light of [the Applicant's past suffering], such a finding would have been impossible to make." The Officer may have accepted that the Applicant was a victim of past crimes. However, I agree with the Respondent that this is not the same as determining that an applicant is a refugee – which remains the first requirement for engaging section 108(4) (*Krishan* at para 76).

[37] Furthermore, *Farah* does not indicate that section 108(4) was inapplicable because the applicant did not establish that he was at risk. On the contrary, paragraph 24 of *Farah* confirms that a section 108(4) analysis was not required because the applicant was inadmissible for serious criminality:

> [24] The Court agrees with the Respondent's submissions. The PRRA Officer did not err in his analysis as subsection 108(4) of the IRPA is inapplicable to the Applicant's situation. The Applicant's record shows that he applied for refugee protection, but because he was found inadmissible to Canada due to serious criminality, the IRB simply rejected his claim. As previously established by this Court, "the relief offered by this provision is available only to persons previously found to be refugees" (*Cardenas* at para 28). This was not the case at bar. The Applicant's claim had been rejected by the IRB; consequently, the issue of presenting new evidence to the PRRA Officer was not relevant to the present matter. The Applicant cited several authorities which were also not pertinent in the case at bar as they involve applications for judicial review of decisions of the Immigration and Refugee Board.
>
> [Emphasis added.]

[38] In light of this precedent, the Officer's determination concerning section 108(4) of *IRPA* was reasonable.

B. *Was the Respondent's conduct during the course of the Applicant's judicial review applications fair and appropriate?*

[39] The Applicant imports principles related to procedural fairness when alleging that the Respondent acted unfairly and has caused prejudice to the Applicant. The Applicant, citing *Baker*, claims the Respondent breached his legitimate expectations.

[40] It is incorrect to suggest that the Respondent owes the Applicant a duty of procedural fairness, regardless of whether the Respondent represents the government. The Applicant has not provided an authority to suggest otherwise. Furthermore, the Applicant has failed to indicate on what basis this Court, on judicial review, may analyze whether the Respondent acted unfairly. Likewise, the Applicant has not specified what relief they seek related to this argument. For example, the Applicant does not request special reasons or costs on the basis that the Respondent has "unnecessarily or unreasonably prolonged proceedings, or acted in a manner that may be characterized as unfair, oppressive or improper" (*Huot v Canada (Minister of Citizenship & Immigration)*, 2009 FC 917 at para 5. See also Rule 22 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22).

[41] Notwithstanding these deficiencies in the Applicant's pleadings, I do not find that the Respondent acted unfairly. I find that there is nothing to suggest that the Respondent agreed with any of the Applicant's factual or legal positions in the 2018 PRRA decision or in the corresponding judicial review application.

[42] As both parties point out, the 2018 PRRA decision and the 2020 PRRA decision differed with respect to section 108(4). In the 2018 PRRA decision, the officer did not consider section 108(4) <u>at all</u>. *Vavilov* requires that a decision must contain the "requisite degree of justification,

intelligibility and transparency" to be reasonable (at para 100). Further, a decision may be unreasonable when it is not "possible to understand the decision maker's reasoning on a critical point" (*Vavilov* at para 103). Although *Vavilov* was decided after the Respondent consented to reconsideration, these principles stem from previous administrative law cases (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47; *Blas v Canada (Citizenship and Immigration)*, 2014 FC 629 at paras 54-66; *Taman v Canada (Attorney General)*, 2017 FCA 1 at para 47). In light of these principles and given that the 2018 PRRA decision provided no analysis on the application of section 108(4) whatsoever, it is rational that the Respondent agreed to have the 2018 PRRA decision re-determined for reasons known only to the Respondent. I make these comments without deciding whether the 2018 PRRA decision was in fact reasonable since that decision is not the subject of this application. Rather, these comments are only meant to illustrate that there may have been a legitimate reason for the Respondents' strategic choices.

IX. Certified Questions

[43] The Applicant submitted three questions for certification and, after hearing submissions of the Respondent, the Applicant withdrew the third question, leaving only the following two proposed questions:

> 1. Is the duty of fairness breached when the respondent consents to reconsideration of a decision which was based on a single reason in exchange for discontinuance of the judicial review of that decision, the applicant discontinues, and the decision after reconsideration is the same, based on the same reason?
>
> 2. Does the compelling reasons proviso, under Immigration and Refugee Protection Act section 108(4), to the change of circumstances reason for rejection, under Act section 108(1)(e), apply to a pre-removal risk assessment application if the applicant is ineligible to make a claim to the Refugee Protection Division of the Immigration and Refugee Board?

[44] The Respondent objected to the Applicant's proposed questions because the Applicant failed to provide the questions within the five-day deadline established by the Court (Practice Guidelines For Citizenship, Immigration, and Refugee Law Proceedings – November 5, 2018). The Applicant only provided the questions to the Respondent on the Saturday evening before the hearing (scheduled for Monday), without any explanation for the late submission.

[45] The Federal Court of Appeal re-affirmed the requirements for a certified question in *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at paragraph 46:

> This Court recently reiterated in *Lewis v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para. 36, the criteria for certification. The question must be a serious question that is dispositive of the appeal, transcends the interests of the parties and raises an issue of broad significance or general importance. This means that the question must have been dealt with by the Federal Court and must arise from the case itself rather than merely from the way in which the Federal Court disposed of the application. An issue that need not be decided cannot ground a properly certified question (*Lai v. Canada (Public Safety and Emergency Preparedness)*, 2015 FCA 21, 29 Imm. L.R. (4th) 211 at para. 10). Nor will a question that is in the nature of a reference or whose answer turns on the unique facts of the case be properly certified (*Mudrak v. Canada (Citizenship and Immigration)*, 2016 FCA 178, 485 N.R. 186 at paras. 15, 35).

[46] In light of the Applicant's withdrawal of one of the proposed certified questions, I will only review the Respondent's submissions on the above two questions. The Respondent submits that the first question fails on the serious question part of the test because questions of fairness are always determined on a case-by-case basis as per *Baker*. As highlighted above, this Court has answered the second question in *Farah* (at para 24) and there is no change of circumstances in this case.

[47] I agree with the Respondent that the Applicant failed to give sufficient notice as required by this Court's Practice Direction. Nevertheless, after reviewing the questions, I also refuse to certify them. The first question is neither dispositive of an appeal nor does it transcend the interests of the parties and raise an issue of broad significance or general importance. This question relates to the particular circumstances of this matter. Likewise, I agree that this Court has already addressed the second question in *Farah*.

X. Conclusion

[48] The application for judicial review is dismissed. There is no question for certification.

JUDGMENT in IMM-4762-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question for certification.

3. There is no order as to costs.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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