Federal Court  Cour fédérale

Date: 20220525

Docket: IMM-300-21
IMM-368-21

Citation: 2022 FC 759

Toronto, Ontario, May 25, 2022

PRESENT: Justice Andrew D. Little

BETWEEN:

SHAHROKH MOHAMMADPOUR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant filed two applications for judicial review to challenge two decisions made by the same senior immigration officer dated November 26, 2020, under the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the "*IRPA*"). The first decision refused an application for a pre-removal risk assessment ("PRRA"). The second decision dismissed the applicant's request for a permanent residence visa from within Canada on humanitarian and compassionate

("H&C") grounds. The applicant asks this Court to set aside the two decisions and remit both applications to a new officer for redetermination.

[2] For the reasons below, I agree that both decisions must be set aside.

I. **Background**

[3] The applicant is a 31-year-old citizen of Iran. He arrived in Canada on a study permit in November 2015. In May 2016, the applicant filed a claim for refugee protection, claiming a fear of persecution or a risk to his life in Iran. The basis of his claim for protection was his sexual orientation.

[4] The applicant claimed that before coming to Canada, he was detained twice in Iran because of his personal and intimate relationship with a man there named Reza. After arriving in Canada, he received a call from his mother informing him that the Revolutionary Guard in Iran had arrested Reza, seized the applicant's laptop, and were looking for him.

[5] By decision dated January 16, 2017, the Refugee Protection Division (the "RPD") of the Immigration and Refugee Board refused the applicant's claim. The RPD was not satisfied that the Applicant had established his identity as a gay man. It found that credibility was the determinative issue. The RPD concluded that a) the applicant had embellished his claim by alleging during the hearing there were compromising photos on his laptop, after failing to mention them in his Basis of Claim form; b) the applicant had not established his relationship

with Reza; and c) the applicant had waited 6 months after arriving in Canada to claim *IRPA* protection.

[6] By decision dated May 17, 2017, the Refugee Appeal Division (the "RAD") upheld the RPD's findings. The RAD also concluded that the applicant had not established his sexual orientation and therefore did not have a subjective fear of risk on return to Iran.

[7] In September 2017, this Court dismissed an application for leave and for judicial review.

[8] On August 20, 2019, the applicant submitted an application for a PRRA. On February 28, 2020, the applicant filed his request for permanent residence with an exemption on H&C grounds. In support of his applications, the applicant provided new evidence to establish and corroborate his sexual orientation as a gay man, his relationship in Canada with his then-partner, and his fear of state persecution in Iran. The evidence included a statutory declaration from the applicant himself and a sworn letter of support from his boyfriend, with whom he lived at the time. I will refer to the applicant's boyfriend as "M" to respect his privacy as their relationship has ended.

[9] The applicant also filed letters of support from his brother, his supervisor, his employer, and several friends; letters of support from two LGBTQ+ organizations in Toronto; screen captures of the applicant's WhatsApp conversations with M, which were translated into English; photos, including with his then-current and previous boyfriends (one of which showed a kiss

with a former boyfriend); and a series of documents discussing the treatment of LGBTQ+ individuals in Iran.

[10] The applicant also provided certified translations of a Letter of Summons dated July 29, 2017, and an Arrest Warrant dated August 13, 2017, that indicated that he was charged in Iran with non-Islamic behaviour and sodomy. However, the applicant did not file the original Letter of Summons and the Arrest Warrant in Farsi with either the PRRA or the H&C application.

II. **The Decisions under Review**

[11] In two decisions dated November 26, 2020, the officer refused both the PRRA and H&C applications. Both decisions were heavily influenced by the officer's finding that the new evidence provided did not establish the applicant's sexual orientation, or persuade the officer that allegations rejected by the RPD and the RAD were "credible and true".

A. *The PRRA Decision*

[12] In the PRRA reasons, the officer stated:

> Following on a refugee claim rejected over determinative findings of credibility, I am disinclined to assign much weight to new evidence premised on the same material allegations unless it provides an objective confirmation of the risk alleged, or an otherwise extensive, persuasive corroboration of the same.

[13] The officer noted that the applicant did not include the originals of the Letter of Summons and the Arrest Warrant, or copies of the originals. The officer summarily concluded:

“I cannot assess translations without at least a copy of the originals attached. Therefore, I will not assess these documents in my decision”.

[14] The officer turned to the letters attesting to the applicant’s sexual orientation and his relationship with M, in addition to his own statutory declaration. The officer found that the letters were vague and gave them “little probative value and weight that the applicant is homosexual”.

[15] For example, the officer wrote: “Navid Mohammadpour, the applicant’s brother, states that it is not easy for him to accept the applicant is homosexual, but he does not indicate how he is aware of the applicant’s homosexuality, nor if he ever met one of the applicant’s boyfriends.” Similarly, the officer dismissed the letter from the applicant’s employer, who attested to knowing the applicant’s sexual orientation and having met M on several occasions, on the basis that the employer did not specify how he knows the applicant’s sexual orientation or when he and M met. The officer concluded that the evidence provided by the applicant was insufficient to establish his sexual orientation or that he would face a risk in Iran.

[16] The officer also gave little probative value and weight to two letters from LGBTQ+ groups in Toronto which were provided to show the applicant’s sexual orientation.

[17] The officer considered the applicant’s statutory declarations submitted with his PRRA and H&C applications. The officer similarly found them to be vague and without sufficient specifics related to his past relationships and his then-current relationship with M.

[18] In the PRRA decision, the officer accepted that the applicant and M were living together. However, the officer found that the applicant's overall description of their relationship was vague because he did not specify the context in which they met, nor their "subsequent encounters", nor when they began discussing moving in together, nor when they moved in together, nor when they decided to get in a serious relationship, nor when he told his friends, nor when the applicant met M's friends. The officer found the same was true for M's supporting letter.

[19] The applicant also provided WhatsApp messages to and from M, posted over a two-month period from June to August 2019. The same translator who had translated the Letter of Summons and the Arrest Warrant also translated these messages. The officer found that the messages did not provide insight into their relationship.

[20] The officer found that the WhatsApp messages and filed photographs of the applicant and his boyfriends "could have offered substantial probative value if [the officer] had been provided with a longer period of messages and if the applicant's affidavit and [M's] letter had been less vague and, therefore, had more probative value." The officer noted that a "single photo showing the applicant kissing a man does not establish that he is a homosexual".

[21] Because of the vagueness of the descriptions of the relationship between the applicant and M, the lack of probative value from the WhatsApp messages and the photos, the applicant had failed to demonstrate that he was in a relationship with M.

[22] The officer therefore found that in the absence of "new significant facts that have been established on a balance of probabilities", and due to the reasons just discussed, the evidence did not establish the applicant's sexual orientation or that he would face a risk in Iran. The officer therefore could not find that the applicant's allegations that were previously rejected as not credible were now, on a balance of probabilities, "credible and true".

[23] With respect to the treatment of LGBTQ+ individuals in Iran, the officer accepted that Iran was an "immensely homophobic country" and that there were serious human rights issues, including unlawful or arbitrary killings, forced disappearances, torture by government agents, widespread corruption and arbitrary detentions and imprisonments. However, the applicant had not demonstrated how these would affect him nor that he would be in danger because of them.

[24] The officer concluded that the applicant had not demonstrated more than a mere possibility that he would face persecution in Iran based on a Convention ground set out in *IRPA* section 96, or that he would face one of the conditions for which protection was available under *IRPA* subsection 97(1).

B. *The H&C Decision*

[25] In the officer's H&C decision dated November 26, 2020, which accompanied a letter to the applicant dated November 27, 2019, the officer referred to the findings in the PRRA decision and the conclusion that the new evidence presented was not sufficient to establish any likely new facts to persuade the officer that the allegations rejected by the RPD panel were now likely "credible and true". As a result, the officer was "not prepared to give any weight to hardship that

the applicant would face as a homosexual in Iran, as, on a balance of probabilities, those matters have not been factually established." The officer rejected the applicant's H&C application.

III. **Analysis**

[26] For the two applications in this Court, the parties agree that reasonableness is the appropriate standard of substantive review for both the PRRA and H&C decisions. Reasonableness review entails a sensitive and respectful, but robust, evaluation of administrative decisions. The starting point is the reasons provided by the decision maker, which are read holistically and contextually and in conjunction with the record that was before the decision maker: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, at paras 10, 12-13, 84, 91-97 and 103. The Court's review considers both the reasoning process and the outcome: *Vavilov*, at paras 83 and 86. A reasonable decision is one that is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrain the decision maker: *Vavilov*, esp. at paras 85, 99, 101, 105-106 and 194.

[27] The Court's review of procedural fairness issues involves no deference to the decision maker. The question is whether the procedure was fair having regard to all of the circumstances, focusing on the nature of the substantive rights involved and the consequences for the individual(s) affected: *Gordillo v Canada (Attorney General)*, 2022 FCA 23, at para 63; *Canadian Pacific Railway Company v Canada (Transportation Agency)*, 2021 FCA 69, at paras 46-47.

[28] The applicant challenged both decisions because they both relied on a flawed assessment of the evidence related to his sexual orientation. That assessment was in the reasons for the PRRA decision. The applicant submitted that the officer failed to consider the risks he would face or the hardship he would experience as a gay man in Iran. According to the applicant, the officer's findings were not findings as to the sufficiency of evidence but rather were veiled credibility findings.

[29] In addition, the applicant submitted that despite his request for an oral hearing in the event of credibility concerns, the officer did not convene a hearing. In my view, those submissions raise procedural fairness issues as well as issues about the officer's substantive decision.

[30] The respondent contended that the officer's decisions were reasonable. According to the respondent, in light of the RPD and RAD findings on the credibility of the applicant's sexual orientation, it was reasonable for the officer to require more evidence to discharge the applicant's legal burden. The respondent submitted that "an immigration officer may give little or no weight to evidence that addresses risks previously assessed by the RPD; whose source is not impartial; or that is vague, inconsistent or lacks corroboration" (citing *Kopalapillai v Canada (Citizenship and Immigration)*, 2019 FC 501, at para 27). The respondent further argued that the officer's findings were based on an insufficiency of evidence, not credibility, and therefore the officer was under no obligation to convene a hearing.

[31] I agree with the applicant that the officer's two decisions were closely related, because the officer's findings made in the PRRA with respect to the applicant's sexual orientation had a direct, central impact on the outcome of both decisions – namely with respect to the risk faced by the applicant in Iran in the PRRA decision, and the hardship he may face there in the H&C decision.

[32] I have concluded that the officer's decisions must be set aside, for two reasons.

[33] First, I agree with the applicant that the officer's findings on the evidence related to the applicant's sexual orientation were concerned with credibility, not the sufficiency of the evidence presented. In both decisions, the officer expressly found that the applicant's allegations that were previously rejected as not credible were not now, on a balance of probabilities, "credible and true". Based on those express statements and on the reasoning used to make both decisions in the PRRA decision, the officer had credibility and not just sufficiency concerns regarding the evidence supporting the applicant's sexual orientation.

[34] The applicant attested in his sworn declaration to his relationship with M, a fact that was not before the RPD and that was corroborated by three support letters, each of which was accompanied by identification documents for their signatories. In addition, and unlike the case law relied on by the respondent, the record before the officer included new evidence from M, the applicant's brother, his supervisor, his employer, his friends and from two non-profit organizations he was involved with, which corroborated the applicant's own evidence of his sexual orientation and his romantic involvement with M. The applicant's evidence included

details about their meeting, the reason they got together and bonded, that they were living together, and their involvement in the LGBTQ+ community in Toronto. He also supplied the WhatsApp communications over a period of two months.

[35] As mentioned already, the officer accepted that the applicant and M lived together. That conclusion was supported by the record, which contained a copy of a lease in M's name, which was for the same location as the address on the applicant's Ontario driver's license.

[36] The officer found that the applicant had not established that he and M were in a relationship. In the H&C decision, the officer found that they had a "strong friendship".

[37] The Court has recognized the inherent challenges associated with establishing one's sexual orientation: *Lin v Canada (Citizenship and Immigration)*, 2022 FC 341, at paras 29-30; *JKL c Canada (Citoyenneté et Immigration)*, 2021 CF 1166, at paras 34-36; *Osikoya v Canada (Citizenship and Immigration)*, 2018 FC 720, at paras 34-36; *Ogunrinde v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 760, at paras 41-42.

[38] On an application for judicial review, it is not the Court's role to reweigh the evidence: *Vavilov*, at paras 125-126. In addition, the officer had scope to engage in fact-finding and to assess the sufficiency of evidence. This Court has recognized that it is open to a decision maker to assess the weight or probative value of evidence without considering whether it is credible: *Ferguson v Canada (Citizenship and Immigration)*, 2008 FC 1067, at paras 25-27. Justice Zinn observed in *Ferguson* that this occurs when the decision maker believes that the credibility or

reliability of the evidence is irrelevant because the evidence is to be given little or no weight, even if it is found to be reliable evidence: *Ferguson*, at para 26.

[39] That is not the situation in the present case. Each one of the statements provided by the applicant, M, M's closest friend, the applicant's employer, his friends, and one of the two LGBTQ+ organizations, expressly stated that the applicant was a gay man or self-identified as one. Several also confirmed that the applicant and M were in a relationship. In order to come to its conclusion, the officer's PRRA decision effectively had to disbelieve each one of those statements on that critical issue.

[40] While the officer repeatedly characterized the evidence supporting the applicant's sexual orientation as "vague", the reasoning strongly suggests that the officer engaged in an improper exercise of acknowledging the existence of letters and other evidence that supported or corroborated his sexual orientation as a gay man, before systematically discounting the evidence for what it did not say (in the case of corroborating statements) or did not depict (in the case of the photographs – although the officer accepted that "[o]ne photo shows the applicant kissing an ex-boyfriend"), or for another extraneous requirement (the length of time of the WhatsApp messages, which the officer also implied were not genuine): *Sitnikova v Canada (Citizenship and Immigration)*, 2017 FC 1082, at para 27; *Belek v Canada (Citizenship and Immigration)*, 2016 FC 205, at paras 21-22.

[41] It is apparent that the officer's treatment of the evidence was primarily concerned with its trustworthiness and whether it was to be believed, and not with its sufficiency or the weight to be

given to credible evidence. The officer's assessment of the evidence involved, in substance, negative credibility findings on a central issue – probably *the* central issue – in the PRRA and the H&C applications, without grounding that disbelief in any inconsistent testimony or documents and without affording the applicant a hearing: *Balogh v Canada (Citizenship and Immigration)*, 2022 FC 447, at paras 27-28, 36-37 and 43; *Qosaj v Canada (Citizenship and Immigration)*, 2021 FC 565, esp. at paras 4, 36, 40-42, 46-51 and 53; *Sitnikova*, at para 5; *Strachn v Canada (Citizenship and Immigration)*, 2012 FC 984, at para 34; *Uddin v Canada (Citizenship and Immigration)*, 2011 FC 1289, at para 3. See also *IRPA*, paragraph 113(*b*) and *Immigration and Refugee Protection Regulations*, SOR/2002-227, section 167.

[42] This is not a case involving a bare assertion that the applicant was a member of the LGBTQ+ community: see *Lin*, at paras 29-34. There was evidence from the applicant, his then-partner and many others, as well as documents showing he resided with M, to support his claim. I find the officer's assessment of the factual foundation for the applicant's claim based on his sexual orientation was unreasonable for its failure to respect the factual constraints in the evidence bearing on the decision, contrary to the requirements of *Vavilov*. These unreasonable findings were fundamental to the assessment of the applicant's two applications as they had a direct impact on the officer's failure to consider the risks associated with the Applicant having to return to Iran in the PRRA decision, and the potential hardship that he would suffer in Iran in the H&C decision.

[43] The second reason supporting the conclusion to set aside the officer's two decisions concerns the officer's treatment of the Letter of Summons and the Arrest Warrant. As noted

earlier, the officer declined to assess these documents because the applicant had not provided the originals, or a copy of the originals with his applications, although he did provide translations of them into English. These documents were potentially very important to both applications: they concerned the applicant's possible arrest on charges of non-Islamic behaviour and sodomy on his return to Iran. As noted already, the officer accepted evidence on the treatment of LGBTQ+ individuals in Iran, finding that Iran was an "immensely homophobic country" and that there were serious human rights and other issues.

[44] While it was open to the officer to require that a copy of the original documents accompany the certified translations, in my view the officer in the present case had an obligation to raise the absence of the original documents, or a copy of them, with the applicant and provide him with an opportunity to submit them, before making a determination not to consider them at all.

[45] Assuming that the officer's insistence on seeing a copy of the Letter of Summons and the Arrest Warrant was more than merely a technical issue of form, the officer's concern must have related to their existence and presumably to their authenticity. However, there was evidence in the record to support the documents' existence and their contents.

[46] The record before the officer included a certified English translation of the original documents by a translator in Ontario. That certified translation, of necessity, implied the existence of underlying documents for the translator to translate – indeed both translations on their face stated that a copy of the original was attached. I observe that the translator who

provided the English translations of these two documents was the same translator who had provided the translation of the WhatsApp communications between the applicant and M. The officer considered the English translation of those messages without any concern as to the qualifications or *bona fides* of the translator.

[47] In addition, the evidence included a statement from a friend of the applicant that independently verified the existence of the two documents and gave an explanation of how they came into the applicant's possession. The friend's statement was witnessed and was supported by Canadian identification. The friend advised that he had travelled to Iran and while he was there, he met with the applicant's parents. The friend stated that the applicant's parents told him that the Revolutionary Guard was looking for the applicant and had issued an arrest warrant and a summons letter for him. In May 2018, when returning to Canada, the friend brought the Arrest Warrant and Letter of Summons from Iran and gave them to the applicant. The officer's reasons did not mention or account for this evidence, which would have to be ignored or disbelieved in order to find that the documents did not exist.

[48] Further, a letter from the applicant's legal counsel that enclosed documents for the PRRA application, including the applicant's statement attaching the translations, confirmed that "original documents [were] available upon request from the decision maker".

[49] In addition to these considerations, I am mindful of the contents and potential importance of the Letter of Summons and the Arrest Warrant to the applicant's applications, as well as the

other findings of the officer related to conditions for members of the LGBTQ+ community in Iran and the stakes for the applicant on a return to that country.

[50] In these circumstances, as a matter of procedural fairness to the applicant and as a matter of reasonableness applying *Vavilov* principles and paragraphs 18.1(4)(*b*) and (*d*) of the *Federal Courts Act*, I conclude that the officer had to provide the applicant with an opportunity to provide the original Letter of Summons and the Arrest Warrant before deciding to ignore their translations entirely for the purposes of the two decisions. The officer could not simply disregard the evidence supporting the existence and contents of the Letter of Summons and the Arrest Warrant without doing so.

IV. **Conclusion**

[51] For these reasons, I conclude that both decisions must be set aside. It is not the Court's role to comment about the appropriate outcome of the two applications on redetermination and these Reasons do not do so.

[52] Neither party proposed a question for certification and none is stated.

JUDGMENT in IMM-300-21 and IMM-368-21

THIS COURT'S JUDGMENT is that:

1. The applications for judicial review are granted. The two decisions dated November 26, 2020 are set aside.
2. The application for a permanent resident visa with an exemption based on humanitarian and compassionate grounds and the application for the pre-removal risk assessment are both remitted for redetermination by another officer. The applicant shall be permitted to update and/or supplement his evidence and submissions on both applications.
3. No question is certified for appeal under paragraph 74(*d*) of the *Immigration and Refugee Protection Act*.

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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