Date: 20071003

Docket: IMM-482-07

Citation: 2007 FC 1010

Ottawa, Ontario, October 3, 2007

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

ALI REZA KARIMI (ALI REZA KAZEMI)

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of a Pre-Removal Risk Assessment (PRRA) Officer dated January 26, 2007, in which it was determined that the applicant was not a person in need of protection.

ISSUES

[2] This application for judicial review raises four issues:

a) Did the PRRA Officer err by not holding a hearing pursuant to paragraph 113(b) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA)?

b) Did the Officer err in relying on interview notes contained within the applicant's immigration file, without providing him the opportunity to examine them?

c) Did the Officer err by failing to consider available documentary sources other than those submitted by the applicant?

d) Did the Officer err in fact in concluding that the applicant had used his Iranian passport to travel back to Iran in 2000?

[3] The answer to the first question is affirmative. Therefore, there is no need to answer questions 2, 3 and 4. The application for judicial review shall be granted.

FACTUAL BACKGROUND

[4] The applicant is a man of Iranian origin, who is married to a Canadian citizen since 1988 and is the father of three children. He arrived in Canada in 1984 using a forged passport, claiming refugee status, a claim which was later closed due to a repeated failure to appear when required.

[5] In 1985, he was convicted of possession of narcotics. In 1988, he was convicted again and sentenced to three years in prison. Prior to his second conviction, his application for permanent residence was denied on grounds of criminality. In 1991, he sought a Minister's permit, thus allowing him to stay in Canada during the course of his rehabilitation. His permit was renewed until May 2000.

[6] In January 2000, he was arrested yet again, and charged with heroin possession, trafficking and breach of his conditions. He was released pending trial, and in February 2000, he left the country for Iran, where he was joined by his wife and children. He returned to Canada in October 2002 and was arrested immediately. In January 2003, the applicant was convicted on the pending charges, and sentenced to five years in prison.

[7] In June 2003, a deportation order was made against him on the grounds of serious criminality. After completing his sentence in 2006, he was taken into charge by the Canada Border Services Agency (CBSA), where he remains pending the execution of the deportation order. He was offered the possibility of applying for a PRRA.

[8] In support of his PRRA application, the applicant submitted his own detailed account of his stay in Iran and the risk to him in his country of origin should he be removed. He submitted that because his Iranian passport was in the possession of the criminal court at the time he fled in 2000, he entered Iran using improper travel documents. This document proved insufficient to gain entry into the country, and as such his father was required to offer his house as a surety. The documents used to enter the country aroused suspicion about his presence after such a long time in Canada. The arrival of his wife and children catalyzed further scepticism that, according to his submissions, culminated in near hysteria. He sent his family back to Canada, and followed to face his criminal charges shortly thereafter.

DECISION UNDER REVIEW

[9] The PRRA Officer determined that the applicant was inadmissible on grounds of serious criminality, pursuant to section 112(3)(b) of IRPA, and is not a "Convention refugee" as described in section 96 of the Act. The Officer found that his application could only be dealt with insofar as he may meet the conditions of a "person in need of protection", in accordance with subsection 97(1) of the Act.

[10] The reasons provided by the PRRA Officer rely on three main findings:

a) The Officer found that the submissions in support of the PRRA application were contradictory when juxtaposed with statements made by the applicant to a Senior Officer in October of 2003, when the deportation order was issued. In the earlier statement, the applicant stated the following about the risk he faced in Iran:

> *No I have no problem there, I have family there.*

He further explained his return to Canada as follows:

> *I left Canada between 2000 and 2002 but I had to come back because my wife who is a Canadian citizen had problems with the life and my children did not go to school because they could not write Persian.*

The Officer found these statements to be contradicted by the representations supporting the applicant's PRRA application, which alleged suspicion surrounding the presence of his wife and a risk of persecution.

b) The Officer also questioned the applicant's means of entering Iran. The applicant stated that he entered the country using an improperly obtained passport; however,

the Officer concluded that this was not substantiated by the evidence, since the applicant was issued an Iranian passport in 1998, a mere two years prior to his entry into Iran. The applicant further maintained that because he did not have proper travel documents, he aroused the suspicion of the authorities, and was required to have his father offer his house as a surety. The Officer found it inconsistent that the applicant would have been able to return to Canada without any consequences to the surety to his father or to the surety he offered.

c) Finally, the Officer found that there was no serious possibility of torture, or risk of cruel or unusual treatment, personalized to the applicant if he were returned to Iran. He concluded that the applicant had not demonstrated that he had performed any subversive acts against Iran that might raise the suspicion of the Iranian authorities, and lead to searches and extensive questioning, as suggested in the U.S. Country Reports on Human Rights Practices. This conclusion was based on the Officer's disbelief of the use of improper travel documents by the applicant.

[11] In conclusion, the Officer reported that the original version of the applicant's history was contradicted by a new version. In the former, the applicant cited his family's difficulties adapting to a different culture to be at the root of his return; in the latter, he alleged harassment by Iranian authorities. The PRRA Officer gave greater weight to the first version, and concluded that the applicant was not a person in need of protection pursuant to subsection 97(1) of the Act.

[12] Under part 7 of the PRRA Results, the Officer decided that the applicant was not entitled to a hearing, and not holding one was not a breach of natural justice.

[13] The denial of the applicant's PRRA application forms the basis of this judicial review.

RELEVANT LEGISLATION

[14] Subsection 97(1) of the *Immigration and Refugee Protection Act* establishes who is a person in need of protection:

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	**97.** (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	*a*) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	*b*) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(ii) the risk would be faced by the person in every part of that	(ii) elle y est exposée en tout lieu de ce pays alors que

country and is not faced generally by other individuals in or from that country,	d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

[15] Section 113(b) of the IRPA provides that an oral hearing may be held in the context of a PRRA application. The factors to be considered in order to determine whether an oral hearing will be held are set out in section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations):

113. Consideration of an application for protection shall be as follows:	**113.** Il est disposé de la demande comme il suit :
[…]	[…]
(*b*) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;	*b*) une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;
167. For the purpose of determining whether a hearing is required under paragraph	**167.** Pour l'application de l'alinéa 113*b*) de la Loi, les facteurs ci-après servent à

113(*b*) of the Act, the factors are the following:	décider si la tenue d'une 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.

ANALYSIS

Issue 1: Did the PRRA Officer err by not holding a hearing pursuant to paragraph 113(b) of IRPA?

[16] The applicant framed this question as one of procedural fairness, while the respondent framed it as a mixed question of fact and law. Generally the right to be heard is a question of procedural fairness; however, the right to an oral hearing is not absolute in the context of a PRRA application. Justice Yves de Montigny recently reiterated this principle in *Iboude v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1316, [2005] F.C.J. No. 1595 (QL) at paragraph 12:

> Section 113 of the *Immigration and Refugee Protection Act* clearly establishes that the Minister or his representative is not bound to grant a hearing or an interview. The Supreme Court recognized in

> *Suresh v. Canada* (M.C.I.), [2002] 1 S.C.R. 3, that a hearing was not required in all cases and that the procedure provided under section 113 was consistent with the principles of natural justice stated in the *Canadian Charter*; in the vast majority of cases, it will be enough that applicants have the opportunity to submit their arguments in writing.

[17] Had the Officer failed to turn his mind to the appropriateness of holding an oral hearing, there may have been a breach of procedural fairness, as was the case in *Zokai v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1103, [2005] F.C.J. No. 1359 (QL) at paragraph 11. Whether or not the Officer should have ordered a hearing pursuant to paragraph 113(b) of *IRPA*, is a question of applying the facts at issue to the factors outlined in section 167 of the *Regulations*. It is my opinion that the question is one of mixed fact and law, and that the Officer's decision should be reviewed on a standard of reasonableness (*Beca v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 566 [2006] F.C.J. No. 714 (QL) at paragraph 9).

[18] In the context of PRRA applications, hearings are held only when the three cumulative factors listed in section 167 of the *Regulations* are met. I will examine them one by one and then determine whether the conclusion of the Officer was reasonable or whether he committed a reviewable error.

[19] Paragraph (a) requires that there be evidence that raises a serious issue of the applicant's credibility and that the issue of credibility be related to the factors set out in sections 96 and 97 of the *IRPA*. In the present case, I find that the Officer relied on evidence which related directly to the credibility of the applicant; credibility was at the forefront of the decision, since the

Officer juxtaposed two versions of the applicant's reasons for returning to Canada, as well as his description of the risks he faced in Iran. The very language used by the Officer in his analysis reveals that the applicant's credibility is central to his conclusions:

> In this PRRA application, a new version of the applicant's history is being presented. […]
>
> This version contradicts the original version, a major part of which rests on the applicant's own statements. […]

[20] This is not, as the respondent suggests, a decision based on insufficiently probative evidence. The respondent cites several cases in which credibility is found to be secondary to the sufficiency of the evidence. In *Kaba v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1113, [2006] F.C.J. No. 1420 (QL) at paragraph 29, Justice Yvon Pinard writes (English translation not available) :

> Dans les circonstances, l'allégation de la demanderesse voulant que l'agent ait commis une erreur en ne lui accordant aucune audience du fait de la remise en question de sa crédibilité est erronée. Même si l'agent a tiré des conclusions de crédibilité, sa décision est surtout fondée sur l'insuffisance de preuve soumise par la demanderesse pour se décharger de son fardeau d'établir qu'elle et/ou sa fille encourent personnellement des risques de retour tels que ceux prévus aux articles 96 et 97 de la Loi dans l'éventualité d'un retour en Guinée.
>
> [Emphasis added]
>
> Also see *Selliah v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 872, [2004] F.C.J. No. 1134 (QL) at paragraph 27; *Iboude*, above at paragraph 14.

[21] In both of these last two cases, the applicant's credibility had been considered by a Refugee Division Board, which is not the case here.

[22] The findings of the Officer on other points, such as the determination that the applicant traveled to Iran using a valid Iranian passport, may be based primarily on insufficient evidence to the contrary; however, credibility is unmistakably at the heart of the applicant's evidence relating to his personalized risk of torture, cruel and unusual treatment or punishment, thereby meeting the requirement of the second factor set out in paragraph 167(b).

[23] The final factor, outlined in paragraph 167(c) requires that the evidence, if accepted, would justify allowing the application for protection. If the applicant's explanations of the contradictions were found to be credible, the application for protection might well be justified. The applicant's credibility was impeached with regard to the risk he would face if returned to Iran. This risk is central to the determination of whether he is a person in need of protection pursuant to subsection 97(1). Notably, the Officer found that no particular risk to the applicant was specified, a finding which might be quite different if the applicant's story was believed.

[24] The decision of the Officer not to grant an oral hearing is reviewable if the decision is unreasonable. In light of the foregoing discussion, and the Officer's failure to identify credibility issues, which were reflected by his own choice of words, I find that he committed a reviewable error. His mischaracterization of the question of credibility is an error apparent on the face of the decision. It is my opinion that this question disposes of the case.

[25] The parties did not submit questions for certification and none arise.

JUDGMENT

THIS COURT ORDERS THAT:

1. The application for judicial review be allowed. The PRRA application is to be redetermined by another PRRA Officer.
2. No question is certified.

"Michel Beaudry"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-482-07
STYLE OF CAUSE:	**ALI REZA KARIMI (ALI REZA KAZEMI) AND THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	September 6, 2007
REASONS FOR JUDGMENT AND JUDGMENT:	Beaudry J.
DATED:	October 3, 2007

APPEARANCES:

Ethan Friedman	FOR APPLICANT
Diane Lemery	FOR RESPONDENT

SOLICITORS OF RECORD:

Ethan Friedman Montreal, Quebec	FOR APPLICANT
John Sims, Q.C. Deputy Attorney General of Canada Montreal, Quebec	FOR RESPONDENT