Date: 20080115

Docket: IMM-192-07

Citation: 2008 FC 51

Ottawa, Ontario, January 15, 2008

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

KARIM BADRUDIN PARSHOTTAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT

[1] Mr. Parshottam had permanent residence status in the United States. After eighteen years in that country he sought protection in Canada. The Immigration and Refugee Board found him to be excluded under Section E of Article 1 of the *United Nations Convention Relating To The Status Of Refugees*. A pre-removal risk assessment officer found that he would not be at risk if returned to the United States. Mr. Parshottam seeks judicial review of that decision.

[2] Mr. Parshottam is Muslim, gay and, by birth, a Ugandan citizen of East Indian descent. His family was forcibly ejected by the regime of Idi Amin in 1972. They moved to Pakistan where he

remained until 1986 whereupon he went to live with an aunt in Texas. In 1988 he obtained temporary residence in the United States under a special program for agricultural workers, which was converted to permanent residence in 1990. Mr. Parshottam says that this was obtained through misrepresentations. His life in the United States was marked by several minor criminal charges, a brief arranged marriage and incidents, he describes, of homophobic intolerance.

[3] Mr. Parshottam says that, after September 11, 2001, he began to fear that his status would be revoked and that he would be deported to Uganda or Pakistan. He says that he consulted a lawyer who advised that he would be unable to obtain US citizenship because of the criminal convictions and that his options were to either remain indefinitely fearful in the US or to leave the country. He chose to come to Canada in February 2004 and to make a refugee claim. At that time, his "green card", evidencing his status as a resident alien entitled to work in the US, remained valid until June 2004.

[4] The Refugee Protection Division (“RPD”), in a decision dated January 9, 2006, accepted Mr. Parshottam’s claim that he would be subject to persecution as a gay man in Uganda. The panel found that as he was recognized by the US as having permanent residence at the time of his admission to Canada he was excluded from refugee status in this country pursuant to Article 1 E of the UN Convention and section 98 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (“IRPA”). It had been argued in post-hearing submissions that the applicant could not return to the US because of the expiry of his green card, his criminal history and misrepresentations of fact in his 1988 application for residency.

[5] The panel member held that the green card could have been renewed and on the evidence, including information obtained from the US authorities, there was not a serious possibility that Mr. Parshottam's status in the US would be revoked. The minor criminal convictions and the outstanding shoplifting charge had all occurred more than ten years earlier. The evidence did not support a finding, in the panel's view, that the US authorities would be interested in deporting the applicant because of these events or the alleged fraud in obtaining status. The member found that the evidence as to the misrepresentations was not credible. An application for leave for judicial review of that decision was denied.

[6] Mr. Parshottam then applied for a pre-removal risk assessment ("PRRA"). On that application he submitted evidence respecting his status in the US which had not been before the RPD. Mr. Parshottam's lawyer from that hearing attested in a supporting affidavit that they had not anticipated that the RPD would conclude that he remained a permanent resident of the US. The new evidence included letters from an attorney admitted to the New York Bar and the US Consulate General offering their assessments of Mr. Parshottam's status in the US and the potential outcome of his case there.

[7] Applying section 113 (a) of IRPA, the PRRA officer rejected the newly submitted documents which predated the RPD hearing. The officer assessed other documentary evidence pertaining to US practice and found that there was no evidence that Mr. Parshottam was under removal proceedings in the US or that he would have automatically lost his permanent residency in that country. She considered a letter from an American official dated July 31, 2006 indicating that, based upon the information provided by CBSA officials and assuming there was no other reason for

ineligibility, Mr. Parshottam could return to the US under the terms of the 1987 Reciprocal Arrangement for the exchange of deportees between the United States and Canada (the "consent letter"). The consent letter was not disclosed to the applicant prior to the officer's determination.

[8] The officer found that the asylum protections available in the US were sufficiently robust to prevent the applicant from being deported to Pakistan or Uganda and that there was insufficient evidence to support his contention that he would be at risk in the US because of his sexual orientation, his religion or his mental state. The officer concluded that Mr. Parshottam would not be subject to a risk of persecution, of torture or a risk to life or of cruel and unusual treatment or punishment if returned to the United States.

[9] In these proceedings, the applicant has submitted additional evidence respecting US practice in the form of a letter from a US attorney, Stephen Tills, dated September 25, 2007, attached to an affidavit from an assistant in counsel's office made October 1, 2007. The letter expresses opinions on US law and practice and contains statements attributed to the US Consulate in Montreal.

[10] At the conclusion of the hearing I reserved my decision. By direction issued December 5, 2007, I invited counsel to provide additional written submissions in relation to the decision of Mr. Justice Phelan in *Canadian Council for Refugees et al. v. Canada (Minister of Citizenship and Immigration)* 2007 FC 1262. Both parties submitted additional written submissions indicating that that decision has no bearing on the present case for varying reasons which are subsumed in the issues discussed below.

ISSUES:

[11] The issues raised by the parties are:

1. Whether the new evidence submitted by the applicant should be accepted by the Court?

2. Whether the PRRA Officer erred in law by applying the incorrect test for exclusion?

3. Whether the PRRA Officer erred in law with regard to the evidence before her about the applicant's status in the US?

4. Whether the PRRA Officer breached natural justice by failing to disclose the US consent letter?

RELEVANT STATUTORY PROVISIONS

[12] Section E of Article 1 of the *United Nations Convention Relating To The Status Of Refugees*, is attached as a Schedule to IRPA:

E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.	**E.** Cette Convention ne sera pas applicable à une personne considérée par les autorités compétentes du pays dans lequel cette personne a établi sa résidence comme ayant les droits et les obligations attachés à la possession de la nationalité de ce pays.

[13] Section 98 of IRPA provides that a person referred to in Section E of Article 1 of the Refugee Convention is neither a Convention refugee nor a person in need of protection.

[14] The PRRA officer applied the limitation on the reception of new evidence set out in paragraph 113 (a) of IRPA:

113. Consideration of an application for protection shall be as follows:	**113.** Il est disposé de la demande comme il suit :
(a) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection	a) le demandeur d'asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'il n'était pas raisonnable, dans les circonstances, de s'attendre à ce qu'il les ait présentés au moment du rejet

[15] Section 312 of the *Federal Courts Rules*, SOR/98-106, allows for the reception of additional evidence on judicial review:

312. With leave of the Court, a party may	**312.** Une partie peut, avec l'autorisation de la Cour :
(a) file affidavits additional to those provided for in rules 306 and 307; (b) conduct cross-examinations on affidavits additional to those provided for in rule 308; or (c) file a supplementary record.	a) déposer des affidavits complémentaires en plus de ceux visés aux règles 306 et 307; b) effectuer des contre-interrogatoires au sujet des affidavits en plus de ceux visés à la règle 308; c) déposer un dossier complémentaire.

ANALYSIS :

Standard of Review :

[16] After conducting a pragmatic and functional analysis of the standard of review applicable to different aspects of a PRRA Officer's decision in *Kim v. Canada (Minister of Citizenship and Immigration*, 2005 FC 437, [2005] F.C.J. No. 540, I concluded at paragraph 19 that the appropriate standard of review for questions of fact should generally be patent unreasonableness, for questions of mixed law and fact, reasonableness, and for questions of law, correctness.

[17] I also agree with the determination of Mr. Justice Luc J. Martineau in *Figurado v. Canada*, 2005 FC 347, [2005] F.C.J. No. 458, that the applicable standard of review when a PRRA Officer's decision is considered "globally and as a whole" is reasonableness.

[18] The choice of the proper legal test by a PRRA Officer is a question of law, and the application of that test to a specific set of facts is a question of mixed fact and law: *Rai v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 12, [2007] F.C.J. No. 12. The former attracts a correctness standard while the latter is reviewable on a reasonableness standard.

Evidence Post-dating the Decision:

[19] There is no dispute that the content of the September 25, 2007 letter from Attorney Tills was not before the PRRA officer when she made her decision. Attorney Tills was apparently retained to test the officer's conclusions by submitting applications on Mr. Parshottam's behalf to the US Consulate to determine his status. The letter refers to information received from the consulates in Toronto and Montreal. The applicant seeks to have it admitted to dispute the PRRA officer's grounds for refusing to deal with the merits of his claim as against Uganda; to address allegations that he is 'asylum shopping'; and, to show a breach of natural justice in the officer's reliance on information which has been disproved through the new evidence.

[20] The respondent objects to the reception of this evidence on the ground that absent special circumstances, a reviewing court is bound by the record which was before the tribunal: *Nejad v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1444, [2006] F.C.J. No. 1810. Further,

if it is to be received, evidence such as an affidavit or letter attached to a purely formal affidavit which says nothing should be afforded little weight where it effectively shields the source from cross-examination: *594872 Ontario Inc. v. Canada*, 55 F.T.R. 215 , [1992] F.C.J. No. 253.

[21] The applicant submits that the test for allowing the filing of additional affidavits is where the additional material will serve the interests of justice, will assist the court and will not seriously prejudice the other side: *Mazhero v. Canada (Industrial Relations Board)*, 2002 FCA 295, [2002] F.C.J. No. 1112. In this instance, the applicant submits that the evidence disproves the information which the officer relied upon and was not available at the time of the decision and that the respondent would not be prejudiced as it has had the opportunity to review and respond to the new evidence.

[22] The cases cited by the applicant as supporting his claim that reception of the evidence is necessary in the interests of justice are not directly on point. In *Ou v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 235, 48 Imm. L.R. (2d) 131, the Court allowed fresh and highly relevant evidence from a witness who had inadvertently conveyed incorrect information to the Board prior to an abandonment hearing. Similarly, in *Bouguettaya v. Canada (Minister of Citizenship and Immigration)*, [2001] 1 F.C. 3 , [2000] F.C.J. No. 992, the tribunal had erred in not finding that a breach of natural justice resulted from reliance on factually incorrect information when it was brought to their attention on a motion to reopen the hearing.

[23] The Court should be very cautious about admitting additional evidence that was not considered by the decision maker. It was open to the applicant to have obtained the evidence in

dispute prior to the PRRA decision. He had been made aware of the concern about his status in the US by the respondent's submissions to the RPD in May, 2005. The question then would have been whether the evidence was admissible under section 113 (a) of IRPA, and, if admissible, what weight it should be afforded by the PRRA officer, determinations which would be subject to review by the Court. In effect, the applicant has by-passed that process by obtaining and submitting the evidence after the PRRA decision.

[24] It is not evident that the content of Attorney Tills' letter would assist the Court or the interests of justice in these proceedings. First, the content contains references to correspondence and statements attributed to third parties which are not before the Court and available for scrutiny. Second, the form in which the evidence is submitted, a letter attached to an affidavit made by an assistant who has no personal knowledge of the content, means that it would be effectively beyond the reach of cross-examination had the respondent pursued that procedural option. Thirdly, even if it were found to be admissible, the letter does not establish that the PRRA officer's findings were incorrect as the content is based upon the hypothetical factual scenario that Mr. Parshottam would have to apply for a special immigrant visa to return to the United States as he had been denied a re-entry permit. As previously noted, US authorities had issued a consent letter indicating that he could return to that country.

[25] Given these factors, I do not find that the affidavit will assist the Court, nor do I agree that allowing it into evidence will not cause serious prejudice to the respondent.

Test for exclusion pursuant to Article 1E:

[26] The applicant alleges that several errors may be found in the decision of the PRRA officer. The first of these is a failure to correctly apply the test for exclusion pursuant to Article 1E of the Refugee Convention, which states that a person recognized as having the rights of residence in a safe country cannot be a refugee for the purposes of the Convention in any other country. He submits that the officer came to his decision that Mr. Parshottam was excluded on the basis of Article 1E solely on the basis of a lack of a negative determination by US authorities on his status in that country and on the lack of removal proceedings against him.

[27] The respondent notes in response that the appropriate date for the determination of a claimant's status for the purposes of Article 1E is that of the refugee claimant's admission to Canada. At the relevant date, Mr. Parshottam was found by the Refugee Protection Division to be a permanent resident of the United States and the PRRA officer was not remiss in relying on that finding of fact.

[28] It is settled law that the relevant date for a determination under Article 1E is that of admission to Canada. I also agree with the *dicta* of Justice Paul U.C. Rouleau in *Canada (Minister of Citizenship and Immigration) v. Choovak*, 2002 FCT 573, [2002] F.C.J. No. 767, that to assess the applicant's status in a third country at the time of the refugee determination, or later yet the PRRA application, would permit the claimant to deliberately manipulate his or her status by delaying the progress of the case. This would not fulfill the purpose of the Refugee Convention, which is to provide assistance to those who face real danger.

[29] I cannot find that the PRRA officer erred by applying the incorrect test for exclusion.

Evidence regarding the applicant's status in the US

[30] The applicant submits that all evidence provided by him in support of his refugee claim against the United States should have been considered by the PRRA officer as new evidence, given that he had been primarily claiming against Uganda in the refugee claim heard by the Refugee Protection Division. He contends that the PRRA officer should have considered all evidence against the US as being new for the purposes of paragraph 113(a).

[31] The primary evidence to which the applicant is referring is that relating to his potential detention as an asylum seeker in the US and its effect on him as a gay Muslim man who is extremely psychologically vulnerable.

[32] The respondent counters that the PRRA officer referred to the evidence supplied by the applicant, some of it explicitly. The officer did not, therefore, ignore evidence or submissions. The applicant is simply seeking a reweighing of the evidence, which is not within the purview of this Court.

[33] I note that Mr. Parshottam did claim against the US in his hearing before the RPD. That claim was assessed by the RPD and found not to be credible. The PRRA Officer was entitled to rely on those findings as the baseline for her decision. The evidence which existed and might reasonably have been procured by Mr. Parshottam prior to his hearing before the RPD with respect to his claim

of risk in the United States was, therefore, properly found by the Officer not to be ‘new’ evidence for the purposes of paragraph 113(a). I do not find that the PRRA Officer erred in this finding.

Failure to disclose consent letter

[34] Finally, the applicant submits that the PRRA Officer breached procedural fairness by failing to disclose that she would be relying on the consent letter between Canada and the US under the Reciprocal Arrangement as evidence of his status in the US. The applicant alleges that he could have responded to the letter had he known that one had been obtained in his case, to show that it had no impact on his status in the US. He acknowledges that such letters are a routine aspect of removals from Canada to the US and other countries.

[35] For the applicant to accept that consent letters are a normal aspect of removals such as his undermines his argument that he was kept from responding to it because he was not informed of its existence. The question of Mr. Parshottam’s status in the US had clearly been a live issue from the time of the decision of the RPD, and it was open to him to provide evidence before the PRRA Officer similar to that which he has attempted to bring before me. I cannot find that the Officer’s weighing of evidence which, while not directly disclosed to the applicant, was clearly known by him to be a likely step in the process of evaluating his risk on removal was tantamount to denying him the opportunity to know, and respond to, the case against him.

[36] For all of these reasons, I find the PRRA Officer did not err in law, breach procedural fairness or come to a sufficiently unreasonable conclusion that her decision should be vacated.

[37] As the parties requested time to consider whether to propose questions for certification after receiving my reasons for decision, Counsel are requested to serve and file any submissions with respect to certification within seven days of receipt of these reasons. Each party will have a further period of three days to serve and file any reply to the submissions of the opposite party. Following that, Judgment will be issued.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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