Federal Court Cour fédérale

Date: 20090729

Docket: IMM-5615-08

Citation: 2009 FC 774

Ottawa, Ontario, July 29, 2009

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

PARMJIT SINGH

Applicant

and

THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision dated October 31, 2008, denying the applicant's Pre-Removal Risk Assessment (PRRA) application on the basis that the applicant would not be subject to a risk of persecution if returned to his country of nationality, India.

FACTS

[2] The applicant is a forty-three year Indian citizen from the state of Punjab. His brother and mother reside in Brampton, Ontario. His first application for a visitor's visa dated Canada on June

26, 1997 and his second application dated March 8, 2004, were refused because of concerns related to his income and employment. However, the applicant was issued a temporary resident permit valid for three weeks on July 20, 2004.

[3] The applicant arrived in Canada on July 25, 2004 and claimed refugee status on August 20, 2004. The applicant claimed that he feared persecution at the hands of the Indian police on the basis of their belief that he is associated with Kashmiri militants. The applicant also claimed that he feared persecution at the hands of Kashmiri militants. His claim was rejected by the Refugee Protection Division on May 16, 2005 on the basis of the applicant's lack of credibility, and because the applicant had an IFA in any event. Leave to judicially review this decision was denied on September 13, 2005.

[4] The RPD decision provided a comprehensive analysis of the applicant's claim and held at page 2 of the decision:

> …However, almost every element of his (the applicant's) description of that arrest was contradictory. He gave multiple answers to the question of how long his detention was. In his oral testimony he said 15 days, in his Personal Information Form he said a couple of days. To the immigration officer he said 1 day. To the Refugee Protection Officer he said he returned home, the police allowed him to go home the same day after he gave the police money to release him. He was given an opportunity to explain these differences in the length of time that he said he was detained. He could not. The panel puts no weight on his allegation of past persecution to attributed political opinion due to these unexplained contradictions and for the following reasons.

The Tribunal proceeded to detail a number of other contradictions in the applicant's testimony and concluded at page 4:

> The panel found the claimant's evidence about his arrest and detention, the central incident of his claim, inconsistent and contradictory. It lacked credibility or trustworthiness.

[5] The applicant commenced an application for permanent residence from within Canada on humanitarian and compassionate (H&C) grounds. This application was refused on October 29, 2008. On March 9, 2006, the applicant submitted the PRRA application underlying this judicial review application.

PRRA Decision under review

[6] The PRRA Officer found that he had not been provided with sufficient new evidence that was not before the RPD demonstrating the applicant would be exposed to a risk of persecution if returned to India.

[7] The PRRA Officer acknowledged that the applicant had provided two new one-page affidavits as personal objective new evidence. One of these affidavits was sworn by the applicant's wife, Kuldip Kaur; the other by an individual named Gursharan Singh Namberdar. The Officer noted that the latter affidavit does not explain Mr. Namberdar's credentials or relationship to the applicant. The Officer summarized the affidavits at p. 11 of the Application Record:

> Both affidavits attest that the applicant was falsely accused of having links with militants, that he was falsely accused of providing food, shelter and help to militants and that he was wrongly arrested and tortured by the police. The affidavits indicate that the applicant was released not only because a bribe was paid but also because of the help he obtained from prominent people in the area….Both affidavits state that the police continue to visit the applicant's residence in

> order to harass the family and warn that the applicant should not return because he might be arrested, tortured and killed by the police if he does.

[8] The Officer found that the evidence that the police continued to harass the applicant's family after his departure was not new, and had been before the RPD (Application Record, p. 11).

[9] The Officer reviewed the country reports and concluded that country conditions had not changed since 2005 so as to constitute new or additional risk. The Officer concluded (Application Record, p. 12):

> In conclusion, having considered the evidence in its totality, I find that the applicant has provided insufficient new evidence to satisfy me that there is more than a mere possibility that he will be persecuted in India. I also find that the applicant has provided insufficient new evidence to satisfy me that he is more likely than not to face a risk of torture, or a risk to life, or a risk of cruel and unusual treatment or punishment. The applicant has failed to fulfil the requirements of sections 96 and 97 of IRPA. He is neither a Convention refugee nor a person in need of protection.

ISSUES

[10] The applicant submits that the PRRA Officer erred by:

1. failing to assess the specific risk raised by the applicant;
2. applying an incorrect standard in requiring the applicant to present new evidence or demonstrate that he would be exposed to a "new, different or additional" risk;
3. finding that the affidavits were not new evidence;
4. breaching procedural fairness by failing to disclose documents which post-dated the applicant's submissions; and
5. failing to give adequate reasons.

STANDARD OF REVIEW

[11] Decisions of PRRA officers are generally reviewed on a standard of reasonableness. *Erdogu v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 407, [2008] F.C.J. No. 546 (QL); *Elezi v. Canada,* 2007 FC 40, 310 F.T.R. 59. The errors alleged by the applicant involve issues of mixed fact and law and thus attract a standard of review of reasonableness.

[12] In determining whether the Officer's findings were reasonable, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." (*Dunsmuir v. New Brunswick,* 2008 SCC 9, 372 N.R. 1 at paragraph 47).

[13] The first and second issues raised by the applicant are questions of law and are subject to a standard of review of correctness. The fourth issue raises a procedural fairness question and will therefore also be reviewed on a correctness standard.

ANALYSIS

Issue No. 1: Did the Officer fail to assess the specific risk raised by the applicant?

[14] The applicant submits that the PRRA Officer failed to provide any analysis with respect to the specific risk identified by the applicant and, in fact, makes no mention of the specific risks raised by the applicant in the PRRA application.

[15] The applicant relies on two cases: *Brzezinkska v. Canada (MCI)* 2006 FC 1182, 57 Imm. L.R. (3d) 59; and *Hovarth v. Canada,* 2008 FC 1005, 74 Imm. L.R. (3d) 198. In those cases, Justice Campbell found that a PRRA Officer erred where he simply cited an RPD decision at length and then engaged in a generalized analysis of country conditions without analyzing state protection with reference to the specific risks identified by the applicant. Those cases are distinguishable from the present case. Here, the risks identified by the applicant are clear from a reading of the PRRA Officer's reasons. At p. 10, the Officer cites the RPD decision, wherein the Board stated:

> He now fears the police and the Kashmiri militants, should he return to India. He fears the police because they thought he was a supporter of Kashmiri militants.

[16] The Officer then summarizes the affidavits submitted as new evidence, stating at p. 11:

> Both affidavits state that the police continue to visit the applicant's residence in order to harass the family and warn that the applicant should not return because he might be arrested, tortured and killed by the police if he does.

[17] It is clear from the reasons that the Officer understood the risk the applicant claimed he would face if returned, and correctly identified the documents that the applicant had submitted as new evidence.

<u>Issue No. 2: Did the Officer err in law by requiring the applicant to demonstrate exposure to a new, different or additional risk?</u>

[18] The applicant submits that the Officer incorrectly stated that a PRRA applicant must bring forward evidence of a new, different or additional risk development. The applicant states that a PRRA applicant requires only that a PRRA applicant present new evidence that arose after the

rejection or was not reasonably available, and that a PRRA may involve consideration of some or all of the same legal and factual issues as the refugee claim. The applicant refers to p. 10-11 of the Officer's reasons, wherein he cited my decision in *Kaybaki v. Canda (Solicitor General of Canada),* 2004 FC 32, 128 A.C.W.S. (3d) 784:

> As per Kaybaki, "the purpose of the PRRA is not to offer an opportunity to reargue the facts that were before the RPD. The decision of the RPD with respect to the issue of protection under sections 96 or 97 of IRPA is final and is subject only to the possibility that new evidence demonstrates that the applicant would be exposed to a new, different, or additional risk development that could not have bene considered at the time of the RPD decision." I find I have not been provided with sufficient new evidence to demonstrate that the applicant would be exposed to a new, different or additional risk development that could not have been considered by the RPD panel.

[19] The applicant's argument relies on a misinterpretation of the phrase "new, different or additional risk development" as used by the PRRA officer. Contrary to the submission of the applicant, this is not the same as requiring a "new, different or additional risk." There is nothing in the above quote or in the PRRA decision that suggests that the PRRA officer incorrectly believed the applicant must present evidence of a new, different or additional risk that was not before the Board. The phrase "new, different or additional risk development," as it was used in *Kaybaki*, and as correctly cited by the Officer, refers to the requirement that the evidence demonstrate a development that is new, different or additional to the evidence that was before the Board.

[20] The Federal Court of Appeal in *Raza v. Canada (MCI),* 2007 FCA 385, 370 N.R. 344, explained at paragraph 13:

> …that a negative refugee determination by the RPD must be respected by the PRRA Officer, unless there is new evidence of facts that might have affected the outcome of the RPD hearing if the evidence had been presented to the RPD.

[21] In this case, the RPD Officer described the two new affidavits, which simply repeat the allegations before the RPD but provide updated information. Moreover, the RPD Officer noted that one affidavit was from the applicant's wife and the other was from an associate of the applicant who is not identified in terms of his relationship to the applicant or the basis upon which he knows the contents of the affidavits. Moreover, the RPD officer notes that both affidavits are exactly the same "word for word" and "they both repeat facts previously considered by the RPD panel" (except for the fact that they update an allegation which the applicant presented to the RPD panel). This finding by the RPD officer shows that these affidavits were not given weight. There is no basis upon which these affidavits are new evidence which contradicted the credibility finding of the RPD, which was a credibility finding made after assessing the oral evidence of the applicant and providing detailed reasons as to why the RPD found that the applicant's evidence was not credible.

Issue No. 3: Did the Officer err in finding the affidavits were not new evidence?

[22] The applicant submits that the Officer erred in finding that the affidavits of his wife and acquaintance were not new evidence. The Officer stated at p. 11:

> Having read the documents I find that the both repeat facts previously considered by the RPD panel. The applicant's PIF narrative provides that the applicant was arrested under suspicion of assisting Kashmiri militants who were renting a room for him. In the last paragraph of the narrative, the applicant states the following:
>
>> My brothers managed to help me with a visitor visa to Canada and I was told on the phone by my wife

> and my friend that police is still looking for me. I should not come back to India. If I go back, I will be arrested, tortured and may be killed in fake encounter.

> Consequently, although both affidavits post date the RPD decision I find the content of the documents is not new evidence.

[23] The applicant submits that while the content of these affidavits - i.e. the information that the police were seeking the applicant and the alleged risk to the applicant at their hands if returned - was before the RPD, the affidavits bolster the credibility of the applicant. The RPD found that while the applicant had been detained, his claims that he had been tortured in prison and that the police continued to seek him out were not credible. The affidavits provide the sworn testimony of two additional individuals attesting that these facts did occur.

[24] The Court has carefully reviewed the two new affidavits. The substance of both affidavits is exactly the same with the same wording. Both affidavits are simple, sketchy and simply repeat the allegations upon which the applicant made the refugee claim. Obviously, these affidavits could have been submitted to the Refugee Board at the time of the Refugee Board hearing and they do not constitute new evidence which proves a fact that was unknown to the refugee claimant at the time of the RPD hearing. Moreover, they are self-serving and not from objective sources.

[25] The only new part of both affidavits is one sentence which reads:

> That police still comes on and off at their residence and harassing his family.

This exact sentence is in both affidavits. It was reasonably open to the PRRA Officer to give these affidavits little or no weight as new evidence.

[26] In *Raza v. Canada (MCI)*, supra. the Federal Court of Appeal set out the test for new evidence at paragraph 13. Justice Sharlow stated:

> ¶13 …
> 3. Newness: Is the evidence new in the sense that it is capable of:
>
> (a) proving the current state of affairs in the country of removal or an event that occurred or a circumstance that arose after the hearing in the RPD, or
> (b) proving a fact that was unknown to the refugee claimant at the time of the RPD hearing, or
> (c) contradicting a finding of fact by the RPD (including a credibility finding)?

[27] Evidence that may contradict a negative credibility finding is therefore "new" in the sense that it may have affected the outcome of the refugee hearing had it been before the RPD. Therefore, the fact that the affiants swore to the truth of events that were found to not be credible by the Board renders the affidavits new evidence within the meaning of section 113(a) of IRPA. While the Officer could accord whatever weight he felt was appropriate to these affidavits, he erred in disregarding it on the basis that it was not "new evidence". However, the PRRA Officer implicitly found these two affidavits not credible in that they were exactly the same and they were from non-objective sources. Such weak affidavit evidence cannot trump the detailed credibility finding of the Refugee Board in this case.

Issue No. 4: Did the Officer deny the Applicant procedural fairness by failing to disclose documents post-dating the Applicant's PRRA submissions?

[28] The applicant submits that the Officer breached procedural fairness by relying on documents post-dating the applicant's PRRA submissions and failing to disclose these documents to the applicant or give him an opportunity to respond. The applicant's counsel made written submissions on April 11, 2006, and submitted further documentary evidence in support of the PRRA application on May 3, 2006. With one exception, all the country conditions documents relied on by the Officer were published either in 2007 or 2008. The applicant relies on *Kumaraswany v. Canada (MCI),* 2008 FC 597, wherein Justice Mandamin found that the failure of a PRRA Officer to disclose a UNHCR Paper to the applicant was a breach of procedural fairness, stating at para. 18:

> … the PRRA Officer is entitled, indeed obligated, to have regard for the UNHCR Paper, as a recent report on changing country conditions, and also may refer to the responding Home Office Guidance Note, which addresses the same circumstances. However, given the subsequent timing of these documents, he should have given the Applicant notice of the documents so he would have benefit of the Applicant's submissions.

[29] In *Kumaraswamy,* Justice Mandamin distinguished the facts underlying his decision from those in *Sinnasamy v. Canada (MCI),* 2008 FC 67, 164 A.C.W.S. (3d) 667, wherein Justice de Motigny held that there was no requirement for disclosure on the part of the PRRA Officer. In *Sinnasamy*, Justice de Montigny found that where a document is in the public domain, and where it is the type of information normally relied upon by an Officer, there is no duty to disclose it. He referred to the Federal Court Appeal's decision in *Mancia v. Canada, ,*[1998] 3 F.C. wherein the Court considered whether an Officer determining a Post Determination Refugee Claimants in

Canada class claim must disclose documents relied upon from public sources in relation to general country conditions. Justice Décary stated at paras. 22-26:

> **22** [...] First, an applicant is deemed to know from his past experience with the refugee process what type of evidence of general country conditions the immigration officer will be relying on and where to find that evidence; consequently, fairness does not dictate that he be informed of what is available to him in documentation centres. Secondly, where the immigration officer intends to rely on evidence which is not normally found, or was not available at the time the applicant filed his submissions, in documentation centres, fairness dictates that the applicant be informed of any novel and significant information which evidences a change in the general country conditions that may affect the disposition of the case.
>
> **26** The documents are in the public domain. They are general by their very nature and are neutral in the sense that they do not refer expressly to an applicant and that they are not prepared or sought by the Department for the purposes of the proceeding at issue. They are not part of a "case" against an applicant. They are available and accessible, absent evidence to the contrary, through the files, indexes and records found in Documentation Centres. They are generally prepared by reliable sources. They can be repetitive, in the sense that they will often merely repeat or confirm or express in different words general country conditions evidenced in previously available documents. The fact that a document becomes available after the filing of an applicant's submissions by no means signifies that it contains new information nor that such information is relevant information that will affect the decision. It is only, in my view, where an immigration officer relies on a significant post-submission document which evidences changes in the general country conditions that may affect the decision, that the document must be communicated to that applicant.

[30] Justice de Montigny also relied upon Justice Dawson's decision in *Al Mansuri v. Canada (Minister of Public Safety and Emergency Preparedness),* 2007 FC 22, wherein she found at para. 52:

> **52** [...] in light of the ongoing nature of the applicants' submissions with respect to risk, the public availability of the two documents at issue, the notoriety of the United Kingdom Home Office as a reliable source for country condition information, the general nature of the content of the two documents at issue, and the fact that Amnesty International documents on the same point were being submitted to the PRRA officer by the applicants the duty of fairness did not require disclosure of the two documents at issue. With due diligence the documents would have been available to the applicants. In view of that, and the content of the Amnesty International documents which the applicants did submit, the applicants were not deprived of a meaningful opportunity to fully and fairly present their case as to risk.

[31] In *Sinnasamy*, Justice de Montigny also found that there was no duty to disclose the documents, stating at para. 39:

> In the case at bar, I believe the PRRA officer was entitled to rely on the UK Home Office Operational Guidance Note for Sri Lanka, since this is a publicly available document from a reliable and well-known website…. In many respects, it merely confirms and collects the evidence available from other sources. It does not reveal novel and significant changes in the general country conditions, even if it is not entirely parallel with the findings reported in the UNHCR document.

[32] In *Kumaraswamy,* on which the applicants rely in this case, Justice Mandamin distinguished his findings from *Sinnasamy* on the basis that the document relied upon by the Officer described a radical change in country conditions and that the applicant could reasonably have not been aware of these developments, and should therefore have a chance to be informed of them and respond. Justice Mandamin stated at para. 14:

> While the case at bar and *Sinnasamy*, above, share similarities, I am of the view that there is a major factual difference which takes this case outside the sphere of judicial comity. In this case, the Applicant made his PRRA submissions two months prior to the release of the UNHCR Paper. The motivation behind the 2006 release of the UNHCR Paper, which was an update of the April 2004 version, was

> the rapidly changing situation in Sri Lanka. The situation in Sri Lanka had changed to the extent that the authors of the paper stated in the introduction to the 2006 version that "[s]ince the issuance of the [UNHCR Paper] in April 2004, there have been several major developments in the country which fundamentally affect the international protection needs of individuals from the country who seek, or have sought asylum abroad" (Tribunal Record at 65).

[33] In the present case, the documents relied on by the Officer were published a significant time after the applicant submitted his evidence. However, the documents do not describe any "novel and significant" change in country conditions since 2006 that would change the case the applicant had to meet or necessitate a response. The documents relied upon by the PRRA Officer were from the U.S. Department of State, the Immigration and Refugee Board, and the UK Home Office. These are publicly available sources that are commonly used by PRRA Officers.

[34] In these circumstances, I do not find that the PRRA Officer breached procedural fairness for not disclosing these documents to the applicants.

<u>Issue No. 5: Did the PRRA Officer fail to give adequate reasons?</u>

[35] The final submission by the applicant is that the Officer failed to give adequate reasons for concluding that country conditions in India were the same as conditions prior to the applicant's PRRA application. The applicant further submits that the Officer did not provide reasons for dismissing the applicant's submissions that country conditions in India were deteriorating constitute a new risk development.

[36] The Officer stated in his reasons that the basis for his conclusion that country conditions have not changed since 2006 was his review of the sources that he cited. Most of the sources provided by the applicant specifically describe the situation in Jammu & Kashmir and the violation of the civil rights of individuals in that area. The applicant is from an area in Punjab that is geographically close to Kashmir, but he is not from the areas of heavy conflict described in a number of the documents provided by the applicant. The applicant has not adduced any evidence of generalized breakdown in the rule of law or state protection.

[37] The applicant points to one source that describes the targeting of several individuals of Sikh origin by the Indian police (Certified Tribunal Record, p. 73-4). This source, however, is not a news article but rather an open letter published in a local weekly paper, protesting the treatment of several Sikh individuals at the hands of the Indian police. The individuals described in the letter were not targeted due to any link to Kashmiri militants. The source is not based on the research of a reporter as it is a letter to the newspaper. It is not from a well-known source. It was reasonably open to the Officer to accord little weight to this article. The Officer is not required to refer to every piece of evidence in the record. I find that the Officer did not ignore relevant evidence and the applicant has not pointed to any evidence directly on point that was not adequately considered by the Officer.

[38] For these reasons, this application for judicial review is dismissed.

[39] Neither party proposed a question for certification. The Court agrees so that no question will be certified for an appeal.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

This application for judicial review is dismissed.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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