Federal Court Cour fédérale

Date: 20140314

Docket: IMM-4100-13

Citation: 2014 FC 251

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, March 14, 2014

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

MILAD MOHAJEER BASTAMIE

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION
AND
MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Court must dispose of an application for judicial review of a decision of a pre-removal risk assessment (PRRA) officer. The PRRA officer issued his decision on April 11, 2013. The application for judicial review was brought under section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act).

[2] The issue raised by the applicant is narrow in scope. He is a 27-year old Iranian citizen who fled Iran clandestinely in November 2009. It is not necessary to describe the events that led the applicant to make his way to Canada, where he arrived on December 26, 2009. Suffice it to say that his claim for refugee protection by reason of his political involvement in Iran was denied by the Refugee Protection Division (RPD). That decision was subject to a judicial review that was also unsuccessful.

[3] Essentially, the RPD determined the applicant's claim on the basis of his credibility. It established right away in its decision that the crucial issue was whether he was credible and then set about demonstrating that he lacked sufficient credibility to warrant a favourable decision. This Court takes no issue with that decision.

[4] A second issue arose when, after the hearing before the RPD, the applicant submitted an article claiming that Iranians who are refused refugee status are subject to sanctions by their government upon their return to Iran. It would appear that allegations of persecution in Iran that are made in order to be granted refugee status in another country are, according to this article, held against the citizen upon their return to Iran.

[5] In its sole response to this allegation, the RPD in its decision at paragraph 31 refers to a paragraph taken from a letter we are told was dated November 16, 2005, from an official at the Canada Border Services Agency. It is necessary to reproduce that paragraph from the letter that had already been written over six years before the decision of the RPD:

> The CBSA removes foreign nationals of their valid passports or travel documents issued by their embassy officials. However, in cases where this is not possible, Enforcement Manual 10, Section 20.3 states that the CBSA may remove individuals using other identity documents, including a birth certificate or national identity card. At no point during the removal process are Iranian authorities or other receiving authorities advised that an individual has made a refugee claim in Canada. As a further safeguard to ensure the safety of an individual who is being removed from Canada, any person may submit an application for a Pre-Removal Risk Assessment to the Department of Citizenship and Immigration Canada prior to removal.

[6] Solely on that basis, the RPD stated in its June 1, 2011, decision that:

> [32] The panel concludes that the claimant would not face a risk because of a failed refugee claim.

[7] The applicant explained to the PRRA officer the risk faced by failed refugee claimants upon their return by means of three arguments. First, he stated that he would be at risk returning to Iran because he fled clandestinely in 2009, without a passport in his possession. Second, he feared that he would be easily identified as someone returning to Iran after failing to obtain refugee status because he could only travel to Iran using Canadian travel documents, which were described at the hearing as consisting of a “single flight journey document”. Lastly, access to the Federal Court judgment upholding the refusal to grant him refugee status added to his fears. The applicant tells us that these factors must be considered together in order to understand their effect and scope.

[8] The PRRA officer refused to consider the first two arguments. In so doing, he stated:

> I find the first two issues that deal with his lack of identity documents and Iranian passport, as well as a potential return to

> Iran under such circumstances, was previously presented to the RPD. The applicant in fact submitted this information in his PIF and the panel considered it in its decision. As well, counsel did not adequately explain how this information was not reasonably available to the RPD. Therefore, I do not find the first two submissions amount to "new evidence" as per 113(*a*) of the IRPA and did not consider them in my decision.
>
> Nevertheless, I accept that the publication of the applicant's identity and details of his failed refugee claim through the federal court public information system is a change in the applicant's circumstance that arose since the RPD decision.

[9] Herein lies the problem. The RPD's decision in no way addresses the first two concerns raised by the applicant. While it is possible that these were referred to in the fairly abundant amount of documentation that had been adduced up to that point, there is nothing to indicate that both arguments were taken into consideration. The RPD's decision was based on the applicant's credibility, which, incidentally, has nothing to do with the potential risks the applicant would face were he to be deported to Iran because his claim for refugee protection had been denied. What creates the risk is the dismissal of the refugee claim and the circumstances in which this occurred. That was the issue before the PRRA officer. Instead, he concluded that these two aspects had been dealt with in the RPD's decision when the well articulated question about the consequences of a dismissed refugee claim could not possibly have been before the RPD at that time.

[10] Counsel for the respondents tried, on more than one occasion, to argue that the PRRA officer's decision could not be overturned because the RPD's decision had disposed of the two questions and thus the PRRA officer was not obliged to consider them, unless there existed new evidence within the meaning of section 113 of the Act.

[11] I do not believe that this argument can survive. The RPD's decision would need to be ambiguous to sustain such an argument. It is not. There is no indication to be found that the particular circumstances of a person who arrived in Canada clandestinely, whose refugee claim was denied and who is to be deported on the basis of Canadian travel documents could even have been considered by the RPD. As I noted earlier, I fail to see how this could be the case, given that the PRRA application is founded on the fact that refugee status had been denied. The RPD determined that the applicant was not a refugee. It did not deal with whether a person without refugee status would be at risk because of their failed refugee claim. One cannot say that the RPD disposed of the argument which is not frivolous when it had not—and could not— have commented on it. Furthermore, new evidence, which could not have existed in June 2011, had been submitted to the PRRA officer, while other evidence that had not been available to the RPD was made available to the PRRA officer. Indeed, the passage taken from the correspondence of the Canada Border Services officer from November 16, 2005, reproduced above, appears to acknowledge that it is best for those deported to Iran to remain anonymous. The question should have been examined in full. In my view, paragraph 18 of *D.P. v The Minister of Citizenship and Immigration*, 2010 FC 533, fully applies to this case:

> [18] The Officer's rejection of the Committee's letter as "new evidence" ignores the ratio in *Raza v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385. The letter was relevant because it was "capable of proving or disproving a fact that is relevant to the claim of protection". The letter was new evidence in that it was "capable of … contradicting a finding of fact by the RPD (including a credibility finding)". Therefore, the rejection of the letter was an error of law. There was no analysis of the "new evidence" criteria.

[12] The valiant attempts made by the respondents' counsel to show that the RPD had disposed of the two initial arguments presented before the PRRA officer were confronted at every turn by the text of the decision itself.

[13] Similarly, the PRRA officer's decision is unambiguous. He refused to consider the possible risks associated with a clandestine departure from Iran, even when using a smugger, or the fact that the applicant would be returning to Iran using Canadian travel documents. The only question considered by the PRRA officer was the publication of the Federal Court decision. The other elements were excluded. At page 4 of his decision, we can see how the officer phrased the question that was before him:

> The test to meet in this application, however, is to determine if his evidence establishes, more likely than not, that Iranian authorities continue their pursuit of the applicant, and thus, would likely access the Federal Court of Canada information to persecute him upon his return.

Moreover, the PRRA officer, after having disposed of these two arguments by claiming that they had been dealt with in the RPD's decision, adds "[I]n the absence of new evidence or new risk factors, I am unable to conduct a meaningful assessment of the applicant's risks". Those risks were before him and had been alleged before him. And there was new evidence. As for whether those risks were sufficient, it is not for this Court to determine. As I repeated on numerous occasions during the hearing, the jurisdiction of this Court is limited to reviewing the legality of a tribunal's decision.

[14] Counsel for the respondents further argued that the RPD's decision, because it disposed of the claim on the basis of the applicant's credibility, meant that there was no need to address the

questions proposed by the applicant. But the applicant's credibility had only been an obstacle to his refugee claim. The risk that is at issue here is that of a failed refugee claimant. It is the fact of not having succeeded, we are told, that can be held against him. The question of credibility as a refugee was not relevant at that stage.

[15] It is a paradox that the PRRA officer states that the applicant provided information which the RPD considered, and in the same breath complains that the applicant failed to adequately explain why that information had not been available to the RPD. The paradox is fully achieved when it is noted that the evidence that was introduced after the RPD's decision was before the PRRA officer. The Court readily agrees that adequacy of reasons is not a stand-alone basis for quashing a tribunal's decision (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, paragraph 14). I also agree that reasons may have their own limitations. Thus, in *Newfoundland and Labrador Nurses' Union*, paragraph 16 reads as follows:

> [16] Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion …

[16] However, in this case, what the PRRA officer in fact disregarded was all of the arguments because he erroneously concluded that they had already been disposed of. It is not a question of adequacy of reasons, but of the decision not to consider certain elements. I fail to see how, in

these circumstances, a decision would be able to meet the test of reasonableness set out in paragraph 47 of *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190:

> [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[17] In this case, with respect, the PRRA officer's decision cannot lend itself to such an exercise.

[18] I would like to reprise the words of the Federal Court of Appeal in *Raza v The Minister of Citizenship and Immigration*, 2007 FCA 385. Paragraph 12 reads as follows:

> An application by a failed refugee claimant is not an appeal or reconsideration of the decision of the RPD to reject a claim for refugee protection. Nevertheless, it may require consideration of some or all of the same factual and legal issues as a claim for refugee protection. In such cases there is an obvious risk of wasteful and potentially abusive relitigation. The IRPA mitigates that risk by limiting the evidence that may be presented to the officer. The limitation is found in paragraph 113(a) of the IRPA.

In the case at bar, the PRRA officer never made it so far as to analyze the evidence that was before him.

[19] In light of the Court's lack of enthusiasm for following the argument of the respondent's counsel that the RPD had, either implicitly or explicitly, disposed of the applicant's arguments before the PRRA officer, she then attempted to justify the PRRA officer's decision on the merits. The respondents' argument consisted of claiming that the decision to dismiss the PRRA was justified when one examined the new evidence. As the Court has repeatedly held, that is not its role (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 (*Khosa*)). That was for the PRRA officer to determine, which he failed to do.

[20] The issue is whether a claimant whose refugee claim was denied by the RPD can use circumstances that he himself helped create as a basis for a PRRA application, thereby in a certain manner invoking his own actions that created the conditions to prevent him from his own return. In this case, the applicant is the one who clandestinely left his country of origin, which would constitute a risk if he were to return. That risk, he argues, is increased by the fact that he would be returned with Canadian travel documents. Having sought refugee status in Canada, the decision dismissing his application for judicial review is now accessible on the Internet. As we can see, these are all circumstances created by the applicant. How can he now invoke them, after the RPD had declared him not to be credible and thus denied him refugee status? The question was vaguely raised by the respondent's counsel, who even had *Toora v The minister of Citizenship and Immigration*, 2006 FC 828, in her Book of Authorities (see in particular, paragraph 51 of the decision).

[21] The difficulty does not arise at that stage because the PRRA officer found that two of those circumstances should not be examined. It will be for a new PRRA officer to dispose of that question and it would not be appropriate for the Court to discuss the matter further.

[22] There are two observations, in my view that deserve mention. First, this matter was reviewed on a reasonableness standard because both parties agreed to this. However, I did indicate at the hearing that I was not convinced that the issue in this case might not be a matter of procedural fairness, which would then be reviewable on a correctness standard (*Khosa*, above). Nonetheless, given the conclusion I have arrived at using the highest standard for the applicant, namely, reasonableness, there is no need for me to pursue the matter further, all the more so given that the parties were not prepared to engage in an enlightened debate on it. Second, my conclusion on the PRRA officer's decision is in no way a judgment on the merits. The merits of the arguments put forth by the applicant will have to be assessed by a new PRRA officer without him or her being encumbered by what might come to be considered as determinations on the merits be this Court. Such is not the case.

JUDGMENT

The application for judicial review is allowed. The decision, dated April 11, 2013, by the pre-removal risk assessment (PRRA) officer is set aside and the matter returned for redetermination before a different PRRA officer. The parties were of the view that there were no questions of importance for certification and I share their view.

"Yvan Roy"
Judge

Certified true translation
Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4100-13
STYLE OF CAUSE:	MILAD MOHAJEER BASTAMIE and THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	March 10, 2014
REASONS FOR JUDGMENT AND JUDGMENT:	Roy J.
DATED:	March 14, 2014

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