Federal Court  Cour fédérale

Date: 20180718

Docket: IMM-4815-17

Citation: 2018 FC 749

Ottawa, Ontario, July 18, 2018

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

RANJITH KUMARA HERATH MUDIYANSELAGE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant, Ranjith Kumara Herath Mudiyanselage, applied to this Court for judicial review of his negative Pre-Removal Risk Assessment ("PRRA") decision dated September 29, 2017.

[2] For the reasons that follow, I am dismissing the application for judicial review.

II. Background

[3] The Applicant is a citizen of Sri Lanka. On November 12, 2014, he arrived in Canada with another citizen of Sri Lanka, Lakmal Jayanath Ariyarathna. The Applicant and Mr. Ariyarathna made a refugee claim on December 20, 2014, saying that they were in a homosexual relationship, and fearful to return to their home country.

[4] The two men were represented by legal counsel at the Refugee Protection Division ("RPD") hearing, where the two refugee claims were joined since they said they were in a relationship. The Applicant's evidence is that when meeting with counsel, his partner, Mr. Ariyarathna, translated for him.

[5] At the refugee hearing, the RPD found the Applicant not to be credible. The decision explained that credibility issues arose from his Basis of Claim (BOC) which lacked personal experiences. Also, the RPD said that his lawyer had to prompt him to give specific answers about himself during the hearing. On March 3, 2015, the RPD rejected the refugee claim as neither of the men was found credible.

[6] The Applicant and Mr. Ariyarathna obtained new counsel and appealed the RPD decision to the Refugee Appeal Division ("RAD"), and when that was dismissed on June 3, 2015, they applied for judicial review in the Federal Court. The Applicant's submissions include a statement

that leave was dismissed in the Federal Court on February, 2014, which is a typographical error for obvious chronological reasons.

[7] The two were issued a removal date of January 16, 2016, and they retained new counsel for the third time to apply for a stay of removal, during which the Applicant says he relied on Mr. Ariyarathna. Although the stay was not granted, they did not appear for removal on January 16, 2016. The Applicant's evidence is that his relationship then ended with Mr. Ariyarathna and he turned himself in at the Greater Toronto Enforcement Centre. At that time, he was provided a PRRA application and he again obtained new counsel. This application was his alone and he received a negative PRRA decision dated September 29, 2017.

[8] On February 6, 2018, I granted the Applicant's subsequent stay for removal which was scheduled for the next day, February 7, 2018, pending the outcome of this decision.

III. Issues

[9] The Applicant identified the issues as:

A. Did the Officer err in considering the Applicant's cognitive impairment?
B. Did the Officer err by failing to consider or apply the Sexual Orientation Gender Identity and Expression Guidelines ("SOGIE")?
C. Did the Officer err by failing to convoke an oral hearing?
D. Was the Officer's analysis of the evidence unreasonable?
E. Did the Officer fail to consider the totality of the evidence?

[10] Many of the issues overlap and I would characterize them as:

A. Was the Officer's treatment of the evidence and failure to apply the SOGIE Guidelines reasonable?

B. Was the Applicant's right to procedural fairness breached because a hearing was not convoked?

IV. Standard of Review

[11] The standard of review of how the Officer assessed and considered evidence is reasonableness. The decision to hold an oral hearing is reviewed for correctness (*Cho v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1299 at para 14; *Micolta v Canada (Minister of Citizenship and Immigration)*, 2015 FC 183 at para 13; *Zmari v Canada (Minister of Citizenship and Immigration)*, 2016 FC 132 at para 13).

V. Analysis

Relevant Provisions

[12] The relevant provisions are attached as Annex A.

A. *Was the Officer's treatment of the evidence and failure to apply the SOGIE Guidelines reasonable?*

(1) Did the Officer err in considering the evidence?

[13] The Applicant argues that the PRRA Officer failed to allow new evidence as required under section 113 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ["IRPA"]. One piece of evidence in particular is a medical assessment written by Dr. Keefer. The Applicant submitted the medical assessment to show he has just recently been assessed as having a cognitive disability.

[14] The Applicant wanted to admit this medical report as evidence that his cognitive disability is the reason for his difficulty responding to the RPD's questions— a difficulty which he says led the RPD to find he is not credible. For instance, the RPD's reasons say the hearing was not a straightforward process, he needed prompting, he was difficult to follow, and he had nothing of substance to say. In response to these findings, the Applicant argues this medical report is evidence of the reality: his odd behavior has nothing to do with credibility and everything to do with his cognitive disability. In total, the Applicant listed nine different quotations where the RPD had trouble with his answers. Yet despite this, the Applicant says the PRRA decision dealt with the cognitive disorder in just one paragraph before dismissing it.

[15] Contrary to the Applicant's argument, the PRRA Officer did accept the medical diagnosis as new evidence. The PRRA Officer clearly states "I have read and considered this report however I find it does not overcome the credibility issues the RPD panel had."

[16] The Respondent has pointed out that the PRRA Officer's negative credibility finding was also based on information beyond the testimony. For example, the PRRA Officer took issue with the Applicant's BOC because it lacked details and information specific to the Applicant. In the reasons, the PRRA Officer also noted the RAD found that "there was virtually no substantive credible evidence to support the applicant's contention that he is a homosexual who plans to marry his friend." I agree with the Respondent that the testimony was not the only reason for the failed refugee claim.

[17] In summary, the PRRA Officer accepted the medical report as new evidence, but also determined the medical report did not overcome the Applicant's credibility issues. As this Court does not reweigh evidence on judicial review, this argument of the Applicant must fail (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 61).

[18] I also note the Applicant made the PRRA Officer aware of a potential incompetence of counsel issue related to the medical report. The Applicant's counsel explained an articling student at his firm quickly realized the Applicant's difficulty answering questions was inadvertent. Counsel then arranged for a medical assessment, where the Applicant's score on a Montreal Cognitive Assessment was "consistent with moderate cognitive impairment and could serve to explain some of his difficulties answering questions and recalling facts" and comparable to moderate Alzheimer's dementia. This was the first time he had been seen by a doctor about this, and his lawyer at the RPD hearing, Mr. Hamilton, was the focus of his incompetent counsel argument. But current counsel did not pursue incompetent counsel as such in this Court or

through the Law Society. No allegation of incompetence of counsel was made against Mr. Crane, who was counsel at the RAD hearing prior to the medical assessment.

[19] At the beginning of the judicial review hearing, I asked if competence of counsel was an issue. The Applicant advised the Court that, while he had not abandoned the issue, he had made the allegation in the context of the RPD proceeding. As this is a judicial review of the PRRA, not the RPD proceeding, he advised I have no outstanding notices regarding allegations of incompetent counsel before me.

[20] It appears that the recourse the Applicant sought is a new refugee hearing. But the purpose of a PRRA is not to reargue a failed refugee claim. PRRA applications are not a second chance at a refugee claim, but are an opportunity for an applicant to submit new evidence that addresses a deficiency in their original RPD hearing (*Sayed v Canada (Minister of Citizenship and Immigration*), 2010 FC 796 at paras 19-21). The PRRA also assesses new risks that developed after the refugee hearing (*Kaybaki v Canada (Solicitor General of Canada)*, 2004 FC 32 at para 11; *Raza v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385 at para 12). I will note the Applicant still has, at his disposal, the ability to file a humanitarian and compassionate application.

[21] The Applicant submits the Officer made other unreasonable evidentiary findings. This argument overlaps with some of the Applicant's other arguments, below. The PRRA's scope is set out in Division 3 of the IRPA. Of particular importance is section 113 of the IRPA, which explains, among other things, the evidence submitted for a PRRA must be new, and the Minister

must form a decision about whether or not a hearing is necessary based on prescribed factors in the *Immigration and Refugee Protection Regulations,* SOR/2002-227 [“IRPR”].

[22] For his PRRA, the Applicant submitted numerous pieces of evidence, including:

- A letter containing the medical diagnosis of Dr. Chris Keefer dated April 12, 2017;
- Undated pictures;
- Affidavit of friend Kumara Don dated March 8, 2017;
- A letter from 519 Community Centre Among Friends LGBT Refugee Support Group dated February 22, 2017;
- Letters from friends met in Canada dated April 10, 12, 17, and 26, 2017;
- Letter from Refugee Peer Support Coordinator dated April 26, 2017;
- Letter from new counsel, Mr. Loeb, to prior counsel, Mr. Hamilton dated April 20, 2017;
- Affidavit of articling student Ayoub Ansari dated May 3, 2017;
- First letter from brother Herath Mudiyanselage Samantha dated March 9, 2017;
- Second letter from brother dated June 21, 2016;
- Third letter from brother dated July 26, 2017;
- Articles and reports about issues faced by homosexuals in Sri Lanka.

[23] The PRRA Officer considered whether any of this evidence satisfied section 113 of the IRPA. Some of the evidence was found not to be new. Although an affidavit may have a recent date, if the information within that affidavit refers to a period of time before an earlier decision, a PRRA Officer may reasonably decide it is not new evidence as required by the IRPA. This is what occurred in regards to Kumara Don’s affidavit. The Applicant’s RPD decision is dated

March 9, 2015, his RAD decision is dated June 3, 2015, and his PRRA is dated September 29, 2017. Providing an affidavit of Kumara Don sworn on March 8, 2017 does not necessarily mean that the PRRA Officer has jurisdiction to accept it as new evidence under the IRPA, and in this case, the PRRA Officer found the substance of the affidavit was not new. And while other evidence was accepted but given little weight due to lack of details, weighing the evidence is the PRRA Officer's role, and does not mean the decision was unreasonable.

[24] The Applicant submitted that the PRRA Officer failed to look at all the evidence as a whole and therefore committed a reviewable error (*Ogunrinde v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 760 at paras 50-51; *Chekroun v Canada (Minister of Citizenship and Immigration)*, 2013 FC 738).

[25] I find that the PRRA Officer did consider the cumulative evidence based on the ability to do so on a PRRA. Again, the bulk of the arguments made go towards the fact the PRRA Officer did not rewind the clock and hold a RPD hearing with the evidence of the Applicant's cognitive disability. That is not the role of a PRRA Officer and I see no error committed by the PRRA Officer.

(2) Did the Officer err by failing to consider or apply the SOGIE?

[26] The Applicant submits that the SOGIE are applicable to PRRA decisions. Because the PRRA Officer failed to consider the SOGIE, he submits a reviewable error was made. For support, the Applicant relied on Justice Brown's decision in *Enam v Canada (Minister of Immigration, Refugees and Citizenship)*, 2017 FC 1117 [*Enam*]. Yet as the Applicant himself

pointed out, *Enam* involved judicial review of a RAD decision. At the hearing, I pointed out that the SOGIE clearly state they apply to RAD decisions — in particular, the SOGIE state they apply to the four Immigration and Refugee Board of Canada divisions: the ID, the IAD, the RPD, and the RAD — but again, at issue in this judicial review is a PRRA. The Applicant replied that in his PRRA submissions his interpretation of the jurisprudence was that the Gender Guidelines apply to PRRA decisions, and so he had argued by analogy in those submissions that the SOGIE should as well.

[27] The Respondent addressed these submissions by arguing that the SOGIE do not apply to a PRRA, but even if they did nothing in this case suggested the PRRA Officer was insensitive to him.

[28] I agree that the SOGIE is not necessary to apply to a PRRA but it is not an error for them to be applied either. In this case officer did not mention them I add that the reasons illustrate the PRRA Officer’s awareness of the Applicant’s BOC which spoke to his alleged sexual orientation of which the RPD and RAD had found was not credible. Combined with the fact that I do not see anywhere in the reasons that the PRRA Officer was insensitive to the Applicant’s alleged sexual orientation, on these facts I do not see any error related to the PRRA Officer not applying the SOGIE.

B. *Was the Applicant's right to procedural fairness breached because a hearing was not convoked?*

[29] The Applicant submits that procedural fairness required an oral hearing because his credibility was at issue. He points to section 113(b) of the IRPA, section 167 of the IRPR, *Singh v Canada (Minister of Employment and Immigration*), [1985] 1 SCR 177; *Tekie v Canada (Minister of Citizenship and Immigration),* 2005 FC 27 at paragraphs 15-16; and *Zmari v Canada (Minister of Citizenship and Immigration),* 2016 FC 132 at paragraph 17, to say that if credibility is a dispositive issue, an oral hearing is necessary.

[30] According to the Applicant, the PRRA Officer made a veiled credibility finding by not believing new sexual orientation evidence or sworn statements (*Uddin v Canada (Minister of Citizenship and Immigration),* 2011 FC 1289 at para 3 [*Uddin*]). The Applicant also argues the assignment of little weight to his sexual orientation evidence is really another way of saying the PRRA Officer disbelieved his evidence.

[31] But as explained by the Respondent, the PRRA Officer did not make the credibility findings, the RPD did and the RAD confirmed them. As Justice Zinn explained in *Ferguson v Canada (Minister of Citizenship and Immigration),* 2008 FC 1067 at paragraphs 25-27, credible evidence can be assigned little weight. Unlike *Uddin,* this PRRA Officer considered the evidence such as letters from friends and 519 Community Centre, but found none of these satisfied the threshold of a balance of probabilities, for example because the information was too vague. This was a weighing of the evidence, not a credibility finding. Weighing the evidence is a function of the PRRA and not a reviewable error.

[32] Another reason the Applicant says he required an oral hearing is because his detailed sworn affidavits were disbelieved. However, the PRRA Officer did not accept Kumara Don's affidavit as new evidence. And although the Applicant says the reasons fail entirely to mention a new relationship, this information is discussed at page 9 of the reasons. The PRRA Officer found, however, the affidavit information was vague, and did not amount to new evidence. In the alternative, had the PRRA Officer accepted the affidavit, the information was very general, vague, and did not overcome the negative RPD credibility finding. To borrow from the Respondent, "the decision rests on an insufficiency of evidence to overcome the negative credibility concerns of the RPD."

[33] That the PRRA Officer decided on the record without a hearing, on these facts, is not an error. Though there may be unfairness when reading the Applicant's submissions, when this is unpacked, the unfairness that is being alleged stems from veiled allegations of incompetent counsel during the Applicant's earlier proceedings. This is not a situation within the PRRA Officer's limited statutory jurisdiction or an issue that can be dealt with in this judicial review. The PRRA Officer's decision is not unreasonable.

[34] In sum, there was no reviewable error and the Court is satisfied as to the existence of justification, transparency and intelligibility within the decision-making process. I find that 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 at paras 47-48).

[35] No question is certified as none were presented.

JUDGMENT in IMM-4815-17

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.

2. No question is certified.

"Glennys L. McVeigh"
Judge

ANNEX A

Immigration and Refugee Protection Act, SC 2001, c 27

Consideration of application

113 Consideration of an application for protection shall be as follows:

(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;

(b) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;

(c) in the case of an applicant not described in subsection 112(3), consideration shall be on the basis of sections 96 to 98;

(d) in the case of an applicant described in subsection 112(3) — other than one described in subparagraph (e)(i) or (ii) — consideration shall be on the basis of the factors set out in section 97 and

(i) in the case of an applicant for protection who is inadmissible on grounds of serious criminality, whether they are a danger to the public in Canada, or

Examen de la demande

113 Il est disposé de la demande comme il suit :

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;

b) une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;

c) s'agissant du demandeur non visé au paragraphe 112(3), sur la base des articles 96 à 98;

d) s'agissant du demandeur visé au paragraphe 112(3) — sauf celui visé au sous-alinéa e)(i) ou (ii) —, sur la base des éléments mentionnés à l'article 97 et, d'autre part :

(i) soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un danger pour le public au Canada,

(ii) soit, dans le cas de tout autre demandeur, du fait que la demande devrait être rejetée en raison de la nature

(ii) in the case of any other applicant, whether the application should be refused because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of Canada; and

(e) in the case of the following applicants, consideration shall be on the basis of sections 96 to 98 and subparagraph (d)(i) or (ii), as the case may be:

(i) an applicant who is determined to be inadmissible on grounds of serious criminality with respect to a conviction in Canada punishable by a maximum term of imprisonment of at least 10 years for which a term of imprisonment of less than two years — or no term of imprisonment — was imposed, and

(ii) an applicant who is determined to be inadmissible on grounds of serious criminality with respect to a conviction of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, unless they are found to be a person referred to in section F of Article 1 of the Refugee Convention.

et de la gravité de ses actes passés ou du danger qu'il constitue pour la sécurité du Canada;

e) s'agissant des demandeurs ci-après, sur la base des articles 96 à 98 et, selon le cas, du sous-alinéa d)(i) ou (ii) :

(i) celui qui est interdit de territoire pour grande criminalité pour déclaration de culpabilité au Canada pour une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans et pour laquelle soit un emprisonnement de moins de deux ans a été infligé, soit aucune peine d'emprisonnement n'a été imposée,

(ii) celui qui est interdit de territoire pour grande criminalité pour déclaration de culpabilité à l'extérieur du Canada pour une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans, sauf s'il a été conclu qu'il est visé à la section F de l'article premier de la Convention sur les réfugiés.

Immigration and Refugee Protection Regulations, SOR/2002-227

Hearing — prescribed factors

167 For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors are the following:

(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;

(b) whether the evidence is central to the decision with respect to the application for protection; and

(c) whether the evidence, if accepted, would justify allowing the application for protection.

Facteurs pour la tenue d'une audience

167 Pour l'application de l'alinéa 113b) de la Loi, les facteurs ci-après servent à décider si la tenue d'une audience est requise :

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) l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;

c) la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4815-17
STYLE OF CAUSE:	RANJITH KUMARA HERATH MUDIYANSELAGE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 14, 2018
JUDGMENT AND REASONS:	MCVEIGH J.
DATED:	JULY 18, 2018

APPEARANCES:

Samuel Loeb	FOR THE APPLICANT
Leanne Briscoe	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Refugee Law Office Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT