

Federal Court



Cour fédérale

Date: 20191127

Docket: IMM-1569-19

Citation: 2019 FC 1515

Ottawa, Ontario, November 27, 2019

PRESENT: Mr. Justice Boswell

BETWEEN:

WAQAS KHAN

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Waqas Khan, entered Canada from Pakistan in November 2014 with a work permit, which was valid until November 2016. Shortly before expiration of the permit, Mr. Kahn made a refugee claim based on his fear of the Taliban, a political movement and military organization, which allegedly attempted to recruit him and killed his cousin. The Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB] rejected his claim in April 2017.

[2] Mr. Kahn appealed the RPD's decision to the Refugee Appeal Division [RAD] of the IRB. The RAD dismissed the appeal in September 2017 and, pursuant to paragraph 111(1) (a) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [IRPA], confirmed the RPD's decision. Following the RAD's decision, Mr. Khan applied for a pre-removal risk assessment [PRRA]. In a decision dated January 29, 2019, a Senior Immigration Officer rejected Mr. Kahn's PRRA application.

[3] Mr. Kahn has now applied under subsection 72(1) of the *IRPA* for judicial review of the Officer's decision. He asks the Court to quash the Officer's decision and return the matter for redetermination by a different officer with any direction the Court considers appropriate. The issue is, therefore, whether this relief should be granted.

I. Background

[4] Mr. Khan is a citizen of Pakistan and of Pashtun ethnicity. In November 2012, his cousin arranged a meeting between Mr. Khan and himself, and three men. At the meeting, the men told Mr. Khan they were looking for individuals with electrical experience to work with detonators. After they left the meeting, Mr. Khan's cousin told Mr. Khan he believed the men worked for the Taliban based on the nature of the job they were proposing and their style of dress.

[5] Shortly thereafter, Mr. Khan's cousin declined the job offer during a telephone conversation. The man with whom he was conversing told him that he and Mr. Khan must accept the job lest they face consequences. Mr. Khan's cousin was allegedly kidnapped two days after this conversation. Following this incident, Mr. Khan's family feared for his life and,

consequently, Mr. Khan went into hiding at his uncle's home. Unknown men then started contacting Mr. Khan's family asking for his whereabouts. Mr. Khan started planning to leave for Canada when he learned that unknown men were looking for him.

[6] After he arrived in Canada in November 2014, Mr. Khan lived with family members in Toronto until 2015. Mr. Khan states in his memorandum of fact and law that he did not claim refugee protection during this time because he was assisting his family members through a difficult time. He claims he first heard about Canada's refugee protection process during one of his visits to a mosque. Mr. Kahn retained a regulated immigration consultant to file a refugee claim.

A. *The IRB Decisions*

[7] The RPD rejected Mr. Khan's claim in mid-April 2017, with the determinative issue being credibility. The RPD determined that Mr. Khan was not credible with respect to material aspects of his claim and that he was not of interest to anyone in Pakistan. It concluded that Mr. Khan demonstrated a lack of subjective fear and that, on a balance of probabilities, the events he alleged took place in Pakistan did not in fact occur.

[8] The RAD confirmed the RPD's decision that Mr. Khan is neither a Convention refugee nor a person in need of protection and dismissed the appeal in early September 2017. Mr. Khan appealed the RPD's credibility findings; he did not submit new evidence in support of his appeal. With respect to the delay in claiming refugee status, the RAD determined that the delay undermined Mr. Kahn's credibility.

[9] This Court denied Mr. Kahn's request for leave to appeal the RAD's decision in early January 2018.

II. The PRRA Decision

A. *Mr. Kahn's PRRA Submissions*

[10] Following the RAD decision, Mr. Khan applied for a PRRA in late September 2018. In his submissions, he requested an oral hearing to resolve any credibility concerns that might arise.

[11] In his application, Mr. Khan submitted that paragraph 113(c) of the *IRPA* entitled him to consideration under sections 96 and 97 of *IRPA*. He adduced evidence that was not before the RPD nor the RAD. Mr. Kahn claimed this evidence was "new" and could be presented under paragraph 113(a) of the *IRPA*. This paragraph provides that: "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".

[12] This evidence included police reports his cousin's wife had filed after her husband's disappearance, a death certificate relating to his cousin's wife, corroboratory statutory declarations of Mr. Khan's parents about the telephone calls they received while he was in hiding, and a letter from Range Ahmad, a member of the provincial assembly of Khyber Pakhtunkhwa in Pakistan.

[13] Mr. Khan submitted that this evidence was reasonably available at the time of his claim to refugee protection, but he had failed to present it due to improper instructions from his counsel. In his statutory declaration, Mr. Khan stated he did not recall signing the affidavit his counsel presented with his RAD record; this declaration states that he did not have any new evidence to present, when in fact he did. Under these circumstances, Mr. Kahn claims he could not have been reasonably expected to present the documents he sought to introduce in his PRRA application.

[14] As part of his PRRA application, Mr. Khan provided two affidavits, one from his mother and one from his father, stating that his life was in danger in Pakistan. He adduced a copy of his birth certificate as well as country conditions reports on Taliban activities in Pakistan, the lack of police protection, and the risk of arbitrary arrest, indefinite detention, and extrajudicial killings of Pashtuns in Pakistan.

[15] Mr. Kahn also provided a police report of his cousin's disappearance. The police report stated that the wife of Mr. Khan's cousin had reported her husband's disappearance in November 2012. In this report, she stated that her husband had disappeared five or six days after a quarrel with her and he had not returned. Mr. Khan believes his cousin's wife lied in the report and did not disclose her husband's abduction because she feared repercussions from the men who took him.

[16] In addition, Mr. Khan provided a death certificate, indicating that his cousin's wife had been murdered and found dead in her home in August 2016. The witness to the report stated that

she did not know who killed her or why. Mr. Khan believes the Taliban murdered her and that the witness did not want to name the Taliban for fear of reprisal.

[17] Mr. Khan also submitted a letter from Mr. Range Ahmad. In the letter, Mr. Ahmad stated that he has knowledge of what happened to Mr. Khan's family. Mr. Ahmad affirmed that he has knowledge of the abduction of Mr. Khan's cousin, and that Mr. Khan continues to receive threats.

[18] Mr. Khan stated he was exposed to the same or substantially similar risk that led to his cousin's disappearance and the death of his cousin's wife. According to Mr. Kahn, he is a Convention refugee under section 96 of the *IRPA* based on his fear of the Taliban and a person in need of protection under section 97(1) because his removal to Pakistan would subject him personally to a risk to his life or to a risk of cruel and usual treatment or punishment.

B. *The PRRA Officer's Decision*

[19] The Officer rejected Mr. Khan's PRRA application in a decision dated January 29, 2019 and did not hold an oral hearing.

[20] The Officer considered Mr. Khan's submissions in addition to conducting independent research on the country conditions as they related to Mr. Khan's application. The Officer found the evidence Mr. Khan provided in support of his application was not new evidence since it was reasonably available and could have been reasonably presented to the RPD or the RAD for consideration at the time of the rejection of his refugee claim.

[21] The Officer was not satisfied with the argument that Mr. Khan's former counsel prevented him from presenting this evidence to both the RPD and the RAD because the refugee hearing is a forum for Mr. Khan to present risks and supporting evidence he wishes to have considered. The Officer found it unreasonable that he would have neglected to raise issues pivotal to his protection claim. The Officer noted that the IRB did not find Mr. Khan's explanations for the lack of corroborative evidence satisfactory. In the Officer's view, Mr. Khan knew of the importance of providing corroborative evidence in support of his refugee claim.

[22] The Officer stated that, even if the documentation were accepted as new evidence under paragraph 113(a) of the *IRPA*, this would not rebut any of the significant findings of the RPD. The RPD had found that Mr. Khan was not credible with respect to material aspects of his claim, that he was of no interest to anyone in Pakistan, and that the events he alleged did not in fact occur.

[23] The Officer found the evidence Mr. Khan provided did not support his cited risks. The Officer noted that the police report dated November 5, 2012 indicated the wife of Mr. Kahn's cousin reported that her husband was a drinker and he quarreled with her and decided to leave. The Officer also referred to a report from August 2016 and her death certificate, indicating that unknown persons had murdered the wife of Mr. Kahn's cousin. The Officer gave this evidence no weight.

[24] The Officer considered the medical reports Mr. Khan had presented to the RPD during his hearing, as well as the country conditions reports he submitted in his PRRA application referring to the Taliban and Pashtuns. The Officer found the latter to be general in content.

[25] The Officer referenced *Raza v Canada (Minister of Citizenship and Immigration)*, 200 FC 1385 [*Raza*] at para 27, for the proposition that a PRRA officer's role is not to revisit the IRB's factual and credibility conclusions, but to consider the present situation.

[26] The Officer determined that Mr. Khan materially restated the same information presented to the RPD and the RAD, and that the evidence presented in his PRRA application did not rebut any of the significant findings of the RPD or the RAD. In the Officer's view, there was insufficient evidence to conclude that Mr. Khan faced more than a mere possibility of persecution for any Convention ground. The Officer also found, on a balance of probabilities, it was unlikely Mr. Khan would be at risk of torture, or a risk to life, or a risk to cruel and unusual treatment or punishment upon return to Pakistan.

III. Analysis

[27] Although Mr. Khan identifies several issues, the following two issues subsume those issues: (i) whether the Officer breached procedural fairness by not having an oral hearing before making adverse and determinative credibility findings; and (ii), whether the Officer unreasonably disregarded the evidence Mr. Khan presented in his PRRA application.

A. *What is the Standard of Review for the Officer's Decision Not to Hold an Oral Hearing?*

[28] Mr. Khan submits that the Officer's determination as to whether to hold an oral hearing is a matter of procedural fairness. According to Mr. Kahn, this Court has confirmed that the question of whether a PRRA officer ought to have held an oral hearing attracts a correctness standard of review. Mr. Khan says the other issues raised by the Officer's decision are to be reviewed on the standard of reasonableness.

[29] The Respondent says that the Officer's decision not to hold an oral hearing and the other issues raised by the decision are to be assessed on the standard of reasonableness.

[30] In determining the applicable standard of review for the Officer's decision not to hold an oral hearing, it warrants note that most PRRA applications are dealt with in writing (*A.B. v Canada (Citizenship and Immigration)*, 2019 FC 165 at para 9 [*A.B.*]).

[31] However, an oral hearing may be convoked in the context of a PRRA application. Paragraph 113(b) of the *IRPA* contemplates this: "a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required".

[32] Section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*] lists the prescribed factors:

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.

[33] Section 167 expressly provides that a hearing is required when the three listed factors are present: (i) evidence that raises a serious issue of an applicant’s credibility; (ii) evidence that is central to the decision; and (iii) evidence, if accepted, would justify allowing the PRRA application (*Huang v Canada (Citizenship and Immigration)*, 2018 FC 940 at para 14 [*Huang*]).

[34] I disagree with Mr. Khan’s statement that this Court has confirmed that correctness is the applicable standard of review for whether a PRRA officer should have held an oral hearing. Although this Court illuminated the divergent paths in the jurisprudence in *Zmari v Canada (Citizenship and Immigration)*, 2016 FC 132 [*Zmari*], the issue remains unsettled.

[35] The applicable standard of review continues to be a product of the Court's characterization of the issues. Some decisions apply the correctness standard of review because the issue is characterized as a matter of procedural fairness; others apply the reasonableness standard of review because the issue is viewed as a question of mixed law and fact involving interpretation of the *IRPA* (*Zmari* at paras 10 to 13).

[36] For instance, in *Huang* the Court referred to *Zmari* and remarked (at para 12) that the Court continues to be divided since *Zmari*. Some decisions apply a correctness standard of review (*Mudiyanselage v Canada (Citizenship and Immigration)*, 2018 FC 749 at para 11; *Nadarajan v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 403 at paras 12 to 17). Others apply a reasonableness standard of review (*Haji v Canada (Citizenship and Immigration)*, 2018 FC 474 at paras 9 and 10; *Gjoka v Canada (Citizenship and Immigration)*, 2018 FC 292 at para 12; *Lionel v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 1180 at para 11; *A.B. v Canada (Citizenship and Immigration)*, 2017 FC 629 at para 15).

[37] In my view, whether an oral hearing is required in a PRRA determination raises a question of procedural fairness. The Officer's determination in this case not to convoke a hearing should be reviewed on a standard of correctness.

[38] This standard requires the Court to determine if the process followed by the Officer achieved the level of fairness required by the circumstances of the matter (*Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 115). The analytical framework is

not so much one of correctness or reasonableness but, rather, one of fairness and fundamental justice.

[39] An issue of procedural fairness “requires no assessment of the appropriate standard of judicial review. Evaluating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation” (*Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11 at para 74). The Federal Court of Appeal has observed that: “even though there is awkwardness in the use of the terminology, this reviewing exercise is ‘best reflected in the correctness standard’ even though, strictly speaking, no standard of review is being applied” (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54).

B. *What is the Standard of Review for the Officer’s Decision as a Whole?*

[40] With respect to the Officer’s decision as a whole, it is settled law that a PRRA decision must be reviewed against a standard of reasonableness (*Zmari* at para 14).

[41] The reasonableness standard tasks the Court with reviewing an administrative decision for the existence of justification, transparency and intelligibility within the decision-making process, and determining 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 at para 47). Those criteria are met if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within

the range of acceptable outcomes (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16).

[42] The decisions of PRRA officers usually deserve a high degree of deference; however, PRRA officers must explain, in their reasons, the justification for their findings of fact. This must be done in an intelligible manner so the Court can understand the logical path followed by the officer. This does not mean that the Court needs to agree with each and every choice made by an officer along the path (*Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14 at para 11).

C. *The Parties' Submissions*

(1) Applicant

[43] Mr. Khan argues that, although the evidence he adduced in his PRRA application existed at the time of the IRB decisions, he failed to present it because of improper instructions from his previous counsel. Mr. Khan says the Officer made an implicit finding that, since he had access to multiple avenues to present this evidence, the issue of counsel incompetence could have been remedied and therefore could no longer be raised.

[44] Mr. Khan notes that in *Botragyi v Canada (Citizenship and Immigration)*, 2017 FC 79 at para 5 [*Botragyi*], the Court found that a PRRA officer had: “failed to appreciate that the allegations of incompetence not only affected the hearing before the Board, but also had to be

taken into account in deciding whether the evidence before the officer could have reasonably been submitted previously”.

[45] According to Mr. Kahn, an oral hearing should have been held because the Officer made a credibility finding, and the evidence he submitted was central to the decision with respect to the application for protection; and if accepted, the evidence would justify allowing the application. Mr. Khan says the test in section 167 of the *Regulations* is conjunctive: for a hearing to be required, his credibility must be called into question and be a determinative factor in the issue that the PRRA officer is to decide.

[46] Mr. Khan claims the Officer made veiled credibility findings in assessing the evidence. The Officer’s disregard of the evidence alleging incompetence by Mr. Kahn’s former representative demonstrates a lack of belief. Despite the presence of sworn evidence, the Officer found it unreasonable for Mr. Khan not to have provided corroborating documentation before the IRB.

[47] In Mr. Khan’s view, the determinative issue disposing of his application was the Officer’s stated disbelief that he was sought after in Pakistan. Mr. Khan says other aspects of the PRRA analysis, such as state protection and internal flight alternative, were not mentioned and the evidence he submitted was central to this issue. According to Mr. Khan, the evidence he presented demonstrated that he continues to be sought after in Pakistan; in particular, Mr. Ahmad’s letter, his parents’ sworn statements, and the updated country conditions reports. Mr. Khan also contends that the Officer failed to assess the risk he faces by virtue of his ethnicity.

(2) Respondent

[48] According to the Respondent, the decision to reject the PRRA application was reasonable since the Officer had regard to Mr. Khan's submissions and reasonably weighed the evidence. In the Respondent's view, Mr. Khan has not demonstrated that the Officer ignored or misapprehended the evidence of risk.

[49] The Respondent says the Officer properly referenced and applied the law with respect to new evidence under paragraph 113(a) of *IRPA*. The Respondent notes that a PRRA is not an appeal of a negative RPD decision; rather, it is to assess new risks from the time of the refugee determination and the removal date, or to assess a risk presented to the RPD with new evidence within the meaning of paragraph 113(a).

[50] According to the Respondent, the Officer reasonably found that the risks Mr. Khan alleged are the same as those assessed by the RPD, and that there was no "new" evidence tendered. In the Respondent's view, the Officer assessed the documents tendered as new evidence and reasonably determined that they were not capable of rebutting any of the RPD's specific findings. The Respondent submits that the Officer's weighing of evidence is no ground for judicial review.

[51] With respect to an oral hearing, the Respondent denies the allegation that the Officer's decision is at its core about credibility rather than sufficiency of objective evidence to establish

Mr. Khan's fear. The Respondent says there was insufficient objective evidence to support Mr. Khan's cited risks.

[52] The Respondent further says the Officer did not err in considering the alleged risk relating to Mr. Khan's Pashtun ethnicity. In the Respondent's view, the evidence Mr. Khan relied on is not a new risk that could not have been contemplated at the time of the RPD decision. It was reasonable, the Respondent says, for the Officer to find the country condition documents Mr. Khan submitted to be general in content.

[53] According to the Respondent, the documents provided by Mr. Kahn did not overcome any significant findings of the RPD or the RAD. In the Respondent's view, they did not demonstrate that Mr. Khan would be exposed to a new, different, or additional risk that could not have been contemplated at the time of the RPD decision.

D. *Analysis*

[54] Paragraph 113(a) of the *IRPA* provides that 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 present at the time of the rejection. I agree with Mr. Khan that the evidence he adduced in his PRRA application is new evidence that he could not have reasonably been expected to adduce in the circumstances.

[55] In *Botragyi*, Justice O'Reilly found the PRRA officer had erred and stated as follows:

[10] In deciding whether to admit new evidence, the officer first had to consider whether that evidence was reasonably available to the applicants at the time of their hearing before the Board. The officer then had to consider whether, in the circumstances, the evidence could reasonably have been presented to the Board (*Immigration and Refugee Protection Act*, SC 2001, c 27, s 113(a) – See Annex).

[11] Here, at least some of the evidence the applicants provided the officer was reasonably available at the time of their hearing before the Board. However, the PRRA officer did not go on to consider whether that evidence could reasonably have been presented to the Board under the circumstances. As I see it, the officer did not appreciate the possibility that the applicants had been denied a reasonable opportunity to put their evidence before the Board due to the conduct of their counsel at the time.

[12] This is not to say that the officer should have admitted the new evidence. Rather, the officer should have considered the full circumstances before concluding that the evidence was not admissible. It was an error of law not to have done so.

[56] The Officer rejected Mr. Kahn's argument - that his former counsel prevented him from presenting evidence to both the RPD and the RAD - because the refugee hearing is a forum for him to present risks and supporting evidence, he wants to have considered. The Officer found it unreasonable that he would have neglected to raise issues that are pivotal to his protection claim.

[57] The Officer's reasons are not intelligible because he or she failed to provide a logical path to the conclusion that it was unreasonable for Mr. Khan to have neglected to raise issues pivotal to his protection claim. The Officer relied on circular reasoning: the IRB was a forum for Mr. Khan to present risks and supporting evidence he wanted to have considered; therefore, the fact he did not present supporting evidence meant the risks were not there. In my view, the Officer erred by excluding the evidence tendered by Mr. Kahn before considering whether, in the

circumstances of incompetent or improper instructions from his previous counsel, he had been denied an opportunity to present the evidence to the IRB.

[58] The Officer stated that, even if the documentation was accepted as new evidence, this would not rebut any of the significant findings of the RPD: specifically, that (i) Mr. Khan was not credible with respect to material aspects of his claim; (ii) he was of no interest to anyone in Pakistan; and (iii) the events he alleged did not in fact occur.

[59] Paragraph 113(a) of the *IRPA* is based on the premise that a negative refugee determination by the RPD must be respected by a PRRA officer, unless there is new evidence that might have affected the outcome of the RPD hearing if the evidence had been presented to the RPD (*Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 at para 13).

[60] A series of questions are implied in paragraph 113(a). Is the evidence credible, considering its source and the circumstances in which it came to existence? Is it relevant to the PRRA application, in the sense that it is capable of proving or disproving a fact relevant to the claim for protection? Is it new, in the sense that it is capable of contradicting a finding of fact by the RPD, including a credibility findings? Is the evidence material, in the sense that the refugee claim probably would have succeeded if the evidence had been made available to the RPD. Although a PRRA officer is not required to address each of these questions, the officer must consider all the evidence presented.

[61] The evidence Mr. Khan presented is relevant, capable of contradicting the RPD's credibility findings, and potentially material. The RPD explicitly stated that the determinative issue in its decision was credibility, and the lack of corroborative evidence to support Mr. Kahn's claims exacerbated its concerns. In his PRRA application, Mr. Khan adduced the corroborative evidence he could not reasonably have provided at his RPD hearing and on appeal to the RAD due to his former counsel's incompetence. In my view, the evidence he submitted with his PRRA application was "new" evidence that the Officer should have accepted.

[62] As to whether the Officer should have granted Mr. Khan an oral hearing, the Officer provided no reasons for denying an oral hearing. On the one hand, Mr. Khan says the Officer made credibility findings. On the other hand, the Respondent maintains that the Officer's refusal to hold an oral hearing was reasonable since the evidence Mr. Khan tendered did not raise a serious issue of credibility. The Respondent denies that the Officer's decision is, at its core, about credibility but, rather, is about sufficiency of evidence.

[63] The crux of this issue lies on whether the Court characterizes the Officer's reasons as findings on credibility or sufficiency of evidence. In my view, the Officer's reasons straddle on a fine edge between credibility findings and sufficiency of evidence. Section 167 requires that Mr. Khan's credibility is called into question and be a determinative factor in the issue that the PRRA officer is to decide (*Matute Andrade v Canada (Citizenship and Immigration)*, 2010 FC 1074 at para 30).

[64] The Officer relied heavily upon the RPD's finding that Mr. Khan was not credible with respect to material aspects of his claim because he failed to provide corroborative evidence to support his testimony. In his PRRA application, Mr. Khan adduced the corroborative evidence the RPD stated his refugee claim lacked. It is difficult to conceive that the Officer was not in fact making credibility findings, which are central to whether a hearing is required under section 167 of the *Regulations*.

[65] In considering this question, the factors noted by the Court in *A.B.* are relevant. Like the applicant in *A.B.*, Mr. Khan made a specific request for an oral hearing. The Officer here, however, made no mention of this, nor is there any indication of whether or how the Officer assessed the factors in section 167. In that sense, there is simply no "decision" to review, beyond the fact that the Officer did not hold a hearing (*A.B.* at para 14).

[66] The circumstances in *A.B.* and in *Zmari* are similar, in that neither applicant had had an oral hearing at the RPD (*Zmari* at para 18; *A.B.* at para 14). *A.B.* highlighted the relevance of this fact and stated that the Applicant had not had an opportunity to demonstrate his credibility or to answer any concerns about it.

[67] Similar to the circumstances in this case, the Court in *A.B.* found that the PRRA officer's concerns about the applicant's credibility formed a significant part of the decision, and these concerns met the criteria listed in section 167. In light of these considerations, the Court determined that the question before it was "whether a fair and just process was followed"; the Court found that it was not (*A.B.* at para 14).

[68] Mr. Khan's credibility formed a significant part of the Officer's decision. His counsel provided detailed written submissions about the evidence he sought to adduce. Mr. Kahn had an oral hearing before the RPD. Taking into consideration the substantive rights involved, in my view, Mr. Khan underwent a fair and just process. Although the Officer's reasons for not conducting an oral hearing are non-existent, the decision not to convoke an oral hearing in the circumstances of this case was not incorrect.

IV. Conclusion

[69] The Officer's decision to deny Mr. Khan's application because the evidence he presented was not new evidence under paragraph 113(a) of the *IRPA* is unreasonable. I agree with Mr. Khan that he could not reasonably have been expected to present the evidence he adduced in his PRRA application in the circumstances of this case.

[70] The Applicant's application for judicial review is granted; the Officer's decision is set aside; and the matter returned for a new determination by a different immigration officer.

[71] Neither party raised a serious question of general importance; so, no such question is certified.

JUDGMENT in IMM-1569-19

THIS COURT'S JUDGMENT is that: the application for judicial review is allowed; the matter is returned for redetermination by a different immigration officer; and no question of general importance is certified.

"Keith M. Boswell"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1569-19

STYLE OF CAUSE: WAQAS KHAN v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: OCTOBER 24, 2019

**REASONS FOR JUDGMENT
AND JUDGMENT:** BOSWELL J.

DATED: NOVEMBER 27, 2019

APPEARANCES:

Naseem Mithoowani FOR THE APPLICANT

Teresa Ramnarine FOR THE RESPONDENT

SOLICITORS OF RECORD:

Naseem Mithoowani FOR THE APPLICANT
Waldman & Associates
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT
Toronto, Ontario