Federal Court  Cour fédérale

Date: 20210804

Docket: IMM-219-21

Citation: 2021 FC 818

Ottawa, Ontario, August 4, 2021

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

FAHMI TAHA MAMAND

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of the decision of the Immigration Officer [the "Officer"] dated September 29, 2020 rejecting the Applicant's application for Pre-Removal Risk Assessment [PRRA] upon finding that the Applicant would not be subjected to risk of persecution, torture, or cruel and unusual punishment or treatment if returned to Iraq [the "Decision"].

II. Background

[2] The Applicant, Fahmi Taha Mamand, is a national of Kurdistan, Iraq. He is 39 years old.

[3] His father, Taha Mamand Rasoul is affiliated with Masoud Barzani, who was the President of the Kurdistan Region from 2005-2017 and the leader of the Kurdish Democratic Party [the "KDP"]. The Applicant's uncle, General Hussain Mamand, is a commander of the Peshmerga forces. The Applicant officially became a member of the KDP in 1999, before he went to university.

[4] Years ago, the Applicant met members of the well-known musical band, Awaze Ciya, while travelling alone through the Qandil Mountains. Awaze Ciya is affiliated with the Kurdistan Worker's Party [the "PKK"]. The PKK and the KDP are rivals. Around 2010 or 2011, the Applicant entered into a romantic relationship with one of the members of Awaze Ciya, Zozan, and maintained a relationship with her for many years.

[5] On August 25, 2017, the Applicant was stopped at a checkpoint, removed from his vehicle and interrogated for about four hours [the "checkpoint incident"]. The guards confiscated his phone and found pictures of the Applicant with the band, including photos of the Applicant and Zozan alone.

[6] The Applicant was accused of being a spy for the PKK and attempting to harm the KDP. His father and uncle, both high-ranking members of the KDP, were contacted and informed that the Applicant had been seen in photographs with PKK fighters.

[7] The Applicant immediately contacted a lawyer who said there was nothing that could be done. Less than one week after the checkpoint incident, the Applicant booked a flight to the USA (on an existing visa) and fled Iraq. The Applicant was only in the USA for nine days. On September 9, 2017, he arrived in Canada without declaring himself at a Port of Entry. Canada Border Services Agency [CBSA] officers intercepted and detained him under subsections 41(a) and 20(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the "*IRPA*"]. He admitted to being a member of the KDP. He initiated a claim for refugee protection.

[8] Upon review of the Applicant's refugee protection claim, the Refugee Protection Division [the "RDP"] Officer recognized that the Applicant's membership with the KDP was of a low-level and that he did not do any fighting in the 2003 overthrow of the Hussein Government. However, on November 21, 2019, the RDP Officer determined that the Applicant was unable to receive refugee protection under subsection 104(1)(b) of the *IRPA*, on the basis that there were reasonable grounds to believe that the Applicant was a member in an organization that has engaged in the subversion of force in any government.

[9] The Applicant then submitted a PRRA application.

III. Decision under Review

[10] The Applicant's PRRA application was received on December 24, 2019. He alleged that he fears persecution from his father, uncle and other authorities for his romantic relationship with a member of a band affiliated with the PKK. He said that his father and uncle accused him of being a spy and a traitor, and had threatened to kill him.

[11] The Decision notes that the Applicant provided no evidence to establish his identity (eg. passport, birth certificate, etc). Documents submitted by the Applicant alluded to him having had "no choice" but to become a member of the KDP due to his family's long-standing connections. The Officer reviewed photos attached to the application of the Applicant's father and uncle surrounded by military officers. The Officer stated that the photos come with "a lot of unknowns" such as who took the photos, when and under what context they were taken, and how the photos were even acquired, given that the Applicant claimed he fled Iraq with no possessions. In light of these "unknowns", the Officer attributed little weight to the photographic evidence.

[12] The Officer also considered two translated letters from the Applicant's sister, Shadia Taha Mamand, in support of the Applicant's allegations. Her letters confirm the August 2017 checkpoint incident and describe their father as angry, disgraced and prepared to kill his son should he ever return to Kurdistan. The Applicant's maternal cousin, Mahdi Mahmoud Abdullah, also provided a letter stating that, in December of 2017, the Applicant's father told a representative of the KDP intelligence that he would impose his own consequences on his son

for betraying the Barzani family. The Officer acknowledged the statements of forward-looking risk presented in these letters, but also found them self-serving and lacking in details about the fears of persecution. Little weight was attributed to them in relation to the Applicant's risk. The Officer found that there was no objective evidence that the Applicant's father would be willing to harm his son or that the KDP was planning to do so.

[13] With respect to the general country conditions, the Officer considered objective evidence showing that Awaze Ciya was affiliated with the PKK, that the PKK and KDP are at odds, and that the KDP targets individuals perceived to be spies and traitors. The Officer referenced a United States Department of State report noting instances in which KDP-aligned Asayish had arrested, detained and even tortured members of the opposition party. The Officer acknowledged that the country conditions were "not ideal", but found that the Applicant had not provided any evidence of how the country conditions would apply to his personal situation.

[14] On a balance of probabilities, and upon considering the totality of the evidence, the Officer concluded that the Applicant did not demonstrate that he would be at risk of torture, of cruel and unusual punishment or treatment due to his perceived affiliation with the PKK. As such, his PRRA application was refused.

IV. Relevant Legislation

[15] The following sections of the *IRPA* are relevant:

Application for protection	**Demande de protection**

112 (1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).	**112 (1)** La personne se trouvant au Canada et qui n'est pas visée au paragraphe 115(1) peut, conformément aux règlements, demander la protection au ministre si elle est visée par une mesure de renvoi ayant pris effet ou nommée au certificat visé au paragraphe 77(1).
…	**…**
Consideration of application	**Examen de la demande**
113 Consideration of an application for protection shall be as follows:	**113** Il est disposé de la demande comme il suit :
(b) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;	**b)** une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;

[16] As well, Division 4 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the "IRPR"] provides:

Hearing — prescribed factors	**Facteurs pour la tenue d'une audience**
167 For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors are the following:	**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) 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;	**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) whether the evidence is central to the decision with respect to the application for protection; and	**b)** l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;

(c) whether the evidence, if accepted, would justify allowing the application for protection.	**c)** la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

V. Issues

[17] The issues are:

A. Did the Officer breach procedural fairness by refusing to convoke an oral hearing?

B. Was the Officer's decision unreasonable?

VI. Standard of Review

[18] The merits of the Officer's decision are reviewable against the standard of reasonableness (*Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 16).

[19] The question of whether the Officer should have convoked an oral hearing is a matter of procedural fairness. While some courts have held that procedural fairness issues are reviewable on the correctness standard, others have stated that a more "doctrinally sound" approach is to determine the procedures and safeguards required in a particular situation and determine whether the decision-maker adhered to them. In *A.B. v Canada,* this Court has held that procedural fairness issues are reviewable with respect to fairness and fundamental justice, rather than reasonableness or correctness (*A.B. v Canada (Citizenship and Immigration)*, 2020 FC 498 [*A.B.*] at para 68)

VII. Analysis

A. *Oral Hearing – Procedural Fairness*

[20] The Applicant submits that the Officer's findings with respect to the sister's letter of support, the photographic evidence and the ultimate determination that the threats were not connected to the perceived affiliation with Zozan and the PKK rest solely on a credibility assessment. Consequently, the Officer's failure to convoke an oral hearing was a breach of procedural fairness.

[21] The Respondent submits that the Officer had no duty to hold an oral hearing, as they did not make credibility findings, but rather, findings of insufficient evidence. The Applicant failed to provide sufficient evidence to establish a personal risk of persecution.

[22] While most PRRA applications are dealt with in writing, an oral hearing *may* be held if, based on the factors in section 167 of the *IRPR*, the officer is of the opinion that a hearing is required. An oral hearing is generally required where the evidence raises a serious issue of an applicant's credibility, is central to the decision, and if accepted, would justify allowing the PRRA application (*A.B.* at para 113).

[23] In determining if an oral hearing is required, it is important to distinguish between reasonable findings of insufficient evidence and credibility determinations. A decision-maker can examine evidence and find it unpersuasive, without requiring a credibility finding. On the

other hand, decision-makers may veil credibility determinations under claims of insufficient evidence. For this reason, courts must look "beyond the actual words used by the officer" to determine the true basis for the decision. This Court has held that where an officer assesses the truthfulness and reliability of the evidence, they are assessing its credibility (*Jystina v. Canada (Citizenship and Immigration)*, 2020 FC 912 at para 22).

[24] I find that the Officer reasonably assessed the translated letter from the Applicant's sister as having limited probative value, without making a credibility finding. While the letter corroborated the Applicant's claims regarding the checkpoint incident, their father's military rank and their uncle's influence, the Officer found it "self-serving" and assigned little weight to it. The sister had no means of independently verifying most of the facts to which she described in her letter (such as what happened at the checkpoint incident). This type of evidence can be discounted without a credibility determination.

[25] Nevertheless, I find that the Officer crossed the line from a consideration of sufficiency to making veiled credibility determinations about the Applicant and the photographic evidence behind claims of insufficient evidence and too many "unknowns". The Officer's reasons focused on what the photographs *didn't say,* rather than acknowledging what they *did say.* While the Officer did not explicitly suggest that the photographs were falsified, the Officer implicitly called into question the authenticity of the document and the credibility of the Applicant. Had the Officer believed the photographs depicted whom the Applicant said they did, the Officer would have had to seriously consider that the Applicant's family is connected to high-ranking officials

in Kurdistan, which is central to his application (*Majali v Canada (Citizenship and Immigration)*, 2017 FC 275).

[26] Moreover, the Officer's conclusion with respect to the photographs is contradictive. The Officer dismisses the corroborative photographic evidence as insufficient, but also appears to make a negative inference from the fact that the Applicant provided any evidence at all, given that he fled the country expeditiously.

[27] The Officer made determinations concerning the Applicant's sworn affidavit and photographic evidence that raised a serious issue in respect of the Applicant's alleged fear of persecution from his father, uncle and the KPD. The Officer's credibility findings, cloaked in the verbiage of weighing evidence, were central to the decision to deny protection.

[28] Additionally, an applicant's testimony is presumed to be true unless there is a valid reason to doubt its truthfulness. The Officer does not provide any reasons for rebutting this presumption. The Applicant in the present instance provided a sworn, detailed statement which was corroborated, not contradicted by letters from third parties, photographs and public source material (*A.B.* at paras 113-116).

B. *Is the Decision Unreasonable?*

[29] The Applicant also submits that the Officer's consideration of the evidence was unreasonable, primarily on the basis of an unreasonable review of country conditions.

[30] The Respondent takes the position that the Officer's decision was reasonable, given that the Officer considered all the evidence before them and that the Applicant has not demonstrated that the Officer has failed to consider any particular evidence. The Respondent also submits that the Applicant has failed to discharge his own evidentiary burden of providing convincing evidence of the state's inability to protect.

[31] The Officer clearly reviewed the objective country condition documents and agreed that the situation in Iraq is not ideal. However, reasonable state protection does not require a state to provide *perfect* protection and guarantee the safety of its citizens at *all* times in order for an officer to determine that the state offers reasonable protection in the circumstances (*Canada (Employment and Immigration) v. Villafranca*, (1992), 99 DLR (4th) 334 (FCA); *Burai v Canada (Citizenship and Immigration)*, 2020 FC 966 at para 46).

[32] In other words, there is a presumption of state protection and the Applicant failed to meet the evidentiary burden to rebut this presumption and establish *personal* risk. The decision on this front dealing with country conditions was not unreasonable.

[33] Nevertheless, for the reasons above, this application is granted. The matter will be remitted for redetermination by a different Officer.

JUDGMENT in IMM-219-21

THIS COURT'S JUDGMENT is that:

1. The application is allowed and the matter is referred to a different officer for reconsideration in accordance with the reasons of this decision.

2. There is no question for certification.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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