

Federal Court



Cour fédérale

Date: 20211125

Docket: IMM-6533-20

Citation: 2021 FC 1307

Ottawa, Ontario, November 25, 2021

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

KRISHNA PRASAD KHAREL

Applicant

and

**THE MINISTER OF
CITIZENSHIP AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Krishna Prasad Kharel, is a citizen of Nepal who reports that he fears persecution by the Communist Party of Nepal [Maoists], their youth organization the Youth Communist League [YCL] and a breakaway faction known as the Biplav Maoist Party [BMP] because of his connection to the Nepali Congress Party [NCP].

[2] Mr. Kharel arrived in Canada in September 2019 as a crew member on a cruise ship. He attempted to file a refugee claim but, for reasons that are not clear on the record, he was arrested and temporarily detained. He submitted a Pre-Removal Risk Assessment [PRRA] application in November 2019 and was released from detention shortly thereafter.

[3] In a decision dated March 31, 2020, a Senior Immigration Officer [Officer] rejected his PRRA application. The Officer assigned Mr. Kharel's corroborative documentary evidence little weight and determined he had failed to establish he would be subject to a risk of torture, persecution or cruel and unusual treatment or punishment or face a risk to his life if returned to Nepal. Mr. Kharel applies under section 72 of the *Immigration and Refugee Protection Act, SC 2001, c 27 [IRPA]* for judicial review of that decision.

[4] In rejecting the PRRA application, the Officer determined an oral hearing was not required. In light of the Officer's identified concerns with the documentary evidence, I am of the view that the Officer was required to provide reasons for refusing Mr. Kharel's request for an oral hearing. The Officer's failure to provide reasons in this instance was contrary to the duty of fairness and also renders the decision unreasonable. The Application is granted. My reasons follow.

II. Background

[5] Mr. Kharel alleges his father was an active member of the NCP and known to Maoists. Mr. Kharel joined the student wing of the NCP during his first year of college in 2010. He became an NCP member in December 2011 and, upon his return to Nepal in 2018 after a time

spent working abroad, became involved in the building up of a youth organization affiliated with the NCP. He reports that in this role he openly criticized the BMP and received a threatening call in early January 2019 instructing him to stop criticizing the Maoists. Later that same month he reports he was confronted by a local BMP leader, assaulted and again warned not to continue his criticism of the BMP. He reported the assault to the police on the advice of the NCP. He reports the threats continued, with the BMP seeking him out at his parents' home a week later. He departed Nepal shortly thereafter. In February 2019, he reports that the Maoists again visited his parents' home in order to search for him and they assaulted his father, who was hospitalized with a head injury. His father died in March 2019.

III. Decision under Review

[6] The Officer determined that, on a balance of probabilities, Mr. Kharel had failed to establish his precise involvement with the NCP, that the BMP or its local leader had attacked or threatened him, or that the BMP was involved in the death of his father. The Officer found the Applicant established that he was involved with the NCP and that his father died due to a head injury.

[7] In support of his application, Mr. Kharel submitted a number of documents:

- 1) A letter from the NCP to establish his political activities. The Officer assigned the document little weight, noting the author did not discuss his personal association with Mr. Kharel or explain how he was aware of the events reported. The Officer found that the letter was vague about the nature of Mr. Kharel's involvement with the NCP, only vaguely referenced the January 2019 assault and did not confirm that

the NCP advised the Applicant to contact the police after that attack. Moreover, the letter did not address the death of Mr. Kharel's father. The Officer also noted the lack of contact information and that a security feature (a stamp) had not been translated;

- 2) A letter reportedly given to Mr. Kharel when he was assaulted by the local BMP leader in January 2019. The Officer found the letter to be of little probative value. The Officer noted the letter did not express an intent to harm, but instead contained a vaguely stated desire to recruit Mr. Kharel away from the NCP and sought a recruitment donation. The Officer drew from an Immigration and Refugee Board report to conclude that the BMP had largely stopped sending threatening letters and such letters had mostly targeted business people or politicians. Since the Applicant fits neither of these profiles, the Officer found he was unlikely to be similarly situated to those at increased risk of receiving threatening letters from the BMP. The Officer also noted that the security feature (a stamp) had not been translated;
- 3) A hospital certification and death certificate evidencing the death of Mr. Kharel's father. The Officer assigned minimal weight to these documents, noting the circumstances leading to the injuries or the cause of death were not explained and therefore did not establish the BMP's involvement;
- 4) A sworn letter from the Applicant's mother addressing events including the assault on Mr. Kharel's father. The Officer found the letter was of insufficient probative value to establish Mr. Kharel's narrative. The Officer noted the absence of identification documentation and an explanation of how the letter had come into

Mr. Kharel's possession and the only contact information contained in the letter was a temporary address. The Officer found that the contents of the statement were vague and at some points confusing. Furthermore, the Officer used Google maps to identify several hospitals and health centres close to the family's home and found that it was "illogical" that Mr. Kharel's father had been treated at a hospital located farther away from the site of the alleged attack; and

- 5) A letter from an Assistant Police Inspector that purports to confirm the initiation of a police complaint after the January 2019 assault by the local BMP leader. The Officer found this letter was of minimum probative value because it did not include the original police report, did not reference a number for the original complaint and provided little detail in respect of the reported assault.

[8] The Officer concluded Mr. Kharel was not a Convention refugee, noting that persistent requests to join another political party and provide donations did not rise to the level of persecution or greatly hinder his political participation. The Officer further found that the Applicant was not a person in need of protection given that the evidence did not demonstrate a personalized, forward-looking risk if he were to return to Nepal.

IV. Issues

[9] The Application raises a number of issues. However, the Officer's failure to provide reasons for concluding that an oral hearing was not required is determinative, and is the only issue I need address.

V. Standard of Review

[10] The Officer's failure to give reasons for declining to hold a hearing raises a question of procedural fairness (*Hidalgo v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1334 at paras 11-12 [*Hidalgo*]).

[11] Procedural fairness issues are reviewed by asking whether a fair and just process was followed, having regard to all of the circumstances (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*CPR*]). This review is "best reflected in the correctness standard," although no standard of review is actually being applied (*CPR* at para 54).

VI. Analysis

[12] Mr. Kharel submits that, although the Officer expressed their findings in respect of the corroborative documentary evidence in terms of weight and probative value, the Officer's findings were in fact, based on numerous adverse credibility determinations. Ultimately, the Officer did not believe Mr. Kharel's core allegation. Mr. Kharel submits that where, as here, credibility was in issue, his risk had not been previously assessed and an oral hearing had been requested, fairness required that the Officer at least provide reasons to explain why an oral hearing was not necessary.

[13] The Officer's decision does frame concerns with the evidence in terms of weight. However, a reviewing court must look beyond the words used in assessing whether credibility

was actually in issue (*Hidalgo* at para 16, citing *Matute Andrade v Canada (Citizenship and Immigration)*, 2010 FC 1074 at para 31).

[14] After a careful reading of the Officer's reasons, I am unable to conclude with certainty that credibility did not play a role in the Officer's assessment of the evidence, including evidence that extended to core aspects of Mr. Kharel's stated fear: the reported telephone threat and the assault on his father by members of the BMP. For example, the Officer specifically comments on Mr. Kharel's failure to provide a call history from his phone and assumes that this information was available to Mr. Kharel because he did not indicate his phone had been lost. The implication is that the failure to provide this information undermines Mr. Kharel's claim that he had received a threat. The Officer discounted the corroborative evidence on oath from Mr. Kharel's mother relating to the assault by the BMP on Mr. Kharel's father, relying in part on a "public search" of hospital locations in Nepal and concluding the mother's decision to take his father to a certain hospital was illogical. This implicitly cast doubt on another key part of Mr. Kharel's narrative.

[15] Paragraph 113(b) of the IRPA provides that a hearing may be held when assessing an application for protection if, based on a consideration of prescribed factors the Minister is of the opinion that a hearing is required. Those factors are prescribed at section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR] as follows:

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

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

the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;	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.

[16] The Respondent submits, and I agree, the three factors identified in section 167 are cumulative (*Demirovic v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1284 at para 10; *Cosgun v Canada (Citizenship and Immigration)*, 2010 FC 400 at para 32; *Hidalgo* at para 15). In addition, establishing the factors does not entitle an applicant to an oral hearing. Paragraph 113(b) of the IRPA provides that a “hearing may be held.” The convening of an oral hearing remains at the Officer’s discretion (*Begashaw v Canada (Citizenship and Immigration)*, 2009 FC 1167 at paras 15 and 19).

[17] In exercising that discretion, I acknowledge that procedural fairness does not trigger a requirement for reasons in every instance. The duty of fairness has been described as being eminently variable, inherently flexible and context specific, and informed by numerous factors (*Vavilov* at para 77; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras 23-27).

[18] However, when, as here, the reasons suggest credibility was in issue and an applicant has specifically requested an oral hearing, fairness does require that the Officer at least explain why the applicant should not be granted an opportunity to address any concerns the decision maker may have. In this instance, those concerns not only arose in respect of evidence the Officer believed should have been provided but also from the results of the Officer's own "public search" for the location of health care facilities in Nepal (*Zemo v Canada (Minister of Citizenship and Immigration)*, 2010 FC 800 at para 18; *Zokai v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1103 at para 12; *Rana v Canada (Minister of Citizenship and Immigration)*, 2010 FC 36 at para 40). The Officer's failure to give reasons not only impugns the fairness of the process but also prevents a reviewing court from assessing the reasonableness of the Officer's conclusion.

VII. Conclusion

[19] The Application is granted. The parties have not identified a serious question for certification and I am satisfied none arises.

JUDGMENT IN IMM-6533-20

THIS COURT'S JUDGMENT is that:

1. The Application for judicial review is granted and the decision set aside;
2. The matter is returned for redetermination by a different decision maker; and
3. No question is certified.

“Patrick Gleeson”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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