Federal Court  Cour fédérale

Date: 20220413

Docket: IMM-1839-21

Citation: 2022 FC 529

Ottawa, Ontario, April 13, 2022

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

SOUAD AHMED HOUSSEIN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant seeks judicial review of a decision rendered by a Senior Immigration Officer [Officer] rejecting the Applicant's pre-removal risk assessment [PRRA] application.

[2] The decision is challenged on the grounds of procedural fairness and unreasonableness. While I find that there was no unfairness, the assessment of state protection was unreasonable. For that reason, the application must be granted.

II. **Background**

A. *Facts*

[3] The Applicant is a 54-year-old divorced female citizen of Djibouti belonging to the Midgan minority group. She arrived in Canada on April 14, 2017 with her father and sibling and made a claim for refugee protection, alleging that she had fled Djibouti after being subjected to harassment and violence from her then husband's family members.

[4] On September 25, 2017, the Refugee Protection Division [RPD] of the Immigration and Refugee Board denied the Applicant's claim. In light of credibility concerns, the RPD did not accept that the Applicant's allegations with respect to her husband's family were true and that her claim lacked subjective fear. There were also several inconsistencies between the Applicant's testimony and documentary evidence regarding dates and her husband's city of residence.

[5] The RPD also assessed the poor treatment of Midgan people in Djibouti. They are considered second-class citizens and face discrimination; however the RPD found that such discrimination does not amount to persecution under s 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The RPD also found that the Applicant had not established on a balance of probabilities that there was a risk of torture or risk to life or cruel and unusual punishment as per s 97 of the *IRPA* if the Applicant returned to Djibouti.

[6] The Applicant applied for leave and judicial review of the RPD decision. On January 4, 2018, the application was dismissed. On February 26, 2018, the Canada Border Services Agency

issued the Applicant a Direction to Report for removal on March 23, 2018. The Applicant successfully requested a deferral of removal in order to apply for a PRRA.

[7] The Applicant alleges that after the rejection of her refugee claim, her spouse told her that she needed to return to Djibouti and that he expected her to live together with his mother's family, and threatened to end their marriage if she did not return. Fearing to return to live with the in-laws who had abused her, the Applicant obtained religious and civil divorces in March 2018.

[8] On October 26, 2018, the Applicant applied for a PRRA. The Applicant submitted new evidence that she had received a divorce, and alleged that she was now facing risk as a single, divorced, Midgan woman in Djibouti. The new evidence was accepted by the PRRA officer.

[9] The PRRA was refused in a decision dated April 2, 2020.

B. *Decision under Review*

[10] The Applicant’s PRRA was based on a heightened risk of persecution if she returns to Djibouti as a divorced single Midgan woman. The Applicant relied on the experiences of her mother and sisters who suffered as divorced Midgan women. The Officer found that the Applicant had failed to provide any evidence indicating her mother or sisters have gone through such circumstances, and had not discharged herself of the burden of proof to demonstrate the alleged risks linked to her mother and two sisters. The Applicant’s verbal allegations pertaining

to her mother and sisters were not in themselves sufficient objective evidence to demonstrate that the Applicant's personal allegations of risk have been established on a balance of probabilities.

[11] Furthermore, the Officer rejected the Applicant's claim that she would be unable to find a place to live if she returned to Djibouti, as no one would rent to a divorced woman. The Officer found that there is insufficient evidence to conclude on the balance of probabilities that the Applicant would not be able to make living arrangements in Djibouti, especially in light of the fact that the Applicant has a large family with whom she lived for two months prior to coming to Canada.

[12] Regarding state protection for women who are victims of violence in Djibouti, the Officer found the evidence to be inconsistent and general in nature. The evidence on record suggested that legislation and state protection do exist but are not perfect, and that matters are often handled by families rather than the courts. The Officer noted that the Applicant fears being a woman without male protection; however she has three brothers living in Djibouti.

[13] The PRRA officer concluded that the Applicant did not establish that she faces more than a mere possibility of persecution if she returned to Djibouti as required by s 96 of the *IRPA*, nor that she faces a danger of torture, threat to life, or a risk of cruel and unusual punishment or treatment as contemplated by s 97 of the *IRPA*.

[14] The Officer determined that an oral hearing was not required in accordance with s 113(b) of the *IRPA* and s 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*].

III. **Issues and Standard of Review**

[15] This application for judicial review raises the following issues:

A. Did the Officer commit a breach of procedural fairness by declining to hold an oral hearing?

B. Was the Officer's PRRA decision reasonable?

[16] The parties agree, and I concur, that the standard of reasonableness applies to the merits of the PRRA decision. None of the situations that allow for a departure from the presumption of the reasonableness standard are applicable in this case: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 17, 25; *Canada Post Corporation v Canadian Union of Postal Workers*, 2019 SCC 67 at para 27.

[17] A reasonable decision is "based on an internally coherent and rational chain of analysis" and "justified in relation to the facts and law that constrain the decision maker": *Vavilov* at para 85. It must encompass the characteristics of a reasonable decision, namely, justification, transparency and intelligibility: *Vavilov* at para 99, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47 and 74; *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at para 13. The reviewing court must adopt a deferential approach and intervene only "where it is truly

necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process": *Vavilov* at para 13.

[18] As for the question of whether an oral hearing should have been held, the Applicant relies on *Abdillahi v Canada (Citizenship and Immigration)*, 2020 FC 422 at para 16 and *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 to submit that rather than apply a particular standard of review, the Court should "determine whether the procedure the PRRA officer followed was fair or not having regard to all of the circumstances, including the statutory framework, the nature of the substantive rights involved, and the consequences of the decision for the applicant."

[19] As a general proposition, I agree that this is the approach to be preferred when dealing with questions of procedural fairness.

[20] When the issue raised relates to the Officer's determination of whether to hold an oral hearing, I agree with the Respondent's submission that the standard of reasonableness applies. In deciding whether to hold an oral hearing, an officer considers the PRRA application against the requirements of para 113(b) of the *IRPA* and the factors in s 167 of the *IRPR*. This is a question of mixed fact and law, to which the standard of reasonableness applies: *Hare v Canada (Citizenship and Immigration)*, 2020 FC 763 at paras 11-12; *Garces Canga v Canada (Citizenship and Immigration)*, 2020 FC 749 at para 22 [*Garces Canga*]; *Huang v Canada (Citizenship and Immigration)*, 2018 FC 940 at para 12 [*Huang*].

A. *Did the Officer commit a breach of procedural fairness by declining to hold an oral hearing?*

[21] In considering whether a veiled credibility finding has been made by a PRRA officer as the Applicant contends in this instance, a reviewing court must determine whether, regardless of the language employed, the officer's decision to reject an applicant's statements was based on a credibility concern or on a finding of insufficient evidence.

[22] I agree with the Respondent that the Officer's conclusions all relate to the insufficiency of evidence and do not constitute veiled credibility findings. Contrary to the Applicant's contention, the Officer accepted the veracity of all of the new evidence submitted by the Applicant and, in particular, accepted the validity of the Applicant's marriage and subsequent divorce from her husband. In doing so, the Officer did not rely on the RPD's negative credibility findings regarding the Applicant's evidence of marital status.

[23] The Officer's discussion of the Applicant's living arrangements in Djibouti and of the situation of the Applicant's mother and sister is not an analysis of whether the statements are true or credible, but rather an analysis of whether the quality of the evidence is sufficient to substantiate the statements.

[24] As discussed by Justice Gascon in *Huang* at paras 41-42, a finding of insufficient probative evidence, which goes to the nature and quality of the evidence and its probative value, should not be confused with an adverse finding of credibility:

> [41] An adverse finding of credibility is not to be confused with a finding of insufficient probative evidence. As I stated in *Ibabu v Canada (Citizenship and Immigration)*, 2015 FC 1068 at paragraph 35, "[a]n adverse finding of credibility is different from a finding of insufficient evidence or an applicant's failure to meet his or her burden of proof". It cannot be assumed that, in cases where an immigration officer finds that the evidence does not establish the applicant's claim, the officer has not believed the applicant (*Gao v Canada (Citizenship and Immigration)*, 2014 FC 59 at para 32).
>
> [42] The term "credibility" is often erroneously used in a broader sense of insufficiency or lack of persuasive value. However, these are two different concepts. A credibility assessment goes to the reliability of the evidence. When there is a finding that the evidence is not credible, it is a determination that the source of the evidence (for example, an applicant's testimony) is not reliable. Reliability of the evidence is one thing, but the evidence must also have sufficient probative value to meet the applicable standard of proof. A sufficiency assessment goes to the nature and quality of the evidence needed to be brought forward by an applicant in order to obtain relief, to its probative value, and to the weight to be given to the evidence by the trier of fact, be it a court or an administrative decision-maker. The law of evidence operates a binary system in which only two possibilities exist: a fact either happened or it did not. If the trier of fact is left in doubt, the doubt is resolved by the rule that one party carries the burden of proof and must ensure that there is sufficient evidence of the existence or non-existence of the fact to satisfy the applicable standard of proof. In *FH v McDougall*, 2008 SCC 53 [*McDougall*], the Supreme Court established that there is only one civil standard of proof in Canada, the balance of probabilities: evidence "must be scrutinized with care by the trial judge" and "must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test" (*McDougall* at paras 45-46).

[25] In this instance, it was reasonable for the Officer to reach the conclusion that insufficient evidence was provided to substantiate the Applicant's claims concerning her living arrangements in Djibouti and the experiences of her mother and sister, as these findings were transparent and justified by the evidentiary record before the Officer. Thus, no adverse credibility finding was

made by the Officer and the decision not to hold an oral hearing pursuant to para 113(b) of the *IRPA* and s 167 of the *IRPR* was reasonable.

B. *Was the Officer's PRRA decision reasonable?*

[26] The Officer's analysis with respect to the requirements of s 96 of the *IRPA* did not, as the Applicant contends, improperly import a requirement of individualized risk and did not conflate the test under s 96 with that of s 97 of the *IRPA.* Moreover, the Officer's assessment did not require the Applicant to show that she was more at risk than other similarly situated persons. Thus, the Officer's conclusion that the Applicant failed to demonstrate how she is personally at risk was reasonable. Where a claimant relies on generalized evidence of those similarly situated, the claimant must show that the evidence is relevant to them: *Agudo v Canada (Citizenship and Immigration)*, 2021 FC 320 at para 45.

[27] However, the Officer's analysis falls short of the reasonableness standard when it came to the assessment of the availability of state protection in Djibouti.

[28] In *Kotai v Canada (Citizenship and Immigration)*, 2020 FC 233 at para 34, Justice Elliott noted that this Court has frequently held that the assessment of adequate state protection must focus on actual, operational adequacy, and that the availability of alternate institutions does not constitute state protection:

> [34] This Court has frequently held that when determining whether adequate state protection exists, a decision-maker must focus on actual, operational adequacy, rather than on a state's "efforts" to protect its citizens: Lakatos v Canada (Minister of Citizenship and Immigration), 2019 FC 864 at para 58. It is an error for a decision-

> maker to focus on evidence of government efforts without examining the operational effectiveness of the police response: Pava v Canada (Minister of Citizenship and Immigration), 2019 FC 1239 at para 48 (emphasis added). The fact that alternate institutions exist does not constitute state protection, even if these institutions are responsible for investigating complaints of discrimination: Tanarki v Canada (Minister of Citizenship and Immigration), 2019 FC 1337 at para 45.

[29] Here, the Officer emphasized that cases of domestic violence against women in Djibouti are often dealt with by families and clans rather than the police in finding that the Applicant would be able to rely on help from her family members in the absence of effective state protection. This assessment was not reasonable, and it does not comply with the guidance of this Court requiring decision-makers to "begin their analysis with an assessment of the nature of the state in question and its security and judicial processes; to then assess the operational effectiveness of those processes in the context of an identified group to which the claimants belong": *Jaworowska v Canada (Citizenship and Immigration)*, 2019 FC 626 at para 45.

[30] Moreover, while the Officer acknowledged that the evidence concerning state protection for women facing domestic violence in Djibouti was inconsistent, some of the evidence relied upon was outdated such as the content of a 2010 awareness seminar. That may account for some of the inconsistency but a PRRA officer has a duty to examine the most recent sources of information in conducting a risk assessment: *Rizk Hassaballa* at para 33; *Woldemichael v Canada (Citizenship and Immigration)*, 2020 FC 655 at para 30; *Jama v Canada (Citizenship and Immigration)*, 2014 FC 668 at para 18.

IV. **Conclusion**

[31] As discussed above, I am satisfied that the Officer's assessment of the adequacy of state protection in Djibouti was unreasonable and the decision must therefore be remitted for reconsideration by another officer.

[32] No serious question of general importance was proposed and none will be certified.

JUDGMENT IN IMM-1839-21

THIS COURT'S JUDGMENT is that the application is granted and the matter is remitted for reconsideration by another officer in accordance with the reasons provided. No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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