Federal Court Cour fédérale

Date: 20230926

Docket: IMM-8929-21

Citation: 2023 FC 1297

Ottawa, Ontario, September 26, 2023

PRESENT: Mr. Justice Norris

BETWEEN:

AHMED BABIKER IBRAHIM MOHAMED

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The applicant is a 35-year-old citizen of Sudan. In March 2019, he entered Canada irregularly from the United States and claimed refugee protection. However, the claim was determined to be ineligible to be referred to the Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada because the applicant was found to be inadmissible to Canada due to serious criminality. The applicant was then offered the opportunity to apply for

a pre-removal risk assessment (PRRA) under section 112 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*). He completed the application on May 10, 2019.

[2] In a decision dated February 12, 2020, a Senior Immigration Officer with Immigration, Refugees and Citizenship Canada refused the application. The decision was not provided to the applicant until 21 months later – on November 26, 2021. The respondent did not lead any evidence to explain this delay. Nevertheless, it will have escaped no one's notice that the delay largely coincides with the onset of the global COVID-19 pandemic.

[3] The applicant now applies under subsection 72(1) of the *IRPA* for judicial review of the decision refusing his PRRA application. He submits that the delay in informing him of the decision breached the requirements of procedural fairness. He also submits that the decision is unreasonable.

[4] As I explain in the reasons that follow, I do not agree that the requirements of procedural fairness were breached or that the decision is unreasonable. This application will, therefore, be dismissed.

II. BACKGROUND

A. *The applicant's personal history*

[5] The applicant was born in Sudan in April 1988. In November 2005, he was granted permission to enter the United States as a dependent of his father, who had earlier been granted

asylum there on the basis of his fear of persecution at the hands of the Muslim Brotherhood. The applicant and his immediate family settled in the United States.

[6] In May 2007, the applicant was charged with robbery with a weapon. He was subsequently convicted and sentenced to imprisonment for five years. It appears that the custodial part of the sentence was completed in March 2014.

[7] On March 17, 2019, the applicant entered Canada irregularly at the Roxham Road border crossing. When he was interviewed by Canadian authorities the next day, the applicant stated that after he completed his sentence in 2014, he was deported from the United States to Sudan. He remained in Sudan until December 2018, when he left for Egypt. From there, he returned to the United States in March 2019 using a friend's passport. After a brief stay in New York City, he made his way to the Roxham Road border crossing where he made a claim for refugee protection. The applicant stated that he feared returning to Sudan because, in December 2018, he had been arrested, jailed, and beaten for having taken part in protests against the Omar Al Bashir regime. The applicant reiterated this narrative in the forms he completed on March 18, 2019, in connection with his refugee claim.

[8] On the other hand, when questioned further by a Canada Border Services Agency officer on March 25, 2019, the applicant eventually admitted that he had never returned to Sudan. Rather, he had remained in the United States the entire time until he entered Canada.

[9] As noted, because the applicant was determined to be inadmissible to Canada on grounds of serious criminality, he was not eligible to have his claim for refugee protection referred to the RPD and a removal order was made against him. He was, however, offered the opportunity to apply for a PRRA.

B. *The applicant's PRRA application*

[10] The PRRA application was based solely on the applicant's fear of persecution and risk of harm due to "an imputed political opinion – that of his father."

[11] In support of the application, in addition to the standard application form, the applicant provided a letter dated January 14, 2002, from the US Department of Justice approving his father's claim for asylum, a letter from his father's lawyer in North Carolina dated April 12, 2019, regarding ongoing efforts to obtain compensation for properties that had been expropriated by the Sudanese government, a copy of the biometric page of his father's passport, and a letter dated November 15, 2005, from the US Embassy in Khartoum, Sudan, confirming approval of the applicant's admission to the United States.

[12] Written submissions in support of the PRRA application were also provided. They are undated, unsigned, and are not on letterhead. In their entirety, the submissions on the merits of the application were as follows (original emphasis removed):

> If Mr. Ahmed Mohamed is obliged to return to the Sudan he fears being detained, tortured or killed due to an imputed political opinion – that of his father.
>
> His father was arbitrarily arrested by the Muslim Brotherhood in Singha in 1995 for voicing his political opinion and detained for

> twenty (20) days during which time he was beaten and treated in an inhumane manner. Charges were never laid and he did not have the right to a lawyer.
>
> The current situation in the Sudan has become worse as evidenced by the National Documentation Package (NDP) of the IRB. A well-founded fear of persecution is forward looking and he cannot return to the Sudan for fear of loosing [*sic*] his life.

[13] In the present application for judicial review, the applicant relies on an affidavit he affirmed on January 11, 2022. Attached as Exhibit B to this affidavit are what the applicant identifies as "the PRRA application and support documents." These include the documents just described. Also included as part of Exhibit B, however, is an undated two-page letter from the applicant's former lawyer (*Application Record, pages 61-62*). Unlike the other documents included in Exhibit B, this letter is not mentioned in the PRRA decision, nor is it found in the Certified Tribunal Record. I will consider below what use, if any, can be made of this document on the present application as well as several other items of new evidence relied on by the applicant.

III. DECISION UNDER REVIEW

[14] The decision refusing the PRRA application is dated February 12, 2020. The officer concludes that the applicant had not demonstrated that there is more than a mere possibility of persecution in Sudan or that there are substantial grounds to believe that he would be subjected to a danger of torture, a risk to his life, or a risk of cruel and unusual treatment or punishment.

[15] The officer finds that the applicant's father's successful asylum claim in the United States and the resettlement of the family in the US establishes that the applicant's father faced

persecution in the past and that this risk extended to the family. However, this "does not speak to whether the applicant currently has reasonable grounds to fear persecution in the future." The letter from the applicant's father's US lawyer and the copy of the applicant's father's passport added nothing in this regard. The officer accepts that government authorities attempted to enlist the applicant and his brothers to fight in the war in 2000 but finds that this does not support a forward-looking risk of forced recruitment today.

[16] With respect to more recent events, the officer finds that the applicant failed to provide sufficient objective evidence corroborating his participation in protests against the al-Bashir government in December 2018. (The officer appears to have overlooked the fact that the applicant had resiled from this part of his original narrative.) The officer notes that, in any event, the al-Bashir government had been ousted in April 2019 and "the evidence that was presented for this PRRA does not elucidate what kind of implications this regime change has on the applicant's forward-looking risks."

[17] As noted above, the applicant was not informed of this decision until November 26, 2021.

IV. STANDARD OF REVIEW

[18] The applicant challenges both the fairness of the procedure by which his PRRA application was dealt with as well as the decision on the merits of his application. There is no dispute about how the Court should approach these issues on judicial review.

[19] First, to determine whether the PRRA application was dealt with in accordance with the requirements of procedural fairness, the reviewing court must conduct its own analysis of the process followed and determine for itself whether that process was fair having regard to all the relevant circumstances, including those identified in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 21 to 28: see *Canadian Pacific Railway Co v Canada (Attorney General)*, 2018 FCA 69 at para 54; *Lipskaia v Canada (Attorney General)*, 2019 FCA 267 at para 14; and *Perez v Hull*, 2019 FCA 238 at para 18. This is functionally the same as applying the correctness standard of review: see *Canadian Pacific Railway Co* at paras 49-56 and *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35. The applicant's sole argument in this regard is that the delay in informing him of the decision on his PRRA application breached the requirements of procedural fairness. The determinative issue is whether the applicant was prejudiced by the delay in the delivery of the decision (*Singh v Canada (Citizenship and Immigration)*, 2014 FC 867 at para 23).

[20] Second, the officer's decision on the merits of the PRRA application is reviewed on a reasonableness standard. A reasonable decision "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 85). A decision that displays these qualities is entitled to deference from the reviewing court (*ibid.*). When applying the reasonableness standard, it is not the role of the reviewing court to reweigh or reassess the evidence considered by the decision maker or to interfere with factual findings unless there are exceptional circumstances (*Vavilov* at para 125). The onus is on the applicant to

demonstrate that the officer's decision is unreasonable. To set aside a decision on this basis, the reviewing court must be satisfied that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100).

V. ANALYSIS

A. *Preliminary Issue – What evidence may be considered on this application?*

(1) Introduction

[21] As noted above, in the present application, the applicant relies on an affidavit he affirmed on January 11, 2022. In part, this affidavit provides uncontroversial background information. In many other respects, however, the affidavit and the exhibits attached to it supplement the record that was before the officer who decided the PRRA application. The respondent submits that this is impermissible and that the Court should disregard this new information entirely.

[22] As I will explain, I agree with the respondent that substantial parts of the applicant's affidavit should not be considered. None of the new information in the affidavit may be used in assessing the reasonableness of the officer's decision. Moreover, in my view, with one exception, the applicant is also precluded from relying on the new evidence to demonstrate that he was prejudiced by the delay in delivering the PRRA decision.

(2) The Governing Principles

[23] The general rule is that only material that was before the original decision maker may be considered on an application for judicial review. Consequently, generally speaking, a party to an application for judicial review cannot submit new evidence: see *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 17-20; *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at paras 13-28; *Sharma v Canada (Attorney General)*, 2018 FCA 48 at paras 7-9; and *Andrews v Public Service Alliance of Canada*, 2022 FCA 159 at para 18.

[24] The rationale for this rule is grounded in the respective roles of the administrative decision maker and the reviewing court (*Access Copyright* at paras 17-18; *Bernard* at paras 17-18; *Andrews* at para 18). The administrative decision maker decides the case on its merits; the reviewing court reviews the legality, rationality, and fairness of what the decision maker has done (*Vavilov* at paras 13, 23-24, and 82). If persuaded that the decision under review is flawed in one or more of these respects, the reviewing court must also determine the appropriate remedy under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7.

[25] There are exceptions to the general rule. The exceptions "are best understood as circumstances where the rationale behind the general rule is not offended" (*Bernard* at para 14). Exceptions will be made only in situations where the receipt of evidence by the reviewing Court "is not inconsistent with the differing roles of the judicial review court and the administrative decision-maker" (*Access Copyright* at para 20).

[26] There are three well-established exceptions: (1) background information; (2) evidence to establish the absence of evidence before the administrative decision maker concerning a particular subject matter; and (3) evidence relevant to an issue of natural justice, procedural fairness, improper purpose or fraud that could not have been placed before the administrative decision maker and that does not interfere with the role of the administrative decision maker as the merits-decider (*Bernard* at para 27).

[27] The third exception, which is the one that is germane here, is subject to another important qualification. This is that, if the evidence relevant to one of the enumerated issues "were available at the time of the administrative proceedings, the aggrieved party would have to object and adduce the evidence supporting the objection before the administrative decision-maker. Where the party could reasonably be taken to have had the capacity to object before the administrative decision-maker and does not do so, the objection cannot be made later on judicial review" (*Bernard* at para 26).

[28] The list of exceptions is not closed (*Bernard* at para 28). Additional exceptions can be recognized as long as they are consistent with the rationale behind the general rule and administrative law values more generally (*Bernard* at para 19). The applicant has not suggested that a new exception be recognized; rather, he relies on the third exception set out above in arguing that the new evidence and information is relevant to the alleged breach of procedural fairness.

(3) The Principles Applied

[29] Applying these well-established principles, I have concluded that, with one exception, none of the new evidence or information in the applicant's affidavit may be considered on this application.

[30] First, as noted above, the applicant's Application Record includes a two-page document that is not found in the CTR. It is an undated letter from the applicant's former counsel addressed to the "Designated Office." It opens by noting that the applicant's PRRA application "signed on May 1st 2019 and submitted has not yet been finally disposed of." (The reference to May 1, 2019, appears to be an error but this is not material for present purposes.) The letter goes on to describe the worsening situation in Sudan, especially since the military coup on October 25, 2020. (It appears that this date is also wrong; the coup in question occurred in 2021.) The letter then provides very limited submissions on the merits of the PRRA application. It notes that "The return of this young man to Sudan is not at all consonant with protection of human right [*sic*] and dignity, irrespective of the 'wrong' that has tainted his stay in the U.S." and that "The risk is eminent [*sic*] and clear that if he is to return to his domicile of origin as already portrayed in the Application." (The letter also includes submissions on how the applicant is now a person of good character.)

[31] As also noted above, the applicant included this document in the same exhibit to his affidavit as his original PRRA application and supporting documents. He described all these documents collectively as his "PRRA application and supporting documents" (*Affidavit of*

Ahmed Babiker Ibrahim Mohamed affirmed January 11, 2022, paragraph 11). He does not address the fact that, on its face, the document now in question obviously post-dates the original submissions. Nor does he provide any evidence of when this document was submitted. Indeed, the affidavit provides no basis for the (implicit) assertion that the document was actually submitted to the decision maker.

[32] In the Reply Memorandum filed on the present application, counsel for the applicant asserts (at paragraph 14) that, "Cognizant of the recent political changes in Sudan, particularly the October 2021 coup, in early November 2021, the Applicant's previous lawyer submitted additional submissions [. . .]." This assertion is not supported by any evidence, nor is it consistent with the CTR. At the hearing of this application, counsel for the applicant advised that the document in question was found in the file the applicant's current solicitor of record received from his former counsel.

[33] On the record before me, I am not satisfied that these "additional submissions" were ever provided to the decision maker. (Had they been provided before the applicant was informed of the result of his PRRA application, the jurisprudence is clear that the decision maker would have been obliged to consider them: see *Chudal v Canada (Citizenship and Immigration),* 2005 FC 1073 at para 19.) Since they were not before the decision maker, they cannot be considered in assessing the reasonableness of the decision.

[34] Nor, in my view, can these "additional submission" be used to support the applicant's procedural fairness arguments. This is because they could have been provided to the decision maker but they were not.

[35] The applicant bears the burden of establishing that he was prejudiced by the 21-month delay in informing him of the decision on his PRRA application. He submits that he was prejudiced by the delay because circumstances had changed for the worse in Sudan during that time. However, as set out above, the applicant is not permitted to rely on new evidence to establish a breach of procedural fairness if that evidence could have been put before the administrative decision maker (see *Bernard* at paras 25-26). I find this to be the case here. The applicant has offered no reason why, in the time between when he submitted his PRRA application in May 2019 and when he learned in November 2021 that it had been rejected, he or his counsel could not have continued to update the PRRA officer on the evolving situation in Sudan. Indeed, according to the applicant, his former counsel did at least attempt to do so, albeit very late in the day. In such circumstances, the applicant is precluded from relying on the two-page letter from his former counsel.

[36] In so concluding, I note that the applicant has not raised any issue of ineffective assistance on the part of his former counsel.

[37] Second, for the same reasons, the information in paragraphs 12 to 14 of the applicant's affidavit, which describes certain events in Sudan between 2019 and 2021, cannot be considered.

[38] Third, for the same reasons, Exhibits D through G to the applicant's affidavit, which are documents drawn from versions of the National Documentation Package for Sudan that post-date the PRRA decision but pre-date the applicant learning his PRRA application had been refused, cannot be considered.

[39] Finally, Exhibit H to the applicant's affidavit is a January 5, 2022, Government of Canada travel advisory for Sudan. Since this document was not before the decision maker, it cannot be considered in assessing the reasonableness of the PRRA decision. Much of the information in the document is background information that pre-dates when the applicant learned his PRRA application had been refused; other information, however, post-dates this and that information could not have been put before the decision maker.

[40] It is not necessary to finely parse what information the applicant can and cannot rely on to support his procedural fairness argument. I am prepared to consider this exhibit as evidence that, at least as of the date of the document, the country condition information on the basis of which the PRRA decision was made continued to be outdated. As such, it is capable of supporting an argument that the applicant continued to be prejudiced by the delay in informing him of the decision on his PRRA application.

B. *Was there a breach of the requirements of procedural fairness?*

[41] The applicant submits that the 21-month delay between when his PRRA application was decided and when he was informed of the result breached the requirements of procedural fairness. In particular, he contends that he was prejudiced by this delay because there were

adverse changes in conditions in Sudan during the period of the delay. As a result, the PRRA decision is no longer based on current country conditions. As a remedy, the applicant asks that the decision be set aside and the matter remitted for reconsideration.

[42] I have not been persuaded that there was a breach of the requirements of procedural fairness. Even assuming for the sake of argument that the information on which the PRRA decision is based was outdated by the time the applicant was informed of the result, this was because of the applicant's inaction while he was waiting for the decision; it was not because of the delay itself. The applicant bore at least some responsibility to provide the decision maker with up-to-date information on conditions in Sudan and to link that information to the issue of risk (*Singh* at para 24; see also *Woldemichael v Canada (Citizenship and Immigration)*, 2020 FC 655 at para 30). He cannot complain now about the consequences of his own failings. I underscore once again that the applicant has not alleged ineffective assistance on the part of his former counsel.

[43] Furthermore, even if the PRRA decision is based on outdated information, I am not persuaded that, in the particular circumstances of this case, the applicant has been prejudiced by this.

[44] It is indisputable that a timely risk assessment is a crucial safeguard against deportation to persecution, torture, and other mistreatment: see *Ragupathy v Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 1370 at para 27; see also my discussion of this issue in *Shaka v Canada (Citizenship and Immigration)*, 2019 FC 798, [2019] 4 FCR 288, at paras 33-44.

Whether a risk assessment is timely depends on the circumstances, including the relative stability of country conditions and the proximity of the anticipated removal to the decision (*Thiruchelvam v Canada (Citizenship and Immigration)*, 2015 FC 585 at para 26). As Justice Tremblay-Lamer held in *Revich v Canada (Citizenship and Immigration)*, 2005 FC 852, "if this review is to be effective and consistent with Parliament's intention when creating it, the PRRA must coincide as closely as possible with the person's departure from the country" (at paragraph 16).

[45] In theory, the delay in informing the applicant of the decision on his PRRA application could have prejudiced him because the way had been cleared for his removal from Canada on the basis of what had become outdated information. In fact, however, there is no evidence that the applicant was facing removal in November 2021 (when he was informed of the decision on his PRRA application) or at any time since then. Should this change, enforcement officers would be required to consider whether any new risks had arisen since the last pre-removal risk assessment: see *Atawnah v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 144 at paras 14-23. As the respondent points out, this is the appropriate vehicle for the applicant to present the new evidence on which he has attempted to rely in the present application. It may also be open to the applicant to apply for a new risk assessment: see *Immigration and Refugee Protection Regulations*, SOR/2002-227, section 165.

[46] Finally, in his written submissions on this application, the applicant contended that the officer had breached the requirements of procedural fairness by making a disguised credibility finding concerning his account of his experiences in Sudan in December 2018 without having convoked a hearing. As set out above, in fact the applicant had resiled from this part of his

original narrative before submitting his PRRA application. Unsurprisingly, this argument was not pursued at the hearing of this application.

[47] This ground for review must be rejected.

C. *Is the decision unreasonable?*

[48] The applicant's arguments challenging the reasonableness of the decision all rely on information that was not before the officer. As I have already discussed, this is impermissible. The reasonableness of the decision cannot be impugned by evidence that was not before the decision maker.

[49] The applicant submitted what can only be described as a bare-bones PRRA application. The officer's conclusion that he failed to establish a forward-looking risk under either section 96 or section 97 of the *IRPA* was altogether reasonable in light of the record before the officer. This ground for review must also be rejected.

VI. CONCLUSION

[50] For these reasons, the application for judicial review will be dismissed.

[51] The parties did not propose any serious questions of general importance for certification under paragraph 74(d) of the *IRPA*. I agree that no question arises.

JUDGMENT IN IMM-8929-21

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-8929-21
STYLE OF CAUSE:	AHMED BABIKER IBRAHIM MOHAMED v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 28, 2023
JUDGMENT AND REASONS:	NORRIS J.
DATED:	SEPTEMBER 26, 2023

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