Federal Court  Cour fédérale

Date: 20240216

Dockets: IMM-369-23
IMM-4445-23

Citation: 2024 FC 256

Ottawa, Ontario, February 16, 2024

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

ASADULLAH ARABZADA

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This proceeding involves two applications. The first is an application for judicial review of a decision by an enforcement officer (the "Officer") with the Canada Border Services Agency (the "CBSA") denying the Applicant's request for a pre-removal risk assessment ("PRRA")

application. The second is an application for a *mandamus* order compelling the CBSA to issue a PRRA application.

II. Background

[2] Mr. Asadullah Arabzada (the "Applicant") is a 28-year-old citizen of Afghanistan.

[3] The Applicant states that members of his family served in the Afghan military before he was born. When the Taliban took control of the country in 1994, they began targeting his family. The Applicant alleges that the Taliban has killed his father, his grandfather, and two of his uncles. He also claims that other members of his family have been maimed at the hands of the Taliban.

[4] The Applicant was young when his father was killed. However, as he is now an adult, he fears for his life. He states that armed members of the Taliban attacked him and his family in their home in November 2015. He and his family initially moved to a different city in Afghanistan, but the Applicant later fled the country in February 2016.

[5] The Applicant entered the United States in December 2016, where he applied for refugee protection in the United States, but was denied in March 2020. In July 2021, he left the United States and entered Canada. He applied for refugee protection soon thereafter. He states that, by then, several more of his family members were killed by the Taliban.

[6] In late September 2022, the Applicant was found to be ineligible for refugee protection because he had unsuccessfully claimed protection in the United States. He was subsequently issued

a removal order around that time. However, due to the ongoing conditions in Afghanistan, removals of Afghani citizens have been suspended pursuant to a temporary suspension of removal (the "TSR") that was issued by the Minister of Public Safety and Emergency Preparedness (the "Minister").

[7] In late November 2022, the Applicant requested that the CBSA issue the Applicant a PRRA application. The Applicant's request went unanswered for several months. In early January 2023, the Applicant brought the application for a *mandamus* order requiring the CBSA to issue a PRRA application to the Applicant.

[8] The CBSA replied to the Applicant and informed him that, pursuant to the TSR, he is not "removal ready" and his removal order is not enforceable. The Applicant's request for a PRRA application was denied. The Applicant brought another application for judicial review in early April 2023, claiming that the Officer erred in denying the Applicant's request.

III. Issues

[9] Is the Officer's decision not to issue the Applicant a PRRA application reasonable?

[10] If so, should the Court grant the application for a *mandamus* order requiring the CBSA to issue a PRRA application to the Applicant?

IV. Analysis

A. *The Applicable Standards*

[11] The standard of review on the first issue is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 25). A decision that is the product of fettered discretion is *per se* unreasonable (*Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at para 24).

[12] An order for *mandamus* is a remedy that compels a decision maker who fell in error to act to meet a duty imposed upon them by law. It is available where the Applicant can show, in part, that he is owed a public legal duty that has not been discharged (*Lukacs v Canada (Transportation Agency*), 2016 FCA 202 at para 29; *Apotex Inc v Canada (Attorney General)*, [1994] 1 FC 742 (FCA) at 766).

B. *Whether it was reasonable to deny the request for a PRRA application*

[13] The Applicant notes that section 112 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*") allows the Officer to issue a PRRA application if the Applicant is "subject to a removal order that is in force" [emphasis added]. The Applicant also notes that section 160 of the *IRPA* requires that the Applicant be notified of his ability to seek a PRRA before the time of removal. These are the two parameters that must be met in relation to any PRRA: (1) a removal order must be "in force" and (2) the Applicant must be notified of the PRRA application before removal from Canada.

[14] Section 50 of the *IRPA* outlines certain circumstances in which a removal order is deemed stayed. Section 50(e) of the *IRPA* includes among those circumstances the existence of a stay imposed by the Minister, such as the TSR. The Applicant describes these limits in section 50 of the *IRPA* as limits on the *enforceability* of a removal order. He argues that the enforceability of a removal order is distinct from it being "in force". According to this view, a removal order may be unenforceable due to a stay by the Minister, but that removal order will nevertheless continue to be "in force".

[15] Therefore, the Applicant argues that whether or not a removal order is enforceable has no bearing on whether the Applicant may apply for a PRRA, since section 112 of the *IRPA* does not require the removal order to be enforceable. Given that the Officer in this case would not issue a PRRA application because the Applicant's removal order is unenforceable under section 50 of the *IRPA*, the Officer effectively fettered their discretion by adding further conditions that must be met without the legal grounds to do so, thereby rendering the decision unreasonable.

[16] I agree with the Applicant that the language of section 48 of the *IRPA* suggests that there is a distinction between a removal order being "in force" and it being enforceable. However, I do not agree with the Applicant's position that the Officer *fettered* their discretion. Rather, the Officer *exercised* their discretion in order to give effect to the purposes for which PRRA applications were introduced – that is, non-refoulement.

[17] This Court has previously held, in *Shaka v Canada (Citizenship and Immigration)*, 2019 FC 798 [*Shaka*] at paragraph 44, that the statutory scheme and the purposes for which the *IRPA*

was enacted indicate that "the relevant time for assessing entitlement to *non-refoulement* protection is the time removal is sought" and that "there is a certain redundancy to submitting a PRRA application while other measures prevent the person's removal from Canada" [emphasis in the original]. The Court went on to explain at paragraph 47:

> [47] Conducting a PRRA reasonably close in time to when the person could be removed from Canada best ensures its effectiveness. This is the best way to protect the rights of the person concerned and the best way to ensure that Canada complies with its domestic and international obligations. I cannot accept the applicant's contention that the PRRA process should function more broadly as an alternative route to refugee status, even though that is one possible outcome of that process and, for some (like the applicant), it is the only route to recognition of that status. In my view, the applicant cannot succeed in modifying the PRRA process to emulate the refugee determination process simply through an exercise in statutory interpretation, as he has attempted to do. The outcome he seeks is contrary to the purpose of the scheme and the clear intention of Parliament in enacting it […]. While the text of paragraph 160(3)(a) of the IRPR is open to the broader interpretation urged by the applicant, it is constrained by the context and purpose of the provision. These considerations support the Minister's interpretation, not the applicant's.

[18] The Applicant attempts to distinguish *Shaka* from the case at hand by noting that in this case, the stay of removal comes in the form of a TSR, which tends to remain in place for an indefinite period of time. This is unlike the form of stay that was at issue in *Shaka*, an administrative deferral of removal ("ADR"), which is more of a short-term stay on removals. The Applicant's argument fails to recognize that, under section 50 of the *IRPA*, there is no distinction between a TSR and an ADR. Both are "stay[s] imposed by the Minister". All such stays affect enforceability and therefore the timing in which a person is likely to be removed.

[19] The Officer's decision was a proper exercise of their discretion as to when to issue a PRRA application to an individual who is subject to a removal order. The Officer used their discretion noting the guidance provided by this Court in *Shaka* that PRRA applications are best issued around "the time the removal is sought". Since that entails acknowledging the fact that the Applicant's removal order is stayed, the Officer's analysis reasonably referred to section 50 of the *IRPA*. The Applicant is wrong to describe the Officer's analysis as a *fettering* of discretion.

[20] The Officer's decision not to issue the Applicant a PRRA application at this time was reasonable.

C. *Whether the Court should grant a mandamus order*

[21] The Respondent argues that, pursuant to section 112(2)(b.1) of the *IRPA*, the Applicant is barred from making a PRRA application for 12 months following the day his refugee claim was "rejected" (or the day on which an appeal or review is completed or their deadline passes, whichever is latest). Accordingly, the Officer did not owe a public legal duty to issue a PRRA application to the Applicant because the Applicant was found to be ineligible in September 2022, less than 12 months prior to his request for a PRRA in November 2022.

[22] The Respondent is incorrect in conflating rejection with ineligibility. The Applicant's claim was never rejected, because he was not eligible to make such a claim in the first place. Therefore, the 12 month waiting period required under section 112(2)(b.1) of the *IRPA* does not apply in this case.

[23] The Applicant cites section 113.01 of the *IRPA* in his submissions, which requires a PRRA officer to hold an oral hearing if a refugee claimant was found to be ineligible under section 101(1)(c.1) of the *IRPA*, as was the case here. The Applicant argues that section 113.01 of the *IRPA* elevates the risk assessment process for those in the Applicant's position to something akin to a refugee protection hearing. Therefore, the provision imposes a public legal duty on the Officer to treat the Applicant's request for a PRRA application like a refugee claim, and delaying such a request is prejudicial to the outcome.

[24] I do not agree with the Applicant. Although section 113.01 of the *IRPA* does impose a mandatory hearing if a refugee claimant was found to be ineligible under section 101(1)(c.1) of the *IRPA*, that obligation arises once a PRRA application is submitted. It goes to the procedural rights that a PRRA applicant is owed in the absence of a prior oral hearing on a refugee claim.

[25] The Applicant asks this Court to order the Officer to issue a PRRA application now, not to hold an oral hearing. Section 113.01 of the *IRPA* has no bearing on when an officer must issue a PRRA application to the claimant and it imposes no such public legal duty with which this Court may make a *mandamus* order.

[26] The Officer's decision not to issue a PRRA application was reasonable. I am not satisfied that the Officer owes the Applicant a public legal duty that has not been discharged. Therefore, a *mandamus* order should not be made against the Officer.

V. Conclusion

[27] The application is dismissed.

JUDGMENT in IMM-369-23 & IMM-4445-23

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.

2. There is no question for certification.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-369-23 & IMM-4445-23
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