Federal Court  Cour fédérale

Date: 20240821

Docket: IMM-13666-22

Citation: 2024 FC 1295

Ottawa, Ontario, August 21, 2024

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

SKGO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant is a citizen of Colombia. She challenges the rejection of her application for a pre-removal risk assessment [PRRA] by a senior immigration officer of Immigration, Refugees and Citizenship Canada.

[2] The Applicant argues that the officer erred by making a veiled credibility finding without a hearing.

[3] The Respondent disagrees, arguing the officer made a finding about sufficiency of evidence as opposed to credibility.

[4] I agree with the Applicant. I find that the officer made a credibility determination, necessitating a hearing or an explanation why a hearing would not be held. This finding is dispositive. I therefore decline to address the parties' remaining arguments. For the more detailed reasons below, this judicial review application will be granted.

[5] I start by providing additional background for context followed by an analysis of the conclusive credibility issue.

II. Factual and Procedural Background

[6] The Applicant came to Canada initially on a student visa. She subsequently made a claim for refugee protection based on fear of the Aguilas Negras, or Black Eagles, a paramilitary group in Colombia. Before her claim could be assessed, however, she was convicted of several sufficiently serious crimes that resulted in ineligibility for protection, and a deportation order.

[7] The Applicant applied for a PRRA pursuant to section 112 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], claiming that she will be targeted by the Black Eagles if she returns to Colombia because of her previous academic studies regarding murdered

Colombian Professor Alfredo Rafael Francisco Correa de Andréis, as well as her work as a human rights defender. See Annex "A" for relevant legislative provisions.

[8] Following the initial rejection of her PRRA application, the Applicant sought reconsideration on the basis that her previous representative, who was neither a registered immigration consultant nor a lawyer, had included incorrect and fraudulent material.

[9] The same officer who rejected the PRRA application permitted the reconsideration but again refused the application, thus triggering the enforcement of the deportation order. Consequently, the Applicant sought an order from this Court to stay her removal from Canada pending the final decision on her application for leave and judicial review of the PRRA decision. I note for clarity that the initial decision is not in issue, but rather the officer's subsequent PRRA decision on reconsideration.

[10] In addition to ordering the anonymity of the Applicant's identity (in a separate order), Justice Norris granted the requested stay of removal: *SKGO v Canada (Citizenship and Immigration)*, 2023 FC 83 [Stay Order]. Other details regarding the Applicant and the officer's decision can be found at paragraphs 3-9 of the Stay Order.

III. Analysis

[11] I find the Applicant met her onus of showing that the officer unreasonably questioned her credibility without a hearing or without explaining why a hearing was not convoked, thus

warranting the Court's intervention*: Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 100**.**

[12] The Applicant argues that this issue involves a question of procedural fairness or natural justice and, thus, attracts a correctness standard of review (with the alternative position that, even on a deferential standard of review, the officer's decision on this issue was unreasonable). I agree with the Respondent, however, that the applicable review standard here is reasonableness: *Vavilov*, above at paras 10, 25.

[13] The Applicant correctly points out that under paragraph 113(b) of the *IRPA*, a hearing may be held in respect of a PRRA application if, on the basis of prescribed factors, the Minister is of the opinion that a hearing is required. Further, section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*], identifies the required factors for determining whether a hearing should be held.

[14] The Applicant cites *Kiflom* for the proposition that the *IRPR* section 167 factors are cumulative: *Kiflom v Canada (Citizenship and Immigration)*, 2022 FC 246 [*Kiflom*] at para 16. Inexplicably, however, the Applicant overlooks that, for Justice Pamel, the applicable standard of review was reasonableness, notwithstanding the apparent divergence in the jurisprudence: *Kiflom*, at paras 13 and 21.

[15] For similar reasons, I also previously have preferred the presumptive review standard of reasonableness in respect of an officer's decision whether to hold a hearing, and see no reason to

depart from this standard in the matter before me now: *Susal v Canada (Citizenship and Immigration)*, 2022 FC 1104 at paras 12-13, relying on the reasoning in *Balogh v Canada (Citizenship and Immigration)*, 2022 FC 447 at paras 13-25.

[16] I agree with the Applicant that the officer made a veiled credibility finding regarding her evidence that when she was kidnapped and sexually assaulted in Colombia, her assailants identified themselves to her as members of the Black Eagles.

[17] The PRRA decision describes in some detail the Applicant's supporting affidavit evidence which accompanied her PRRA application. The officer accepts much of the Applicant's evidence including her studies and research in Colombia, and that she was the victim of a violent sexual assault. The officer determines, however, that, "other than her statement the applicant has proffered little evidence demonstrating why the Black Eagles/Aguilas Negras would have any interest in her…" (underlining added). The officer concludes that, "the applicant has not demonstrated that the individuals who sexually assaulted her, were members of the Black Eagles/Aguilas Negras who wanted the applicant to cease her research into Professor Correa's work."

[18] The officer provides no explanation why some of the Applicant's sworn evidence is accepted but, crucially, not the sworn evidence concerning what her assailants told her about their identity. The Respondent's attempt to recast the officer's decision as rooted in a lack of probative evidence about the assailants is, in my view, impermissible bolstering or gap-filling.

[19] Justice Pamel notes that credibility answers the question about the trustworthiness of the source of information, while probative value concerns whether the evidence can establish the fact for which it is offered in proof: *Kiflom*, above at para 17, citing *Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14 at paras 16, 21.

[20] Justice Gascon clarifies that, when considering whether an evidentiary threshold has been met, the trier of fact must determine if the evidence provided, assuming it is credible, is sufficient to establish the alleged facts, on a balance of probabilities: *Lv v Canada (Citizenship and Immigration)*, 2018 FC 935 at para 43. Put another way, absent a credibility determination, an applicant's evidence is presumed to be true: *Cho v Canada (Citizenship and Immigration)*, 2010 FC 1299 at para 24 [*Cho*].

[21] The case before me is not one where the Applicant assumed or suspected the Black Eagles kidnapped and sexually assaulted her; rather, she deposed that they told her they were members of the Black Eagles. By finding the Applicant "has not demonstrated that the individuals who sexually assaulted her, were members of the Black Eagles/Aguilas Negras who wanted the applicant to cease her research into Professor Correa's work," the inescapable conclusion, in my view, is that the officer disbelieved what the Applicant was told by her assailants, absent a negative determination about the reliability of her evidence.

[22] I find the jurisprudence on which the Applicant relies persuasive in this regard.

[23] In *Cho* (at paras 24-26), the officer did not believe that the claimant was assaulted because of the lack of corroborative evidence. Justice Tremblay-Lamer held that the claimant's statements about the assaults were directly relevant to whether the events took place; thus, the officer made a credibility determination.

[24] In *AB*, Justice Boswell found that the officer made a veiled credibility finding by disbelieving the applicant's sworn evidence about being tortured by state authorities who accused him of subversion, while accepting the doctor's report finding that his injuries were consistent with his narrative: *AB v Canada (Citizenship and Immigration)*, 2020 FC 498 at paras 117-118 [*AB*].

[25] Similarly, the officer here accepted the sexual assault confirmed by the supporting medical letter, but not the Applicant's sworn evidence about what occurred during the assault. I find this is a credibility determination about evidence that is central to the Applicant's risk in Colombia. Had the officer believed the Applicant, it is difficult to understand how the officer could conclude that she was not at risk: *Islam v Canada (Citizenship and Immigration)*, 2022 FC 261 at para 43.

[26] As in *AB* (at para 118), I am persuaded that the officer's credibility findings should have given rise to a hearing.

IV. Conclusion

[27] For the above reasons, I conclude that the officer unreasonably made a veiled credibility finding without a hearing, thus warranting the Court's intervention. The PRRA decision will be set aside, with the matter remitted to a different officer for redetermination.

[28] Neither party proposed a question for certification, and none arises in the circumstances.

JUDGMENT in IMM-13666-22

THIS COURT'S JUDGMENT is that:

1. The Applicant's judicial review application is granted.
2. The November 14, 2022 decision of the senior immigration officer rejecting the Applicant's application for a pre-removal risk assessment is set aside, with the matter remitted to a different officer for redetermination.
3. There is no question for certification.

"Janet M. Fuhrer"
Judge

Annex "A": Relevant Provisions

***Immigration and Refugee Protection Act*, SC 2001, c 27.**
***Loi sur l'immigration et la protection des réfugiés*, LC 2001, ch 27.**

Application for 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).	**Demande de protection** **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 **113** Consideration of an application for protection shall be as follows: … **(b)** a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required; …	**Examen de la demande** **113** Il est disposé de la demande comme il suit : … **b)** une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires; …

***Immigration and Refugee Protection Regulations*, SOR/2002-227.**
***Règlement sur l'immigration et la protection des réfugiés*, DORS/2002-227.**

Hearing — prescribed factors **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 the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act; **(b)** whether the evidence is central to the decision with respect to the application for protection; and **(c)** whether the evidence, if accepted, would justify allowing the application for protection.	**Facteurs pour la tenue d'une audience** **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 mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur; **b)** l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection; **c)** la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

FEDERAL COURT

SOLICITORS OF RECORD

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