Federal Court Cour fédérale

Date: 20120606

Docket: IMM-7820-11
IMM-7821-11

Citation: 2012 FC 701

Ottawa, Ontario, June 6, 2012

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

MULUGETA TEBIKIE ESHETE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] These reasons address two applications for judicial review arising from decisions of a Senior Immigration Officer which refused the applicant's request for an exemption on humanitarian and compassionate ("H&C") grounds from the in-Canada selection criteria for permanent residence and found that he would not be at risk of persecution or harm on return to his country of origin in a pre-removal risk assessment ("PRRA").

[2] For the reasons that follow, both applications are dismissed.

BACKGROUND:

[3] The applicant is 39 years old and a citizen of Ethiopia. He entered Canada in October 2004 on a visitor's visa to compete in a marathon and claimed protection shortly thereafter. His wife and son continue to live in Ethiopia.

[4] The applicant alleged in his claim that he was at risk of persecution in Ethiopia because he was a member of the All Ethiopia United Party (AEUP) which was in opposition to the government. In August 2005, the Refugee Protection Division of the Immigration and Refugee Protection Board (the "RPD") denied the claim on credibility grounds. The RPD concluded that the applicant had not shown that he had suffered serious harm in Ethiopia or would face a risk of harm if returned.

[5] An application for leave and judicial review of the RPD decision was denied in December 2005. An application for reconsideration of the RPD decision was ultimately denied after being held in abeyance pending the release of decisions from the Federal Court of Appeal relating to the hearing procedure followed by the RPD.

[6] In December 2005, the applicant applied for an exemption from the in-Canada selection criteria and for permanent residence under s.25(1) of the *Immigration and Refugee Protection Act,* SC, 2001, c 27 ("the Act"). Over the six years this application was in process, the applicant provided extensive submissions in support of his application. He drew attention to his establishment in Canada and the alleged risk he faced as a returning deportee to Ethiopia. He submitted that the

Ethiopian government would perceive him as an opposition member because of his claim for protection from Canada against Ethiopia. The application was denied on September 20, 2011.

[7] The applicant applied for a PRRA on October 19, 2010. In support of that application, he drew attention to an increase in persecution of opposition members by the Ethiopian government following the 2005 election in that country asserting that this was a new risk which had not been before the RPD when it heard his claim. He also said that the Ethiopian police were still actively seeking him, pointing to e-mails from his wife who said that the police had come to her home on several occasions, beat her and threatened to kill her if she did not tell them where the applicant was. A negative risk assessment was issued on September 14, 2011.

ISSUES:

[8] The following issues are raised in this case:

1. Whether the officer breached the applicant's right to procedural fairness by not calling him for an interview;

2. Whether the officer applied the wrong test for H&C relief;

3. Whether the officer's treatment of the evidence before her was unreasonable;

4. Whether the officer failed to consider a ground of risk the applicant advanced to support his PRRA.

ANALYSIS:

Standard of Review

[9] Where an issue of procedural fairness arises, the Court must determine whether the process followed by the decision-maker satisfied the level of fairness required in all of the circumstances: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC12, [2009] 1 SCR 339 at para 43.

[10] The standard of review applicable to the question of whether an officer applied the correct test for H&C relief is correctness: *Herman v Canada (Minister of Citizenship and Immigration)*, 2010 FC 629 at para 12. The standard applicable to the officer's analysis of the evidence is reasonableness: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 62; *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para 18. The officer's alleged failure to consider the applicant's claim as it was advanced is also subject to the reasonableness standard: *Nabizadeh v Canada (Minister of Citizenship and Immigration)*, 2012 FC 365 at para 24.

Was there a breach of procedural fairness?

[11] The applicant submits that in both the PRRA and H&C decisions, the officer relied on the assessment of the applicant's credibility by the RPD. In neither application did the officer give the applicant an opportunity to address credibility concerns in an oral interview. The applicant contends that this was a breach of procedural fairness.

[12] As discussed in *Baker*, above, at paragraphs 33 and 34, an oral hearing is not required in an H&C application. The officer was required to provide the applicant with an opportunity to make submissions, which she did. The H&C decision was based, not on credibility, but on the lack of objective evidence to demonstrate the hardship which the applicant alleged.

[13] With respect to the PRRA application, s.113(b) provides that a hearing may be held if required on the basis of prescribed factors. The prescribed factors, set out in section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, require that there be evidence that raises a serious credibility issue in relation to the factors set out in sections 96 and 97 of the Act, that this evidence be central to the decision and, if accepted, that it would justify allowing the application for protection.

[14] Here the officer evaluated the new evidence presented by the applicant. She declined to consider evidence which was available or could reasonably have been made available before the RPD decision. This was consistent with the principles set out by the Federal Court of Appeal in *Raza* v *Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385 at para 13. The evidence that did meet the standards of newness, relevance and materiality was considered by the officer.

[15] The new evidence did not raise serious credibility issues as it was, for the most part, documentary evidence relating to the conditions in Ethiopia. The only evidence about which credibility could have been a factor were three e-mails from the applicant's wife indicating that the police continue to look for him. The officer made no credibility finding with respect to this

evidence, determining rather to give it little weight due to its vagueness. That evidence was not central to the decision and would not have justified allowing the PRRA application.

[16] In my view, credibility was not a live issue in either application and consequently there was no breach of procedural fairness.

Did the officer apply the wrong test for humanitarian and compassionate relief?

[17] The same Senior Immigration Officer considered both applications. The applicant submits that the officer, having first dealt with the PRRA application, merely substituted "hardship" for "risk" when she came to consider the H&C application. In other words, she applied the higher thresholds for risk under sections 96 and 97 of the Act and did not adequately consider that a level of risk which did not meet those standards could yet constitute unusual, disproportionate and undeserved hardship warranting a H&C exemption.

[18] In my view, the decision clearly shows that the officer evaluated the H&C application on the correct hardship test. Among other references to the correct test interspersed in her reasons, at the outset she stated:

> I am cognizant in this application that while the harm he has cited may not rise to a level of s. 96 and/or s. 97 of the [Act], it may contribute to a finding of unusual and undeserved or disproportionate hardship

[19] The applicant had stressed risk in Ethiopia as a ground of hardship in his H&C submissions. It was reasonable for the officer to analyze whether the risk which would show hardship actually existed and her reasoning on this point does not show that she applied the wrong test. The applicant

had raised essentially the same grounds of risk in both the H&C and the PRRA applications and it is not unreasonable to find that the language used to evaluate those risks will necessarily be similar. Aside from that similarity, there is no evidence that the officer applied an incorrect test for the H&C application.

Was the officer's treatment of the evidence before her unreasonable?

[20] Under paragraph 113(a) of the Act;

> a. an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection;

[21] The question before the officer, then, was whether the applicant had demonstrated he faced a forward-looking risk in Ethiopia on the basis of evidence which was not before the RPD. The applicant asserted the same risks in his PRRA Application as he had before the RPD. Although the applicant submitted several country documents which showed opposition members are at an increased risk in Ethiopia, he did not provide any evidence beyond his bare assertion that he was an opposition member, a claim which the RPD had disbelieved. This is what the officer was referring to when she said that:

> I note that the [applicant] is not named in the documents and he has not indicated how they relate to a personalized, forward looking risk for him in Ethiopia.

[22] Given the onus on the applicant to show, based on new evidence, that he faced a risk because of his party membership, it was reasonable for the officer to look at the documents to see if

he was named in them as an opposition member. It was also reasonable for the officer to find that, in the absence of evidence showing the applicant was actually an opposition member, any risk established by the country documents was a generalized one. The officer's conclusion the applicant had not established the risk asserted in the PRRA application was reasonable.

[23] The officer considered the letters from the psychiatrist. They indicate that the applicant's psychiatric condition did not begin until after the RPD decision. It was not unreasonable to conclude that this stemmed from the failure of his claim and not from the conditions he had experienced in Ethiopia before his journey to Canada. The letters indicate that medicine was prescribed to address the condition but do not contain information regarding the availability of the medication in Ethiopia. The officer reasonably gave a low probative value to this evidence with respect to the PRRA application and the determination of hardship.

[24] The officer also reasonably dealt with the other aspects of the H&C decision. It is not enough for the applicant to say that the officer could have concluded that the evidence he submitted showed establishment in Canada that would lead to hardship if he was removed. The officer reviewed all the relevant evidence and came to a conclusion that was open to her. The Court may intervene only if the decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Khosa*, above, at para 59. That was not the case here.

Did the officer fail to consider a ground of risk the applicant advanced to support his PRRA?

[25] The applicant also argues that the officer did not consider whether he faced a risk simply because he was a returning failed refugee claimant. As the respondent points out, the applicant did not raise this ground of risk in his submissions on the PRRA application but rather in his H&C application. Although considered by the same officer, these were separate applications. Had they been processed separately by different officers, the applicant would not have the benefit of the grounds he raised in his H&C application being before the officer considering his PRRA.

[26] To hold it was a reviewable error for the officer not to consider grounds raised in a separate application would be to grant greater protection to claimants whose applications are processed together than those whose applications are processed separately. A reviewable error should not arise simply out of peculiarities in scheduling. In any event, the officer acknowledged the alleged risk factor in his PRRA decision.

[27] The evidence offered in support of this ground relates primarily to the large number of returnees expelled from the adjacent countries in Africa and to renditions of persons from other more developed nations, presumably for inadmissibility reasons. It does not establish that the applicant is similarly situated to those persons and would face risk merely by reason of returning following a failed refugee claim abroad. Similarly, the evidence does not demonstrate that he would be at risk by reason of his profile as a returned international calibre athlete. In the absence of evidence, this is no more than an argument that the officer failed to speculate as to what might occur.

[28] The evidence does establish that the level of oppression towards opposition members increased following the 2005 elections which returned a larger number of them to the legislative assembly. But, as the RPD found, the applicant did not have the profile of an opposition activist before he left Ethiopia and it did not believe that he was a member of an opposition party. The officer did not need to revisit those findings.

[29] I understand that the applicant has the support of many in the community who believe that he has and could continue to make a valuable contribution to Canadian society. He has for example helped to train and mentor youth in the running sports. To make a living, he has set up a small business and employs others. This is evidence of his determination to make a home in Canada. But the question before me is not whether it is fair for Mr. Eshete to stay in Canada but whether the officer's decisions fall outside the acceptable range of outcomes defensible on the facts and the law. I am unable to reach that conclusion.

[30] No serious questions of general importance were proposed and none will be certified.

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JUDGMENT

THIS COURT'S JUDGMENT is that:

1. the applications for judicial review in Court files IMM-7820-11 and IMM-7821-11 are dismissed;
2. a copy of the reasons for judgment and judgment will be placed on each file; and
3. in each file, no questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7820-11 IMM-7821-11
STYLE OF CAUSE:	MULUGETA TEBIKIE ESHETE and THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	May 30, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	MOSLEY J.
DATED:	June 6, 2012

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