Federal Court Cour fédérale

Date: 20120416

Docket: IMM-5981-11

Citation: 2012 FC 433

Ottawa, Ontario, April 16, 2012

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

FARSHID MC VANDIFAR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application by Farshid Mc Vandifar (the Applicant) for judicial review of a decision of the Pre-Removal Risk Assessment [PRRA] Officer, Véronique Roy, dated June 14, 2011, where she concluded that the applicant "did not demonstrate more than a mere possibility of being subjected to persecution as per section 96 of IRPA, nor did he establish that there are

substantial grounds to believe he would face a danger of torture, risk to life or risk of cruel and unusual treatment or punishment in Iran as per section 97 of the IRPA".

[2] For the following reasons, this application for judicial review is allowed.

II. Facts

[3] The Applicant is a citizen of Iran. He was a political activist in Iran and has remained politically active since his arrival in Canada, participating in meetings and rallies in Toronto and Ottawa to protest against the Iranian regime. He is also involved in the promotion of human rights.

[4] The Applicant claims that Iranian diplomats take pictures of protestors to collect evidence and imprison them under false and unfounded charges upon their return to Iran. He therefore fears that upon his return to Iran, he will be charged, incarcerated, tortured and possibly killed.

[5] He came to Canada in 1995 and applied for refugee status. In 1996, his refugee claim was rejected by the Immigration and Refugee Board.

[6] In 1998, the Applicant received a negative decision following the review of his case under the Post-Determination Refugee Claimants in Canada Class.

[7] In 1999, the Applicant filed his first application under Humanitarian and Compassionate grounds [H&C]. He subsequently received a negative decision in 2000.

[8] He filed a second H&C application in January 24, 2005 and received a negative decision on October 3, 2005.

[9] He submitted his application for a Pre-removal Risk Assessment on December 7, 2010. He was not represented .The PRRA Officer determined that the Applicant failed to submit sufficient evidence for the Officer to reasonably conclude that he faces a personalized risk should he return to Iran. Consequently, the Officer concluded in her decision dated June 14, 2011, which was communicated to the Applicant on July 19, 2011, that the Applicant had not demonstrated more than a mere possibility of being subject to persecution as per section 96 of the *Immigration and Refugee Protection Act,* SC 2001, c27 [*IRPA*]. The PRRA officer also found that the Applicant had failed to establish that there exist substantial grounds to believe that he would face a danger of torture, risk to life or risk of cruel and unusual treatment or punishment in Iran under section 97 of the *IRPA*.

III. Legislation

[10] The applicable legislation is appended to this judgment.

IV. Issues and standard of review

A. Issues

[11] The Applicant framed the issues as follows:

> ***1. Did the Officer err in failing to hold an oral hearing?***
>
> ***2. Did the Officer breach the principles of natural justice by ignoring evidence?***
>
> ***3. Did the Officer err in mischaracterizing the Applicant's risk?***

B. Standard of review

[12] The first issue is a question of procedural fairness and must be determined on a standard of correctness (see *Lai v Canada (Minister of Citizenship and Immigration)*, 2007 FC 361, [2008] 2 FCR 3 at para 55; and *Sketchley v Canada (Attorney General)*, 2005 FCA 404, [2006] 3 FCR 392).

[13] As for the second and third issues, it is well established by the jurisprudence of this Court that PRRA officers' determinations are accorded significant deference and their decisions are reviewable on a standard of reasonableness (see *James v Canada (Minister of Citizenship and Immigration)*, 2010 FC 318, [2010] FCJ No 368 (QL) at para 16). The appropriate standard of review for decisions of PRRA Officers involving an exercise of discretion for questions of mixed fact and law is reasonableness (*Li v Canada (Minister of Citizenship and Immigration)*, 2009 FC 623, [2010] 2 FCR 467 at para 32).

V. Analysis

1. Did the Officer err in failing to hold an oral hearing?

A. Applicant's submissions

[14] The Applicant submits that, "for a hearing to be required, the applicant's credibility must be called into question and must be a determinative factor in the issue that the PRRA officer is to decide" (see *Andrade v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1074 at para 30). He affirms that these requirements are met.

[15] In her decision, the Officer concluded that the Applicant failed to provide sufficient evidence to demonstrate that he faces personalized risks should he return to Iran. The Applicant alleges that this finding is a veiled credibility determination (see *Zokai v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1581 at para 13). He further affirms that the Court has recognized that where the PRRA officer finds that there is insufficient objective evidence it "really means the PRRA officer did not believe the applicant" (see *Yakut v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1190 at para 13 [*Yakut*]).

[16] The Applicant underlines that the Officer's decision did not turn on the basis of a lack of objective evidence. Rather, the decision turned on the evidence establishing the Applicant's personal risk. Further, in *Lewis v Canada (Minister of Citizenship and Immigration)*, 2007 FC 778 at para 22, the Court determined that credibility was not an issue because "on all occasions the Officer operated on the assumption that the Applicant's story was true". However, the Applicant claims that in this instance, a critical piece of evidence is the Applicant's statement that he participated in hundreds of protests and demonstrations against the Iranian regime and that, during these protests and demonstrations, Iranian diplomats photographed him. If the Officer accepted the

Applicant's statement as true, her conclusion would not have been the same. The Applicant argues that this amounts to a veiled credibility finding.

[17] Moreover, the Applicant submits that his statement and photographs are not evidence which can be discarded lightly, nor without sound reasons. This evidence is central to the Applicant's claim. Thus, the primary issue with respect to this evidence is whether it is credible or not.

[18] As for the other factors of section 167 of the *IRPR*, the Applicant alleges that the evidence adduced was central to his application and if accepted as true, it would have justified allowing his PRRA application. The wording of the decision reveals the Officer had concerns about the Applicant's evidence. The Applicant contends that in such instances the Officer should have held a hearing, thereby affording the Applicant the opportunity to address these concerns.

B. Respondent's submissions

[19] The Respondent notes that a hearing may only be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required. The legislation and the preponderance of the case-law hold that oral hearings are exceptional and only granted in the prescribed circumstances and where an applicant satisfies all the factors set out in section 167 of the *IRPR*. Applicants must present evidence to support their PRRA application and indicate how that evidence relates to them. PRRA applicants cannot assume that a hearing will be held.

[20] The Respondent alleges that in the present case, the Officer did not determine that the Applicant lacked credibility. She found the Applicant had failed to establish that he was subject to a personalized risk in light of the documentary evidence submitted. In other words, the evidence adduced had little or no probative value and did not establish the facts and concomitant risks asserted by the Applicant according to the Respondent, who relies on the following cases (see *Ferguson v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1067 at para 26 [*Ferguson*]; *Iboude v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1316 at paras 5, 12-14).

[21] The Respondent further contends that the Court has held that a hearing is not required where the officer denies the PRRA application on the basis of objective evidence. According to the Respondent, this issue is different from credibility findings (*Al Mansuri v Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 22 at para 43; *Tran v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 175 at para 28).

[22] The Respondent submits that "it is open to the trier of fact, in considering the evidence, to move immediately to an assessment of weight or probative value without considering whether it is credible" (*Ferguson* cited above at paras 25-26). In this instance, according to the Respondent, the Applicant's allegations of risk were given little probative value due to the deficiencies identified in relation to the supporting documentation. It was unnecessary to assess the Applicant's credibility as the weight assigned to his evidence did not meet the legal burden of proving that he was at risk from the Iranian government.

[23] At the hearing the Respondent's counsel pointed specifically to the country documentation indicating that when protesters were being photographed, they or their relatives back in Iran often received threats, which was not the case in this instance.

C. Analysis

[24] The Applicant alleges that the Officer made veiled credibility findings. He relies on *Yakut* cited above where Justice Lemieux held that when a PRRA Officer finds that there is insufficient objective evidence, the Officer really means that he or she disbelieves the applicant. In *Yakut*, Justice Lemieux relied on *Latifi v Canada (Minister of Citizenship and Immigration)*, [2006] FCJ No 1738 at para 48 [*Latifi*]. In that case, Justice Russell had to make a distinction between "sufficiency" of evidence and "credibility".

[25] Justice Tremblay-Lamer, in *Cho v Canada (Minister of Citizenship and Immigration),* 2010 FC 1299, recalled the principle that, in the absence of a determination as to credibility, an Applicant's evidence is presumed to be true. This does not bar an officer from assessing the probative value of the evidence adduced without making a credibility finding. Rather this principle entails that an officer properly distinguishes insufficient or unreliable evidence from a lack of credibility.

[26] In *Latifi* cited above, Justice Russell analyzed the wording of the decision and determined that "the context in which this is said, and the way the Officer approached the evidence adduced by the Applicant, suggests to me that by "reliable" the Officer means more than just "sufficiently

probative" of the risks identified by the Applicant" (see para 57). He also writes "As regards the new evidence of the Applicant's activities in Iran the words "vague" and "contradictory" in my view give rise to credibility concerns rather than merely dealing with sufficiency" (see para 62).

[27] In *Liban v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1252, [2008] FCJ No 1608 at para 13, Justice O'Reilly wrote:

> [13] The officer's reasons persuade me that a hearing was required here. First, the officer seemed to place considerable emphasis on the credibility findings of the Immigration Appeal Division. Second, the officer found that there was insufficient objective evidence to support Mr. Liban's claim that he had a relationship with Jimmy. Third, the officer found that there was insufficient objective evidence to support Mr. Liban's claim to be an alcoholic. Fourth, the officer seemed to accept that homosexuals and alcoholics would be subjected to mistreatment in Ethiopia. Therefore, if Mr. Liban's evidence relating to his sexuality and alcoholism had been accepted, the officer would likely have allowed the application.

[28] The aforementioned decisions suggest that the context and the wording of the decision are crucial in distinguishing the sufficiency of evidence from credibility issues. In the present case, the Officer wrote, at page 11 of the Applicant's record:

> . . . However, the applicant does not submit evidence to demonstrate that he is a member of a human rights organization, nor does he establish with information and evidence that he participated in hundreds of meetings and protests. In fact, he does not specifically identify and elaborate on a single one of those events or meetings. While he submits photographs of himself holding flags and states they were taken at demonstrations in front of the Iranian embassy in Ottawa, he fails to provide specific information regarding the context in which these photographs were taken, by whom, what were the demonstrations for and what was his role in the events. The Applicant adds that Iranian diplomats took his pictures and have enough evidence to imprison him on forged charges. However, he does not say what leads him to believe that individuals took pictures of him and that these individuals are Iranian diplomats. He does not explain where and in which circumstances he believes he was

> photographed by them, nor does he provide documentary evidence in order to substantiate the allegation.

[29] The decision as worded does not suggest that a low probative value was given to the evidence. Rather, it states there are too many questions left unanswered. The Officer had several interrogations regarding the Applicant's evidence. She determined there was a lack of objective evidence to prove the basis of the Applicant's claim. Such a determination, in the present context, constitutes a veiled credibility finding because it is obviously the Applicant's statement which is disbelieved.

[30] The Officer's interrogation dealt with evidence central to the Applicant's claim. If the Officer would have believed the Applicant, in light of the evidence adduced, she would have possibly found the Applicant to be at risk.

[31] In the Court's view, the Officer had to conduct a hearing under paragraph 113*(b)* of the *IRPA*. The three factors set out in section 167 of the *IRPR*, that is (*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; and (*c*) whether the evidence, if accepted, would justify allowing the application for protection. In the present case, as a result, the Officer breached his duty of procedural fairness.

[32] "Here the remedy being sought by the Applicant is precisely the remedy affected by the lack of natural justice and procedural fairness" (see *Persaud v Canada (Minister of Citizenship and*

Immigration), 2011 FC 31 at para 20). Having determined a breach of the Officer's duty of procedural fairness, there is no need to look at the other issues. The Officer's decision cannot stand.

VI. Conclusion

[33] The PRRA Officer had to conduct a hearing under paragraph 113*(b)* of the *IRPA*. All three factors set-out in section 167 of the *IRPR* are met. As a result, the Officer breached his duty of procedural fairness. The Applicant's application for judicial review is hereby allowed and a reassessment of the Applicant's risk should be conducted by another PRRA Officer.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed and a reassessment of the Applicant's risk should be conducted by another PRRA Officer; and

2. There is no question of general importance to certify.

"André F.J. Scott"

Judge

ANNEX

Sections 96, 97 and 113 of the *Immigration and Refugee Protection Act,* SC 2001, c 27 [*IRPA*] read as follows:

Convention refugee

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

- (*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or
- (*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

Person in need of protection

- **97.** (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally
  - (*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or
  - (*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if
    - (i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,
    - (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,
    - (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and
    - (iv) the risk is not caused by the inability of that country to provide adequate health or medical care.
- **Person in need of protection**

  (2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

Consideration of application

113. Consideration of an application for protection shall be as follows:

- (*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;

- (*b*) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;

- (*c*) in the case of an applicant not described in subsection 112(3), consideration shall be on the basis of sections 96 to 98;

- (*d*) in the case of an applicant described in subsection 112(3), consideration shall be on the basis of the factors set out in section 97 and

    - (i) in the case of an applicant for protection who is inadmissible on grounds of serious criminality, whether they are a danger to the public in Canada, or

    - (ii) in the case of any other applicant, whether the application should be refused because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of Canada.

Section 167 of the *Immigration and Refugee Protection Regulations,* SOR/200-227 [*IRPR*] read ad follows:

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.

FEDERAL COURT

SOLICITORS OF RECORD

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