Federal Court  Cour fédérale

Date: 20180502

Docket: IMM-3924-17

Citation: 2018 FC 474

Toronto, Ontario, May 2, 2018

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

SIRAJI BASHIR HAJI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant brings this application for judicial review of a negative Pre-Removal Risk Assessment [PRRA] dated July 12, 2017 made by a senior immigration officer [Officer].

[2] The Applicant is a failed refugee claimant. He alleges that Ethiopian authorities have targeted him because they believe he has links to the Ogaden National Liberation Front. The

Applicant's claim was dismissed by the Refugee Protection Division [RPD] as not credible, later upheld by both the Refugee Appeal Division and this Court (*Haji v Canada (Citizenship and Immigration)*, 2015 FC 868).

[3] In support of his PRRA, which is now under review, the Applicant sought to remedy the RPD's credibility concerns. He submitted a new affidavit sworn in Kenya by his wife, in which she deposed that she had been "targeted" in Ethiopia as a result of allegations against her husband and "arrested unlawfully". She further deposed that she had "escaped for the safety of [her] life" and currently lived in Kenya as a refugee. The Officer gave the affidavit little weight because the wife had provided no other details about the targeting or the arrest, her statements were not corroborated by objective evidence, and she had an interest in the outcome of the PRRA.

[4] Having considered the submissions of the parties, it is my view that this application comes down to one issue: when faced with evidence that the wife was unlawfully arrested in Ethiopia because of allegations against the Applicant, did the Officer have only two options, either accept that fact as established, or dismiss her evidence as lacking credibility?

[5] The Applicant submits that the Officer is so constrained, such that the decision contains a veiled credibility finding and must be set aside. I disagree: a PRRA officer may, and did in this case, remain unconvinced by affidavit evidence without making a finding as to the affiant's credibility — particularly the affidavit of a third party, the value of which cannot be directly tested. As a result, I am dismissing this application. My rationale is set out below.

II. Standard of Review

[6] The Applicant argues that the Officer made a veiled credibility finding against his wife such that the Officer sidestepped considering whether to hold an oral hearing under section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations]. The Applicant submits that the Officer's failure to consider whether or not to hold an oral hearing is subject to review on a correctness standard, relying on *Zmari v Canada (Citizenship and Immigration)*, 2016 FC 132 [*Zmari*].

[7] The Respondent takes the position that the issue of whether reasonableness or correctness applies to a PRRA officer's failure to consider whether to hold an oral hearing does not arise on the facts of this application, because the Officer made no veiled credibility finding.

[8] In response, the Applicant concedes that if this Court concludes that the Officer made no veiled credibility findings, then the Officer had no reason to consider whether or not to hold an oral hearing — in other words, if no veiled credibility finding was made, then the standard of review on the issue of an oral hearing is irrelevant.

[9] I rely on the articulation recently set out in two cases that comprehensively reviewed this issue — *AB v Canada (Citizenship and Immigration)*, 2017 FC 629 [*AB*], which relied on *Ikeji v Canada (Citizenship and Immigration)*, 2016 FC 1422 [*Ikeji*]. These cases concluded that the issue of whether a PRRA officer has made a veiled credibility finding is reviewed on a standard of reasonableness. As Justice Southcott found:

15 In my view, when the issue is whether a PRRA Officer should have granted an oral hearing, the appropriate standard is reasonableness, as the decision on that issue turns on interpretation and application of the Officer's governing legislation. Section 113(b) of IRPA provides that a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required, and s. 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002/227 [IRPR] prescribes the applicable factors to be 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;	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) whether the evidence is central to the decision with respect to the application for protection; and	b) l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;
(c) whether the evidence, if accepted, would justify allowing the application for protection.	c) la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

16 The arguments in the present case focused on the first of these factors, whether there is evidence that raises a serious issue of the principal Applicant's credibility, and in particular on whether the Officer's reasoning, which is expressed in terms of sufficiency of evidence, is more properly characterized as a veiled credibility finding. At paragraph 20 of the decision in *Ikeji*, Justice Strickland held that reasonableness is the standard of review for questions of veiled credibility findings and, while noting the divided jurisprudence on the standard of review applicable to a PRRA officer's decision respecting an oral hearing, held that this is also reviewable on the reasonableness standard. Justice Strickland reached this conclusion because such a decision is made by the officer by considering the requirements of s. 113(b) of IRPA and the factors in s. 167 of IRPR, which involves a question of mixed fact and law.

> 17 I agree with this analysis and consider it to be particularly applicable to the present case, where the Applicants' position surrounding the issue of an oral hearing turns on the argument that the Officer made a veiled credibility finding. I will therefore apply the reasonableness standard to both issues in this application. However, I also note that my conclusions below would remain the same even if a standard of correctness was applied to the oral hearing issue.

[10] The reasoning in *AB* and *Ikeji* applies to the facts before me. Accordingly, I will assess the Officer's analysis of the wife's evidence on a reasonableness standard. This requires it to have been justified, transparent, and intelligible, as well as to have fallen within a range of outcomes defensible in fact and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

III. Analysis

[11] In determining whether a PRRA officer has made a veiled credibility finding, it is necessary to consider the decision in some detail (*Zdraviak v Canada (Citizenship and Immigration)*, 2017 FC 305 at para 14 [*Zdraviak*]). Therefore, I will excerpt the Officer's analysis of the wife's affidavit:

> It is noted that the applicant's spouse does not provide objective corroborating evidence to support the statements in her affidavit. She does not provide corroborating objective documentary evidence to support that the applicant has been "blacklisted", that he is on the Ethiopian Government watch list, that she was unlawfully arrested and escaped or that she was targeted because of the allegations against her husband. She does not indicate as to what ways she was targeted or by whom. She does not provide details as to when she was arrested, by whom, how long she was incarcerated or how she escaped. She does not articulate as to how she has come to know that her husband has been "blacklisted" or how she has learned that he is on a Government watch list. As such I afford the affidavit little weight as the statements are not corroborated by objective evidence and the affidavit is from someone who has an interest in the outcome of this PRRA.

[12] In this application, the Applicant draws a distinction between the personal experiences to which the wife deposes, and information in her affidavit that is not personal to her. He concedes, for instance, that it was open to the Officer to afford little weight to the wife's statement that her husband was blacklisted and on a watch list.

[13] However, the Applicant argues that the wife's targeting, arrest, and escape — events that she herself would have experienced — had to either be accepted by the Officer or dismissed as not credible (which could not occur unless the Officer considered whether to hold an oral hearing). In the Applicant's view, this is because the wife's affidavit benefitted from the presumption that sworn testimony is true (*Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 (Federal Court of Canada – Appeal Division (QL)).

[14] The Applicant submits that the lack of detail referred to by the Officer is therefore irrelevant, stating in his written submissions that "…what does the length of imprisonment or the manner of escape have to do with anything, as long as the officer accepted, as he had to do without a hearing, that the wife was imprisoned and she did escape?" Similarly, he argues that, if the Officer had believed the wife, there would have been no need for corroborating evidence. In short, the Applicant submits that matters like details, corroboration, and self interest go to credibility and not to weight when they concern events that happened to the wife.

[15] As a result, the Applicant argues that the Officer made a veiled credibility finding against the wife, and should have considered whether to convene an oral hearing to address those concerns. The Applicant relies on the findings in *Zmari*, *Ruszo v Canada (Citizenship and*

Immigration), 2017 FC 788 [*Ruszo*], and *Balogh v Canada (Citizenship and Immigration)*, 2017 FC 654 [*Balogh*].

[16] The Respondent counters by relying on *Ferguson v Canada (Citizenship and Immigration)*, 2008 FC 1067 [*Ferguson*], in which Justice Zinn held that it is open to a decision-maker to assess the probative value of evidence without considering first whether it is credible (at para 26). In particular, Justice Zinn also held that evidence from a witness with a personal interest in the case may be examined for its weight before considering its credibility, because such evidence typically requires corroboration in order to have probative value (at para 27). The Respondent further relies on *Fadiga v Canada (Citizenship and Immigration)*, 2016 FC 1157, in which the Court affirmed the principle that an uncorroborated statement from a non-arm's length party may have little value (at para 26).

[17] The Applicant replies that the principles articulated by Justice Zinn apply only to hearsay evidence, and not to evidence within the direct knowledge of an affiant.

[18] I do not agree with the Applicant's narrow reading of *Ferguson*. In *Nakawunde v Canada (Citizenship and Immigration)*, 2015 FC 309, Justice Zinn noted that "there have been many cases where the court upheld a PRRA officer's finding that the applicant provided insufficient evidence about facts that were not external to them" (at para 26).

[19] In the recent case *Zdraviak*, for instance, Justice Gleeson relied on *Ferguson* in holding that a sworn statement submitted in a PRRA is not necessarily sufficient, in and of itself, to establish the facts set out therein on a balance of probabilities:

> 17 In the face of this consideration of the evidence, Mr. Zdraviak argues that the Officer made a negative credibility finding. To accept this view, I would have to conclude that Mr. Zdraviak's sworn PIF statement must not only benefit from a presumption of truth, but must also be presumed as sufficient, in and of itself, to establish the facts set out in the sworn statement on a balance of probabilities. I cannot accept such a proposition. Having highlighted the frailties of the evidence, including any readily identifiable indicia of Mr. Zdraviak's alleged ethnicity, it was not inappropriate for the Officer to then consider whether the evidentiary threshold had been satisfied. This weighing exercise falls squarely within the Officer's wheelhouse.
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> 18 In this case, the Officer did not question Mr. Zdraviak credibility, rather the Officer concluded that the evidence provided, assuming it was credible, was simply insufficient to establish, on a balance of probabilities, that Mr. Zdraviak was half-Roma and half-Jewish or would be perceived to be so by Hungarian society. The Officer did not err in examining the question of weight prior to considering credibility (*Ferguson v. Canada (Minister of Citizenship & Immigration)*, 2008 FC 1067 (F.C.) at para 27).
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> [Emphasis added.]

[20] When an affiant fails to provide details or corroborating materials, this can reasonably ground a finding that the evidence is insufficient, regardless of whether the information is personal to the affiant or not. For instance, in *Balogh*, relied on by the Applicant in this case, Justice Southcott considered a PRRA officer's treatment of an applicant's statement, holding: "…the Officer noted that [the applicant] had provided little information about [her former partner] or her relationship with him, and little corroborating evidence of the abuse. This can all be characterized as a finding of insufficiency of evidence" (at para 30). Similarly, in *Ikeji*, the officer had reasonably found that the applicant had failed to establish her sexual orientation in

part because her sworn affidavit contained insufficient detail, without having made an adverse credibility finding (at paras 32-34).

[21] In my view, *Zmari* and *Ruszo* do not assist the Applicant, as both are factually distinguishable. In *Zmari*, not only had the PRRA officer clearly put the applicant's credibility at issue, the applicant had never had an oral hearing before the RPD, and so had never had an opportunity to address any credibility concerns with respect to his claim (at paras 18 -20).

[22] Likewise, in *Ruszo*, the officer had dismissed evidence on the basis of inconsistencies between the applicant's affidavit and other evidence provided (at para 18). Thus, unlike in the facts before the Court today, the officer in *Ruszo* made classic credibility findings. Here, however, the Officer found the wife's affidavit to have little probative value — without considering credibility — because of lack of detail, lack of corroboration, and her interest in the PRRA. It is to be remembered that a third-party affidavit sworn in support of a PRRA cannot be tested by an officer. As a result, I do not agree that the Officer's assessment of the wife's affidavit involved a veiled credibility finding.

[23] Alternatively, even if the applicant's case is taken at its highest, and the wife's affidavit is assumed to be sufficient to prove the facts therein, those facts are themselves insufficient to establish a risk to the Applicant in Ethiopia. The affidavit provides no indication when, where, or by whom the wife was arrested, what the allegations against her husband were, or what the basis of her asylum claim in Kenya was. I do not agree with the Applicant's submission that these important links are implicit in his wife's affidavit — and neither did the Officer.

[24] Neither do I agree with the Applicant's alternative argument that the Officer unreasonably afforded the wife's affidavit little weight. First, the Applicant states that it was unreasonable for the Officer to discount the wife's evidence because she had an interest in the PRRA. However, the wife's self-interest was only one of several factors relied on. Therefore, this was not a reviewable error (*Palanivelu v Canada (Citizenship and Immigration)*, 2017 FC 1044 at para 18 [*Palanivelu*]). Second, the Applicant submits that the wife's affidavit was indeed corroborated by a copy of her Kenyan refugee identity card. However, it is clear from the Officer's reasons that the concern was over corroborative documents relating to the details of the wife's arrest, not her status as a refugee.

[25] The Applicant also argues that the Officer was required to consider whether his new evidence cast doubt on the RPD's negative credibility findings. However, since I have concluded that the Officer reasonably gave little weight to the wife's affidavit, I need not consider this issue: her evidence was of little probative value, and so could not have altered the RPD's findings.

[26] Lastly, even if I am incorrect in my analysis and the Officer indeed made a veiled credibility finding against the Applicant's wife, I would still not interfere with the decision. This Court has held that a PRRA officer need not convene an oral hearing to assess credibility concerns relating to third parties (see *Palanivelu* at para 21; *Borbon Marte v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 930 at paras 62-63). This makes sense, since third parties cannot present themselves in the PRRA process to have their evidence tested.

[27] At the hearing of this application, I asked the Applicant's counsel what the Applicant could have done, had an oral hearing been held, to supplement the wife's credibility, since the Applicant could not himself speak directly to the facts at issue. His counsel submitted that the Officer could use the Applicant's answers to assess the Applicant's own credibility. In my view, that answer merely supports this Court's view that an oral hearing is not needed when the credibility of third parties is at issue.

[28] The Applicant makes two further arguments on this point. First, he submits that in his case there was a direct link between his wife's evidence and his own credibility, since his credibility was partially impugned in prior refugee proceedings as a result of his wife's return to Ethiopia. However, this speaks to whether the wife's evidence, had it been sufficiently probative, would have warranted an oral hearing to consider the Applicant's credibility — not whether an oral hearing was required to determine the credibility of the wife's evidence to begin with.

[29] Finally, the Applicant relies on *Zmari*, which held that the decision-maker in that case had unreasonably cast doubt on the credibility of the applicant's brother's letter, which thus reinforced the Court's conclusion that a hearing should have been conducted in the circumstances (at para 22). However, I do not agree that the situation in *Zmari* is analogous for two main reasons.

[30] First, as mentioned above, the applicant in *Zmari* never had the benefit of a refugee hearing, and thus never had a risk assessment prior to his PRRA, which would have provided an opportunity to test his credibility. This was significant to the Court's analysis (*Zmari* at para 20).

Second, the credibility of the applicant himself was clearly at issue (see *Zmari* at para 19), and that was indeed the basis for the Court's finding that an oral hearing was required. The Court's comments with respect to the brother's letter were secondary.

[31] Instead of *Zmari*, I find the analysis in *Firdous v Canada (Citizenship and Immigration)*, 2012 FC 1261 [*Firdous*] to be far more squarely on point. There, the applicant's refugee claim, like in the present case, had also been rejected by the RPD as not credible. The *Firdous* applicant, in her PRRA, submitted evidence of an alleged attack against her grandfather that postdated the RPD's decision. The PRRA officer gave little weight to that evidence, which was found to be insufficient.

[32] On judicial review, Justice Mactavish held that a PRRA interview with the applicant was not required, because what was in issue was the credibility of third parties. Those paragraphs bear repeating, because Justice Mactavish's analysis equally applies to the case at hand:

> [9] However, Ms. Firdous was in Canada at the time of the alleged attack and she could not, therefore, have had any first-hand knowledge of the incident. Indeed, her affidavit does not identify any information that she could have added with respect to the attack on her grandfather. Ms. Firdous' own credibility was not in issue before the PRRA Officer. What was in issue was the credibility of third parties. An interview with a PRRA applicant is not required in such circumstances: see *Borbon Marte v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 930, [2010] F.C.J. No. 1128, at para. 62.
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> [10] What the PRRA Officer had to do was to determine whether Ms. Firdous had adduced sufficient evidenced to establish that the attack had actually taken place. An interview is also not required when the issue is the sufficiency of the evidence: see *Ferguson v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1067, [2008] F.C.J. No. 1308.

IV. Certified Question

[33] The Applicant proposes the following question for certification:

> What is the appropriate standard of review applicable to whether an oral hearing is required in a pre-removal risk assessment determination in the application of section 113(b) of the *Immigration and Refugee Protection Act* and section 167 of the *Regulations*?

[34] Although I recognize divergence in the case law on this point, I decline to certify the Applicant's question because, as counsel conceded, the issue of standard of review would only arise if I found that the Officer had indeed made a veiled credibility finding. As I have concluded that the Officer did not make a veiled credibility finding and in the alternative, even if I am wrong and one was indeed made, that section 167 of the Regulations would not have been engaged, no question will be certified in this case.

V. Conclusion

[35] This application is dismissed. No questions are certified.

JUDGMENT in IMM-3924-17

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. No questions are certified.

3. No costs will issue.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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