Federal Court  Cour fédérale

Date: 20181116

Docket: IMM-751-18

Citation: 2018 FC 1162

Ottawa, Ontario, November 16, 2018

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

ABDULLAHI HASHI FARAH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] The Applicant, aged 27, is a citizen of Somalia. This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [IRPA] of a negative Pre-Removal Risk Assessment [PRRA] conducted by a senior immigration officer [Officer] with Citizenship and Canada pursuant to section 112 of the IRPA. For the reasons that follow, the application is dismissed.

II. Facts

[2] In 1999, the Applicant and his family travelled to Kenya from Mogadishu. In 2000, the Applicant arrived in the United States of America [USA], with his family, as a refugee at the age of ten. He remained in the USA as a permanent resident until 2017. In 2008, the Applicant was convicted of burglary in Minneapolis, USA for which he was subject to a removal order in 2009. His criminal convictions include possession of a fire arm, contempt/obstruction to justice, false name to a peace officer and theft. In 2017, the Applicant arrived in Canada and filed for asylum; however, on December 8, 2017, he was found ineligible to be referred to the Immigration and Refugee Board of Canada [IRB] due to serious criminality, as per subsection 101(1) of the IRPA. The Applicant then applied for a PRRA, with assistance from counsel, claiming that he fears persecution in Somalia, either from Somali authorities or his family, on the basis of his sexual orientation. In his application, the Applicant further indicated that he fears Al-Shabaab if he is sent back to his country.

III. Impugned decision

[3] On January 31, 2018, the Applicant's PRRA application was rejected. According to the Officer, the Applicant would not be subject to risk of torture, risk to life or risk of cruel and unusual treatment or punishment if returned to his country.

[4] After careful consideration of the country conditions in Somalia and the evidence submitted by the Applicant, the Officer was not convinced that "the applicant's activities and profile would lead him to come to the attention of Al Shabaab as a potential target" (Certified

Tribunal Record [CTR], Reasons for Decision, p 9). The Officer further noted that the Applicant has provided "insufficient evidence of his sexual orientation. There are no supporting letters, photographs or affidavits of his relationships" (CTR, Reasons for Decision, p 9). The Officer also noted that the Applicant failed to provide any evidence regarding his family members in Somalia who would oppose to his sexual orientation. Based solely on the documentary evidence presented by the Applicant, the Officer found that it could not establish a direct linkage to the Applicant's personal circumstances. Finally, the Officer was not satisfied that the Applicant is being sought by the authorities or his family members in Somalia for his sexual orientation as he alleges.

[5] According to the Officer, the Applicant has not established that he is being subjected to persecution as per section 96 of the IRPA or that he faces a personalized risk to his life or of cruel and unusual treatment or punishment, or a danger of torture, as per section 97 of the IRPA.

IV. Issues

[6] The Court finds that the following issues to be determined in the present matter are the following:

1. Did the PRRA Officer err in not holding an oral hearing?
2. Did the PRRA Officer err by failing to consider the "compelling reasons" as set out in subsection 108(4) of the IRPA?

[7] While the Court seems to have taken two different paths on the standard of review applicable to a PRRA officer's decision to allow an oral hearing, the Court is of the view that the

applicable standard of review should be that of reasonableness based on substantial authority which demonstrate that "the decision on that issue turns on interpretation and application of the officer's governing legislation" (*Balogh v Canada (Citizenship and Immigration)*, 2017 FC 654 at paras 21-23). In *Matano v Canada (Citizenship and Immigration)*, 2010 FC 1290 at para 10:

> [10] The applicable standard of review when evaluating the PRRA Officer's decision to allow an oral hearing based on the facts in a case is that of reasonableness, as it is a core element of the Officer's competence and legislative mandate. It is related to the exercise of the Officer's discretion and should be awarded deference (*Matute Andrade c. Canada (Citoyenneté et Immigration)*, 2010 CF 1074; *Lopez Puerta v. Canada (Citizenship and Immigration)*, 2010 FC 464). […]

[8] Therefore, the Court shall only intervene if the decision falls outside "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]).

V. Relevant Provisions

[9] Sections 112(1) and 113 of the IRPA reads as follows:

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).	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).
113 Consideration of an application for protection shall be as follows:	113 Il est disposé de la demande comme il suit :

(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) — other than one described in subparagraph (e)(i) or (ii) — 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

a) le demandeur d'asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'il n'était pas raisonnable, dans les circonstances, de s'attendre à ce qu'il les ait présentés au moment du rejet;

b) une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;

c) s'agissant du demandeur non visé au paragraphe 112(3), sur la base des articles 96 à 98;

d) s'agissant du demandeur visé au paragraphe 112(3) — sauf celui visé au sous-alinéa e)(i) ou (ii) —, sur la base des éléments mentionnés à l'article 97 et, d'autre part :

(i) soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un danger pour le public au Canada,

(ii) soit, dans le cas de tout autre demandeur, du fait que la demande devrait être rejetée en raison de la nature et de la gravité de ses actes passés ou du danger qu'il constitue pour la sécurité du Canada;

e) s'agissant des demandeurs ci-après, sur la base des articles 96 à 98 et, selon le cas, du sous-alinéa d)(i) ou (ii) :

Canada; and

(e) in the case of the following applicants, consideration shall be on the basis of sections 96 to 98 and subparagraph (d)(i) or (ii), as the case may be:

(i) an applicant who is determined to be inadmissible on grounds of serious criminality with respect to a conviction in Canada punishable by a maximum term of imprisonment of at least 10 years for which a term of imprisonment of less than two years — or no term of imprisonment — was imposed, and

(ii) an applicant who is determined to be inadmissible on grounds of serious criminality with respect to a conviction of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, unless they are found to be a person referred to in section F of Article 1 of the Refugee Convention.

(i) celui qui est interdit de territoire pour grande criminalité pour déclaration de culpabilité au Canada pour une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans et pour laquelle soit un emprisonnement de moins de deux ans a été infligé, soit aucune peine d'emprisonnement n'a été imposée,

(ii) celui qui est interdit de territoire pour grande criminalité pour déclaration de culpabilité à l'extérieur du Canada pour une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans, sauf s'il a été conclu qu'il est visé à la section F de l'article premier de la Convention sur les réfugiés.

[10] Section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227

[IRPR] reads as follows:

167 For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors

167 Pour l'application de l'alinéa 113b) de la Loi, les facteurs ci-après servent à décider si la tenue d'une

are the following:	audience est requise :
(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.

VI. Submissions of the Parties

A. *Submissions of the Applicant*

[11] The Applicant argues that the Officer rendered an unreasonable decision. According to the Applicant, the Officer made a veiled credibility finding based on the only evidence (the PRRA application) provided by the Applicant about his sexual orientation. The Applicant argues that in *Zmari v Canada (Citizenship and Immigration)*, 2016 FC 132 [*Zmari*], the Court allowed the application for judicial review on the basis that the PRRA officer made a credibility finding by doubting the letter from the applicant's brother. The Applicant also mentioned several Federal Court decisions in which the application for judicial review was granted (*Majali v Canada (Citizenship and Immigration)*, 2017 FC 275 [*Majali*]; *Balogh v Canada (Citizenship and Immigration)*, 2017 FC 654 [*Balogh*]; *Howard v Canada (Immigration, Refugees and*

Citizenship), 2017 FC 780 [*Howard*]). Consequently, the Applicant submits that the Officer failed to consider the factors as set out in s 167 of the IRPR in order to decide whether an oral hearing was required (*Ruszo v Canada (Citizenship and Immigration)*, 2017 FC 788 at para 19).

[12] The Applicant further submits that the Officer breached the duty of fairness by failing to consult the *Chairperson Guideline 9 - Proceedings before the IRB Involving Sexual Orientation and Gender Identity and Expression* [the SOGIE Guidelines] before rendering his decision (*Hernandez v Canada (Minister of Citizenship and Immigration)*, 2005 FC 429).

[13] The Applicant also argues that compelling reasons should have been assessed in the case of the Applicant pursuant to s 108(4) of the IRPA, because the analysis is relevant when considering a claimant's refugee protection. Failure to address the exception under the provision constitutes a reviewable error and, therefore, the Officer's decision should be quashed (See for example *Buterwa v Canada (Citizenship and Immigration)*, 2011 FC 1181 at para 11; *Nagaratnam v Canada (Citizenship and Immigration)*, 2007 FC 1208 at para 17; *Rose v Canada (Minister of Citizenship and Immigration)*, 2004 FC 537 at para 5).

[14] Finally, the Applicant submits that the Officer's decision is unreasonable as he failed to make a reference to the word "persecution" in the letter sent to the Applicant. According to the Applicant, "failure to produce a decision letter which is consistent with the risk assessment indicates that the officer did not(sic) give to this application the care and attention it deserved."

B. *Submissions of the Respondent*

[15] The Respondent, on the other hand, argues that the Officer had no duty to provide an oral hearing. It was reasonable for the Officer to find that there was insufficient evidence on the Applicant's sexual orientation, as he had claimed. The Respondent submits that the Officer undertook the appropriate analysis when assessing the evidence as he did not make a veiled credibility finding. In fact, the Respondent argues that there is a clear distinction to be made between an assessment of credibility and an assessment of weight of the evidence. In *Ferguson v Canada (Citizenship and Immigration)*, 2008 FC 1067 at para 27 [*Ferguson*], this Court concluded that:

> [27] […] When the trier of fact assesses the evidence in this manner he or she is not making a determination based on the credibility of the person providing the evidence; rather, the trier of fact is simply saying the evidence that has been tendered does not have sufficient probative value, either on its own or coupled with the other tendered evidence, to establish on the balance of probability, the fact for which it has been tendered. That, in my view, is the assessment the officer made in this case.

[16] Contrary to the Applicant's argument, the Respondent submits that subsection 108(4) of the IRPA does not apply to the Applicant's situation as he was not found to be a refugee by the IRB. In fact, the analysis of "compelling reasons" under this provision applies "only to persons previously found to be refugees" (*Cardenas v Canada (Citizenship and Immigration)*, 2018 FC 262 at para 27 [*Cardenas*]).

[17] Finally, the Respondent argues that the Officer did not err by omitting to use a specific term in his decision. The decision as a whole is reasonable and should not be found otherwise

due to a lack of a word. As clearly articulated in *Lopez Segura v Canada (Citizenship and Immigration)*, 2009 FC 894 at para 29, "[i]t is not the use of particular words that is determinative; it is whether it can be said on a reading of the decision as a whole that the officer applied the correct test and conducted a proper analysis". Even if the Officer failed to mention the word "persecution" in the decision letter that was sent to the Applicant, the Respondent argues that the jurisprudence has previously established that decisions ought to be read in conjunction with the reasons for decisions and notes of a decision maker.

C. *Reply*

[18] The Applicant argues that his case is distinguishable from *Ferguson* because he provided his own evidence on his sexual orientation in his own statement, rather than from a third party. The Respondent, however, submits that the same counsel for the Applicant had made a similar submission in a similar case in *Nakawunde v Canada (Citizenship and Immigration)*, 2015 FC 309, where this Court rejected the argument and concluded that the PRRA officer's finding was reasonable as it did not constitute a credibility finding.

VII. Analysis

[19] The application for judicial review is dismissed. The Court agrees with the Respondent's position. There is no reviewable error for this Court to intervene in the present application for judicial review.

A. *Did the PRRA Officer err in not holding an oral hearing?*

[20] The Applicant argued that the Officer made a veiled credibility finding when concluding that there was "insufficient evidence" about the Applicant's sexual orientation. The Court notes that the PRRA application was the only evidence presented by the Applicant. Therefore, it was reasonable for the Officer to find that the PRRA application did not amount to new evidence nor was it, in and of itself, sufficient to make any conclusion on the Applicant's sexual orientation. "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* at para 26). This was the case at bar. The Officer neither believed nor disbelieved that the Applicant is homosexual (*Ferguson* at para 34). The Court notes that the Applicant's personal statement in support of his PRRA application, although it came from the Applicant himself, was not supported by any other evidence except by documentary evidence on the country conditions in Somalia. It is clear from the reasons for decision that the Officer was not convinced by the evidence presented by the Applicant on his fear of being persecuted in Somalia based on his sexual orientation.

[21] It is trite law that the Applicant bears the burden of proof in a PRRA application (*I.I. v Canada (Citizenship and Immigration)*, 2009 FC 892 at para 22; *Ferguson* at para 21; *Bayavuge v Canada (Citizenship and Immigration)*, 2007 FC 65). The Officer did not commit an error by concluding that there was insufficient evidence to make any finding on the Applicant's sexual orientation, because the Applicant did not discharge the burden of proof. The Court concludes that the Officer's finding was a "weighing of the evidence, not a credibility finding. Weighing

the evidence is a function of the PRRA and not a reviewable error" (*Mudiyanselage v Canada (Citizenship and Immigration)*, 2018 FC 749 at para 31 [*Mudiyanselage*]). The Officer's decision is reasonable. There was no duty to provide an oral hearing. In *Ikeji v Canada (Citizenship and Immigration)*, 2016 FC 1422) at para 34:

> [34] […] Rather, it was open to the Officer to conclude, without making an adverse credibility finding, that the evidence adduced was not sufficient to establish, on a balance of probabilities, the Applicant's sexual orientation. Accordingly, an oral hearing was not required.

[22] The Applicant further argued that the Officer erred by failing to consider the SOGIE Guidelines. The Court disagrees as there is no obligation for a PRRA officer to apply these guidelines to the Applicant's sexual orientation when dealing with a PRRA (*Mudiyanselage* at para 28). On the contrary, "[t]his Guideline addresses the particular challenges individuals with diverse SOGIE may face in presenting their cases before the Immigration and Refugee Board of Canada (IRB) and establishes guiding principles for decision-makers in adjudicating cases involving SOGIE." [Emphasis added by the Court].

[23] In support of his submissions, the Applicant relies on earlier case law (specifically *Zmari*, *Howard*, *Balogh* and *Majali*) in order to demonstrate that this Court has concluded that the PRRA officers in these decisions have made veiled credibility findings. The Court finds that the case law clearly differs from the present matter. The PRRA officers in the aforementioned decisions have either commented on the corroborating evidence presented by the applicants or they have compared the available evidence in the CTR with the applicants' statements. For instance, the present application for judicial review does not involve a PRRA decision in which the officer raised inconsistencies with information provided by the applicant, therefore doubting

the applicant's own statement (*Balogh* at para 29). In the case at bar, the Applicant has simply not provided the Officer with any evidence to support his allegations, except for his PRRA application.

B. *Did the PRRA Officer err by failing to consider the "compelling reasons" as set out in subsection 108(4) of the IRPA?*

[24] The Court agrees with the Respondent's submissions. The PRRA Officer did not err in his analysis as subsection 108(4) of the IRPA is inapplicable to the Applicant's situation. The Applicant's record shows that he applied for refugee protection, but because he was found inadmissible to Canada due to serious criminality, the IRB simply rejected his claim. As previously established by this Court, "the relief offered by this provision is available only to persons previously found to be refugees" (*Cardenas* at para 28). This was not the case at bar. The Applicant's claim had been rejected by the IRB; consequently, the issue of presenting new evidence to the PRRA Officer was not relevant to the present matter. The Applicant cited several authorities which were also not pertinent in the case at bar as they involve applications for judicial review of decisions of the Immigration and Refugee Board.

[25] The Court finds no error in the Officer's conclusions. The Officer's decision is reasonable and falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para 47).

VIII. Conclusion

[26] The application for judicial review is dismissed. No question of general importance is certified.

JUDGMENT in IMM-751-18

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

There is no question for certification and no order as to costs.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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