Federal Court  Cour fédérale

Date: 20200127

Docket: IMM-5894-18

Citation: 2020 FC 135

Ottawa, Ontario, January 27, 2020

PRESENT: The Honourable Mr. Justice Norris

BETWEEN:

EDGET EREDAW DEMESA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant is a citizen of Ethiopia. He entered Canada on September 20, 2012, at Fort Erie, Ontario, where he made a claim for refugee protection. He had been living in the United States for about four years before that.

[2] The applicant claimed that he had been persecuted in Ethiopia because of his opposition to the ruling party, he had continued to work in opposition to the ruling party since leaving the

country, and he therefore had a well-founded fear of persecution and faced a risk to his life, a risk of torture, and a risk of cruel and unusual treatment or punishment if he returned.

[3] The applicant's refugee claim was heard by the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada on March 26, 2015. For reasons dated November 12, 2015, the RPD rejected the claim on credibility grounds.

[4] On or about November 1, 2016, the applicant submitted an application for a Pre-Removal Risk Assessment [PRRA] under section 113(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. This application was supported by a number of documents which the applicant submitted met the test for admission under section 113(a) of the *IRPA*.

[5] For reasons dated August 31, 2018, a Senior Immigration Officer denied the application. Among other things, the officer determined that the evidence relied on by the applicant either was not new in the requisite sense or it was insufficient "to overcome the findings of the RPD."

[6] The applicant applies for judicial review of this decision under section 72(1) of the *IRPA*. He submits that the PRRA officer's conclusions with respect to the evidence he tendered in support of the PRRA application are unreasonable. He also submits that the decision was made in breach of the requirements of procedural fairness because the officer made negative credibility findings against the applicant without having given him an opportunity to address the officer's concerns in a hearing.

[7] For the reasons that follow, I agree that the officer's conclusion that critical evidence tendered by the applicant was not new in the requisite sense is unreasonable. Since this means that the matter must be reconsidered, it is not necessary for me to determine whether the original decision was made in breach of the requirements of procedural fairness.

[8] A determination concerning the admissibility of new evidence under section 113(a) involves questions of law and mixed fact and law (*Elezi v Canada (Citizenship and Immigration)*, 2007 FC 240 at para 22).

[9] It is well-established that a PRRA officer's findings on questions of mixed fact and law are reviewed on a reasonableness standard: see *Perampalam v Canada (Citizenship and Immigration)*, 2018 FC 909 at para 14; *Aboud v Canada (Citizenship and Immigration)*, 2014 FC 1019 at paras 17-18; *Thamotharampillai v Canada (Citizenship and Immigration)*, 2016 FC 352 at para 18; and *Lakatos v Canada (Citizenship and Immigration)*, 2018 FC 367 at para 13.

[10] That this is the appropriate standard has been reinforced by *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], where the majority of the Court set out a revised framework for determining the standard of review with respect to the merits of an administrative decision (at para 10). Applying *Vavilov*, there is no basis for derogating from the presumption that reasonableness is the applicable standard of review.

[11] I do not need to decide under the revised framework whether a different standard applies to any pure questions of law involved in decisions on the admissibility of evidence under

section 113(a) of the *IRPA*. Assuming for the sake of argument that the PRRA officer's interpretation of this provision is correct in the abstract, as I will explain below, the application of the provision to the new evidence tendered by the applicant is unreasonable.

[12] The majority in *Vavilov* also sought to clarify the proper application of the reasonableness standard on judicial review (at para 143). The principles the majority emphasizes were drawn in large measure from prior jurisprudence, particularly *Dunsmuir v New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9 [*Dunsmuir*]. Although the present application was argued prior to the release of *Vavilov*, the footing upon which the parties advanced their respective positions concerning the reasonableness of the officer's decision is consistent with the *Vavilov* framework. I have applied that framework in coming to the conclusion that the officer's determination that key evidence relied on by the applicant was not new evidence is unreasonable; however, the result would have been the same under the *Dunsmuir* framework.

[13] As discussed in *Vavilov*, the exercise of public power "must be justified, intelligible and transparent, not in the abstract but to the individuals subject to it" (*Vavilov* at para 95). For this reason, an administrative decision maker has a responsibility "to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion" (*Vavilov* at para 96). A reasonable decision "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). An assessment of the reasonableness of a decision must be sensitive and respectful yet robust (*Vavilov* at paras 12-13). Here, the onus is on the applicant to demonstrate that the officer's determinations with respect to the admissibility

of the new evidence are unreasonable. Before the decision can be set aside on this basis, I must be satisfied that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100).

[14] In *Vavilov*, the majority emphasized the importance of the legal constraints that bear on administrative decision-making, including the statutory scheme within which the decision is made, when assessing the reasonableness of a given decision (*Vavilov* at paras 106 and 108). Sections 112(1) and 113(a) of the *IRPA* provide the crucial legal constraints on the officer's decision in this case.

[15] The right to a PRRA under section 112(1) of the *IRPA* is grounded in Canada's domestic and international commitments to the principle of non-refoulement: see *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 at para 10 [*Raza*]. Where there has been a delay between the rejection of a refugee claim and removal from Canada, the question of risk may need to be assessed anew since circumstances may have changed in the interim or the individual may face a new risk. Thus, the purpose of a PRRA "is to determine whether on the basis of a change in country conditions or on the basis of new evidence that has come to light since the RPD decision, there has been a change in the nature or degree of risk" (*Kreishan v Canada (Citizenship and Immigration)*, 2019 FCA 223 at para 116; see also *Shaka v Canada (Citizenship and Immigration)*, 2019 FC 798 at paras 40-47).

[16] A PRRA application is not an appeal or a reconsideration of an earlier decision to reject the claim for refugee protection; it is an assessment of the risk an individual faces at the time of removal. However, the latter assessment may require consideration of some or all of the same factual and legal issues that were considered in the earlier, unsuccessful claim.

[17] The Federal Court of Appeal observed in *Raza* that this potential for overlap creates "an obvious risk of wasteful and potentially abusive relitigation" in a PRRA application (para 12). The *IRPA* attempts to mitigate this risk by limiting the evidence that a failed refugee claimant may rely on in support of a PRRA application. Specifically, section 113(a) of the *IRPA* provides as follows:

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; […].	*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; […].

[18] The Court held in *Raza* that this provision is "based on the premise that a negative refugee determination by the RPD must be respected by the PRRA officer, unless there is new evidence of facts that might have affected the outcome of the RPD hearing if the evidence had been presented to the RPD" (at para 13). To similar effect, in the context of a discussion of the rules of admissibility of evidence on appeals to the RAD, the Federal Court of Appeal stated

with respect to applications under section 112(1) of the *IRPA* that "the PRRA officer must show deference to a negative decision by the RPD and may only depart from that principle on the basis of different circumstances or a new risk" (*Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at para 47).

[19] Section 113(a) of the *IRPA* limits the evidence that a failed refugee claimant may offer in support of a PRRA application to evidence that is "new" in one of three possible senses: (1) the evidence arose after the refugee claim was rejected (e.g. because it relates to events that occurred after the rejection); (2) the evidence was not reasonably available when refugee protection was claimed; or (3) the evidence was reasonably available but the person could not reasonably have been expected in the circumstances to have presented it when refugee protection was claimed. Absent such new evidence, the negative refugee determination must be "respected" by the PRRA officer (*Raza* at para 13). Indeed, the rejection of the claim for refugee protection would presumably be determinative of the PRRA application, since in the absence of new evidence in the requisite sense there will be no evidence to show that the risk now is any different than what was assessed earlier in connection with the refugee claim. The determination of whether evidence tendered in support of a PRRA application meets the test under section 113(a) of the *IRPA* can thus have significant consequences for the application for protection.

[20] The substance of the applicant's PRRA application was that he was at risk in Ethiopia because of his political activities in Canada both before and after his refugee claim was rejected. The applicant submitted in particular that this risk had been intensified by a state of emergency in Ethiopia declared on October 9, 2016, only a few weeks before he filed his PRRA application.

The applicant also submitted that he continued to be targeted by the ruling party in Ethiopia and provided evidence to corroborate this submission.

[21] Among other things, the applicant tendered a package of documents pertaining to the declaration of the state of emergency in Ethiopia on October 9, 2016, and its consequences for opponents of the regime. It will be recalled that the RPD heard the applicant's refugee claim on March 26, 2015, and rejected the claim in a decision dated November 18, 2015. The state of emergency was declared almost a year after the claim was rejected. Despite this, the PRRA officer refused to consider the documents relating to that event, stating simply: "I find these documents were reasonable [*sic*] available and could have been presented to the RPD for consideration." How information concerning an event that had not happened yet could reasonably have been available to the applicant or could have been presented to the RPD is left unexplained. The officer's determination falls well short of the requisite degree of justification, transparency and intelligibility.

[22] Further, the applicant provided a letter dated October 24, 2016, from Ethiopian Satellite Television and Radio (ESAT) which described the activities of that organization in covering the state of emergency as well as the applicant's contributions to ESAT generally. Other documents tendered by the applicant showed that the Ethiopian government blamed the Ethiopian diaspora for using diaspora-based media such as ESAT to incite the public against its rule. Notably, when the state of emergency was declared, the government passed legislation which prohibited "watching or sharing television or radio programs such as ESAT, OMN or other similar terrorist linked media."

[23] The officer does not mention the ESAT letter anywhere in the decision. While this, standing on its own, does not necessarily give rise to a reviewable error because the officer is presumed to have considered the letter, I find that this presumption is rebutted here. As is well-known, the more important the evidence that is not mentioned, the more willing a court may be to infer from the decision maker's silence that the decision was made without regard to that evidence (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 at para 17). The ESAT letter was central to the applicant's claim for protection. An additional consideration supporting the conclusion that the presumption has been rebutted is the fact that while the officer provided an enumerated list of the documents tendered by the applicant and then addressed each of the items on the list *seriatim,* the ESAT letter is not mentioned anywhere. In these respects as well, the officer's determination lacks the requisite degree of justification, transparency and intelligibility.

[24] For these reasons, the officer's conclusion that critical evidence relied on by the applicant did not meet the test for admission under section 113(a) of the *IRPA* is unreasonable. Even if the applicant was alleging the same risk as had been rejected by the RPD – a risk of persecution, a risk of torture, a risk to his life and a risk of cruel and unusual treatment or punishment at the hands of the ruling party in Ethiopia because of his opposition to that party – the evidence he relied upon potentially demonstrated that there had been material developments since the RPD's decision affecting the nature or degree of the risk he faced. The PRRA officer failed to recognize this fundamental point and, as a result, failed to conduct the assessment required under section 113(a) of the *IRPA*.

[25] The officer's decision must therefore be set aside and the matter reconsidered by another decision maker. As I indicated at the outset, given this conclusion, it is not necessary to address the applicant's additional argument that the officer's decision was made in breach of the requirements of procedural fairness.

[26] The parties did not suggest any serious questions of general importance for certification under section 74(d) of the *IRPA*. I agree that none arise.

JUDGMENT IN IMM-5894-18

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.
2. The decision of the PRRA officer dated August 31, 2018, is set aside and the matter is remitted for redetermination by a different decision maker.
3. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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