Federal Court  Cour fédérale

Date: 20200624

Docket: IMM-5034-19

Citation: 2020 FC 722

Ottawa, Ontario, June 24, 2020

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

DANIEL ALLUSHI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant, Mr. Daniel Allushi, seeks judicial review of the pre-removal risk assessment [PRRA] conducted by an Immigration Officer [the Officer] on July 24, 2019 pursuant to sections 112 and 113 of the *Immigration and Refugee Protection Act*, SC 2001 c 27

[the Act]. The Officer found the Applicant would not be subject to risk of persecution or risk of cruel and unusual treatment or punishment if returned to his country of nationality, Albania.

[2] For the reasons that follow, the application for judicial review is dismissed.

II. **Background**

[3] This is Mr. Allushi's second attempt to seek protection in Canada. On both occasions, he arrived irregularly by boat.

[4] The Applicant is the youngest son of a family of six. His father, who was the owner of the family home and some agricultural land, died in 2010. After his death, the children and his wife inherited the house and the land.

[5] The Applicant first left Albania in 2015 and sought refugee protection in Germany. His asylum claim was denied. He then made his way to Canada and claimed refugee protection, alleging fear of his two brothers who lived in Greece.

[6] In December 2015, the Refugee Protection Division [RPD] concluded that while believing the Applicant had disputes with his two brothers who were abusive toward him and who owe him money, it was clear from the Applicant's testimony that his fears in Albania were above all economic. The Applicant found it difficult to find work there. While acknowledging that the economic situation in Albania is difficult, the RPD concluded that these problems affect

the entire population and did not amount to individualized persecution or mistreatment within the meaning of sections 96 and 97 of the Act.

[7] The Applicant unsuccessfully appealed the RPD decision to the Refugee Appeal Division [RAD] and was removed to Albania in May 2017. In June 2017, he says that he visited the family owned agricultural land and noticed that cannabis was being grown on it. He alleges having informed his two brothers of his discovery. The Applicant claims that his brothers told him they had leased the land to drug dealers related to an Albanian elected official and that they had warned him that the lives of all of their family members were in danger should he disclose the situation to anyone. He indicated one of the brothers assaulted him and their mother.

[8] A year later, the Applicant says he informed local authorities of his discovery by showing pictures of cannabis seeds and plantations, but that the police afterwards claimed he fabricated the story and threatened him with death. Again, the Applicant left Albania for Germany where he lived, for a few months without status. He then made his way back to Canada as a stowaway. When the boat docked, he was turned over to the immigration authorities and was allowed to again seek protection by filing a PRRA application on May 10, 2019.

[9] In support of his application, the Applicant submitted several documents:

a) A death certificate for his father;
b) A change of name certificate for himself;
c) A family composition certificate; and
d) A certificate attesting that he holds rights on an agricultural property.

[10] The Applicant also submitted documentary evidence regarding the widespread extent of cannabis cultivation and trafficking in Albania.

III. **Decision under review**

[11] The PRRA officer rejected the application on July 24, 2019, finding that while the situation in Albania is difficult, the Applicant had not met his burden to demonstrate the existence of a personal and objectively identifiable risk in his home country.

[12] The Officer accepted that the Applicant's father had died in 2010 and had left property to his family. However, the Officer held the Applicant had not submitted any evidence to demonstrate that the land had been leased for cannabis cultivation or that the Applicant would be, as a result, at risk of death or ill-treatment in Albania for informing on his brothers and the criminal gang.

IV. **Issues**

[13] The Applicant contends that the Officer provided insufficient reasons to justify his decision and it was therefore unreasonable. The Applicant also contends that the decision was based on veiled credibility concerns and that the Officer erred in failing to conduct an oral hearing pursuant to section 113(b) of the Act and section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations].

V. **Standard of Review**

[14] The parties made no submissions on the applicable standard of review. I am satisfied that, overall, the presumptive standard of reasonableness in the framework set out by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] applies.

[15] The attributes of a reasonable decision were discussed by Justice Rowe in *Canada Post Corp.v Canadian Union of Postal Workers*, 2019 SCC 67 [*Canada Post*] at paras 31-33:

> [31] 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). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
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> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
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> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that

> any shortcomings or flaws relied on . . . are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100). In this case, that burden lies with the Union.

[16] The jurisprudence of this Court regarding the standard of review to apply to the refusal or failure to conduct an oral hearing was unsettled prior to *Vavilov*. In some instances, the reasonableness standard has been applied since the application of paragraph 113(b) of the Act and section 167 of the Regulations is a question of mixed law and fact: *Zmari v Canada (Citizenship and Immigration)*, 2016 FC 132 at para 12 [*Zmari*]; *Thiruchelvam v Canada (Citizenship and Immigration)*, 2015 FC 913 at para 3. In other instances, this decision-making context has been held to raise a question of procedural fairness (*Zmari* at paras 11 and 13; *Nur v Canada (Citizenship and Immigration)*, 2019 FC 951 at para 8; *Suntharalingam v Canada (Citizenship and Immigration)*, 2015 FC 1025 at para 48).

[17] The Court has recently held, considering *Vavilov* and *Canada Post*, that the decision of a PRRA officer not to hold a hearing is a question of procedural fairness: *FGH v Canada (Citizenship and Immigration)*, 2020 FC 54 at para 17.

> [17] The standard of review to be applied in considering the procedural fairness issue—whether the Officer breached the Applicant's right to procedural fairness by failing to conduct an oral hearing—is best reflected in the correctness standard. However the true nature of this analysis is a consideration of whether the procedure was fair having regard to all of the circumstances (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54, also see *Diallo v Canada (Citizenship and Immigration)*, 2019 FC 1324 at paras 14 and 15).

[18] I see no reason to depart from that reasoning.

VI. **Analysis**

A. *Entitlement to an oral hearing*

[19] An oral hearing is generally not available to PRRA applicants. Subsection 113(b) of the Act states that a hearing may be held if, on the basis of the factors prescribed by the Regulations, a hearing is required. Those factors are set out in section 167 of the Regulations.

Hearing – prescribed factors	**Facteurs pour la tenue d'une audience**
167 For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors are the following:	**167** Pour l'application de l'alinéa 113b) de la Loi, les facteurs ci-après servent à décider si la tenue d'une 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.

[20] The Applicant argues that the Officer made veiled credibility findings by framing his conclusions as findings of insufficient evidence. The Applicant submits that a decision maker who says that the evidence presented is insufficient amounts to another way of saying that he does not believe the applicant.

[21] The distinction between an adverse credibility finding and a finding of insufficient evidence is difficult to draw: *Gao v Canada (Citizenship and Immigration)*, 2014 FC 59 at para 32. The exercise of identifying veiled credibility findings is fact specific: *Lopez Puerta v Canada (Citizenship and Immigration)*, 2010 FC 464.

[22] As stated by Justice Favel in *Gul v Canada (Citizenship and Immigration)*, 2019 FC 812 [*Gul*] at para 24:

> [24] The Court has found veiled credibility findings in cases where an officer gave no weight to the applicant's story and professed fears, effectively implicitly rejecting the applicant's evidence as not credible (see for example *Zokai v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1103), in cases where an officer doubted the truthfulness of an Applicant's testimony without providing a valid reason (see for example *Whudne v Canada (MCI)*, 2016 FC 1033, at para 20 [*Whudne*], *Chekroun v Canada (Citizenship and Immigration)*, 2013 FC 737 at para 68), and where officers' findings were based on contradictions in sworn evidence (see *Whudne* at para 20).

[23] In this matter, the Officer was unable to conclude that the Applicant had provided sufficient objective evidence to demonstrate that he was at risk. That did not constitute a veiled credibility finding but a conclusion that the Applicant had failed to meet his evidentiary burden. There was an absence of evidence that could have supported his claim, for example an affidavit

from his mother attesting to the events which he described. In my view, the Officer's findings did not raise a serious issue of credibility that required an oral hearing.

B. *Reasonableness of the Decision*

[24] The burden of proof rests on the Applicant to demonstrate that he is personally at risk if he returns to Albania: *Ferguson v Canada (Citizenship and Immigration)*, 2008 FC 1067 at para 21; *Gul* above at para 19. He claims that he is at risk having denounced the illegal cannabis culture on his family's agricultural land and argues that the Court has recognized that in certain situations, claimants do not require evidence of personalized risk when it can be inferred that they are members of a group that is being discriminated against.

[25] The Applicant relies on *Kanakasingam v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 457 at para 20 [*Kanakasingam*] where Justice McDonald states the following:

> [20] Additionally, it was not reasonable for the Officer to require evidence of a personalized risk of harm. The Officer noted that the Applicant's submissions did not provide "any compelling evidence of the alleged personalized risk that [he] may face in Sri Lanka". However, there was no need for the Applicant to present direct evidence that he would in fact face such targeted risks if sent back to Sri Lanka; rather, it can be inferred by circumstantial evidence by the fact the Applicant is a member of a group that is being discriminated against. (see *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61 at para 53)

[26] *Kanakasingam* involved evidence of escalating and systemic violations of the human rights of young males of Tamil ethnicity in Sri Lanka, a group which the applicant in that case belonged to. Here the Applicant failed to demonstrate that cannabis was being grown by

criminals on his land and that he would be targeted for persecution as a result. He claimed to have taken photographs which were shown to the local authorities. None were included, however, in his documentary evidence. The new basis for his claimed need for protection, the cannabis cultivation on his land, was not corroborated. It was reasonable, therefore, for the PRRA Officer to conclude that the Applicant had provided insufficient evidence to demonstrate the risk he would face in Albania.

[27] In the result, the application for judicial review is dismissed. No serious questions of general importance were proposed and none will be certified.

JUDGMENT IN IMM-5034-19

THIS COURT ORDERS that the application is dismissed. No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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