Federal Court  Cour fédérale

Date: 20200325

Docket: IMM-5998-18

Citation: 2020 FC 422

Ottawa, Ontario, March 25, 2020

PRESENT: Mr. Justice Pentney

BETWEEN:

FILSAN ELMI ABDILLAHI
RAYAN IBRAHIM YOUSSOUF

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Filsan Elmi Abdillahi (the Applicant) and her son, Rayan Ibrahim Youssouf (together referred to as the Applicants), seek judicial review of the denial of their Pre-Removal Risk Assessment (PRRA) by a senior immigration officer on July 25, 2018. They claim that the officer denied them procedural fairness by making veiled credibility findings without giving them the opportunity for a hearing, and erred by applying the wrong legal test to the assessment of their claims.

I. Background

[2] The Applicant is a citizen of Djibouti. In 2008, her father accepted a marriage proposal from Ibrahim Youssouf, a police officer who had inherited considerable wealth from his family. The same year, the Applicant married him. The Applicant's family supported the arranged marriage, and her mother and father encouraged her to stay with her husband despite the fact that she told them he was abusing her.

[3] In 2009, the Applicant gave birth to her son, Rayan Ibrahim Youssouf, and later that year her husband married a second wife. The disagreements continued between the Applicant and her husband, and he continued to beat her.

[4] In 2011, the Applicant gave birth to a daughter. The physical abuse continued. In 2013, her husband came home drunk and beat her badly, leaving her face, arms, and legs bruised, swollen, and bleeding. She went to the police and was told to go back to her husband. At a different police station, she was told to get a doctor's note, which she obtained and presented to the police. However, nothing was done to investigate her husband.

[5] In January 2014, the Applicant went to court to apply for a divorce. The judge granted the divorce but her husband retained custody of both children. The Applicant initially left her husband, but returned to live with him the following month to maintain her relationship with her children. A few months later, she told her husband she wanted to go on a family vacation to the United States, to get away from everything that had happened. Her husband was unable to travel

at that time, and he only allowed her to travel with one of her children, stating they would re-marry upon her return.

[6] The Applicants arrived in the United States in September 2014. A few days later, they went to the Canadian border to claim refugee status, but were refused because of the Safe Third Country Agreement. They returned to the United States and applied for asylum there in February 2015. Their application did not proceed and they never had a hearing.

[7] In February 2017, the Applicants came back to Canada to seek refugee status. They were found to be ineligible for a refugee claim but were offered a PRRA. The Applicant claimed that she risked violence or death at the hands of her ex-husband if she returned to Djibouti, and that there is no state protection for victims of domestic abuse. She also claimed that her family would not protect her because they believed she had brought shame to them by divorcing her husband and leaving the country.

[8] The PRRA was refused because the officer found the evidence failed to demonstrate a risk, and this decision forms the basis for this application for judicial review.

II. Issues and Standard of Review

[9] The issues are: (i) whether the PRRA officer denied the Applicant procedural fairness by making veiled credibility findings without giving her an opportunity to address these questions in an oral hearing; and (ii) whether the PRRA officer applied the wrong test to the assessment of her claim.

[10] When this case was argued, the leading authority on reasonableness review was *Dunsmuir v New Brunswi*ck, 2008 SCC 9 and its progeny. Since then the Supreme Court of Canada has updated and clarified the framework for judicial review in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], as applied in *Bell Canada v Canada (Attorney General)*, 2019 SCC 66 and *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 [*Canada Post*]. The question of the appropriate standard of review must now be re-assessed in light of the *Vavilov* framework.

[11] In view of paragraph 144 of *Vavilov*, I see no reason on the facts of this case to request additional submissions from the parties on either the appropriate standard or the application of that standard. This case is similar to the situation in *Canada Post*, where the Supreme Court stated at paragraph 26 that it was not unfair to decide a case applying the *Vavilov* framework when it had been argued under the *Dunsmuir* approach, because the results would be the same under both frameworks. The same reasoning applies here.

[12] The standard of review that applies to the merits of the PRRA decision is reasonableness. This standard has been applied in previous decisions *(Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43 [*Khosa*]; *Chen v Canada (Citizenship and Immigration)*, 2016 FC 702 at para 13). This has not changed under *Vavilov*.

[13] When reviewing for reasonableness, the Court asks "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). It must be internally coherent, and display a rational chain of analysis (*Vavilov* at para 85).

[14] As such, a decision will be unreasonable if the reasons read in conjunction with the record do not enable the Court to understand the decision maker's reasoning on a critical point (*Vavilov* at para 103). The framework set by this decision "affirm[s] the need to develop and strengthen a culture of justification in administrative decision-making" by endorsing an approach to judicial review that is both respectful and robust (*Vavilov* at paras 2, 12-13).

[15] The standard to be applied to an examination of the PRRA officer's decision whether to hold an oral hearing depends on how the question is framed. Generally the issue of whether an oral hearing is required in administrative decision-making has been viewed as a question of procedural fairness, which has been reviewed on a standard of correctness (see *Khosa* at para 59). However, in the context of PRRA decisions, this has given rise to some debate in the jurisprudence of this Court, because the decision by an officer to hold an oral hearing is a matter of statutory interpretation. For a discussion of the various decisions of this Court on this question, see *Huang v Canada (Citizenship and Immigration)*, 2018 FC 940 at para 12 [*Huang*].

[16] In this case, for the reasons I set out in *AB v Canada (Citizenship and Immigration)*, 2019 FC 165 at para 11, I remain of the view that it is not productive to enter into the debate as to the proper standard of review (see, to the same effect, *Ahmed v Canada (Citizenship and Immigration)*, 2018 FC 1207 at para 22 [*Ahmed*]). Applying the guidance of the Federal Court of Appeal in *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*Canadian Pacific*], in assessing whether procedural fairness has been breached, a

reviewing court must determine whether the procedure the PRRA officer followed was fair or not having regard to all of the circumstances, including the statutory framework, the nature of the substantive rights involved, and the consequences of the decision for the applicant. That is the approach I will apply in this case.

III. Analysis

A. *Did the PRRA officer deny the Applicant procedural fairness?*

[17] The Applicant claims that the requirements for an oral hearing set out in section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*] were met, and the decision must be set aside because she did not have an opportunity to answer the officer's credibility concerns, which involved matters that were central to the decision and would have justified granting the PRRA application.

[18] As a general rule, PRRA applications are decided without an oral hearing. However, a PRRA officer has discretion to hold an oral hearing pursuant to section 167:

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.

[19] An oral hearing is only required where an applicant satisfies all three factors set out in section 167 of the *IRPR* (*Gjoka v Canada (Citizenship and Immigration)*, 2018 FC 292 at paras 12, 18; *Huang* at para 34). The evidence at issue here is the Applicant's evidence of domestic abuse and her family's unwillingness to support her. That the parties do not dispute that this evidence is central to the application (para 167(b)) and would justify granting the application if accepted (para 167(c)). The dispute centres on whether the Applicant's credibility is at issue (para 167(a)).

[20] The key evidence relating to the Applicant's allegations of domestic abuse and that her family would be unwilling to provide her with support is as follows. The Applicant provided a sworn affidavit in which she recounted the abuse she had experienced at the hands of her ex-husband, as well as her family's reaction when she sought assistance from them. She also provided documentary evidence to corroborate her claim of domestic abuse. The Applicant submits that the officer had credibility concerns about this evidence, and denied her procedural fairness in failing to hold an oral hearing.

[21] The Applicant argues that if there were no credibility concerns the officer would not have refused to accept her evidence or required further corroboration. She notes that she had

submitted various documents in support of her claim, which were considered but discounted by the officer. These include the following:

- The interview notes of the Canada Border Services Agency officer who interviewed the Applicant at the border. These notes show that when asked why she sought refuge in Canada, she had stated "conjugal violence – husband." The PRRA officer found the notes provided little detail, and thus did not attribute any probative value to them;
- Her asylum claim in the United States, which contained essentially identical allegations to those contained in her PRRA. There is no assessment of the weight the officer attributed to this document;
- An attestation from a police officer in Djibouti dated December 9, 2013, which indicates that the Applicant filed a complaint against her ex-husband for domestic abuse, and that the police had asked her to obtain a medical certificate to assist in the investigation. The PRRA officer discounted this document because it did not contain any contact information such as the address, phone number, or e-mail address of the police station; in addition, it did not outline any details regarding the investigation or the conclusion reached by the police. The officer concluded that the police attestation was insufficient to demonstrate that the Applicant suffered physical abuse at the hands of her ex-husband, and therefore gave it little probative value;
- The medical certificate dated December 10, 2013, in which the doctor certified that the Applicant was physically assaulted and had bruises in her thoracic region. Once again, the officer noted the lack of contact information such as the address, phone number, or e-mail address of the medical clinic, as well as the lack of detail regarding who carried out

the assault or caused the injuries. For these reasons, the officer attributed little probative value to the medical certificate;

- The divorce certificate, which indicates that the Applicant applied for a divorce because she suffered "aggression and insults" by her ex-husband, and she had been forced to leave her home and was not receiving any allowances from him. The officer notes that the Applicant's husband denied all of the allegations against him, claimed that she had been disobedient, and indicated he would only grant her a divorce if he maintained full custody of the children. The officer concluded that the document did not establish that the Applicant had experienced physical abuse: "On the contrary, the document states that the applicant's ex-husband denied all accusations against him at the divorce hearing." The officer therefore discounted the divorce certificate;
- Medical evidence showing that the Applicant had been circumcised as a young girl, as well as a report from a mental health therapist who had been treating the Applicant for seven months. The mental health report recounted the same narrative as the Applicant had stated in the PRRA as well as her asylum claim in the United States. The officer noted that the author of this report "whose observations are based on the applicant's statements, does not demonstrate having first-hand knowledge of the events that occurred in Djibouti. Consequently, I find that this document bears little probative value in establishing the events which would be in relation to the applicant's condition."

[22] The officer also reviewed the country condition evidence which indicated the risk that certain women in Djibouti face, as well at the prevalence of forced marriages, the lack of protection offered to victims of domestic abuse, and more generally violence against women in that country. The officer accepted that the situation of women in Djibouti is not ideal, but found

that this evidence did not establish that the Applicant was personally at risk of violence at the hands of her ex-husband.

[23] On the question of an oral hearing, the officer's entire analysis is the following:

> I note that the applicant did not have the opportunity to be heard by the Immigration and Refugee Board. However, as provided for in subsection 113(b) of the Act, a hearing may be held for a PRRA application if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required. After a careful review of the application provided by the applicant to date, and in accordance with article 167 of the Regulations, I am of the opinion that an oral hearing is not necessary in this case.

[24] The Applicant submits that this conclusion is unreasonable because the only reason the officer required further corroboration of the narrative set out in her affidavit is because of credibility concerns. The officer did not make explicit credibility findings, but the jurisprudence has recognized that a decision may be based on either explicit or "veiled" credibility findings, which the Applicant contends was done in this case (*Majali v Canada (Citizenship and Immigration)*, 2017 FC 275 at paras 29-33).

[25] The Respondent argues that the officer's decision is not based on veiled credibility findings, but rather on the insufficiency of the evidence submitted by the Applicant to support her claim. A sufficiency assessment goes to the nature and quality of the evidence needed to be tendered and its probative value; in such a case, no oral hearing is required (*Huang* at para 48). In this case, the officer found that the evidence submitted by the Applicant was not sufficient or persuasive enough to discharge her burden of proof.

[26] I agree with the Applicant. The only way to make sense of the reasons provided for the PRRA decision is that the officer required corroboration for the Applicant's claims as set out in her affidavit, but found the corroborating evidence to be lacking (as described above, it was discounted), therefore suggesting the officer did not believe what the Applicant said about why she needed protection (see *Ahmed* at para 38). This was not simply a determination about insufficiency of evidence. Considered as a whole, and in the context of the assessment of a PRRA application, the only plausible interpretation of the decision is that it is based on a veiled credibility finding.

[27] In this case, the Applicant submitted a detailed sworn affidavit setting out the basis for her fears of her husband, and why she would not receive assistance from her family or the authorities if she returned to Djibouti. In support of this, she submitted a variety of documentation.

[28] In assessing the various documents, the officer appears to give no value to the repeated statements by the Applicant to various authorities (the divorce court, the police, the doctors, the American refugee claim or border officials), either because they contain denials by the ex-husband, or do not recount in sufficient detail the specifics, or they do not set out first-hand accounts. I note that in a situation where the claim is of domestic abuse at the hands of an ex-husband, it would be unusual to have the evidence from first-hand witnesses.

[29] The officer's conclusion that the Applicant had not made out her case must have been based on a chain of reasoning that began with some doubt as to her credibility, where her claims were measured against the corroborating evidence, which was found to be lacking. Having

engaged in this credibility assessment, on evidence which both parties agree was essential to the Applicant's claim and which, if believed, would have supported her PRRA application, the officer never gave the Applicant an opportunity to address any of the credibility and the concerns with the evidence. That is what paragraph 113(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] is intended to provide to PRRA applicants (*Ahmed* at para 29, citing *Tekie v Canada (Citizenship and Immigration)*, 2005 FC 27 at para 16). This amounts to a denial of procedural fairness.

[30] In this case, I find that the procedure was not fair. Returning to the approach set out in *Canadian Pacific*, the following factors must be examined in assessing whether the procedure was fair: (i) the statutory framework – here the parties agree that the determinative question in this case is whether the officer conducted a veiled credibility assessment; (ii) the rights involved – here, the rights are of fundamental importance, involving the physical security of the Applicant; and (iii) the consequences for the person – in this case, the decision involves the prospect of returning the Applicant to face a risk of continued abuse at the hands of her husband, with no prospect of assistance from either her family or the authorities in Djibouti.

[31] As noted above, I find that the officer's analysis of the evidence can only be understood as a veiled credibility assessment. Pursuant to paragraph 113(b) of *IRPA*, the officer had a discretion whether to hold an oral hearing, in accordance with the criteria set out in the *IRPR*. However, as Rennie J. stated in *Canadian Pacific* at paragraph 56: "No matter how much deference is accorded administrative tribunals in the exercise of their discretion to make procedural choices, the ultimate question remains whether the applicant knew the case to meet

and had a full and fair chance to respond." For the reasons set out above, I conclude that the Applicant was denied this in the case at bar.

[32] In addition, the officer's explanation for why an oral hearing was not held does not meet the standard of justification set out in *Vavilov*. The decision refers to the legal framework and then states a conclusion. The officer's statement that this was done "[a]fter a careful review of the application provided by the applicant" and "in accordance with article 167 of the Regulations," does not explain how any of the factors were assessed. It is a conclusion that is not supported by any analysis (*Vavilov* at para 102). Even taking into account the administrative context for this type of decision – for example the pressures on officers to process a large number of claims – this is simply not good enough. In view of the significance of the decision for the Applicant, some explanation for how the decision not to hold an oral hearing was made is required.

B. *Did the PRRA officer apply the wrong test to the assessment of the Applicant's claim?*

[33] In light of my conclusion on the previous issue, it is not necessary to address the issue of whether the officer applied the correct test.

IV. Conclusion

[34] For these reasons, the application for judicial review is allowed, and the matter is remitted back to a different officer for reconsideration.

[35] There is no question of general importance for certification.

JUDGMENT in IMM-5998-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The matter is remitted back to a different officer for reconsideration.

3. There is no question of general importance for certification.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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