Federal Court  Cour fédérale

Date: 20200402

Docket: IMM-5349-19

Citation: 2020 FC 473

Ottawa, Ontario, April 2, 2020

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

MOHAMMAD, MAHDAWI

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant seeks judicial review of the pre-removal risk assessment [PRRA] conducted by an immigration officer [the Officer] on July 16, 2019 pursuant to sections 112 and 113 of the *Immigration and Refugee Protection Act*, SC 2001 c 27 [Act]. The Officer concluded that the Applicant would not be subject to persecution or to a risk of cruel and unusual treatment or punishment if returned to his country of birth and habitual residence, Kuwait.

II. Background

[2] The Applicant was born in Kuwait in January 1964. Despite being born in that country, he is a “Bidoon”, which, in Arabic, means “without citizenship”. On January 19, 2014, he left Kuwait with his wife, who is a Kuwaiti citizen, to come to Canada. He sought refugee protection on February 6, 2014. He alleged having been discriminated against all of his life for being a Bidoon. As such, he claimed not being able to work legally or have access to medical treatment. He also alleged being refused the renewal of his “green” or “review” card since 2008 and not even being able to get a driving licence. He also indicated having been arrested on several occasions and beaten while in detention regarding matters related to his Bidoon status.

[3] Although it recognized that Bidoons face discrimination in Kuwait on several issues such as education, employment, medical care and in obtaining civil documents, the Refugee Protection Division [RPD], after noting that the situation is worst for “undocumented” Bidoons than it is for “documented” Bidoons, found that a review of the Applicant’s personal circumstances led it to believe that he was a “documented” Bidoon. As a result, the RPD concluded that the discrimination or less favourable treatment endured by the Applicant did not amount to persecution.

[4] The RPD further concluded that the Applicant did not act like someone who was fearing persecution or exposed to a risk under subsection 97(1) of the Act. In particular, the RPD took issue with the fact that the Applicant had the opportunity to leave Kuwait and seek refugee protection in 2012 when he accompanied his wife for medical treatment in France, but did not.

The RPD was also concerned by the fact that starting in April 2013, which is before he was issued a Canadian visa, the Applicant held several visas from different countries but did not use any of these to flee Kuwait. The RPD concluded that the Applicant was forum shopping, which affected his credibility.

[5] The RPD further noted that the Applicant had failed to disclose that he unsuccessfully sought refugee status in the United Kingdom on two occasions in 2010. The RPD dismissed, as being unreasonable and unsatisfactory, the Applicant's explanation that disclosing such information would have instantly invalidated his refugee claim in Canada.

[6] The Applicant unsuccessfully appealed the RPD decision to the Refugee Appeal Division [RAD]. However, he did not seek judicial review of the RAD decision. As a result, he became the subject of a removal order. On March 3, 2015, the Applicant sought the deferral of his removal to Kuwait until such time he was afforded a PRRA. That request was refused a few days later and the Applicant was directed to report for his removal, first on March 20, 2015, and then on April 10, 2015. On April 8, 2015, the Court stayed, on consent, his removal to Kuwait. This eventually led to the cancellation of the removal order.

[7] The Applicant submitted his PRRA application on December 3, 2015 asserting a new risk stemming from a judgment of the Kuwaiti Court of Appeal [KCA], dated February 14, 2014. The KCA held that the Applicant was an Iranian national and not a Kuwaiti Bidoon, which he vehemently denies. He claimed that this judgment is part of a strategy of the Kuwaiti government to accuse Bidoons of being foreign nationals, which facilitates their deportation to foreign

countries. This, he said, puts him at risk, if returned to Kuwait, of being arrested for unlawful residency, having no access to the courts and being the subject of an administrative deportation to Iran.

[8] If deported to Iran, where he has never travelled to, has no siblings and does not speak the language, the Applicant claimed that he would be deemed an “Ahwazi Arab”, considered an inferior class and persecuted and discriminated against in terms of education, employment, housing, political activities and cultural rights. He could also be considered a threat to national security since the Iranian government consider persons who speak Arabic, have any association to Arab holiday celebrations, wear Arabic clothing, or own an Arabic book brought from outside of Iran to present such a threat. This, in turn, would put him at risk of arbitrary arrest, imprisonment, torture and even execution.

[9] The Applicant asserted in his PRRA application that although the KCA judgment bears a date that precedes the RPD hearing, it was not until his wife travelled to Kuwait on July 1, 2014, that she noticed said judgment in the mail. According to the Applicant, it is only when his wife returned to Canada, on August 15, 2014, that she made him aware of the KCA judgment. In light of the conclusions of that judgment, the Applicant claimed having then contacted his former counsel to inquire as to whether it could be included in the evidence for consideration before the RAD. However, according to the Applicant, he was told that the deadline for filing supporting documentation and arguments had already passed.

[10] Finally, the Applicant insisted that he be provided with an oral hearing "[i]f the PRRA Officer intends to make any negative decisions based on a credibility assessment" (PRRA Application, Certified Tribunal Record at p. 542).

[11] The Officer found the Applicant not to be at risk under either section 96 and subsection 97(1) of the Act. First, he concluded that the Applicant had restated the allegations of risk that had already been considered by the RPD and the RAD.

[12] Second, and more importantly, the Officer dismissed the Applicant's contention that the KCA judgment was evidence of a new risk that has arisen since the RPD and the RAD rendered their decisions. His main findings in that regard are that the Applicant failed:

a. To provide sufficient corroborative evidence of when the judgment was mailed to his home in Kuwait;

b. To declare in his affidavit in support of his PRAA application that the "Respondent" named in the KCA judgment was someone else;

c. To disclose to the RPD and the RAD that the Kuwaiti authorities believed he was an Iranian national, since that issue arose, according to the KCA judgment, in December 2012 approximately; and

d. To disclose as well to these two decision-makers the legal process and interactions he had with various tribunals in Kuwait regarding his citizenship issue since, as stated in the KCA judgment, he had appeared twice in court proceedings in view of challenging the Kuwaiti authorities' contention that he is an Iranian national.

[13] The Applicant claims that the Officer's decision is both unreasonable and in breach of the principles of procedural fairness. On reasonableness, the Applicant contends that the Officer completely disregarded the evidence that demonstrated that he could not have reasonably presented the KCA judgment to the RPD or the RAD, given the circumstances surrounding the discovery of the that judgment.

[14] In particular, he contends that it was unreasonable for the Officer to blame him for not having provided sufficient corroborative evidence of when the judgment was mailed to his home in Kuwait. The Applicant explains that both he and his wife provided sworn evidence to the Officer that his wife discovered the KCA's judgment when she returned to Kuwait for a visit in July 2014 and that it was only when she returned from that trip in August, that she made him aware and handed him said judgment. He therefore contends that it is obvious, from the evidence on record, that the KCA judgment was mailed to his home in Kuwait between February and July 2014.

[15] Regarding the fact that the KCA judgment was not filed before the RAD, the Applicant submits that the Officer did not question his evidence that he contacted his former counsel as soon as he became aware of said judgment, but was advised that the deadline for submitting new evidence for consideration had passed. He contends that the Officer should have concluded that he could not reasonably have been expected to have presented this document before the rejection of his appeal to the RAD.

[16] The Applicant argues that since the Officer's finding that the KCA judgment was not evidence of a new risk was based on erroneous findings of facts, it should be set aside. The Applicant claims that to the extent the KCA judgment is capable of proving a fact that was unknown to him at the time of the RPD hearing, it meets the criteria of "newness" established by the Federal Court of Appeal in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 at para 13 [*Raza*] and should therefore have been considered by the Officer as evidence of a new risk if he is to return to Kuwait.

[17] On procedural fairness, the Applicant claims that he was entitled to an oral hearing before the Officer since the Officer implicitly disbelieved his evidence that the Kuwaiti authorities consider him an Iranian national. In particular, he submits that the Officer's finding that he had failed to provide any explanation as to why he did not disclose the proceedings before the Kuwaiti courts regarding the allegations that he is Iranian clearly engaged his credibility.

[18] As a result, the Applicant submits that the Officer was at least required to consider the factors set out in section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations] and to consider, in doing so, whether the evidence to which these credibility concerns relate – the KCA judgment – was central to his conclusion that the Applicant was not at risk if returned to Kuwait. This is especially true, since the Officer was requested, in the PRRA application, to hold an oral hearing if he had any doubts as to the Applicant's credibility.

III. Issues and Standard of Review

[19] This case raises the following two issues:

a. Is the Officer's decision reasonable?

b. Was the Applicant entitled to an oral hearing before the Officer?

[20] Both parties agree that the standard of review applicable to the merits of the Officer's decision is the standard of reasonableness and that the recent decision of the Supreme Court of Canada in *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] has operated no change in this regard (*Mbula-Kolela v Canada (Citizenship and Immigration)*, 2020 FC 260 at para 9).

[21] *Vavilov* reaffirms that administrative decision-makers "are understood to possess specialized expertise on all questions that come before them" (*Vavilov* at para 28) and that the reviewing court conducting a reasonableness review must, in order to fully respect the distinct adjudicating role delegated to these decision-makers by the legislator, "focus on the decision the administrative decision-maker actually made, including the justification offered for it, and not on the conclusion the court itself would have reached in the administrative decision-maker's place" (*Vavilov* at para 15 and 75).

[22] This is why it is generally understood that reasonableness review finds its starting point in judicial restraint and has always been, and is still considered as a deferential standard of review (*Vavilov* at para 26 and 75). In other words, the reviewing court must guard against

"conduct[ing] a *de novo* analysis or seek[ing] to determine the "correct" solution to the problem" (*Vavilov* at para 83).

[23] A reasonable decision will be one "that is based on an internally coherent and rational chain of analysis" (*Vavilov* at para 85). In other words, a reasonable decision will be one that "exhibit[s] the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100) and which is justified "in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99, quoting from *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 and 74).

[24] As for the standard of review applicable to the issue of whether the Applicant was entitled to an oral hearing, the parties acknowledge that there is some divergence in the jurisprudence of this Court as in some cases, when the matter is viewed as one of procedural fairness, the correctness standard is applied, whereas in others, when the matter is viewed as one of misinterpretation or misapplication of section 167 of the Regulations, the reasonableness standard is applied (*Zmari v Canada (Citizenship and Immigration)*, 2016 FC 132 at para 11-13; *Nur v Canada (Citizenship and Immgration)*, 2019 FC 951 at para 8; *Huang v Canada (Citizenship and Immigration)*, 2018 FC 940 at para 12-16 [*Huang*]; *A.B. v Canada (Citizenship and Immigration)*, 2017 FC 629 at para 13-15; *Blidee v Canada (Citizenship and Immigration)*, 2019 FC 244 at para 11).

[25] However, given my conclusion regarding the first issue, it will not be necessary to address the second issue.

IV. Analysis

[26] According to subsection 112(1) of the Act, any person in Canada, other than a person referred to in subsection 115(1) of the Act, who faces an enforceable removal order may apply to the Respondent Minister for protection by seeking a PRRA. The effect of a positive PRRA is to stay the removal order.

[27] A PRRA is to be considered on the grounds set out in sections 96 and 97 of the Act, but it is neither an appeal nor a reconsideration of a refugee determination previously made under these two provisions (*Huang* at para 20). Indeed, subsection 113(a) of the Act provides that a PRRA applicant whose refugee claim has been denied, as is the case here, "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".

[28] In *Raza*, the Federal Court of Appeal established five criteria to be met for evidence to qualify as "new evidence" admissible under paragraph 113(a) of the Act. These criteria, which are cumulative, are the following: credibility, relevance, newness, materiality and express statutory conditions:

> [13] As I read paragraph 113(*a*), it 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. Paragraph 113(a) asks a number of questions, some expressly and some by necessary implication, about the proposed new evidence. I summarize those questions as follows:

> 1. Credibility: Is the evidence credible, considering its source and the circumstances in which it came into existence? If not, the evidence need not be considered.
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> 2. Relevance: Is the evidence relevant to the PRRA application, in the sense that it is capable of proving or disproving a fact that is relevant to the claim for protection? If not, the evidence need not be considered.
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> 3. Newness: Is the evidence new in the sense that it is capable of:
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> (a) proving the current state of affairs in the country of removal or an event that occurred or a circumstance that arose after the hearing in the RPD, or
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> (b) proving a fact that was unknown to the refugee claimant at the time of the RPD hearing, or
>
> (c) contradicting a finding of fact by the RPD (including a credibility finding)?If not, the evidence need not be considered.
>
> 4. Materiality: Is the evidence material, in the sense that the refugee claim probably would have succeeded if the evidence had been made available to the RPD? If not, the evidence need not be considered.
>
> 5. Express statutory conditions:
>
> (a) If the evidence is capable of proving only an event that occurred or circumstances that arose prior to the RPD hearing, then has the applicant established either that the evidence was not reasonably available to him or her for presentation at the RPD hearing, or that he or she could not reasonably have been expected in the circumstances to have presented the evidence at the RPD hearing? If not, the evidence need not be considered.
>
> (b) If the evidence is capable of proving an event that occurred or circumstances that arose after the RPD hearing, then the evidence must be considered (unless it is rejected because it is not credible, not relevant, not new or not material).

[29] Here, as indicated previously, the Officer held that the KCA judgment was not “new evidence” within the meaning of subsection 113(a) of the Act essentially because the Applicant was aware, well before the RPD hearing, of the issue of whether the Kuwaiti authorities

considered him as an Iranian national and not as a Bidoon. The Officer noted in that regard that the Applicant had provided no explanation as to the reason he had not disclosed the legal process he was involved in with various Kuwaiti tribunals regarding this issue in the course of his refugee claim.

[30] The Respondent claims that it was open to the Officer, in these circumstances, to find that the KCA judgment was not evidence of a new risk that the Applicant could not reasonably have been expected to have presented to the RPD or the RAD. Therefore, according to the Respondent, the Applicant's submissions relating to the date he discovered the KCA judgment are immaterial to the question of whether said judgment constituted evidence of a new risk.

[31] The newness of evidence, the Respondent says, cannot be tested solely by the date of the document the Applicant wishes to introduce in evidence; what is important is rather the event or information sought to be proved by that document (*Raza* at para 16).

[32] The Respondent stresses the fact that the Applicant acknowledged, in the affidavit he signed in support of his judicial review application, having made a deliberate choice not to disclose to the RPD the Kuwaiti court proceedings regarding his citizenship status in Kuwait.

[33] In said affidavit, the Applicant affirms he did not mention the Kuwaiti court proceedings in his refugee claim and refugee appeal because, at the time, he did not have a judgment from the KCA and, therefore, would not have been able to support his allegations with any evidence. He

adds that it was always his intention to bring this evidence forward as soon as the KCA made a decision in his case (Applicant's Record, p. 27, at para 52-53).

[34] He claims, therefore, that in such context, he could not reasonably have been expected to have presented this evidence prior to becoming aware of the KCA judgment, which for all intents and purposes, legally modified his status in Kuwait from a Bidoon to an Iranian national. Therefore, the Applicant concludes, his submissions with respect to when he discovered the KCA judgment and as to why he did not disclose the issue regarding his status in Kuwait earlier, are both relevant and material to the question of whether the KCA judgment constituted evidence of a new risk.

[35] I believe the Applicant, in the rather unique circumstances of this case, has a valid point. However, it is not so much that this point engages the principles of procedural fairness, as contended by the Applicant in his written submissions, but rather that it weakens, in my respectful view, the reasonableness of the Officer's decision. My reasons for this conclusion are as follows.

[36] Ultimately, the KCA judgment was discarded by the Officer as evidence of a new risk because the Applicant did not disclose to the RPD the existence of the court proceedings that led to that judgment. The problem with that finding is that it assumes that the risk associated to the fact he might be an Iranian national in Kuwait would have been assessed by the RPD. However, at the time that his refugee claim was denied and at the time that he appealed that decision to the RAD, all the Applicant knew, according to the evidence on record, is that a decision of an

Iranian court had rejected the Iranian government's claim that he was an Iranian citizen, as opposed to a Bidoon and that the appeal before the KCA was pending.

[37] The Officer fails to explain in his decision how revealing the existence of the Kuwait court proceedings could reasonably have been considered by the RPD – or the RAD – as evidence of a risk requiring an assessment under sections 96 or 97 of the Act. In my view, at that specific point in time, one could only reasonably conclude, without knowing about the KCA judgment, that such risk was purely speculative and need not to be assessed. In other words, that risk, at that point in time and as I alluded to at the hearing, had not yet crystallized to the extent that no one in Canada with an interest in the present matter, including the Applicant himself, knew about the KCA judgment.

[38] This is why the issue regarding when the Applicant discovered the KCA judgment becomes critical. On that particular point, I agree with the Applicant that by simply stating that he "provide[d] insufficient corroborating evidence of when the document was mailed to [his] home in Kuwait", the Officer committed a reviewable error since, in so doing, the Officer disregarded, without providing any explanation, the sworn evidence from both the Applicant and his wife that the existence of KCA judgment was only discovered when the Applicant's wife visited Kuwait in the summer of 2014 and was only brought to the attention of the Applicant when his wife came back from that trip.

[39] The Applicant's wife explained in her affidavit that knowing that the Applicant was under a lot of stress with his refugee claim procedures in Canada and that the KCA judgment

would greatly upset him due to the persecution he faces in Kuwait, the best course of action was to bring the judgment with her to Canada and give it to the Applicant in person, rather than telling him about it over the phone (Applicant's Record, p. 300, at para 22 to 25).

[40] What reasonably stems from the evidence presented to the Officer is that the KCA judgment was mailed sometime between February 14, 2014, which is the date the judgment bears, and July 2014, when the Applicant's wife says she found that document in the mail at the couple's home in Kuwait. Again, the Officer does not explain in his decision why that evidence was disregarded. I agree with the Applicant that this amounts to a finding of fact made without regard for the material that was before the Officer. Although a reviewing court will only interfere with an administrative decision-maker's factual findings in "exceptional circumstances", the Court's intervention will be justified when the decision-maker has "fundamentally misapprehended or failed to account for the evidence before it" (*Vavilov* at para 125-126). This, in my view, is the case here.

[41] Coupled with the Officer's shortcoming in his chain of reasoning regarding the crystallization of the risk stemming from the Kuwaiti court proceedings related to the Applicant's status in Kuwait, I conclude that this error justifies the Court's intervention in this case as the Officer's decision, due to said shortcomings, does not, in my view, bear the hallmarks of reasonableness.

[42] In other words, said decision, in the unique circumstances of this case, fails to exhibit the requisite degree of justification, intelligibility and transparency in relation to the relevant factual

and legal constraints that bear on the decision (*Vavilov* at para 99). Here, I am particularly mindful of the "principle of responsive justification" set out in *Vavilov* for cases where the decision of the administrative decision-maker may have harsh consequences "that threaten an individual's life, liberty, dignity or livelihood". This principle entrusts on administrative decision-makers in such cases a "heightened responsibility […] to ensure that their reasons demonstrate that they have considered the consequences of a decision and that those consequences are justified in light of the facts and law" (*Vavilov* at paras 133 and 135). The present case is one of these cases and I respectfully believe that the impugned decision comes short of this heightened standard.

[43] I note, in closing, that nothing in this case turns on the fact that the Applicant did not bring the KCA judgment to the RAD's attention. The Applicant explained to the Officer that he had reached out to his counsel at the time, in order to have the document placed before the RAD but was advised that the deadline for doing so had expired. The Officer did not question this explanation and there is nothing on record suggesting that the Applicant did not make reasonable efforts to file the KCA judgment with the RAD.

[44] This judicial review application will therefore be granted and the matter will be remitted to a different PRRA officer for redetermination. There is no question for certification raised by the parties. I agree that none arise.

JUDGMENT in file IMM-5349-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted;

2. The decision of the Officer, dated July 16, 2019, dismissing the Applicant's Pre-Removal Risk Assessment application is set aside and the matter is remitted to a different immigration officer for redetermination;

3. No question is certified.

"René LeBlanc"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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