Federal Court  Cour fédérale

Date: 20160204

Docket: IMM-564-15

Citation: 2016 FC 132

Ottawa, Ontario, February 4, 2016

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

IMAD ZMARI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant is a 42 year old Palestinian who has applied for judicial review of a decision dated December 5, 2014, rejecting his application for a restricted pre-removal risk assessment.

I. Background

[2] The Applicant joined the Palestinian Liberation Organization in 1989 when he was 16 years old. In 1993 and 1994 he was arrested and beaten by Israeli authorities on suspicion of being a member of an illegal organization and throwing stones. In March 1995, he joined the Palestinian Authority as an officer in the General Intelligence Directorate [GID], a secret police agency known in Arab countries as the *Mukhabarat*. Despite being an officer of the GID, the Applicant was arrested and jailed by the GID on various occasions and for various reasons, the last of which was following his third request to resign from the GID when he was jailed for about a week. After he was granted leave to visit friends and family in Jordan in March 2000, the Applicant fled from there to the United States, utilizing a temporary visa previously issued to him in 1998 when he had been sent to the US to receive training from the Central Intelligence Agency on the protection of VIPs. In early 2001, the Applicant learned that the GID had sent police officers to his home in Palestine in October and November 2000 to arrest him, and also that his father had been detained at the police station and questioned as to his whereabouts for two hours.

[3] According to the Applicant, living without status in the US made him feel anxious and nervous, so he came to Canada on March 23, 2003, making a claim for refugee protection the same day. Two days later, his claim was referred to the Refugee Protection Division [RPD] of the Immigration and Refugee Protection Board [the Board], and on April 29, 2003, the RPD received his Personal Information Form. In November 2005, after the Canada Border Services Agency [CBSA] had completed two reports as to the Applicant's inadmissibility, the CBSA

requested the RPD to suspend his claim until the Immigration Division [ID] of the Board could determine if he was inadmissible. In October 2008, the ID found the Applicant inadmissible for two reasons: one, under paragraph 34(1)(f) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*Act*], because he had been a member of the Palestinian Authority, an organization that had recently engaged in terrorist acts (although it had not done so while the Applicant had been a GID officer); and two, under paragraph 35(1)(a) of the *Act*, by reason of crimes against humanity which the *Mukhabarat* regularly committed while he was a GID officer. Leave for judicial review of the ID's decision was denied by this Court in October 2009.

[4] In February 2009, the Applicant applied for a restricted pre-removal risk assessment [PRRA] as well as permanent residence by way of a spousal sponsorship with his wife who is a Canadian citizen and the mother of the Applicant's two young, Canadian-born children. In March 2009, a PRRA officer found that, if deported to Palestine, the Applicant would be at risk under section 97 of the *Act*. In January 2011 the Applicant's permanent residence application was refused due to his inadmissibility. Nearly five years after the PRRA officer's positive risk assessment, CBSA completed its danger assessment on March 10, 2014, concluding that the Applicant was not a danger to Canada. The PRRA officer's risk assessment, CBSA's danger assessment, additional documentation, and the Applicant's submissions were all then sent to a Director, Case Determination [the Director], at Citizenship and Immigration Canada. In a letter dated December 5, 2014, the Director refused the Applicant's restricted PRRA application despite CBSA deeming him not to be a danger to Canadian society and the PRRA officer finding him to be at risk if returned to Palestine.

II. The Director's Decision

[5] The Director found that the Applicant would not be at risk of torture, risk to life or risk of cruel and unusual treatment or punishment if he was removed to Palestine. The Director reviewed the facts pertaining to the Applicant and considered the situation in the West Bank, including the political situation and the recorded human rights abuses by the Palestinian Authority and its police forces.

[6] The Director found "Mr. Zmari's actions are not consistent with an individual who faces a risk to life, a risk of torture or a risk of cruel and unusual treatment or punishment." The Director noted that the Applicant willingly joined the Palestinian Authority, received promotions, and was selected for specialized training in the US. The Director also found that although the Applicant travelled outside the West Bank, he had not attempted to stay in Jordan. In addition, the Director stated that the Applicant had not made a claim for asylum at the earliest possible opportunity, remaining in the US for three years before seeking asylum in Canada.

[7] The Director acknowledged the Applicant's expressed fears of the Palestinian Authority, Hamas, and Israel. However, with respect to Hamas and Israel, the Director found insufficient evidence to support the Applicant's fears in this regard. As to the Palestinian Authority, the Director acknowledged that the PRRA officer had accepted the Applicant's allegation, supported by his brother's letter, that the GID had ordered his return and threatened to arrest him. The Director, though, stated that this letter was "self-serving" and consequently gave it "little weight." The Director also found the Applicant's concern about his passport, which had been

sent to his brother for renewal and possibly taken by the Palestinian Authority, "speculative" and, consequently, gave the disappearance of the passport "very little weight." Although the documentary evidence before the Director clearly showed that Palestinians suspected of collaboration with Israel face serious reprisals, including torture and execution, the Applicant's absence from the West Bank since March 2000 meant he had had little opportunity to provide any tangible intelligence to the Israelis since that time, making it speculative and unlikely that he might be seen as an Israeli collaborator.

[8] The Director made the following conclusion on the Applicant's risk:

> My review of the information on file does not lead me to conclude that Mr. Zmari has a subjective fear of returning to the West Bank, nor has he demonstrated an objectively-identifiable risk. … He states that he was imprisoned on a number of occasions, however his career with the General Intelligence division of the Palestinian Authority suggests that he was an employee who was trusted enough to be sent on specialized training to the United States, trusted enough to be assigned to guard Bill Clinton when he travelled to Jericho, and who was promoted to the rank of Sergeant Major within five years of his service. Mr. Zmari was permitted to travel into Jordan on at least three occasions that he has recounted, and although he recounts one occasion when he was turned back at the border, this appears to be as a result of his lack of proper documents and not persecutory treatment. Finally, although Mr. Zmari provides objective supporting evidence of his imprisonment in 1994, he provides insufficient supporting evidence of imprisonment by the Palestinian Authority between 1995 and 2000.
>
> Consequently, for all of the afore stated reasons, I am satisfied on a balance of probabilities that Mr. Zmari is not likely to face personalized risks as identified in section 97 of IRPA – namely that he is unlikely to be tortured, face cruel or unusual treatment or be killed if returned to the West Bank.

III. Issues

[9] The three issues raised by the Applicant may be rephrased as follows:

1. What is the appropriate standard of review?
2. Did the Director err and deny procedural fairness by failing to have an oral hearing before making adverse and determinative credibility findings?
3. Did the Director err by unreasonably disregarding the evidence from the Applicant's brother?

IV. Analysis

A. *What is the appropriate standard of review?*

[10] The appropriate standard of review applicable to whether an oral hearing is required in a PRRA determination is open to some question. The Court's recent decisions in this regard diverge and follow one of two paths.

[11] One path finds the applicable scope of review to be a standard of correctness with no deference accorded to the decision-maker, because the issue of whether an oral hearing is required is a question of procedural fairness. See, e.g.: *Suntharalingam v Canada (Citizenship and Immigration)*, 2015 FC 1025 at para 48, 257 ACWS (3d) 924; *Antoine v Canada (Citizenship and Immigration)*, 2015 FC 795 at para 12, 258 ACWS (3d) 153; *Matinguo-Testie v Canada (Citizenship and Immigration)*, 2015 FC 651 at para 6, 254 ACWS (3d) 149; *Vargas Hernandez v Canada (Citizenship and Immigration)*, 2015 FC 578 at para 17, 254 ACWS (3d)

912; *Negm v Canada (Citizenship and Immigration)*, 2015 FC 272 at para 33, 250 ACWS (3d) 317; *Micolta v Canada (Citizenship and Immigration)*, 2015 FC 183 at para 13, 249 ACWS (3d) 826; *Fawaz v Canada (Citizenship and Immigration)*, 2012 FC 1394 at para 56, 422 FTR 95; and *Ahmad v Canada (Citizenship and Immigration)*, 2012 FC 89 at para 18, 211 ACWS (3d) 409.

[12] The other path applies a deferential standard of reasonableness because the application of paragraph 113(b) of the *Act* and section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*] is a question of mixed law and fact. See, e.g.: *Thiruchelvam v Canada (Citizenship and Immigration)*, 2015 FC 913 at para 3, 256 ACWS (3d) 394; *Kulanayagam v Canada (Citizenship and Immigration)*, 2015 FC 101 at para 20, 248 ACWS (3d) 921; *Abusaninah v Canada (Citizenship and Immigration)*, 2015 FC 234 at para 21 249 ACWS (3d) 843; *Ibrahim v Canada (Citizenship and Immigration)*, 2014 FC 837 at para 6, 244 ACWS (3d) 177; *Kanto v Canada (Citizenship and Immigration)*, 2014 FC 628 at paras 11-12, 242 ACWS (3d) 912; *Bicuku v Canada (Citizenship and Immigration)*, 2014 FC 339 at paras 16-17, 239 ACWS (3d) 723; *Chekroun v Canada (Citizenship and Immigration)*, 2013 FC 737 at para 40, 436 FTR 1; *Ponniah v Canada (Citizenship and Immigration)*, 2013 FC 386 at para 24, 229 ACWS (3d) 1140; and *Adetunji v Canada (Citizenship and Immigration)*, 2012 FC 708 at para 27, 218 ACWS (3d) 616.

[13] In my view, whether an oral hearing is required in a PRRA determination raises a question of procedural fairness. As noted by the Supreme Court in *Mission Institution v Khela*, 2014 SCC 24 at para 79, [2014] 1 SCR 502, "the standard for determining whether the decision maker complied with the duty of procedural fairness will continue to be 'correctness'."

Accordingly, the Director's determination in this case not to convoke a hearing should be reviewed on a standard of correctness. This requires the Court to determine if the process followed by the Director achieved the level of fairness required by the circumstances of the matter (see: *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 115, [2002] 1 SCR 3).

[14] As for the Director's decision as a whole, it is settled law that a PRRA decision must be reviewed against a standard of reasonableness (see, e.g.: *Sing v Canada (MCI)*, 2007 FC 361 at para 55, 307 FTR 1; and *Figurado v. Canada (Solicitor General)*, 2005 FC 347, [2005] 4 FCR 387). This standard is applicable in addressing the third issue below.

B. *Did the Director err and deny procedural fairness by failing to have an oral hearing before making adverse and determinative credibility findings?*

[15] It must be noted that a hearing is not automatically mandated by paragraph 113(b) of the *Act*, which provides that: "a hearing *may* be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required [emphasis added]." The Minister's discretion in this regard is somewhat constrained though by the prescribed factors set forth in section 167 of the *Regulations*, which stipulates:

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	*a*) l'existence d'éléments de preuve relatifs aux éléments

the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;	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.

[16] Whether each of these three prescribed factors must be present before a hearing "is required" is another question upon which the Court's jurisprudence diverges. For example, in *Mosavat v. Canada (Citizenship and Immigration)*, 2011 FC 647 at para 11, 203 ACWS (3d) 359, the Court stated that: "An oral hearing is only required if all of the factors set out in s. 167 of the Regulations are met (*Bhallu v Canada (Solicitor General)*, 2004 FC 1324)". However, in *Hurtado Prieto v Canada (Citizenship and Immigration)*, 2010 FC 253, 186 ACWS (3d) 205, the Court found that:

> [30] … section 167 describes two types of circumstances where issues of credibility will require an oral hearing. Paragraph (a) relates to the situation where evidence before the officer directly contradicts an applicant's story. Paragraphs (b) and (c), on the other hand, essentially outline a test whereby one is to consider whether a positive decision would have resulted but for the applicant's credibility. In other words, one needs to consider whether full and complete acceptance of the applicant's version of events would necessarily result in a positive decision. If either test is met, an oral hearing is required.

[17] In the present case, it is unnecessary to decide whether all or merely some of the prescribed factors must be present before a hearing "is required." It is not necessary because in view of *Tekie v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 27 at para 16, 50 Imm. L.R. (3d) 306, section 167 becomes operative where credibility is an issue which could result in a negative PRRA decision; the intent of the provision is to allow an applicant to face any credibility concern which may be put in issue.

[18] Unlike most refugee claimants, the Applicant never had an oral hearing before the RPD because his claim was suspended pending a determination as to his inadmissibility. Thus, in this case, the Applicant has never had an opportunity to address any credibility concerns about his fear of the Palestinian Authority.

[19] The Applicant's credibility was clearly at issue in the following passage from the Director's reasons:

> Mr. Zmari's actions are not consistent with an individual who faces a risk to life, a risk of torture or a risk of cruel and unusual treatment or punishment. Mr. Zmari willingly joined the Palestinian Authority, and continued to carry our [sic] his duties within the General Intelligence directorate, which included the arrest of persons suspected of collaboration with the Israeli government or occupying forces, or persons believed to act against the PA (generally, supporters of Hamas). He was selected as a group of staff who traveled to the United States for specialized training in the protection of VIPs, and performed this duty when former US President Bill Clinton traveled to Jericho. It is not likely that this duty would have been assigned to individuals suspected of being enemies of the Palestinian Authority. On the contrary, it is more likely that persons selected for this specialized training and related duties would be individuals who have demonstrated their loyalty to the PA, and who were considered to be trustworthy. Mr. Zmari's narrative regarding the punishments he alleges to have been subject to because of his insubordination does not correlate

> with his selection for this specialized training overseas, his assignment to this duty, or his promotions with the PA, such that he had obtained the rank of Sergeant Major within five years.

[20] The Director's determination that the Applicant's narrative "does not correlate" with his actions, assignments and promotions with the GID is an implicit rejection of the Applicant's story and a veiled credibility finding against him. The punishments suffered by the Applicant at the hands of the GID are central to his claim; he fears the Palestinian Authority because, if arrested, he would be subject to torture for having deserted. Although the PRRA officer's risk assessment was not binding on the Director (see: *Muhammad v Canada (Citizenship and Immigration)*, 2014 FC 448, 454 FTR 161), it is nonetheless clear that the Director, in making this veiled credibility finding against the Applicant, disagreed with the PRRA officer's acceptance of the Applicant's story some five and one-half years earlier. The Applicant's evidence, if accepted (as it was by the PRRA officer), could have grounded a claim for protection, and in these circumstances, an oral hearing was required before the Director's negative PRRA decision was made (and, perhaps, all the more so because, as noted above, the Applicant's claim and his credibility had not been assessed by way of an oral hearing before the RPD).

C. *Did the Director err by unreasonably disregarding the evidence from the Applicant's brother?*

[21] The Director's decision states that: "In the absence of any additional supporting evidence, I find the letter from Mr. Zmari's brother to be self-serving, and I give it little weight." This determination is problematic, especially in the context of this case where fairness dictated that a hearing should have been held before the Director rejected the Applicant's restricted PRRA

application. The Director is, of course, entitled to assign little or no weight to documentary evidence based upon its reliability. However, by discounting or discrediting this letter as "self-serving", the Director in effect finds that the veracity of its content is doubtful (see: *Hamza v Canada (Citizenship and Immigration)*, 2013 FC 264 at para 38, 429 FTR 93). This Court has determined that a document said to be self-serving introduces "suspicion into the decision-making process," and a failure to provide an applicant with an opportunity to address concerns raised by such a document can amount to a breach of the duty of fairness (see: *Wen v Canada (Citizenship and Immigration)*, 2013 FC 1159 at para 4, 235 ACWS (3d) 785).

[22] In my view, the Director's treatment of this letter is unreasonable and cannot be justified. It is tantamount to making yet another veiled credibility finding which is neither transparent nor justifiable. Characterizing this letter as self-serving casts doubt on the credibility and independence of the Applicant's brother, and the Director should have explained why it deserved little weight. Furthermore, it serves to reinforce the conclusion above that a hearing should have been conducted in the circumstances of this case, not only to put this credibility concern to the Applicant and receive a response, but also to assess the Applicant's own credibility vis-à-vis his fear of the Palestinian Authority and the reasons for such fear.

V. Conclusion

[23] In view of the foregoing reasons, the Applicant's application for judicial review is granted, the Director's decision is set aside, and the matter returned for a new determination by a different delegate of the Minister of Citizenship and Immigration. No question of general importance is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that: the application for judicial review is allowed; the matter is returned to the Minister of Citizenship and Immigration for redetermination by a different director of case determination; and no question of general importance is certified.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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