Federal Court  Cour fédérale

Date: 20170323

Docket: IMM-2002-16

Citation: 2017 FC 305

Ottawa, Ontario, March 23, 2017

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

PAL PETER ZDRAVIAK

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Mr. Zdraviak, is a citizen of Hungary. He entered Canada in May 2013 and claimed protection on the basis of his Roma and Jewish ethnicity. Between 2012 and 2014, Mr. Zdraviak was charged with and convicted of a number of criminal offences, including assault causing bodily harm. In July 2014, he was found to be inadmissible to Canada for serious criminality, his refugee claim was terminated and a deportation order was issued.

[2] Mr. Zdraviak applied for a Pre-Removal Risk Assessment [PRRA] in April 2015. He claimed that he faced a risk of harm from right-wing extremist groups and a racist Hungarian society because of his ethnicity. The PRRA Officer concluded that Mr. Zdraviak was not a person in need of protection as defined in sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, [IRPA]. The PRRA was denied.

[3] Mr. Zdraviak submits that in refusing the PRRA the Officer breached his right to procedural fairness by making veiled negative credibility findings and not conducting an oral hearing. He argues that the sufficiency of evidence and negative credibility findings reached by the Officer were unreasonable and that the Officer erred in assessing state protection.

[4] The application raises the following issues for the Court's consideration:

A. Was there a breach of procedural fairness?;

B. Were the Officer's findings relating to the sufficiency of evidence, credibility and inconsistencies in the evidence unreasonable?; and

C. Did the Officer err in addressing the issue of state protection?

[5] Having considered the parties written submissions and their oral arguments, I am unable to conclude that there was a breach a procedural fairness. I am also satisfied that the Officer's sufficiency of evidence findings were reasonable. In particular, it was not unreasonable for the Officer to conclude that Mr. Zdraviak had failed to introduce sufficient evidence to establish he is of half-Roma ethnicity or that he is perceived to be Roma in Hungarian society. The application is dismissed for the reasons set out below.

II. Standard of Review

[6] The parties submit that issues of procedural fairness are to be reviewed against a standard of correctness (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190 [*Dunsmuir*], *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at paras 52-53 and *Reinhardt v Canada (Attorney General)*, 2016 FCA 158 at para 14). I agree. In considering issues of fairness on a correctness standard, the Court is required to determine if the process followed by the PRRA Officer achieved the level of fairness required by the circumstances of the matter (*Zmari v Canada (Minister of Citizenship and Immigration)*, 2016 FC 132 at para 13 [*Zmari*] citing *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 115).

[7] There is also no dispute as to the standard of review to be relied upon in assessing the Officer's findings of fact and mixed fact and law in the context of a PRRA application. These issues will be assessed against a reasonableness standard (*Dunsmuir* at paras 51, 54 and *Rathnavel v Canada (MCI)*, 2013 FC 564 at para 19).

III. Analysis

A. *Was there a breach of procedural fairness? Were the Officer's findings relating to the sufficiency of evidence, credibility and inconsistencies in the evidence unreasonable?*

[8] The applicant's procedural fairness and reasonableness arguments are linked, and I will address them together.

[9] The applicant submits that the Officer breached his right to procedural fairness by failing to hold an oral hearing in accordance with section 113 of the IRPA and section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, [IRPR].

[10] Paragraph 113(b) of the IRPA provides that a hearing may be held where the Minister, based upon consideration of prescribed factors, is of the opinion that a hearing is required. Section 167 of the IRPR sets out the prescribed factors:

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.

[11] Mr. Zdraviak argues, relying on the decision of Justice Keith Boswell in *Zmari*, that section 167 is engaged where credibility is an issue. He further submits that as his claim for refugee protection was never heard, he has never had the benefit of an oral hearing where credibility could have been assessed. He argues that his evidence of discrimination was set out in

a sworn statement and that statement benefits from a presumption of truth, absent a valid reason to doubt that truthfulness. He further submits that the sworn statement was supported by corroborating documentary evidence.

[12] The applicant submits that while the Officer did not expressly question the credibility of his sworn statement, the insufficiency of evidence finding was a veiled credibility finding. He argues that this is reflected in the Officer's concerns related to the documentary evidence, concerns that would not have arisen if the Officer found the sworn statement to be credible. He submits that in reviewing the Officer's decision, this Court must go beyond the "insufficient evidence" language used by the Officer and recognize that credibility was in issue.

[13] The jurisprudence cited by the applicant affirms that a reviewing court must consider more than the Officer's choice of words in determining whether credibility was actually the basis for an Officer's decision (*Zokai v Canada (Minister of Citizenship and Immigration)* 2005 FC 1103 at para 12, *Liban v Canada (Minister of Citizenship and Immigration)* 2008 FC 1252 at para 14 and *Chekroun v Canada (Minister of Citizenship and Immigration)* 2013 FC 738 at paras 70-71).

[14] To determine if the Officer did make credibility findings, it is necessary to consider the decision in some detail.

[15] The decision notes that the Officer was in possession of Mr. Zdraviak's Personal Information Form [PIF] and other documentary evidence that was provided in support of the

PRRA. The Officer listed and reviewed this evidence, and noted inconsistencies between the sworn PIF statement and information provided in the context of a pre-sentence interview. Having noted the inconsistencies, the Officer then highlighted "… the common aspects of the statements". These included the allegations of mistreatment based on ethnicity in school and from society and that, although Mr. Zdraviak was fair skinned and blonde, he had nonetheless been mistreated because the community was aware of his father's ethnicity. The fact that the Officer noted inconsistencies and consistencies between the various pieces of evidence does not amount to a credibility finding, express or implied.

[16] Having generally reviewed the evidence, the Officer then considered Mr. Zdraviak's profile. The Officer noted that Mr. Zdraviak has the evidentiary burden of establishing the grounds of his application. He noted that Mr. Zdraviak himself acknowledged that neither his name nor his appearance demonstrate that he is of Roma or Jewish background. The Officer noted that attempts at relocation within Hungary to escape discrimination were reportedly unsuccessful because Mr. Zdraviak's ethnic identity was reflected in a "Work History Document Book". This book was not produced. The Officer noted (1) the poor quality of documentary evidence; (2) the absence of information relating to both his mother's ethnicity and harassment based on ethnicity in a letter from his mother; and (3) the absence of an explanation for how documentary evidence was obtained. Having highlighted the frailties of the documentary evidence, the Officer concluded that it was of little probative value and gave it little weight.

[17] In the face of this consideration of the evidence, Mr. Zdraviak argues that the Officer made a negative credibility finding. To accept this view, I would have to conclude that Mr.

Zdraviak's sworn PIF statement must not only benefit from a presumption of truth, but must also be presumed as sufficient, in and of itself, to establish the facts set out in the sworn statement on a balance of probabilities. I cannot accept such a proposition. Having highlighted the frailties of the evidence, including any readily identifiable indicia of Mr. Zdraviak's alleged ethnicity, it was not inappropriate for the Officer to then consider whether the evidentiary threshold had been satisfied. This weighing exercise falls squarely within the Officer's wheelhouse.

[18] In this case, the Officer did not question Mr. Zdraviak credibility, rather the Officer concluded that the evidence provided, assuming it was credible, was simply insufficient to establish, on a balance of probabilities, that Mr. Zdraviak was half-Roma and half-Jewish or would be perceived to be so by Hungarian society. The Officer did not err in examining the question of weight prior to considering credibility (*Ferguson v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1067 at para 27).

[19] The Officer's decision is justified, transparent and intelligible. It falls within the range of possible, acceptable outcomes defensible in respect of the facts and law (*Dunsmuir* at para 47). The decision was reasonable.

[20] Having concluded that the Officer's analysis was not based on a finding of credibility, I also conclude that section 167 of the IRPR was not engaged. The Officer was not required to conduct an oral hearing. There was no breach of procedural fairness.

B. *Did the Officer err in addressing the issue of state protection?*

[21] Having concluded that the Officer reasonably found that Mr. Zdraviak had not established a profile that placed him at risk, I need not address the state protection issue.

IV. Conclusion

[22] Having found no breach of procedural fairness and concluding that the Officer's decision as it related to Mr. Zdraviak's ethnicity was reasonable, the application is dismissed.

[23] The parties have not identified a question of general importance, and none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed. No question is certified.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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