Federal Court  Cour fédérale

Date: 20171222

Docket: IMM-5352-16

Citation: 2017 FC 1191

Ottawa, Ontario, December 22, 2017

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

GHULAM HASSAN HAJI ALIKHANI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant, who is a citizen of Iran, seeks judicial review of a decision of a delegate of the Minister of Immigration, Refugees and Citizenship [the Delegate], dated September 13, 2016, whereby the Delegate concluded, on redetermination of his pre-removal risk assessment application [PRRA Application] made in 2009 pursuant to sections 112 and 113 of the *Immigration and Refugee Protection Act*, SC 2001 c. 27 [the Act], that he is not likely to face

more than a mere possibility of being personally subjected to a risk to his life, or to a risk of torture or of cruel and unusual treatment or punishment if removed to Iran.

II. Background

[2] The Applicant is now 57 years old. He has been in Canada for more than 30 years. He currently has no status in this country and faces a removal order. His Canadian immigration history leading to the present PRRA Application can be summarized as follows.

a) The Applicant entered Canada in October 1986, at which time he indicated his desire to make a refugee claim fearing reprisals from the Iranian authorities due to his association with the Mujahideen-e-Khalq, also known now as the People's Mojahedin Organization of Iran [MEK or PMOI], a left-wing Muslim group founded in 1965 which was first involved in the protest that led to the downfall of the Shah of Iran and the establishment of the Islamic Republic of Iran in 1979, but which shortly after such establishment launched an armed struggle to topple the Islamic Republic;

b) He made his refugee claim on January 1, 1989. In the meantime, he was issued a ministerial permit enabling him to remain in Canada. While under ministerial permit, the Applicant travelled twice to a pro-MEK camp located in Iraq [Camp Ashraf];

c) In April 1992, the Applicant was present at the Iranian Embassy in Ottawa when the Embassy was attacked by a group of dissidents opposed to the Iranian regime. Shortly after the attack, he was intercepted while attempting to leave Canada for Camp Ashraf using someone else's passport;

d) As a result of these incidents, the Applicant was convicted of a number of offences under the Criminal Code and on September 27, 1995, a deportation order was issued against him due to his criminality;

e) On June 24, 1997, the Applicant was found to be a Convention Refugee by the then Convention Refugee Determination Division of the Immigration and Refugee Board of Canada [the Board]. The Board concluded that the Applicant's activities since arriving in Canada had clearly put him at risk of persecution if he returned to Iran. By the same token, it dismissed the Respondent's claim that the Applicant was excluded from refugee protection under Article 1F(a) of the Refugee Convention on account of his involvement, both in Iran and in Canada, with an organization – the MEK – found to have committed crimes against humanity during the time of said involvement. The Board found that there was no evidence that the Applicant had been personally involved in the commission of such crimes;

f) The Respondent successfully challenged the Board's decision before this Court. On September 1, 2000, the Board, upon redetermination, found that although there was a reasonable chance that the Applicant would face persecution on return to Iran, he was excluded, as claimed by the Respondent, from refugee protection on the basis of Article 1F(a) of the Refugee Convention. The Applicant unsuccessfully challenged the Board's redetermination;

g) In August 2001, the Applicant filed an in-Canada application for permanent residence on the basis of humanitarian and compassionate considerations [H&C application]. For the purpose of said application, the Respondent asked the PRRA

unit for a risk opinion. On February 24 2003, the PRRA unit found that it was highly likely that the Applicant was known to the Iranian authorities as a MEK supporter and thus as someone opposed to the regime in Iran. He concluded that should the Applicant return to Iran, he could be charged with "acting against state security" and "membership in a proscribed organization", two charges punishable with death in Iran. Finally, the officer determined that no internal flight alternative was available to the Applicant in Iran;

h) In August 2004, the Applicant's H&C application was denied; his subsequent attempt to have that decision judicially reviewed was also denied; and

i) Between 2004 and 2011, the Applicant's removal was prevented by his lack of travel document.

[3] The Applicant's PRRA Application was submitted in 2009. It was rejected on April 29, 2011, but that decision was judicially overturned by consent of the Respondent on October 26, 2011. As a result, said application was sent back for redetermination. On redetermination, assessments were conducted pursuant to subsections 172(2)(a) and (b) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations] as the Applicant was someone described in subsection 112(3)(c) of the Act, that is an applicant whose refugee claim had been rejected on the basis of Article 1 (F) of the Refugee Convention.

[4] These assessments examined, on the one hand, whether the Applicant's removal to Iran would put him at risk pursuant to section 97 of the Act, and, on the other hand, whether the

Applicant, if such risks were found, should nevertheless not be allowed to remain in Canada on the basis of the nature and severity of the acts he committed in relation to his involvement with the MEK or of the danger he constitutes to the security of Canada.

[5] The section 97 assessment was performed in December 2011. The officer conducting the assessment found that while the Applicant's activities in Canada were 19 years earlier, it was possible that his name would still appear on a government list of perceived Iranian dissidents. The officer was also persuaded that the Applicant's allegiance to MEK put him at risk as defined in section 97. Therefore, it was more likely than not, according to the officer, that the Applicant would face a risk for his life, or of cruel or unusual treatment or punishment if returned to Iran.

[6] On March 26, 2014, the danger assessment was completed by the Canadian Border Services Agency [CBSA]. The Agency found that the Applicant did not constitute a danger to the security of Canada but that the acts he had committed were significantly severe. These acts ranged from voluntary joining the MEK in 1979, supporting it, once in Canada, through the organization's Toronto office, travelling on two occasions to a pro-MEK camp in Iraq and attempting to travel to that camp a third time, being present and significantly involved in the attack on the Iranian Embassy in Ottawa, and collecting funds for the MEK from other Iranian nationals in Canada. It concluded as follows:

> "[The Applicant] was a member of the MEK, an organization that has committed crimes against humanity and acts of terrorism. He was a member for at least 21 years, from 1979 until at least the time of his hearing before the [Convention Refugee by the then Convention Refugee Determination Division] in 2000. [The Applicant] came to Canada in 1986 and while here, he continued his involvement in the group's activities over the next 14 years at least.

> While seeking its protection, [The Applicant] used Canada as an operational base from where he was able to raise funds for the MEK and travel to Camp Ashraf, their military base, in Irak (sic) on 2 occasions fully funded by the organization and on another occasion, used someone else's travel documents in an attempt to travel to Iraq for a third time. In addition, [The Applicant] took part in a violent attack on the Iranian Embassy in Ottawa, in what were internationally coordinated MEK attacks. His activities on behalf of the MEK indicate a high level of dedication and of involvement in the furtherance of the organization's objectives and as such, [The Applicant] made a voluntary, knowing and significant contribution to the MEK's criminal purpose activities with the MEK (sic).
>
> Considering the information available at this time, the CBSA does not believe that [The Applicant] constitutes a danger to the security of Canada. However, the CBSA considers based on the above analysis that "[The Applicant]'s acts reach a significant level of nature and severity."

[7] In April 2014, the Applicant was provided with a copy of both assessments as well as an opportunity to respond, which he did in May 2014.

[8] In July 2016, the Applicant was informed by the Delegate that his final decision on redetermination would be referring to the most recent and current country information documentation available at the Immigration and Refugee Board website and other annually published and publicly available material. As his most recent submissions dated back to May 2014, the Applicant was offered the opportunity to update said submissions, which he did on August 26, 2016.

[9] As indicated at the outset of these Reasons, the Delegate issued his decision on redetermination on September 13, 2016, rejecting the Applicant's PRRA Application. In a 25-page decision, the Delegate stated first the task at hand, which was to consider and allow, or

reject, the Applicant's PRRA Application, and assess whether the Applicant was a person who, by virtue of the nature and severity of his past acts or the danger he poses to the security of Canada, should not be permitted to remain in Canada. He stressed that he was not bound by any of the previous findings holding that the Applicant would be at risk if returned to Iran, including the section 97 assessment performed in December 2011, which, he said, was "the trigger to the present phase of the PRRA process pursuant to section 113(d)."

[10] After establishing the background facts of the case, the Delegate proceeded to assess the risk for the Applicant of a return to Iran. He noted that the Applicant had left Canada twice after claiming refugee status to travel to Camp Ashraf in Iraq, and that his third attempt to reach the camp aborted when the Applicant was intercepted with someone else's passport after the Embassy attack. He noted that all expenses for these trips were paid by the MEK. The Delegate highlighted that the Applicant's story that he had been visiting Iraq to find his brother, whom he believed to be a prisoner of war, was not credible.

[11] The Delegate also noted that the Iranian government may be aware of the Applicant's involvement with the MEK due to the publicity surrounding his arrest in Canada in 1992. However, he stressed that the Applicant had failed to provide any evidence of the threat (phone call) he allegedly received due to his involvement in the Embassy attack. The Delegate found that at this time, some 24 years later, there was no remnant of publicity connecting the Applicant to the Embassy attack and no indication that he had come to the attention of any Iranian officials since 1992.

[12] The Delegate also noted that the Applicant's family members living in Iran appeared to be living normal lives despite their past affiliation to the MEK.

[13] The Delegate then turned his mind to whether or not a risk of persecution arose from the fact the Applicant may be questioned upon his return to Iran on his past association with the MEK. After a review of documentary evidence, the Delegate concluded that the Applicant did not have the profile of a MEK member who would be persecuted upon his return to Iran as he did not hold a high rank within the organization. As such, the Applicant was unlikely to be on any blacklist. Furthermore, the Delegate observed that there were ways for the Applicant to ensure that his return to Iran is as smooth as possible.

[14] Despite noting that there are reports on the mistreatment of political prisoners in Iran and that a mention of the MEK is akin to a "enemy of the state" type of accusation, the Delegate found that the highlighted cases of mistreatment appeared to be linked to other crimes such as civil servants providing state secrets to the MEK or fomenting protests, and not to cases of mere membership or past membership. As such, those reports provided limited value in examining the Applicant's case.

[15] In brief, the Delegate acknowledged that Iran has a poor human rights record and that several people are executed every year for various crimes. He noted that the statistics regarding the mistreatment faced by prisoners is unclear given the lack of monitoring permitted within the judicial/penitentiary system. However, he also concluded that the MEK is not currently popular

in Iran and, as such, only represent a limited threat to the regime. Other groups such as the Kurds are of more interest to the authorities.

[16] The Delegate observed that ex-combatant MEK members had been repatriated and did not appear to have been persecuted upon their return to Iran.

[17] Ultimately, the Delegate concluded that the Applicant could be questioned upon his return to Iran regarding his MEK involvement and the embassy attack in 1992 but that given the limited role the Applicant played, there was nothing to suggest that he would be of interest to Iranian prosecutors some 24 years later and that there was even less of a chance that he be persecuted as a result. After noting that the Applicant's family members may be able to assist him in minimizing the questioning, the Delegate held that the Applicant was not likely to face more than the mere possibility of the risks identified in section 97 of the Act.

[18] The Applicant essentially claims that the Delegate fatally erred in considering whether he was at risk, in returning to Iran, because of his past association with the MEK. He says that in doing so, the Delegate ignored evidence of his continued involvement and commitment to that organization and failed therefore to consider the risk he actually faces in returning to Iran where the MEK is still considered an "enemy of God".

III. Issue and Standard of Review

[19] The sole issue to be determined in this case is whether the Delegate committed a reviewable error in assessing the risk the Applicant faces if returned to Iran.

[20] The standard of review applicable to the Delegate's decision is that of reasonableness (*Belaroui v Canada (Citizenship and Immigration),* 2015 FC 863 at paras 9-10; *Nguyen v Canada (Citizenship and Immigration),* 2015 FC 59, at para 4; *Wang v Canada (Citizenship and Immigration)*, 2010 FC 799 at para 11). That standard will be met where the impugned decision fits comfortably with the principles of justification, transparency and intelligibility and falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir v New Brunswick,* 2008 SCC 9, at para 47).

IV. Analysis

[21] Having been excluded from refugee protection under Article 1F(a) of the Refugee Convention, the Applicant, pursuant to section 112(3)(c) of the Act, cannot obtain such protection through a PRRA. His PRRA Application, therefore, can only be considered in the manner provided for in subsection 113(d) of the Act and section 172 of the Regulations, that is on the basis of the factors set out in section 97 of the Act and in considering whether said Application should be refused because of the nature and severity of the acts committed by the Applicant or because of the danger the Applicant constitutes to the security of Canada.

[22] A positive PRRA decision in such context would provide the Applicant with a stay of the removal order he is facing; it would not, according to subsection 114(1)(b) of the Act, result in refugee protection.

[23] In sum, someone in the Applicant's position may only be accorded a stay of removal if he is found, on a balance of probabilities, to be at risk under one of the grounds identified in section

97 of the Act, that is a danger of torture or a risk to life or of cruel and unusual treatment or punishment, and when such risk is found, if he is determined not to be a danger to the security of Canada or if the nature and severity of the acts he committed are not such that his PRRA application should be refused.

[24] Here, the Delegate, having found that the Applicant was not at risk pursuant to section 97 of the Act, did not embark into the second stage of the analysis. Was his section 97 finding reasonable then? I do not believe so.

[25] As previously indicated, the Applicant complains that the Delegate erroneously based his decision on his past involvement with the MEK, thereby overlooking evidence of his continued involvement and commitment to the MEK. In other words, the Applicant claims that the Delegate failed to consider what mattered the most, that is the risk he faced in returning to Iran given the fact he is still a MEK supporter and that the MEK is still considered an enemy of God in that country.

[26] The Applicant stresses that when asked, at question 52 of his PRRA Application form, under the heading "Reasons for Applying for a Pre-Removal Risk Assessment (PRRA)", to set out all the significant incidents that caused him to seek protection outside of his country of nationality, he answered this:

> I was exped (sic) from university (political activities)
>
> I did not go for military service (during war between Iran and Iraq)
>
> I was in jail for (political activities) – my families (sic) were involved supporting PMOI and also myself was supporting other

> group and PMOI (my sister and my brother was (sic) supporting PMOI)
>
> I am supporting PMOI (now)
>
> I was involved in demonstration in Ottawa in 1992. (my name was appeared (sic) in newspaper)
>
> All files are in immigration department
>
> (My emphasis)

[27] The next question on the Application form – question 53 - asked the Applicant to explain why he had not sought protection from his country of nationality. The Applicant answered: "Same as Box 52".

[28] That form was filled out in 2009 but the Applicant says that these answers have not changed in the intervening eight years.

[29] The Respondent claims that the Applicant's bare statements that he still supports the MEK, without more, simply cannot be said to so conclusively establish MEK involvement that the Delegate was unreasonable in finding otherwise. It adds that besides these answers to questions 52 and 53 of the PRRA Application form and submissions made by the Applicant's counsel in 2009 through which he stated the current state of his commitment to opposing the Iranian government, none of the other written submissions he or his counsel filed in the course of his immigration journey (one by him, four by his counsel) assert current involvement with or support for the MEK.

[30] It was therefore reasonably open to the Delegate, the argument goes, to find that there is no evidence that the Applicant has been involved with the MEK since the attack on the Iranian Embassy in 1992 or that he would be considered a leader or high profile member of that organization and be "black-listed" as a result. After all, the Respondent says, the onus was on him to submit an application that was clear, detailed and complete and to provide evidence to support his allegations (*Borbon Marte v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 930, at paras 39-40). That onus, according to the Respondent, has not been met.

[31] The Respondent's position would be compelling if it was not for the outcome of the section 97 assessment conducted in 2011, in the course of the redetermination of the PRRA Application, where the Applicant was found to be at risk if removed to Iran. That assessment was very much part of the Applicant's PRRA Application redetermination. As the Delegate himself acknowledged, it was "the trigger to the present phase of the PRRA process pursuant to section 113(d)". It was statutorily mandated. Short of being a meaningless exercise, a result Parliament presumably did not intend, it could not be ignored. It may be that the Delegate, as he claims in his decision, was not legally bound by this assessment, but given the conclusion reached by the officer who conducted that assessment, I am satisfied that the Delegate had a duty to refer to the Applicant's evidence regarding his continued support for the MEK and explain why it was given no weight and why he was distancing himself from the conclusions of the section 97 assessment.

[32] The need for some reference to that evidence and for some explanation as to why it was not retained was all the more important in the circumstances of this case as there were previous findings on file concluding in the same manner the section 97 assessment did, as well as a recent

danger opinion concluding that the Applicant's activities on behalf of the MEK signaled a high level of dedication and involvement in the furtherance of the organization's objectives, and as such, a voluntary, knowing and significant contribution to the MEK's criminal purpose.

[33] In my view, in such context, and upon being fully aware that the MEK is still considered an enemy of God in Iran, which is punishable by death, it was incumbent upon the Delegate to explicitly consider and weigh the Applicant's evidence of his continued support for the MEK. It was not an option for him to proceed otherwise and focus on the Applicant's past participation in MEK's activities without fatally affecting the intelligibility, transparency and justification of his decision. In *Newfoundland Nurses* (*N.L.N.U. v Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62 at para 12), the Court noted that when assessing the reasonableness of a decision, the Court must first seek to supplement the reasons before it may subvert them. However, in the present case, the Delegate's failure to consider evidence of the Applicant's continued support of MEK is a flaw that cannot be remedied by the supplementation by this Court. Given that this is the case, the Respondent cannot circumvent this flaw in the Delegate's decision by supplementing the reasons for decision in its written submissions on judicial review.

[34] The Delegate also found that the Applicant had shown a lack of objective fear of returning to Iran because he travelled twice – and intended to travel a third time - to Iraq to attend Camp Ashraf. The Respondent points out that this finding was of little or no import to the ultimate decision. I agree. Nevertheless, I also agree with the Applicant that this finding is illogical, and therefore unreasonable, in the particular circumstances of this case.

[35] The Applicant also brought a number of arguments, based in large part on the interpretation of Citizenship and Immigration Canada's operational guidelines, regarding the

"jurisdiction" of the Delegate. These arguments were raised for the first time at the hearing of this proceeding. Unsurprisingly, counsel for the Respondent objected to them, claiming that she was not in a position to respond to them adequately. In all fairness, any debate on those arguments should be left to another day when the Court has a proper record before it.

[36] That being said, the Applicant's judicial review application will be allowed and the matter remitted to the Respondent for redetermination by a different delegate.

[37] At the end of the hearing, counsel for the Applicant proposed the following five questions for certification:

1. If the Minister seeks exclusion of a refugee protection claimant for membership in a terrorist organization and succeeds, can the Minister then, in pre-removal risk assessment, find that the claimant is not a member of a terrorist organization?

2. If an applicant described in Act section 112(3) applies for pre-removal risk assessment and a pre-removal risk assessment officer determines that an applicant faces risk, is a senior decision maker limited to determining, under Act section 113(d) whether the nature and severity of the acts committed or danger to the public or security to Canada outweigh the risk to the applicant?

3. If an applicant for pre-removal risk assessment had been previously found by the Refugee Protection Division of the Immigration and Refugee Board or its predecessor Convention Refugee Determination Division to be at a risk, can a pre-removal risk assessment decision be made on the basis of change of circumstances without meeting the legal standard for cessation set out in Act section 108(1)(e)?

4. If an applicant for pre-removal risk assessment had been previously found by the Refugee Protection Division of the Immigration and Refugee Board or its predecessor Convention Refugee Determination Division to be at risk, can a pre-removal risk assessment decision

be made on the basis of change of circumstances without notice to the applicant that change of circumstances would be considered?

5. Can a senior decision maker when making a pre-removal risk assessment decision, after advance disclosure with an opportunity to respond, then rely on undisclosed country condition information to make decision?

[38] The Respondent opposes certification.

[39] As is well settled, the test for certification consists in finding whether there is a serious question of general importance and of broad significance which would be dispositive of the appeal and which transcends the interests of the parties to the litigation (*Canada (Minister of Citizenship and Immigration) v Zazai*, 2004 FCA 89 at para 11; *Canada (Minister of Citizenship and Immigration) v Liyanagamage*, 176 NR 4, at para 4, [1994] FCJ No. 1637).

[40] In assessing whether to certify a question the Court must be mindful of the fact that the certification process is not to be used as a tool to obtain from the Court of Appeal declaratory judgments on questions which need not be decided in order to dispose of the case.

[41] In the present case, I find that none of these questions would be dispositive of the appeal. In particular, I note that proposed questions 2, 3 and 5 concern issues which were raised for the first time at the hearing and which were not, as a result, fully debated. I note too that nothing in this case turns on proposed question 4. As to proposed question 1, it turns on the facts of this case and does not amount, as a result, to a serious question of general importance.

[42] None of the proposed questions, therefore, will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The judicial review application is allowed;
2. The decision of a delegate of the Minister of Immigration, Refugees and Citizenship, dated September 13, 2016, is set aside and the matter is remitted to the Minister for redetermination by a different delegate;
3. No question is certified.

"René LeBlanc"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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