Federal Court  Cour fédérale

Date: 20181023

Docket: IMM-1133-18

Citation: 2018 FC 1066

Ottawa, Ontario, October 23, 2018

PRESENT: **The Honourable Mr. Justice Annis**

BETWEEN:

CHENAI MAVHIKO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA] of a pre-removal risk assessment [PRRA] decision dated February 17, 2018 [the Decision]. In this PRRA, a Senior Immigration Officer [the Officer] determined that the Applicant would not be subject to risk of persecution, danger of torture, risk to life or risk of cruel and unusual treatment or punishment if removed to Zimbabwe.

[2] For the reasons that follow, the application is dismissed.

II. Facts

[3] The Applicant is a 29 year-old female national of Kwekwe, Zimbabwe, who arrived in Canada on May 4, 2016, on a visitor's visa. The Applicant submitted a refugee claim at the port of entry. The basis for her claim was her fear of mistreatment by the Zimbabwe African national Union- Patriotic Front [ZANU-PF], due to her alleged support of a political opposition party.

[4] In 2008, the Applicant worked as a campaigner. In 2012, she started working at a school during which time she was a polling station monitor for the 2013 national elections. The Applicant was charged with observing Mr. Mangwiro, a ZANU-PF supervisor. The Applicant alleges that she was warned by the school's headmaster some two years after the election that she was being watched. The Applicant believes that Mr. Mangwiro is a spy who thinks that she will expose him, and as a result she claims that she fears he may harm or kill her.

[5] In January 2015, the Applicant was involved in a car accident and hospitalized as a result of the incident. While in the hospital, she received a text message stating that she should leave the president's constituency to save her life. The Applicant obtained a school transfer, however her new place of work was also in the president's constituency. Soon after, the Applicant claims that a group of people came to assess the area and speak to the school. Mr. Mangwiro was among the group. He allegedly questioned the headmaster about the Applicant, who in turn

told her to watch her back. At this time, the Applicant, fearing for her life, left Zimbabwe and arrived in Canada on a visitor's visa.

[6] The Applicant claims that she is afraid that due to widespread corruption in the country, she will have no recourse if arrested, that she will not be afforded a fair trial and that she will be prosecuted on made-up charges. She is also afraid that she will be tortured, raped, abused and otherwise mistreated as a woman if she is detained or taken into custody. She claims that politically active women face a particular risk, and that those perceived to be supporting the wrong party are withheld basic necessities such as food, thus turning to prostitution to survive. Additionally, the Applicant is afraid that she will be at an increased risk in Zimbabwe, since as a single woman without male protection she will be an easy target for rape, assault, attacks and other gender-based violence. She claims that politically motivated violence has been steadily rising since July 2016, and that those who, like her are perceived as political opponents are increasingly subjected to abductions, assaults, arbitrary arrest, torture and other abuses. The Applicant claims that security forces provide no protection to civilians; as such she benefits from no state protection and has no viable internal flight alternative in Zimbabwe.

[7] The Applicant's claim was rejected by the Refugee Protection Division [RPD] of the Immigration and Refugee board on July 21, 2016. The RPD found innumerable improbabilities in the Applicant's narrative. These included: that the car accident would be planned by Mr. Mangwiro at the peril of so many other people when the claimant was such a low-value target; that the accident occurred two years after Mr. Mangwiro visited the school; that it would be improbable that Mr. Mangwiro would incriminate himself to a headmaster; and that if she was

a target she would have likely been confronted in some way before 2015. Although the panel of the RPD found the applicant's testimony to be consistent with the other evidence before it, it concluded that her assertions failed to demonstrate that she faced a credible threat.

[8] The Applicant subsequently requested a PRRA. In support of her application, she submitted a copy of a warrant for her arrest and an email from the sender of the warrant, Nigel Mutumbi to her counsel. The Applicant also submitted new evidence that had not been before the RPD: a statutory declaration and accompanying exhibits, as well as twelve general country condition reports.

[9] The Officer rejected the Applicant's PRRA application on February 17, 2018, on the basis that the Applicant did not provide documentary evidence to support that her profile in Zimbabwe was similar to those persons that would currently be at risk of persecution or harm in that country as a low-level political worker. The Applicant's evidence did not support that she is of interest to persons wishing to harm her in Zimbabwe, and thus did not support that the Applicant faced a particular risk in Zimbabwe. The Officer also declined to consider the Applicant's cited risk related to living alone as a woman without male protection in Zimbabwe, concluding that the Applicant could have raised this concern at her RPD hearing, and that she failed to explain why she had not reasonably done so.

[10] The Applicant now seeks judicial review of the PRRA decision rendered by the Officer dated February 17, 2018.

III. Relevant Legislation

[11] The following provisions of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 are applicable in these proceedings:

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.

IV. Issues

[12] The Applicant raises four issues in this application:

1. Did the Officer err in refusing to consider evidence regarding the Applicant's alleged risk as a woman living alone in Zimbabwe?
2. Did the officer conflate the legal tests under s. 96 and s. 97 of IRPA?

3. Did the Officer misapprehend or ignore the Applicant's evidence?

4. Was the Officer's decision refusing to grant the Applicant an oral hearing reasonable?

V. Standard of Review

[13] With respect to issues 1, 2 and 3, the assessment of evidence and inferences to be drawn therefrom are at the core of the expertise of the PRRA officers, as such the standard of reasonableness applies to these questions. *Zdraviak v Canada (Citizenship and Immigration)*, 2017 FC 305 at paras 6-7, *Dunsmuir v New-Brunswick*, 2008, SCC 9 at para 54.

[14] However, the jurisprudence on the standard of review applicable to a decision regarding granting an oral hearing pursuant to section 167 of the IRPR and section 113 of the IRPA is mixed. The Applicant relies upon the recent decision of *Zmari v Canada (Citizenship and Immigration)*, 2016 FC 132 [*Zmari*] in which the Court explained this divergence and held at paragraph 13 that the appropriate standard of review is correctness, as follows:

> [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 (CanLII) at para 79, [2014] 1 SCR 502 [*Mission Institution*], "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: *00*), 2002 SCC l [CanLII] at para 115, [2002] 1 SCR 3)
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> [Emphasis Added]

[15] With respect, the Court does not share the opinion that the *Mission Institution* decision states the law regarding the applicable standard of review in this instance. Rather, it stands for the proposition that once the standard is determined to be correctness to assess the conduct in question, it must be procedurally fair. In *Mission Institution*, the Court concluded at paragraph 5 that there had been a breach of the statutory requirements which rendered the decision procedurally unfair, because "the correctional authorities did not comply with the statutory disclosure requirements" [Emphasis added]. In other words, it was a classic factual circumstance of a failure by a tribunal to provide a party with a reasonable opportunity to respond to allegations brought against him.

[16] The Court in *Mission Institution* further elaborated on the requirement to focus on the essence of the nature of the impugned conduct in order to determine the appropriate standard of review. This is evident when it recognized that the discretion involving the transfer of an inmate is reviewed on a reasonableness standard, while the failure to provide the inmate with sufficient information to participate in the decision-making process falls to be considered using a correctness review standard. This distinction is best précised in the case headnote that summarizes paragraphs 74 to 79 of the *Mission Institution* decision as follows:

> A transfer decision that does not fall within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law will be unlawful. Similarly, a decision that lacks justification, transparency, and intelligibility will be unlawful. For it to be lawful, the reasons for and record of the decision must in fact or in principle support the conclusion reached. A decision will be unreasonable, and therefore unlawful, if an inmate's liberty interests are sacrificed absent any evidence or on the basis of unreliable or irrelevant evidence, or evidence that cannot support the conclusion. Deference will be shown to a determination that evidence is reliable, but the authorities will nonetheless have to explain that determination. A review to determine whether a

> decision was reasonable, and therefore lawful, necessarily requires deference. An involuntary transfer decision is nonetheless an administrative decision made by a decision maker with expertise in the environment of a particular penitentiary. To apply any standard other than reasonableness in reviewing such a decision could well lead to the micromanagement of prisons by the courts. The application of a standard of review of reasonableness, however, should not change the basic structure or benefits of the writ of *habeas corpus*. First, the traditional onuses associated with the writ will remain unchanged. Second, the writ remains non-discretionary as far as the decision to review the case is concerned. Third, the ability to challenge a decision on the basis that it is unreasonable does not necessarily change the standard of review that applies to other flaws in the decision or in the decision-making process. For instance, the standard for determining whether the decision maker complied with the duty of procedural fairness will continue to be "correctness".
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> [Emphasis added]

[17] There is no issue raised in this matter of the PRRA Officer not complying with any of the tenets of procedural fairness. Instead, the matter relates entirely to the PRRA Officer's exercise of discretion in assessing the new evidence pursuant to section 167 of the Regulations to determine whether it (1) raises a serious issue of credibility that is (2) central to the decision, and (3) would justify allowing the application if accepted by the Officer. These are determinative of the requirement to hold a hearing as a question of mixed fact and law: see *Chekroun v. Canada (Citizenship and Immigration)*, 2016 FC 1422, at para 20.

[18] I addressed this issue previously in *Bicuku v Canada (Citizenship and Immigration)*, 2014 FC 339, particularly where I cited Justice Yves de Montigny, then a member of this Court, in *Ponniah v Canada (MCI)*, 2013 FC 386 (CanLII) [*Ponniah*] at para 24 of his decision to the same effect, as follows:

> [24] The jurisprudence of this Court is divided on the standard of review for oral hearings under paragraph 113(b). I recently reviewed this question in *Adetunji v Canada (Citizenship and Immigration)*, 2012 FC 708 (CanLII), 2012 FC 708, and I can do no better than repeat what I wrote there (at para 24):
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> That being said, there is a controversy in this Court as to the standard of review to be applied when reviewing an officer's decision not to convoke an oral hearing, particularly in the context of a PRRA decision. In some cases, the Court applied a correctness standard because the matter was viewed essentially as a matter of procedural fairness [references omitted] On the other hand, the reasonableness [standard] was applied in other cases on the basis that the appropriateness of holding a hearing in light of a particular context of a file calls for discretion and commands deference [references omitted]. I agree with that second position, at least when the Court is reviewing a PRRA decision [references omitted].
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> [Emphasis added]

[19] In addition, it would seem analytically illogical to distinguish between the Officer's discretion to apply a standard of correctness (1) to what is basically a *prima facie* mixed question of fact and law conclusion [whether the new evidence raises a serious issue of credibility that is central to the decision, and would justify allowing the application], and if accepted (2) to conduct a hearing to determine whether the PRRA application should be allowed based upon the same three criteria to be reviewed on a standard of reasonableness.

[20] Accordingly, I am satisfied that the appropriate standard of review raised in this matter whether to conduct a hearing requires the exercise of a discretion and should be reviewed on a deferential standard of reasonableness.

VI. Analysis

A. *Did the Officer err in refusing to consider evidence regarding the Applicant's alleged risk as a woman alone in Zimbabwe?*

[21] The Applicant submits that the Officer should have accepted any evidence that arose after the rejection of her refugee claim, or that she could not have reasonably been expected to have presented considering the circumstances. The Applicant alleges having received the warrant for her arrest in September 2016, approximately two months after the RPD decision rejecting her application for refugee status. She further alleges that the receipt of this warrant triggered her fear as a woman living alone in Zimbabwe. As such, the Applicant submits that the Officer erred by refusing to consider the Applicant's risk in Zimbabwe as a woman without male protection, since this fear arose after her RPD hearing.

[22] In *Singh v Canada (Citizenship and Immigration),* 2014 FC 11, Justice Shore summarized the central principle applicable to PRRAs:

> [23] As stated by Justice Judith Snider in *Cupid v Canada (Minister of Citizenship and Immigration)*, 2007 FC 176
>
> > [4] … Canada has taken steps to ensure that a claimant is provided with a process whereby changed conditions and circumstances may be assessed. It follows that, if country conditions or the personal situation of the claimant have not changed since the date of the RPD decision, a finding of the RPD on the issue of state protection – as a final, binding decision of a quasi-judicial process – should continue to apply to the claimant. In other words, a claimant who has been rejected as a refugee claimant bears the onus of demonstrating that country conditions or personal circumstances have changed since the RPD decision such that the claimant, who was held not to be at risk by the RPD, is now at risk. If the applicant for a PRRA fails to meet that burden, the PRRA application will (and should) fail.
> >
> > [Emphasis added.]

[23] I find that the Officer's conclusion that the Applicant could have raised her fear of living alone as a woman without male protection in Zimbabwe at her RPD hearing was reasonable, since the conditions giving rise to this fear existed at that time. It was similarly reasonable for the Officer to be unconvinced by the Applicant's claim that her fear of gender-based violence in Zimbabwe was triggered by receipt of the purported arrest warrant relating to her long past political activities. There is little inherent in the arrest warrant that would give rise to a fear of living alone as a woman in Zimbabwe, not to mention the frailties of the document and supporting evidence. To the extent that the arrest warrant is relevant, it is only with respect to the Applicant's risk of political persecution, not her risk of persecution as a woman living alone.

B. *Did the officer conflate the legal tests under s. 96 and s. 97 of IRPA?*

[24] The Applicant submits that the Officer erred in requiring the Applicant to show that her fear of persecution was personalized in order to meet the legal test under s. 96 of IRPA. The Applicant submits that she presented documentary evidence clearly supporting a finding that as a single woman who is also politically active in Zimbabwe she will face persecution. As such, the Applicant claims that the decision maker erred in requiring personalized evidence relating to this ground before being satisfied that the Applicant would face persecution as a woman in Zimbabwe if she returned there. The Applicant argues that all that she had to demonstrate was that there was a "reasonable chance" of persecution or that she faces "more than a mere possibility" of persecution upon her return on the basis of her gender.

[25] The Court does not find that a PRRA officer's use of terms such as "individualized risk" or "personalized persecution" means that the analysis under sections 96 and 97 of the IRPA have been conflated. Rather, the officer's reason must be read as a whole to determine whether the proper tests have been applied: *Kaur v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 505, [2014] F.C.J. No. 590 at para 37.

[26] In *Debnath v Canada*, 2018 FC 332 Justice Strickland defined the test under s. 96 as follows:

> [31] As stated in *Fi v. Canada* (Minister of Citizenship & Immigration), 2006 FC 1125 (F.C.) at para 13, to satisfy the definition of "Convention refugee" in s 96 of the IRPA, the applicant must show that he or she meets all the components of this definition, beginning with the existence of both a subjective and objective fear of persecution. The applicant must also establish a link between him or herself and persecution on a Convention ground. The applicant must be targeted for persecution in some way, either "personally" or "collectively", and the applicant's well-founded fear must occur for reasons of race, religion, nationality, membership in a particular social group, or political opinion. Further, persecution under s 96 can be established by examining the treatment of similarly situated individuals, the applicant does not have to show that he himself has been persecuted in the past or would be persecuted in the future.
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> [Emphasis added]

[27] In the case before me, the issue concerning her fear arose from her alleged status as a political activist. Her personal profile as a politically active person was therefore relevant to the Officer's section 96 analysis. The Officer was not seeking evidence of personalized risk, but was rather attempting to determine where to place the Applicant on the spectrum of risk. Indeed, not all politically active persons in Zimbabwe are at risk. It was thus, essential for the Officer to determine whether the Applicant's place on the spectrum of risk was sufficient to

find a subjective fear. The Officer found no evidence to ground a subjective fear of persecution in persons with the Applicant's profile who present a relatively low political profile, particularly given the extent of time that had passed since the incidents giving rise to the alleged persecution occurred.

C. *Did the Officer misapprehend or ignore the Applicant's evidence?*

[28] The Applicant submits that the Officer made two factual errors.

[29] First, the Officer stated that the Applicant's father and brother reside in Zimbabwe. However, the Applicant maintains that all of her brothers have left Zimbabwe and that although her parents continue to reside in Zimbabwe, they are elderly and live in a rural area of the country. As such, they would not be able to protect or support her. However, the Officer's finding with regards to the Applicant's brothers was not material to the decision as it relates to a submission that she was at risk as a woman living alone, which was not raised as an issue before the RPD and does not constitute a new, different or additional risk development that could not have been contemplated at the time of the RPD decision.

[30] Second, the Officer stated that the email from Mr. Mutumbi sending the arrest warrant to the Applicant's counsel, was dated July 28, 2017, a year after he received the warrant from the authorities. The Applicant contends that in fact, Mr. Mutumbi forwarded the arrest warrant to her via WhatsApp on September 16, 2016, immediately after receiving it. The Applicant submits that the Officer was mistaken in assuming that when Mr. Mutumbi sent the warrant to the Applicant's counsel via email on July 28, 2017, this was when the Applicant was first

notified of the arrest warrant. The Applicant maintains that this factual error is material because the Officer relied on it to ground his concerns as to why Mr. Mutumbi waited nearly one year after having received the warrant from the authorities to send it to the Applicant.

[31] It is unclear to the Court when the Applicant received the warrant. As the Respondent noted, the Applicant presented no evidence to support her contention that she received the warrant via WhatsApp, as she did not submit the message itself. The only evidence regarding the source of the warrant was as an attachment to the email from Mr. Mutumbi to the Applicant's counsel dated a year later on July 28, 2017. This no doubt contributed to the Officer's confusion, if such was the case. Moreover, the Officer concluded that the sender could not be confirmed because it was in an email format, without any indication of the identity and location of the sender. Nor was the arrest warrant dated or signed, while containing an illegible stamped source of authority.

[32] Furthermore, the charges of "undermining the person of the President" and "for subverting the Constitution" brought in 2016 do not seem to be reasonable for someone who worked as a campaigner in 2008 and a polling station monitor in 2013 — basically the same conclusion arrived at by the RPD. As the Officer noted there was no indication of the circumstances that gave rise to these crimes, or how they were connected to the Applicant's alleged political activities. In addition, the Officer noted that the author of the email asserted that he "doubted" the person delivering the arrest warrant was police, again raising concerns about its probative value. The Court finds no reviewable error in the Officer's attributing little weight to the arrest warrant in support of the Applicant's cited risk in Zimbabwe. Nor does the

warrant overcome the issues raised before the RPD concerning the general improbability of such a low level political participant being the target at risk, not to mention the delay in threatening her.

D. *Was the Officer's decision refusing to grant the Applicant an oral hearing reasonable?*

[33] The Applicant submits that in her case, the Officer made a veiled credibility finding, as such, the duty of procedural fairness required the Officer to conduct a hearing. The Applicant maintains that this case is analogous to *Sitnikova v Canada* (*Citizenship and Immigration*), 2017 FC 1082 [*Sitnikova*], which she argues stands for the proposition that decision makers should not cast aspersions on the authenticity of a document, and then give documents "little weight," as this amounts to a veiled credibility finding, where credibility is a central issue and is likely to lead to an unfavourable result for the applicant, and as such a hearing should be held.

[34] The Court finds that this case can be distinguished from *Sitnikova*, in which the applicant swore an affidavit attaching certain documents, stating that she had obtained them directly from their respective authors. In this matter, the Applicant is not swearing to the authenticity of the arrest warrant, but rather to its authenticity as a document obtained via a WhatsApp message from Mr. Mutumbi, sometime after September 16, 2016, when the only evidence of its receipt is via an email to her counsel. Moreover, both the Applicant and Mr. Mutumbi appear to concede that they doubt that the warrant came from the police. But most importantly, the PRRA officer's reasonable assessment of the purported warrant's low probative value. This does not

constitute an attack on the Applicant's credibility, but rather a conclusion that the evidence presented had insufficient probative value, which does not give right to an oral hearing.

VII. Conclusion

[35] For the foregoing reasons, I conclude that the decision of the Officer was reasonable. Accordingly, the application must be dismissed. There are no questions for certification.

JUDGMENT in IMM-1133-18

THIS COURT'S JUDGMENT is that the application is dismissed, the style of cause is amended and there are no questions for certification.

"Peter Annis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	CHENAI MAVHIKO v. MCI
PLACE OF HEARING:	OTTAWA, ON
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