Federal Court  Cour fédérale

Date: 20190725

Docket: IMM-4440-18

Citation: 2019 FC 951

Ottawa, Ontario, July 25, 2019

PRESENT: Madam Justice McDonald

BETWEEN:

AWIL AHMED NUR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant seeks review of a negative Pre-Removal Risk Assessment (PRRA) on the grounds that the Officer made errors in assessing the underlying evidence. For the reasons that follow, this judicial review is granted and the matter is returned for a full redetermination.

Background

[2] The Applicant, Awil Ahmed Nur, was born in 1992 in Somalia. While he was a baby his family fled to Kenya as refugees. In 2006 the family was resettled in the United States (U.S.) when the Applicant was 14 years old. However, as a result of the Applicant's accrued criminal convictions, he was no longer eligible to apply for U.S. citizenship and his permanent residence and refugee status were rescinded.

[3] The Applicant arrived in Canada in March 2017 but was not eligible to apply for refugee protection because of his criminal record. He is therefore subject to removal to Somalia. Prior to being removed, he is entitled to have his risks on returning to Somalia assessed.

PRRA Decision

[4] The Applicant's PRRA was rejected on June 11, 2018. It was determined that there was no more than a mere possibility of persecution and that the Applicant would not be subject to a risk to life or risk of cruel and unusual punishment if returned to Somalia pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. Despite the country condition evidence, the Officer determined that the Applicant faces the same generalized risk of violence as the entire population of Somalia.

[5] In his PRRA application, the Applicant alleged that he would face risk in Somalia due to (i) his membership in the Reer Hamar minority clan that is subject to persecutory violence; (ii) his likely targeting by al-Shabaab for being a Westernized and presumptively un-Islamic male;

and (iii) his inability to secure the basic necessities of life as a returnee with no employment and family support.

[6] While the PRRA Officer accepted the Applicant was a national of Somalia, she found that there was insufficient evidence to establish the Applicant was a member of a minority clan. The Officer also found that there was insufficient evidence of his family's resettlement to the U.S. due to clan affiliation or that the death of his father and brother were due to this affiliation. The Officer found that there was no corroborative evidence that the Applicant's tattoos were visible markers of being "un-Islamic" such that he might be targeted by the terrorist organization al-Shabaab. Most significantly, the Officer determined that the Applicant's identity fraud and forgery convictions compromised the sufficiency of his affidavit evidence.

Issue and Standard of Review

[7] While the Applicant raises a number of issues with the PRRA Officer's decision, the Officer's finding on credibility without conducting an oral hearing is dispositive of this judicial review. It is therefore unnecessary to address the other issues and I decline to do so.

[8] I acknowledge that the appropriate standard of review applicable to whether an oral hearing is required in a PRRA determination is subject to debate and there has been some divergence in the cases of this Court. For the purpose of this judicial review, I am adopting the correctness standard of review as applied by Justice Boswell in *Khan v Canada (MCI)*, 2019 FC 534 (at para 19). I agree that whether an oral hearing is required in a PRRA determination raises

a question of procedural fairness, and a procedure which is unfair will be neither reasonable nor correct.

Analysis

[9] On credibility issues the Federal Court of Appeal outlined a foundational principle in *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 at para 5 stating: "When an applicant swears to the truth of certain allegations, this creates a presumption that those allegations are true unless there be reason to doubt their truthfulness."

[10] Where no valid reason has been provided to doubt an applicant's truthfulness, it would be an error to require corroborative evidence of such allegations as this would defeat the presumption of truthfulness (see *Ndjavera v Canada (MCI)*, 2013 FC 452 at paras 6-7 and *Chekroun v Canada (MCI)*, 2013 FC 737 at para 65).

[11] Here the Applicant provided a sworn Affidavit on the facts relevant to the three grounds of risk he raised in his PRRA application including: his minority clan membership; his risk of being targeted for being Westernized and presumably un-Islamic; and, his lack of ability to support himself in Somalia.

[12] In considering his Affidavit, the Officer concluded:

> The applicant's identity fraud and forgery convictions compromises the sufficiency of his affidavit and as such, due to the lack of corroborative evidence, I find he has provided insufficient evidence to establish his personal circumstances are such, that he is at risk under section 96 or 97 of IPRA [*sic*].

[13] The Officer erred by relying upon the "applicant's identity fraud and forgery convictions" to discredit the presumptive truthfulness of the Applicant's affidavit evidence as the Applicant was not convicted of these crimes. This error was compounded by the fact that the Officer then required corroborative evidence to rectify the Applicant's impugned credibility, thereby undermining the presumption of truthfulness that should have been afforded to him.

[14] I disagree with the Respondent's position that this is a "microscopic distinction" because the Applicant has a criminal record. Be that as it may, here, having made a credibility finding on misapprehended evidence, the Officer erred. Further, it is clear that the Officer is making a credibility finding and in the circumstances, the Applicant should have been afforded an oral hearing. As stated by the Supreme Court of Canada in *Singh v Canada (MEI)*, [1985] 1 SCR 177 at para-59:

> In particular, I am of the view that where a serious issue of credibility is involved, fundamental justice requires that credibility be determined on the basis of an oral hearing. […] I find it difficult to conceive of a situation in which compliance with fundamental justice could be achieved by a tribunal making significant findings of credibility solely on the basis of written submissions.

[15] An oral hearing is also contemplated at paragraph 113(b) of the *IRPA*, which states that, "a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required". The prescribed factors are set out in section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*] as follows:

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.

[16] Further, as articulated by the Court in *Tekie v Canada (MCI)*, 2005 FC 27 at para 16, "In my view, 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."

[17] Here the factors listed in section 167 of the *IRPR* became operative and fairness required that the Applicant be granted an oral hearing.

[18] Therefore, this judicial review is granted.

JUDGMENT in IMM-4440-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted. The decision of the PRRA Officer is set aside and the matter is remitted for redetermination by a different officer; and

2. No question of general importance is proposed by the parties and none arises.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4440-18
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