Federal Court  Cour fédérale

Date: 20200918

Docket: IMM-1642-19

Citation: 2020 FC 912

Toronto, Ontario, September 18, 2020

PRESENT: Mr. Justice Diner

BETWEEN:

KWIEK JYSTINA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant seeks judicial review of a Senior Immigration Officer's (Officer) refusal of a pre-removal risk assessment application (PRRA Application). I would decline to interfere with the Officer's decision for the reasons that follow.

II. Factual Background

[2] The Applicant is a 24-year-old Roma Polish citizen. She first arrived in Canada as a minor with her family in April 2011. Her parents filed a refugee claim for the family, citing fears of violence, racist threats, arson, vandalism, and extortion stemming from the family's ethnicity. They presented their case before the Refugee Protection Division (RPD) over three hearing days (April 30, 2012; August 23, 2012; and October 29, 2012). The Applicant was a 17-year-old minor at that time.

[3] On February 1, 2013, the RPD rejected the claims, finding the claimants provided insufficient credible evidence. The Applicant and her family left Canada on April 5, 2013.

[4] The Applicant re-entered Canada, on her own, in March 2017. She did not seek refugee protection at that time. Rather, she returned to Poland shortly thereafter to visit her father in the hospital. Following his recovery, she re-entered Canada once again on September 8, 2018.

[5] On October 17, 2018, the Applicant filed a refugee claim. On November 8, 2018, the Respondent Minister deemed the applicant inadmissible under paragraph 41(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], and issued an exclusion order under section 228 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*].

[6] The Applicant submitted a PRRA Application on December 18, 2018, which led to the decision under review. In addition to claims of persecution included in the 2013 claim, she also alleged new instances of persecution against herself and her family. Notably, she alleges her father intends to force her to marry her first cousin, per a "well-known" Roma tradition.

III. Decision Under Review

[7] On February 18, 2019, the Officer rejected the PRRA Application (Decision). The Officer found that the Applicant essentially restated the same information presented before the RPD in 2013. Specifically, the Officer found insufficient objective evidence of the threat of forced marriage, a risk of persecution, a lack of proper available medical care, and a lack of available assistance from public resources.

A. *Issues raised in this Judicial Review*

[8] The Applicant challenges the Decision, arguing that the Officer made (i) conclusions unsupported by evidence, (ii) veiled credibility findings, and (iii) an error in failing to hold an oral hearing. She submits the latter breached procedural fairness, attracting the correctness standard of review.

[9] The Applicant also proposes a new interpretation of subsection 101(1) of the *IRPA* and section 167 of the *IRPR*. She invites the Court to interpret these sections in a manner that would exempt minors who were previously part of a rejected refugee claim from ineligibility. She also invites this Court to interpret the provisions to provide such claimants with a presumptive right to a hearing before the RPD or a PRRA officer, where they allege a new risk of persecution. I note that this issue was raised for the first time before this Court, in this judicial review.

[10] The Respondent asserts reasonableness as the applicable standard of review, and submits the Decision was reasonable. They further agree with the Officer’s decision not to hold a hearing, and submit that the Applicant cannot rely on affidavit evidence that was not presented to the Officer.

IV. Issues Raised

[11] I would reformulate the issues raised as follows:

A. Did the Officer make any veiled credibility findings and should the Officer have held an oral hearing?

B. Did the Officer make conclusions without regard to the evidence?

Before providing my analysis of these two issues, I will address a preliminary point raised at the hearing regarding new argument and evidence, along with the standard of review.

V. New argument and evidence

[12] The Applicant submitted written argument that this Court reinterpret subsection 101(1) of the *IRPA* and section 167 of the *IRPR* in a way that has not previously been done. This argument was not put before the Officer. Furthermore, this would involve a reading down of the ineligibility provisions and thus require constitutional notice to the Attorneys General. Such notice was not provided.

[13] I also note that the Applicant's affidavit contains statements not presented to the Officer. These include her references to: (i) family members "trying to force [the Applicant] into an arranged marriage"; (ii) her parents "insisting that [she] obey them and that [she] do as [she] was told"; (iii) the Applicant having "intentions of making a refugee claim in Canada" in March 2017 but "having a hard time adjusting"; (iv) facing pressure from "family here in Canada and in Poland" to return to Poland at the time of the father's hospitalization, which was "too much" for the Applicant; (v) meeting a Roma boy in Canada with whom the Applicant had a child; and (vi) asking to "be heard" before any decision was made on the PRRA Application.

[14] New arguments and evidence going to the merits of the matter are generally not permitted on judicial review, save few exceptions: *Delios v Canada (Attorney General)*, 2015 FCA 117 at para 42; *Jama v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1459 at para 23 [*Jama*]; *Storozhuk v Canada (Citizenship and Immigration)*, 2017 FC 74 at para 13. This is consistent with a PRRA applicant's burden to establish their claim, and to put their "best foot forward" (*Jama* at para 23; see also *Ikeji v Canada (Citizenship and Immigration)*, 2016 FC 1422 at para 47).

[15] The present circumstances do not warrant a departure from this rule. Accordingly, to the extent that statements in the Applicant's affidavit present new information, and she presents new legal arguments not made before the Officer, they will not be considered in this judicial review. Applicant's counsel conceded that the Applicant's former counsel failed to make the subsection 101(1) argument before the Officer.

VI. Standard of Review

[16] The Supreme Court of Canada recently revisited the standard of review analytical framework in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. The reasonableness standard serves as the presumptive starting point (*Vavilov* at para 16; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at para 27 [*Canada Post*]). There are situations that can rebut this presumption. These do not arise here. As a result, reasonableness applies to the Decision rejecting the PRRA Application.

[17] The Court must, under a reasonableness review, examine the administrative decision-maker's reasons and determine whether the outcome demonstrates an "internally coherent chain

of reasoning, justified in light of the relevant legal and factual constraints" (*Canada Post* at paras 2, 26). The parties agree, as do I, that the substantive review of the Decision – including the Officer's interpretation and application of the governing legislation to the facts – requires a reasonableness review. The Decision must bear the hallmarks of reasonableness: justification, transparency, and intelligibility, and it must be justified in relation to the relevant factual and legal constraints; if it meets these criteria, this Court will not substitute its outcome (*Vavilov* at para 99).

[18] However, the Applicant submits that the correctness standard applies to a PRRA officer's decision whether to hold a hearing because it amounts to an issue of procedural fairness. Cases that espoused a correctness review pre-*Vavilov* include *Mudiyanselage v Canada (Citizenship and Immigration)*, 2018 FC 749 at para 11; and *Nadarajan v Canada (Minister of Public Safety and Emergency Preparedness)*, 2017 FC 403 at paras 12-14. Others applied a reasonableness standard by framing whether to hold an oral hearing as a mixed finding of fact and law: *Haji v Canada (Citizenship and Immigration)*, 2018 FC 474 at paras 9-10; and *Lionel v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 1180 at para 11.

[19] The Respondent disagrees. This is reflective of a divergence in the pre-*Vavilov* jurisprudence. This divergence has remained, and continues, in post-*Vavilov* case law (see *Garces Canga v Canada (Citizenship and Immigration)*, 2020 FC 749 at para 22; *Hare v Canada (Citizenship and Immigration)*, 2020 FC 763 at para 11, on the one hand, and on the other, *Allushi v Canada (Citizenship and Immigration)*, 2020 FC 722 at para 17, and *FGH v Canada (Citizenship and Immigration)*, 2020 FC 54 at para 17).

[20] I acknowledge that there may be some disagreement in the jurisprudence concerning the standard of review of whether the Officer erred by failing to conduct an oral hearing. However, in the Applicant's case, I disagree with her that there was a reviewable error on this issue due to the evidence she presented and the reasonable interpretation and application of the law in light of the facts presented in this case, as will be addressed in my analysis.

VII. Analysis

[21] The Applicant claims that the Officer committed two reviewable errors: (i) making veiled credibility findings, thus failing to consider whether to hold an oral hearing; and (ii) making unreasonable conclusions without regard to the evidence. I will discuss each in turn.

A. *Did the Officer make veiled credibility findings?*

[22] A finding of insufficient evidence and one of veiled credibility may be difficult to distinguish from one another: *Simonishvili v Canada (Citizenship and Immigration)*, 2020 FC 193 at para 12. Nevertheless, the two remain distinct: *Fatoye v Canada (Citizenship and Immigration)*, 2020 FC 456 at paras 41 [*Fatoye*]. In *Fatoye*, Justice Denis Gascon referenced his earlier decision in *Lv v Canada (Citizenship and Immigration)*, 2018 FC 935 at para 40 [*Lv*]. Credibility determinations, despite the thin line that often separates them from "sufficiency of evidence" findings, are nonetheless distinct. To assess the credibility of evidence is to determine the reliability and trustworthiness of its source: *Fatoye* at para 41. I cannot do better than to borrow from Justice Gascon's earlier decision in *Lv*:

> [41] The term "credibility" is often erroneously used in a broader sense of insufficiency or lack of persuasive value.

However, these are two different concepts. A credibility assessment goes to the reliability of the evidence. When there is a finding that the evidence is not credible, it is a determination that the source of the evidence (for example, an applicant's testimony) is not reliable. The reliability of the evidence is one thing, but the evidence must also have sufficient probative value to meet the applicable standard of proof. A sufficiency assessment goes to the nature and quality of the evidence needed to be brought forward by an applicant in order to obtain relief, to its probative value, and to the weight to be given to the evidence by the trier of fact, be it a court or an administrative decision-maker. The law of evidence operates a binary system in which only two possibilities exist: a fact either happened or it did not. If the trier of fact is left in doubt, the doubt is resolved by the rule that one party carries the burden of proof and must ensure that there is sufficient evidence of the existence or non-existence of the fact to satisfy the applicable standard of proof. In *FH v McDougall*, 2008 SCC 53 [*McDougall*], the Supreme Court established that there is only one civil standard of proof in Canada, the balance of probabilities: evidence "must be scrutinized with care by the trial judge" and "must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test" (*McDougall* at paras 45-46). In all civil cases, it is up to the trier of fact to "scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred" (*McDougall* at para 49).

[42] Credible or reliable evidence is not necessarily sufficient, in and of itself, to establish that the facts set out therein meet the standard of proof of balance of probabilities. The trier of fact may decide to assign little or no weight to the evidence, and hold that the legal standard of proof has not been met. In the same vein, a presumption of truth or reliability cannot be equated with a presumption of sufficiency. Even if presumed credible and reliable, evidence from an applicant, or self-serving evidence, cannot be presumed to be sufficient, in and of itself, to establish the facts on a balance of probabilities. This is for the trier of fact to determine.

[43] When frailties have been highlighted in the evidence, it is appropriate for the trier of fact to consider whether the evidentiary threshold has been satisfied by an applicant. By doing so, the trier of fact does not question the applicant's credibility. Rather, the trier of fact determines whether the evidence provided, assuming it is credible, is sufficient to establish, on a balance of probabilities, the facts alleged (*Zdraviak v Canada (Citizenship and Immigration)*, 2017 FC 305 at paras 17-18). In other words, not

> being convinced by the evidence does not necessarily mean that the trier of fact disbelieves the applicant.
>
> [44] In *Ferguson v Canada (Citizenship and Immigration)*, 2008 FC 1067 [*Ferguson*] at paragraph 27, Justice Zinn provided a useful synopsis of the interplay between weight, sufficiency, and credibility of the evidence. His comments are particularly apposite to the case of Mr. Lv:
>
> > [27] Evidence tendered by a witness with a personal interest in the matter may also be examined for its weight before considering its credibility because typically this sort of evidence requires corroboration if it is to have probative value. If there is no corroboration, then it may be unnecessary to assess its credibility as its weight will not meet the legal burden of proving the fact on the balance of probabilities. When the trier of fact assesses the evidence in this manner, he or she is not making a determination based on the credibility of the person providing the evidence; rather, the trier of fact is simply saying the evidence that has been tendered does not have sufficient probative value, either on its own or coupled with the other tendered evidence, to establish on the balance of probability, the fact for which it has been tendered. That, in my view, is the assessment of the officer made in this case.

[23] The Officer simply found a lack of corroboration for the various claims made by the Applicant. This conclusion of insufficient evidence was entirely reasonable given the circumstances, particularly in regard to a forced marriage arranged by her father. The Officer remarked that while the Applicant entered Canada in March 2017 to escape the pressure of marriage, she subsequently returned to Poland in September 2017 to be with her father, and re-entered Canada without issue. In the Officer's view, the evidence did not demonstrate the pressure still existed at the time of the Applicant's return to Canada. The Officer did not evaluate the reliability of the evidence's source, but rather found the nature and quality of the evidence

insufficient for the Applicant to discharge her burden of proof. This conclusion was logical, coherent, and reflective of the record. Accordingly, the conclusion was reasonable.

[24] The Applicant provided no corroborating evidence on this aspect of the PRRA Application. She provided no explanation other than one short paragraph in her unsworn narrative. Nor did she produce any evidence – sworn or not – from any witness, despite having many family members in Poland. Nor did she provide any supporting evidence, including any objective country condition evidence, to support the claim that a forced marriage is "a well known" Roma tradition. The Applicant was represented by experienced counsel at a well-known law firm in her PRRA Application and, despite a dense, 13-page submission letter from her lawyer, and an additional 74 pages of supporting evidence, nothing further is mentioned on the subject.

[25] The Applicant then alleges that the Officer "sidestepped" the need to convene a hearing by making a veiled credibility finding. Again, I cannot agree. The Officer made no finding regarding the Applicant's credibility, but simply found the evidence to be wanting in substance to corroborate her narrative.

[26] Paragraph 113(b) of the *IRPA* gives the immigration officer discretion to hold a hearing if they are of the opinion that one is required:

113 Consideration of an application for protection shall be as follows:	**113** Il est disposé de la demande comment il suit :
[…]	[…]
(b) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is	**b)** une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;

required;

[27] Section 167 of the *IRPR* sets out the relevant factors that officers must consider:

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.

[28] These provisions state unambiguously that an immigration officer may hold a hearing if they believe one is required where a serious issue of credibility arises. The Officer did not expressly address the issue of a hearing, because they reasonably explained how sufficiency, not credibility, led to their conclusion. Without a "serious issue of credibility," the Officer had no reason to convoke and no legal basis to justify an oral hearing (section 167 of the *IRPR*). In fact, the Applicant never requested an oral hearing in the large submission package that accompanied her PRRA Application. An applicant who does not ensure the accuracy and sufficiency of materials filed cannot simply hope for a hearing and claim a breach of procedural fairness if one is denied: *Sanchez v Canada (Citizenship and Immigration)*, 2016 FC 737 at para 7.

[29] The Applicant cites Justice Richard Southcott's decisions in *Ruszo v Canada (Citizenship and Immigration)*, 2017 FC 788 [*Ruszo*], and *Balogh v Canada (Citizenship and Immigration)*, 2017 FC 654 [*Balogh*], to show an oral hearing was warranted. Respectfully, neither decision applies.

[30] In *Ruszo*, Justice Southcott found an immigration officer erred in failing to convene an oral hearing relating to a Humanitarian and Compassionate (H&C) grounds application. He deemed many of the officer's observations on the evidence amounted to assessments of its credibility or genuineness, namely: inconsistencies between the applicant's address stated in a letter from a Roma Self-Government Official and in the H&C declaration; inconsistencies between the original and translated versions of that same letter; and, the absence of a postmarked envelope for that same letter (at para 18). Moreover, the officer expressly stated her difficulty assessing the reliability of the information's source (at para 18).

[31] In *Balogh*, Justice Southcott once again held that an immigration officer made a veiled credibility finding when she gave little weight to an applicant's written PRRA narrative. He found the officer doubted the veracity of the applicant's claim she was being stalked because of an inconsistency between her written narrative and a letter from a shelter she submitted in evidence (at para 29).

[32] Two factors clearly distinguish these cases from the Applicant's. First, the applicants in *Ruszo* and *Balogh* both submitted specific evidence in addition to their written statements, which supported their story. Here, the Applicant did not submit specific evidence beyond her PRRA narrative.

[33] Second, the officers in *Ruszo* and *Balogh* drew their conclusions from inconsistencies between the various evidentiary submissions. They questioned whether to trust each piece of evidence. Here, the Officer drew their conclusion from the complete lack of evidence supporting the Applicant's claim, rather than an inconsistency between submissions.

B. *Did the Officer's conclusions overlook evidence?*

[34] The Applicant submits that the Officer failed to address three instances of persecution that she claims took place in Poland after her refugee claim was rejected by the RPD.

[35] However, the Officer considered and found the materials provided general in nature, untailored to the material aspects of the PRRA Application. They noted many allegations were materially the same as those the RPD rejected in 2013. They noted insufficient evidence to demonstrate a lack of available medical care in Poland, as well as the lack of evidence the Applicant could not seek assistance from her local police or other public resources if she felt threatened. I note that the incidents she recounts all provided an opportunity for corroboration, but she failed to provide same, or even any explanation why she provided nothing beyond her own word in support. For instance, she describes three incidents between 2014 and 2016, all of which involved other people (her brother, cousin, and attendees at a wedding). However, she failed to produce a single document such as a hospital or police report, letter, or affidavit from any of these multiple people to support her claim. In my view, this led to a finding that the Applicant would not likely face a risk to life, of torture, of cruel and unusual treatment or punishment, or of persecution if she returned to Poland. The Officer justifiably noted that the new evidence "restated materially the same information that she presented to the RPD," and that she did not rebut any of those earlier findings.

[36] Reasons are rarely perfect, nor do they need to be (*Vavilov* at para 91). The Officer did not need to mention every incident raised by the Applicant. The Decision nevertheless evidences a clear and coherent chain of analysis based on the record and the law, which merits deference (*Vavilov* at para 85).

[37] The Applicant, in her written materials, urged this Court to reinterpret subsection 101(1) of the *IRPA* and section 167 of the *IRPR* to provide additional rights to claimants who were children at the time of their failed refugee claim, by reading down subsection 101(1) such that minor children are not ineligible to make future refugee claims before the RPD upon reaching the age of majority. However, the Applicant did not make this argument during the PRRA process.

[38] The Applicant has been aware of her previous failed refugee claim since 2013. She received assistance and guidance from qualified counsel throughout the PRRA process. If she wanted to raise an interpretation of a legal issue that was within the proper jurisdiction of the Officer in the PRRA Application, she should have done so at that instance (*Yue v Bank of Montreal*, 2020 FC 468 at paras 48-49; see also *Canada RNA Biochemical Inc v Canada (Health)*, 2020 FC 668 at para 92). The Applicant's counsel at this judicial review, who provided as strong a case as he could have on her behalf given the background I have described, conceded this point at the hearing. Accordingly, I decline the invitation to reinterpret these provisions.

VIII. Certified Question

[39] The Applicant, preceding the hearing, requested that this Court certify the following question:

> "Whether IRPA s.101(1) should be read down so that it applies only to adult refugee claimants who made previous refuge claims in Canada, and not to their minor children, in order to conform to UN Convention on the Right of the Child Article 12."

[40] The Applicant resiled from this question at the hearing, given the concession described in Part V of these Reasons. Instead, she proposed the following question for certification:

> "Which standard of review is required to review PRRA officer decisions on whether to hold a hearing: reasonableness or correctness?"

[41] Certification has three main criteria. The proposed question must be a serious question that (i) is dispositive of the appeal, (ii) transcends the interests of the parties, and (iii) raises an issue of broad significance or general importance: *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at para 46 [*Lunyamila*]; *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 36. A question is not dispositive if a previous decision has already answered it: *Singh v Canada (Citizenship and Immigration)*, 2020 FC 328 at paras 47-50. Accordingly, such a question cannot qualify as a serious question of general importance within the meaning of paragraph 74(d) of the *IRPA*.

[42] Additionally, an issue that need not be decided cannot ground a properly certified question: *Lunyamila* at para 46; *Lai v Canada (Public Safety and Emergency Preparedness)*, 2015 FCA 21 at para 10. That is, the question must have been dealt with by the reviewing court, and must arise from the case itself rather than merely from the way in which that court disposes of the application: *Lunyamila* at para 46. As a corollary, the question cannot be in the nature of a reference or turn on the unique facts of the case or the judge's reasons: *Weldemariam v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 631 at para 76; *Lunyamila* at para 46.

[43] The proposed question does not satisfy the test for certification. I have acknowledged there may be some divergence in the case law on the standard of review of whether to hear an oral hearing in certain situations where serious issues of credibility arise. But here, the Officer identified no serious issue of credibility, and made no veiled credibility findings. Rather they reasonably based the Decision on a lack, or insufficiency, of evidence. The proposed question is therefore not dispositive in these circumstances, and I will decline to certify the question proposed.

IX. Conclusion

[44] I find the Officer's Decision to be justified in relation to the factual and legal constraints, and thus reasonable. For all the reasons explained above, I will dismiss this application for judicial review.

JUDGMENT in IMM-1642-19

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. The question proposed by the Applicant does not meet the requirements for certification and will therefore not be certified.

3. There is no award as to costs.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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