Federal Court  Cour fédérale

Date: 20211109

Docket: IMM-1326-20

Citation: 2021 FC 1206

Ottawa, Ontario, November 9, 2021

PRESENT: Mr. Justice Pentney

BETWEEN:

A.B.

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant is a female citizen of Saint Vincent and the Grenadines (St. Vincent). She fled that country and came to Canada at the age of 19 in 2001, in order to escape physical, mental, and sexual abuse by her father. Since then she has pursued a number of different immigration processes in an effort to stay in Canada, but all of them have been unsuccessful.

[2] Most recently, the Applicant applied for a Pre-Removal Risk Assessment (PRRA), but it was denied. The Applicant then retained new counsel, and applied for a reconsideration of her PRRA on the basis of incompetent representation by two previous legal representatives: an immigration consultant and a lawyer. Her request for reconsideration was denied on February 19, 2020. The Applicant seeks judicial review of that decision.

[3] In view of the nature of the Applicant's claim and the evidence that she could be re-traumatized if the details of her claim were made public, Justice James Russell ordered that the file should be rendered anonymous, and thus the Applicant's name has been replaced by initials in the style of cause.

[4] For the reasons that follow, the application for judicial review is allowed.

II. Background

[5] The Applicant states that her father was an alcoholic who abused her sexually, mentally, and physically as a child and a teenager. She never told anyone about the abuse because her father threatened to kill her if she did so. As she grew older, she began to resist her father but he physically assaulted her and the sexual abuse continued. She eventually told her mother, who confronted her father but he threatened to kill both of them. She went to the police but they did not accept her complaint.

[6] The Applicant and her mother went into hiding, but her father searched for them and she was told that he had said that he would find her "dead or alive". Her mother borrowed money

and sent her to Canada in 2001. She said she relied on an aunt who lived in Canada to help her find a way to stay in Canada, but her applications for a student visa and for humanitarian and compassionate consideration were refused. She was told that if she married a Canadian citizen she would gain status, but she was not prepared to do that.

[7] In the end, she submitted a claim for refugee status on the advice of an immigration consultant, who then represented her at the refugee hearing. The Refugee Protection Division (RPD) denied her claim on the following bases:

i. her delay in claiming refugee status undercut her claim of fearing persecution if she returned to St. Vincent;
ii. she was found not to be credible in part because she failed to provide any corroborating evidence from her mother and sister whom she said had also suffered abuse by her father;
iii. she never sought counselling or support for her experiences until she submitted her refugee claim; and
iv. she failed to rebut the presumption of state protection in St. Vincent.

[8] At the refugee hearing, the RPD noted that the Applicant was a 36-year old woman who had not seen her family for 16 years, and that she would have no need to live with or otherwise associate with her father if she returned to St. Vincent. On the basis of all of this, the RPD denied her claim for refugee status.

[9] The Applicant retained a lawyer to seek judicial review of this decision, but leave was dismissed by this Court on September 17, 2018.

[10] The Applicant then applied for a PRRA, and her previous immigration consultant represented her in that process. In support of the Applicant's claim that she risked persecution in St. Vincent, the immigration consultant filed letters from the Applicant's aunt in Canada and her mother, as well as a psychological assessment. The consultant also filed country condition documents recounting evidence of the scope and scale of child sexual abuse in St. Vincent, as well as the failure of authorities to provide adequate protection to victims.

[11] The PRRA officer (Officer) refused to consider any evidence that pre-dated the RPD decision because the Applicant had not explained why she had not provided it to the panel. The Officer noted that the risks cited by the Applicant in her PRRA were essentially the same as those considered and rejected by the RPD, and the focus of the Officer's analysis was on whether the Applicant had established new risks that had not been previously considered.

[12] The Officer discounted the letters from the Applicant's aunt and mother because they did not provide evidence of new risks or sufficient details regarding when the father had last threatened to harm the Applicant, nor did they explain why he would still want to harm her, more than 18 years after her departure from St. Vincent. The Officer noted that the Applicant had provided no sworn declarations to support her fear of her father.

[13] In regard to the psychologist's evidence, the Officer observed that the Applicant had obtained these assessments in connection with her previous and current immigration proceedings and there was no evidence that she continued to see her psychologist for ongoing treatment or counselling. The Officer did not consider the Applicant's risks associated with her mental health

condition, because subparagraph 97(1)(b)(iv) of the *Immigration and Refugee Protection Act*, SC 2001, c I-9, provides that risks caused by "the inability of the country of origin to provide adequate health or medical care" are not to be factored into the analysis.

[14] In a decision dated December 20, 2019, the Officer denied the PRRA because the Applicant had not established that she faced any additional forward-looking risk of persecution in her home country beyond that previously assessed by the RPD.

[15] The Applicant retained new counsel, and then submitted a request for reconsideration of the PRRA decision on February 14, 2020 (Reconsideration Request). Some of the details of this request will be discussed below. At this stage, it is sufficient to note that the request for reconsideration was based on allegations of incompetent representation by the immigration consultant and the lawyer who had previously acted for the Applicant.

[16] In the Reconsideration Request, the Applicant's new counsel (who represented her in this proceeding) indicated that he had provided notice of these allegations to both the immigration consultant and the lawyer, and that they had been asked to provide any response within ten days. Despite this, the Officer denied the Reconsideration Request on February 19, 2020, without considering the responses of the consultant and the lawyer.

[17] The Applicant seeks judicial review of this decision.

III. Issues and Standard of Review

[18] The issue in this case is whether the Officer's reconsideration decision is reasonable (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]; *Hussein v Canada (Citizenship and Immigration)*, 2018 FC 44 [*Hussein*]).

[19] In summary, under the *Vavilov* framework for judicial review on a standard of reasonableness, a reviewing court "is to review the reasons given by the administrative decision maker and determine whether the decision is based on an internally coherent chain of reasoning and is justified in light of the relevant legal and factual constraints" (*Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at para 2 [*Canada Post*]). The burden is on the Applicant to satisfy the Court "that any shortcomings or flaws relied on… are sufficiently central or significant to render the decision unreasonable" (*Vavilov* at para 100, cited with approval in *Canada Post* at para 33).

[20] Certain questions arose regarding evidence that both sides wanted to rely upon at the hearing, but in view of the analysis below, it is not necessary to deal with these issues.

IV. Analysis

A. *Legal Framework*

[21] The jurisprudence confirms that immigration officers have the jurisdiction to reconsider their decisions on the basis of new evidence or further submissions (*Canada (Citizenship and*

Immigration) v Kurukkal, 2010 FCA 230 at para 5; *Hussein* at paras 52-53). The process consists of two steps: first, the officer must decide whether to "open the door to a reconsideration"; if the officer decides to re-open the case, the second stage involves an actual reconsideration of the decision on its merits (*Hussein* at para 55; *Gill v Canada (Citizenship and Immigration)*, 2018 FC 1202 at para 12 [*Gill*]).

[22] There is no general obligation on officers to reconsider their decisions; the onus is on the applicant to show that this is warranted in the interests of justice or because of the unusual circumstances of the case (*Hussein* at para 57, citing *Ghaddar v Canada (Citizenship and Immigration)*, 2014 FC 727 at para 19 [*Ghaddar*]).

[23] The decision in this case clearly shows that the Officer understood that they had a discretion whether to reconsider the original PRRA decision. The parties disagree, however, whether the Officer's refusal was made at the first stage or the second.

B. *Submissions of the Parties*

[24] The Respondents point to the Officer's statement in the second paragraph of the decision letter: "After a review of your reconsideration request, I have exercised my jurisdiction not to reconsider your application". The Respondents argue that this is a clear indication that the Officer made the refusal at the first stage.

[25] The Respondents note the wide discretion available to an officer in making that determination and submits that the Officer did not need to conduct a full review or weighing of

the new evidence, citing *Pierre Paul v Canada (Citizenship and Immigration)*, 2018 FC 523 at paras 28-29. The Respondents assert that the Applicant's argument that the reasons for the decision are inadequate serves to bolster their argument that the Officer did not enter into the second stage of the analysis. The Respondents argue that the Applicant's critique is misplaced because the Officer was not required to provide a detailed or lengthy explanation for the refusal, and it would have been an error for the Officer to consider the evidence in any detail at the first step of the analysis.

[26] The Applicant argues that the decision as a whole must be reviewed. The Reconsideration Request was based on allegations of incompetence of counsel. Her submissions on this point mainly focus on her prior representatives' failure to explain the need for her to obtain detailed evidence and the importance of obtaining corroborative evidence from family members to support her claim of abuse by her father. She also pointed to the failure to explain the need to show why evidence was not filed at an earlier stage of her immigration process in connection with the PRRA application. Finally, she asserts that the immigration consultant was in a position of conflict because of his prior failures to provide competent representation for her in relation to the RPD proceeding. The Applicant argues that this conflict should have been disclosed to her before the consultant represented her in the PRRA application.

[27] With this background, the Applicant points to the following passage in the refusal decision:

> Your current counsel informs that you could not reasonably have been expected to submit these documents with your PRRA due to your ineffective counsel at that time. It is noted that you had the same law firm represent you in your RPD hearing in May 2018, in

> your litigation of the negative RPD decision in August 2018 and in your PRRA application in December 2019. It is reasonable to expect that had you been dissatisfied with the efforts of your original counsel, you would have exercised your right to obtain new counsel prior to submitting your PRRA application. Regardless, it is also noted that the PRRA application informs you to list the written documents you will be providing that clearly act as evidence in support of your PRRA; you signed the PRRA application declaring that you read and understood the contents of the application. Further, you submitted supporting documents at your refugee claim hearing and with your PRRA application. The submissions you provided with these previous applications demonstrate that you were aware that you could submit any documents that act as evidence in support of your immigration processes. Therefore, the initial decision to refuse your PRRA application remains unchanged.

[28] The Applicant submits that this reflects an engagement with the evidence, which has been found to constitute entry into the second stage of the analysis (citing *Gill* at para 14). The Applicant submits that this decision is unreasonable because it fails to engage with the substance of her request for reconsideration, namely the consequences of her prior incompetent representation.

C. *Discussion*

[29] The Officer's decision is, to say the least, somewhat confusing. Having considered the parties' submissions and reviewed the record in detail, I am not persuaded that the Officer entered into the second stage of the analysis.

[30] It bears repeating that the two stages involve different considerations: (i) whether to re-open the decision – to "open the door to reconsideration" – based on the interests of justice or the unusual circumstances of the matter; and (ii) an actual reconsideration of the underlying

decision, here a PRRA. The passage of the decision relied on by the Applicant does not involve any consideration of the evidence of the risks the Applicant alleges she faces, but rather it explains the reasons why the Officer refused to reopen the case. This case is therefore different from the situation in *Gill*, where the officer considered the substance of the evidence and asked for clarification from the applicant (see para 14).

[31] It is inevitable that an officer will need to examine the reasons put forward to re-open a decision, and this will entail some consideration of the submissions of an applicant about why it is in the interests of justice or necessary in the circumstances to reconsider the original decision. In the present case, the Officer's analysis focuses entirely on the reasons put forward by the Applicant to re-open the PRRA; there is no mention of the new evidence in regard to the risks she might face, and this is the clearest indication that the Officer did not enter into the second stage of the analysis.

[32] However, I agree with the Applicant that the Officer's reasons for refusing to reopen fall short of what is required by reasonableness review. According to *Vavilov*: "a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and the law that constrain the decision maker" (at para 85). I find that this decision fails to meet this standard, for several reasons.

[33] First, the context for the decision is an important consideration. Here, the decision to be reconsidered is a PRRA, which is focused on risks facing a claimant if they return to their country of origin, and which therefore engages the liberty and security of the person interests

protected by section 7 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (*B10 v Canada (Citizenship and Immigration)*, 2015 SCC 58 at para 75). No violation of section 7 is alleged here. I mention it merely to emphasize the nature of the interests implicated by the decision.

[34] This affects what reasonableness review demands of a decision-maker, as stated in *Vavilov*: "Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes" (at para 133).

[35] Next, it is important to consider the decision in light of the factual matrix put before the decision-maker. The crux of the question before the Officer was whether the interests of justice or unusual circumstances called for a reconsideration of the PRRA decision. The PRRA decision was based on several factors, including the RPD's findings regarding the credibility of the Applicant's claims that she feared her father, the absence of sworn corroborating evidence, and the Applicant's failure to demonstrate that she could not obtain state protection in St. Vincent.

[36] The Applicant's Reconsideration Request challenged all of these conclusions, pointing to the incompetent representation the Applicant says she received, as well as to evidence that was not previously considered, and which corroborated her claims of risk of persecution as well as her argument that she could not obtain state protection.

[37] The Officer's refusal to reopen is explained in the passage cited earlier, which involved two key findings:

i. that it was reasonable to expect that if the Applicant was dissatisfied with her prior representation, she would have sought out other professionals to represent her; and

ii. that the Applicant must have known that she had to submit documents to support her claim because the PRRA form she signed clearly indicates that documents must be provided, and she had submitted documents in support of her previous immigration requests.

[38] The upshot of the Officer's analysis is to reject the Applicant's claim that she was utterly dependent on the consultant and counsel. Essentially, what the Officer is saying is that the Applicant knew about the requirements and cannot complain that she failed to meet them because of inadequate representation, in particular because she did not change her representatives until the final stage of the process.

[39] This is problematic on a number of levels. The Applicant's vulnerability is supported by her personal narrative and the evidence of her psychologist that diagnosed her as suffering from Post-Traumatic Stress Disorder of a complex nature. Despite the RPD's and Officer's questions about the timing of the Applicant's psychologist's reports, there is no evidence to contradict the diagnosis. The Applicant's vulnerability had to be taken into account in assessing the basis for her reconsideration request.

[40] The assertion that it was reasonable to expect the Applicant to seek out new counsel if she was unhappy with her prior representatives ignores her evidence and submissions. She states that she was not aware of the incompetence issue until she retained new counsel, and given her overall state of vulnerability, plus the fact that it was not reasonable for her to be aware of the intricacies of the evidentiary or procedural rules governing PRRA determinations, this finding is unreasonable. It is also based on a factual error. The Officer states that the same law firm represented the Applicant in her RPD hearing and the PRRA, but this is incorrect. This mistake, while not fatal, also undermines the Officer's analysis on this point.

[41] In addition, the Officer's reasoning regarding what the Applicant knew and what the forms said undermines the rationale for seeking out professional assistance and places the burden on the individual rather than on the professionals retained to undertake these very duties (see *Guadron v Canada (Citizenship and Immigration)*, 2014 FC 1092 at para 29).

[42] The Applicant's Reconsideration Request was based on a detailed, thorough explanation of how incompetent representation allegedly undermined her case. It reported that her representatives failed to inform her of the nature of the evidence she needed to obtain (*i.e.*, detailed, dated, sworn statements) and to explain why the evidence was not provided earlier in light of the legal requirements for new evidence in PRRA proceedings. A person without legal training would not ordinarily be expected to understand matters of this nature, particularly not a person in the Applicant's state of vulnerability.

[43] Finally, the Officer fails to demonstrate through a path of logical reasoning how they considered the interests of justice in relation to the Reconsideration Request. The Applicant submitted a timely request to reconsider the negative PRRA decision, supported by evidence that raised questions about her vulnerability. Her claim of incompetent representation was supported by detailed and thorough submissions, focused on evidence and arguments that went to the heart of the prior negative decision. In my view, the Officer's explanation for refusing to reopen the matter is lacking in intelligibility and justification, given the nature of the materials submitted by the Applicant and the specific context of this case.

[44] I hasten to add that the requirements to justify a refusal to reopen a decision is not at the high end of the scale, and much depends on the actual circumstances of the case and the nature of the request. For example, an officer does not have to explain in any detail why they refused to reconsider a visa request or humanitarian and compassionate decision, where an applicant submits a perfunctory reconsideration request not supported by detailed and compelling submissions (see *Ghaddar* at para 18).

V. Conclusion

[45] For these reasons, the application for judicial review is granted and the matter is to be remitted back for determination by a different officer.

[46] The parties posed no question of general importance for certification and I agree that none arises.

JUDGMENT in IMM-1326-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The matter is to be sent back for redetermination by a different officer.

3. There is no question for certification.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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