Federal Court  Cour fédérale

Date: 20221125

Docket: IMM-6761-21

Citation: 2022 FC 1620

Ottawa, Ontario, November 25, 2022

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

AB

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision by a Senior Immigration Officer of the Humanitarian Migration Office, dated July 23, 2021 [Decision]. The Officer rejected the Applicant's application for a Pre-Removal Risk Assessment [PRAA] by finding that he would not be subject to a risk of persecution, torture, risk to life or risk of cruel and unusual treatment

or punishment if returned to South Africa. The Applicant was found not to be a Convention refugee or a person in need of protection.

II. Facts

[2] The Applicant is a 50-year-old South African national. He arrived in Canada in October 2017 and made a claim for refugee protection. The claim was based on alleged discrimination and violence the Applicant experienced in South Africa due to his perceived status as a foreigner, in addition to HIV-related stigma and discrimination. The Applicant also identified a fear of retaliation from a hitman that he states was hired by the family of a work associate due to a dispute over the ownership of a taxicab.

[3] The Applicant's refugee claim was denied in 2018. Subsequently, the Applicant's appeal to the RAD was dismissed for lack of perfection in 2019. The Applicant unsuccessfully applied to reopen his appeal and filed an application for leave and for judicial review. The application to reopen was refused in 2019. The Applicant filed another application for leave and judicial review of the RAD's refusal to reopen his appeal. Both applications for leave were joined. Leave was granted, but the Applicant's judicial reviews were dismissed in 2020.

[4] The Applicant submitted a PRRA which was refused by decision dated July 23, 2021. He also submitted a request for permanent residence status which was dismissed and which is the subject of IMM-6762-21 in respect of which a Reasons and Judgment are also delivered today. The two application were heard on the same day, one after the other.

III. Decision under review

A. *Perception as a foreigner*

(1) Mistreatment from authorities

[5] On this first point, the Officer found that there was insufficient evidence to conclude that the Applicant had faced mistreatment by authorities in South Africa on the basis of having been perceived as a foreigner. The Applicant's claim in this regard was based on his allegedly being arrested on three separate occasions for various issues surrounding his perceived identity and citizenship. The Officer noted that the Applicant did not advance corroborating documentation such as affidavits from individuals indicated to have been implicated in his detainments, such as his mother or lawyer. Neither was the officer satisfied the Applicant had pursued any avenues to report the alleged mistreatment.

(2) Societal abuses

[6] The Applicant indicated in his materials that his various businesses had been "targeted by mobs who were attacking businesses which they claimed were foreign-owned". The Applicant claimed three separate attacks to his properties. The Officer agreed with the decision of the RPD but found that the evidence was insufficient to rebut the presumption of state protection.

B. *HIV-positive status & stigma*

(1) HIV status

[7] The Officer draws his reasoning from the section 97(1)(b)(iv) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [*IRPA*], which states:

> **Person in need of protection**
>
> 97 (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally […]
>
> (b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if
>
> […]
>
> (iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

[8] The Officer found that the Applicant's health condition was described in section 97(1)(b)(iv) and, therefore, was ineligible for consideration. Additionally, the Officer noted that the Applicant did not state that he would be denied access to health or medical care in South Africa on the basis that he would be discriminated against to the point of persecution. Specifically, the Officer points out that the Applicant learned of his HIV status in either 2008 or 2009 and "began taking medication right away." Neither does the Applicant indicate having been refused treatment for his health condition on any ground or basis during this 8-9 year period.

(2) HIV stigma

[9] The Applicant's allegation of social ostracization due to his HIV status is drawn from experiences where friends and other community members began avoiding him entirely. In the Officer's view, this experience does not rise to a level of mistreatment that would amount to persecution as contemplated by the Convention. Furthermore, the Officer notes the Applicant's failure to advance sufficient evidence to demonstrate that he would directly and personally face such mistreatment were he returned to South Africa. In the Officer's view, there was insufficient evidence from which to conclude that the Applicant had been denied employment, housing, or other services, and/or would face physical abuse or systematic denials of his rights if he were to return to return to South Africa.

C. *Dispute with taxi drivers*

[10] The Applicant indicated previously that he had worked as a taxi driver in South Africa and was involved in a dispute with other drivers due to the larger size of his vehicle, which allowed him to carry a greater number of passengers. The Applicant's taxi was then destroyed by arson in retaliation. Thereafter, the Applicant registered his vehicle under the name of an individual of whom he states everyone was "afraid". That individual was then shot and killed in May 2017. Following this, the slain individual's family threatened to kill the Applicant and his family, allegedly hiring a hitman to complete the task. These events prompted the Applicant to relocate to a city approximately 1200 kilometres away. The Applicant was later informed by his wife that armed men entered his hair salon on October 28, 2017.

[11] Briefly, the Officer notes that the Applicant does not advance sufficient evidence from which to conclude that his “adversaries” in the taxi dispute have continued interest in pursuing the client or his family presently.

IV. Issues

[12] The only issue is the reasonableness and or correctness of the Decision.

[13] I granted an Order anonymizing this proceeding prior to the hearing hence the style of cause, selected by the Applicant, remains as it chosen by his counsel.

V. Standard of Review

[14] The parties largely agree the relevant standard of review is reasonableness. However, the Respondent submits that in raising an issue of whether the Applicant should have been provided with an oral hearing, an issue of procedural fairness is triggered. Therefore, that issue should be addressed on the correctness standard. I will outline both in turn.

A. *Reasonableness*

[15] In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, issued at the same time as the Supreme Court of Canada’s decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 [*Vavilov*], the majority per Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

> [31] 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 law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
>
> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
>
> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).
>
> [Emphasis added]

[16] Furthermore, *Vavilov* makes it abundantly clear the role of this Court is not to reweigh and reassess the evidence unless there are "exceptional circumstances". The Supreme Court of Canada instructs:

> [125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55;

> see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.
>
> [Emphasis added]

[17] The Federal Court of Appeal recently held in *Doyle v Canada (Attorney General),* 2021 FCA 237 that the role of this Court is not to reweigh and reassess the evidence:

> [3] In doing that, the Federal Court was quite right. Under this legislative scheme, the administrative decision-maker, here the Director, alone considers the evidence, decides on issues of admissibility and weight, assesses whether inferences should be drawn, and makes a decision. In conducting reasonableness review of the Director's decision, the reviewing court, here the Federal Court, can interfere only where the Director has committed fundamental errors in fact-finding that undermine the acceptability of the decision. Reweighing and second-guessing the evidence is no part of its role. Sticking to its role, the Federal Court did not find any fundamental errors.
>
> [4] On appeal, in essence, the appellant invites us in his written and oral submissions to reweigh and second-guess the evidence. We decline the invitation.

B. *Correctness*

[18] With regard to the first issue, questions of procedural fairness are reviewed on the correctness standard: *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, per Binnie J at para 43. That said, I note in *Bergeron v Canada (Attorney General),* 2015 FCA 160, per Stratas JA at para 69, the Federal Court of Appeal says a correctness review may need to take place in "a manner 'respectful of the [decision-maker's] choices' with 'a degree of

deference': Re: *Sound v Fitness Industry Council of Canada*, 2014 FCA 48, 455 N.R. 87 at paragraph 42." But see *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [per Rennie JA]. In this connection I also note the Federal Court of Appeal's recent decision holding judicial review of procedural fairness issues is conducted on the correctness standard: see *Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees and Citizenship*), 2020 FCA 196 per de Montigny JA [Near and LeBlanc JJA concurring]:

> [35] Neither *Vavilov* nor, for that matter, *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, have addressed the standard for determining whether the decision-maker complied with the duty of procedural fairness. In those circumstances, I prefer to rely on the long line of jurisprudence, both from the Supreme Court and from this Court, according to which the standard of review with respect to procedural fairness remains correctness.

[19] I also understand from the Supreme Court of Canada's teaching in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 23 that the standard of review for procedural fairness is correctness:

> [23] Where a court reviews the merits of an administrative decision (i.e., judicial review of an administrative decisions <u>other than a review related to a breach of natural justice and/or the duty of procedural fairness</u>), the standard of review it applies must reflect the legislature's intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law. The starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness.
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> [Emphasis added]

[20] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50, the Supreme Court of Canada explains what is required of a court reviewing on the correctness standard of review:

> [50] When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

VI. Analysis

A. *Unreasonable credibility findings*

[21] The Applicant submits that the Officer made an unreasonable credibility finding on the Applicant's lack of "sufficient corroborating evidence" of his detentions by the South African government. The Applicant takes particular issue with the following:

> Evidence before me of these interactions is limited to statements by the client and counsel. The client does not advance corroborating documentation such as affidavits from individuals indicated to have been implicated in his detainments … Nor does the client submit documentation pertaining to his imprisonment, court appearances, or payment of a cash bond for which he states he receipt a receipt. There is insufficient evidence before me from which I am able to conclude that the client had faced mistreatment by authorities in South Africa.
>
> [Emphasis added]

[22] The Applicant argues that all the "interactions" referred to by the Officer were outlined in the Applicant's Basis of Claim form and testimony before the RPD. Regardless, the RPD made no adverse credibility findings on these points. The Applicant points out that both his testimony and affidavit before the RPD were subject to a presumption of truth, and the Officer did not

provide justified, transparent and intelligible reasons why the Applicant's evidence was not to be believed.

[23] While the Applicant acknowledges that the Officer was not bound by the RPD's findings regarding credibility, the Applicant suggests that the Officer must provide some explanation for departing from these findings especially where there is not new evidence before the Officer. The Applicant cites this Court's decision in *Kaur v Canada (Citizenship and Immigration)*, 2004 FC 1612, for the proposition that an Officer "is not permitted to go behind the RPD's decision to reach a different conclusion."

[24] The Respondent submits the Officer's statement in this regard was not a credibility finding, and that the only evidence of that alleged mistreatment came from statements by the Applicant and his Counsel. In the Respondent's view, there was a lack of evidence provided by individuals who would have had first-hand knowledge of the alleged mistreatment. This included any official documentation confirming his imprisonment, court appearances, and bond payments.

[25] Given the lack of corroborating documentation, the Respondent submits that the Officer's finding was one concerning the sufficiency of evidence rather than credibility. With respect the Respondent (and Applicant) both correctly cite to this Court's decision in *Ferguson v Canada (MCI)*, 2008 FC 1067, which concerns the distinction between credibility and insufficiency in evidentiary findings. In *Ferguson*, Justice Zinn set out the following:

> [26] If the trier of fact finds that the evidence is credible, then an assessment must be made as to the weight that is to be given to it. It is not only evidence that has passed the test of reliability that may be assessed for weight. It is open to the trier of fact, in

considering the evidence, to move immediately to an assessment of weight or probative value without considering whether it is credible. Invariably this occurs when the trier of fact is of the view that the answer to the first question is irrelevant because the evidence is to be given little or no weight, even if it is found to be reliable evidence. For example, evidence of third parties who have no means of independently verifying the facts to which they testify is likely to be ascribed little weight, whether it is credible or not.

[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 the officer made in this case.

[…]

[33] The weight the trier of fact gives evidence tendered in a proceeding is not a science. Persons may weigh evidence differently but there is a reasonable range of weight within which the assessment of the evidence's weight should fall. Deference must be given to PRRA officers in their assessment of the probative value of evidence before them. If it falls within the range of reasonableness, it should not be disturbed. In my view the weight given counsel's statement in this matter falls within that range.

[34] It is also my view that there is nothing in the officer's decision under review which would indicate that any part of it was based on the Applicant's credibility. The officer neither believes nor disbelieves that the Applicant is lesbian – he is unconvinced. He states that there is insufficient objective evidence to establish that she is lesbian. In short, he found that there was some evidence – the statement of counsel – but that it was insufficient to prove, on the balance of probabilities, that Ms. Ferguson was lesbian. In my view, that determination does not bring into question the Applicant's credibility.

[26] In my view and with respect, the PRRA Officer as trier of fact in this case was – as the Respondent submits - simply saying the tendered evidence did not have sufficient probative value to establish the facts for which it was tendered. Rather than believing or disbelieving the applicant's claim, the officer was unconvinced because there was insufficient objective evidence to establish that the facts alleged on the balance of probabilities. That determination did not bring the applicant's credibility into question. In effect, whether credible or not, there was insufficient evidence to convince the decision maker. That, as *Ferguson* confirms, in a finding open to the Officer in this case.

[27] Given the injunctions from both the Federal Court of Appeal [*Doyle*] and the Supreme Court of Canada [*Vavilov* at para 125] that this Court "must" not involve itself with reweighing and reassessing the evidence considered by the Officer in the absence of exceptional circumstances, as here, I am unable to accept the Applicant's submissions in this respect. This is all the more so given that deference that must be given to PRRA officers in their assessment of the probative value of the evidence before them. If the decision falls within the range of reasonableness, it should not be disturbed – see *Ferguson* at para 33. That it does and it will not be disturbed in this case.

B. *Oral hearing*

[28] My finding the issue is one of sufficiency of evidence disposes of the Applicant's submissions concerning a requirement for a PRRA Officer to hold an oral hearing, and does so whether this aspect of the case is assessed on the basis of reasonableness or correctness. There

was no such requirement in this case because there was no veiled credibility finding. The decision was reasonable in this respect.

[29] As Justice Russell held in *Nnabuike Ozomma v Canada (MCI)*, 2012 FC 1167, where a PRRA application is determined based on the insufficiency of the evidence, there is no need to hold an oral hearing:

> [52] I am sure that it is possible to find factual distinctions in each of these cases that had a lot to do with the final determination in each. However, the cases can be reconciled. Officers can only avoid credibility findings and decide applications on the basis of sufficiency of evidence if their decisions show that, credibility aside, what the applicant has to say is not sufficient, on the applicable standard of proof, to show that he or she faces a risk under either section 96 or section 97. In other words, it has to be a situation where a credibility finding is not necessary in order to decide the probative value of evidence so that, whether or not an applicant is being truthful, their evidence is not sufficient to establish persecution or a section 97 risk. In such a situation, it is not procedurally unfair to refuse to hold an oral hearing.
>
> [53] In the present case, the Applicant provided, along with his counsel's submissions, his 2009 PIF narrative and his declaration saying that the information provided was true and correct and that the "declaration has the same force and effect as if made under oath."
>
> [54] The relevant part of the PIF has some detail but it is general and vague regarding the forward-looking risk he claims to face. He has been imprisoned in the past and humiliated under Decree 33, but he managed to escape. He fears that the Lagos state government is looking for him so that they can enforce Decree 33 against him. He also says the Nigerian government has information that he is a MASSOB. I accept that the Applicant is entitled to the presumption of truthfulness in this context.
>
> [55] However, without disbelieving the Applicant as to what has happened to him and other people in the past, the evidence before the Officer was vague and speculative as to what might happen to him on return to Nigeria.

> [56] The Officer is not obligated under section 167 to provide applicants with an interview so that they can supplement their evidence. The onus was upon the Applicant to provide sufficient evidence to convince the PRRA officer that he faces forward-looking risk in accordance with the applicable standard of proof. The Applicant in this case had every opportunity to do this.

C. *State protection analysis*

[30] The Applicant also takes issue with the Officer's adoption of the RPD's reasons on state protection. In the Applicant's view, he continues to be a victim of state sanctioned xenophobia, which was made clear in the three times he was detained for his perceived nationality.

[31] I note there is country condition evidence that suggests the "state is complicit in crimes against foreigners" and fails to protect them against deadly attacks. The Applicant cites to a detailed report by Human Rights Watch outlining these conditions. However, I am not satisfied the Applicant did enough in his own interests in this respect, noting that he did not complain of any of the three interactions with the state, nor with respect to three of the four incidents involving non-state participants. I am not persuaded these were situations where he would have been required to risk his life to obtain state protection. While the test for state protection is adequate state protection at the operational level, which was not considered or applied, there is no need for an analysis on this aspect of the state protection issue given the Applicant's failure to take reasonable steps in the circumstances.

D. *Assessment of HIV status*

[32] The Applicant submits that the Officer's assessment of the Applicant's risk due to his HIV status was unreasonable. In the Applicant's view, the Officer erred in finding that there was insufficient evidence to conclude that the Applicant would directly face mistreatment in South Africa despite acknowledging individuals with HIV faced mistreatment in South Africa.

[33] With respect, given the law set out in both *Doyle* and *Vavilov* cited above, I decline to engage in what I find is simply a request to reweigh and reassess evidence without exceptional circumstances. I also note that despite living in the country for 8-9 years with HIV, there was no evidence the Applicant faced abuse or discrimination in employment, housing or other services based on his HIV status.

E. *Anonymity order*

[34] An order for confidentiality is governed by rule 151(2) of the *Federal Court Rules*, SOR/98-106, which states:

> **Demonstrated need for confidentiality**
>
> (2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.

[35] The Applicant requested that an order be made due to concerns that he and/or his family could be subject to HIV-related stigma and discrimination should the Applicant's status become

widely known. Given this submission and that the Respondent does oppose such an order, I granted this Order prior to the hearing and formalize it now.

VII. Conclusion

[36] In my respectful view, the Applicant has not established the Decision is unreasonable. Therefore this application must be dismissed.

VIII. Certified Question

[37] Neither party proposed a question of general importance, and none arises.

JUDGMENT in IMM-6761-21

THIS COURT'S JUDGMENT is that this application is anonymized, the application is dismissed, no question of general importance is certified and there is no Order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6761-21
STYLE OF CAUSE:	AB v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY WAY OF VIDEOCONFERENCE
DATE OF HEARING:	NOVEMBER 21, 2022
JUDGMENT AND REASONS:	BROWN J.
DATED:	NOVEMBER 25, 2022

APPEARANCES:

Debbie Rachlis	FOR THE APPLICANT
David Cranton	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Debbie Rachlis Law Barrister & Solicitor Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT