Federal Court		Cour fédérale

Date: 20100112

Docket: IMM-249-09

Citation: 2010 FC 36

Ottawa, Ontario, January 12, 2010

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

KHALID ZUBAIR RANA

Applicant

and

MINISTER OF
CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT

[1] This is an application pursuant to subsection 72 (1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of the negative decision of the Applicant's Pre-Removal Risk Assessment, dated December 8, 2008 (Decision), which refused the Applicant's application to be deemed a Convention refugee or person in need of protection under sections 96 and 97 of the Act.

BACKGROUND

[2] The Applicant is a citizen of Pakistan. He made a claim for protection which was denied by the RPD on the grounds of credibility on June 18, 2004. The judicial review of this application was dismissed. The Applicant then submitted a PRRA application which was denied on March 3, 2008. He filed a second PRRA application which was also rejected. The Applicant then made a motion for a stay of removal which was dismissed by Justice Mandamin on February 23, 2009. Accordingly, the Applicant was deported from Canada after having lived here for 21 years.

[3] The Applicant is a homosexual who claims to have been abused and isolated upon his return to Pakistan by his family and others.

DECISION UNDER REVIEW

[4] The Officer found that because another PRRA had already been considered, the second PRRA application would be assessed "only in terns of risk factors arising since the last PRRA assessment, in accordance with the administrative law principle of *issue estoppel*." The second PRRA assessment noted that credibility was the determining factor in the first PRRA decision.

[5] The Applicant expressed concerns that family members who had previously abused him would harm, and possibly kill, him upon his return to Pakistan. He submitted two affidavits in support of this claim.

[6] The Officer noted that the Applicant had submitted his own statements, photographs of a male couple, and copies of postcards in support of his application. The Officer found that this evidence was new evidence, but that it was not evidence of the Applicant's homosexuality.

[7] The Officer determined that the Applicant had not provided sufficient evidence to corroborate his claim. Rather, the only evidence provided were his own statements. Although the Applicant had the opportunity to provide additional evidence to support his claim, he had not done so. Further, the Officer noted that the country conditions of Pakistan had not deteriorated since the first PRRA application. Accordingly, the application was not allowed.

ISSUES

[8] The issues arising on this application can be summarized as follows:

1) Whether the judicial review of the PRRA is moot because the Applicant is no longer in Canada;
2) Whether the Officer failed to clearly address which evidence was being excluded under section 113(a) and used the wrong test when assessing whether certain pieces of evidence should be excluded;
3) Whether the Officer erred by failing to consider all of the section 96 risk factors asserted by the Applicant;

4) Whether the Officer erred by not sufficiently considering and applying the Applicant's evidence;

5) Whether the Officer violated principles of procedural fairness and fundamental justice by making an adverse credibility finding against the Applicant without an oral hearing.

STATUTORY PROVISIONS

[9] The following provisions of the Act are applicable in these proceedings:

Convention refugee	**Définition de « réfugié »**
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	*a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(*b*) not having a country of nationality, is outside the country of their former habitual residence and is	*b*) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut

unable or, by reason of that fear, unwilling to return to that country.

ni, du fait de cette crainte, ne veut y retourner.

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

Personne à protéger

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents

	à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
Person in need of protection	**Personne à protéger**
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

STANDARD OF REVIEW

[10] The Supreme Court of Canada found in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 that the standard of review for choosing the correct legal test and procedural fairness is correctness, while a standard of reasonableness is appropriate in respect of findings of facts and an examination of the overall decision. See *Dunsmuir, supra*, and *Golesorkhi v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 511, [2008] F.C.J. No. 637.

[11] As such, a standard of correctness is appropriate when considering: a) whether the Officer used the wrong test when assessing the exclusion of evidence; and b) whether the Board breached procedural fairness by making a finding of credibility without giving the Applicant an oral hearing.

[12] In *Dunsmuir* the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review" (*Dunsmuir* at paragraph 44). Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of "reasonableness" review.

[13] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[14] Because questions of facts and discretion are to be reviewed on the standard of reasonableness (*Dunsmuir* at paragraphs 51 and 53), reasonableness is the appropriate standard of review for determining: a) whether the Officer erred by failing to consider all of the section 96 risk factors asserted by the claimant; and b) whether the Officer erred by not sufficiently considering and applying the Applicant's evidence.

[15] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable

outcomes which are defensible in respect of the facts and law": *Dunsmuir* at paragraph 47. Put another way, the Court should only intervene if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

ARGUMENTS

The Applicant

Mootness

[16] The Applicant disputes the Respondent's suggestion that this application is moot. In *Perez v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 171, [2009] F.C.J. No. 691 the Federal Court of Appeal recently considered whether an application for judicial review of a PRRA is moot where the individual who is the subject of the decision has been removed from, or has left Canada, after an application for a stay of removal has been rejected. The Court answered this question in the affirmative. Nonetheless, the Applicant asks the Court to exercise its discretion to hear the present application.

[17] The test to determine whether a decision is moot can be found in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, [1989] S.C.J. No. 14. First, the Court must determine whether the tangible and concrete dispute has disappeared, rendering the issue academic. If so, the Court must then decide whether or not to exercise its discretion to hear the case.

[18] As regards the first step of the test, the Applicant notes that any argument he might have on this issue would essentially be a rehearing of *Perez*. The Applicant recognizes that the Court is bound by *Perez*.

[19] The second step of the test is whether the Court should exercise its discretion to decide the case despite the lack of a live issue. The Supreme Court has determined that, when dealing with mootness, underlying rationales of the mootness doctrine must be considered. The Applicant submits that such rationales include: 1) that the Court should ensure an adversarial context; 2) the concern of judicial economy; and 3) the need for the court to be sensitive to efficacy of judicial intervention and to demonstrate awareness of the judiciary's role in our political framework.

[20] The adversarial context may be satisfied where the adversarial relationship will prevail despite the cessation of the controversy. The Applicant has submitted an affidavit which describes the ongoing persecution he faces. He contends that this continuing persecution and discrimination constitutes an adversarial context that still exists in the case at hand. Moreover, when assessing the adversarial context, the Court must also consider the collateral consequences of a decision. In this case, a positive decision by a PRRA Officer would provide the Applicant the possibility for return to Canada under section 52(1). However, without a positive determination, no such grounds exist. Accordingly, any chance the Applicant has of return is based on this decision. The Applicant contends that the collateral interest in this case is "inherently linked" to an order requiring a re-determination of the PRAA.

[21] In *Borowski*, the Court determined that judicial resources may be expended where the court could prevent the need for repetitious litigation.

[22] In this instance, the Officer failed to give any weight to a number of the Applicant's documents because they could have been submitted for the RPD hearing. To make this determination, the Officer relied on sections 5.1 and 5.7 of the PRRA Manual which instruct an officer to use the legal test of "issue estoppel" in determining what evidence to assess. The Applicant contends that these instructions should be stricken from the Manual because they are erroneous in accordance with principles established in *Raza*. As a result, any reliance placed on these instructions will constitute an error of law pursuant to paragraph 13 of *Raza*. The Applicant submits that this is a pertinent issue that requires a decision by the Court.

[23] According to *Borowski*, courts should be open to hearing recurring questions that consistently evade review. The Applicant suggests that one such issue is whether the Court has the authority to order the Minister to return the applicant to Canada pending a re-determination. This issue is of the utmost importance in the case at hand, because if the Court makes a positive determination then it could grant a remedy that would revive the issue at hand so that the matter would no longer be moot. Some cases have suggested that such an authority exists, while others have found it unlikely that the court can grant such a remedy and that a removal renders a pending application for judicial review null and void.

[24] In *Selliah v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 261, [2004] F.C.J. No. 1200 at paragraph 20, Justice Evans of the Federal Court of Appeal found in the context of a motion to stay a removal that a review of the PRRA application would not be moot because "if the appeal is successful, the appellants will probably be permitted to return to Canada at public expense, I cannot accept that removal renders their right of appeal nugatory."

[25] The Applicant submits that, as a result of *Perez*, this issue will continually evade litigation unless the Court exercises its jurisdiction to hear the case.

[26] The Applicant contends that additional factors for consideration exist, including the need for judicial clarity. This is important in the current case as different courts have offered differing opinions on similar situations. For instance, the same evidence that convinced Justice Campbell that the Applicant required a stay based on irreparable harm did not convince Justice Mandamin that: a) a stay was necessary, or that b) irreparable harm would occur. Meanwhile, Justice Heneghan found that there was indeed a serious issue to be tried and granted leave for the judicial review. Furthermore, this leave for judicial review was granted after *Perez* had been decided.

[27] Based on the variety of judicial opinions rendered in this case, the Applicant suggests that it is important that the judicial review occur so that judicial clarity may be established.

Wrong legal test

[28] The Applicant submits that the Officer erred by considering only risk factors that had arisen since the previous PRRA. This is clear based on the Officer's reasons that "this subsequent PRRA application will be assessed only in terms of risk factors arising since the last PRRA assessment." As a result, the Officer excluded evidence which he did not consider to be relevant, although he fails to specify which evidence was excluded. This is an error, since *Raza v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385, 289 D.L.R. (4th) 675 makes it clear that a PRRA Officer must consider all evidence unless it is excluded under an acceptable ground, including credibility, relevance, newness, materiality, and express statutory conditions.

[29] The Officer erred by stating that he would exclude evidence based on "the administrative law principle of issue estoppel." The Applicant submits that this is the wrong legal test with regard to new evidence on a PRRA application. The Officer clearly erred by using the principle of issue estoppel, rather than applying the *Raza* test to determine what evidence should be considered. As a result, the Officer erred further by excluding important evidence that should have been considered under section 133(a) of the Act.

[30] Much of the Applicant's evidence could have been used to contradict the credibility finding of the RPD. The Applicant submits that under the *Raza* test this evidence would be considered new evidence. In considering the newness of evidence, the Officer must consider not only whether the evidence was available to the Applicant at the time of the RPD hearing, but also whether the

evidence is being used to contradict a finding of the RPD. Under issue estoppel this sort of evidence would be excluded. By using the wrong legal test, the Officer effectively excluded important evidence that would meet the standard set out in 113(a) of IRPA and *Raza*.

Failed to consider all risk factors

[31] The Officer failed to consider all the pertinent risk factors. The Officer made reference to only one of the factors submitted by the Applicant, but neglected to address the other factors, including the threatening phone calls to the Applicant's brother, the discrimination faced by homosexuals in Pakistan, or the risk of life due to laws of the state. These are all important factors to consider in determining whether there is a reasonable chance that persecution would occur.

[32] The Applicant submits that the Officer should have considered whether there is a reasonable chance of persecution based on the risk factors asserted by the Applicant. Such a consideration did not occur. The Officer should have also considered whether the Applicant is a member of a particular social group; in this case, homosexuals. These reasons do not demonstrate that such an analysis occurred.

Errors in the treatment of evidence

[33] The Applicant submitted new information regarding the risks he faced if returned to Pakistan, as well as new evidence regarding his identity as a homosexual. The latter evidence was

especially important since the Applicant's sexual identity was rejected by the IRB and by the PRRA Officer in the first PRRA assessment. Accordingly, the Applicant's new evidence of his homosexuality was submitted to contradict the negative credibility findings.

[34] The new evidence submitted by the Applicant included: two affidavits; pictures of him and various male partners he has had; greeting cards from numerous partners; a letter from his brother regarding threats he received; and information on country conditions. The Officer made numerous errors with regard to each piece of evidence he assessed.

[35] First of all, the Officer failed to indicate how much weight he gave to the Applicant's affidavits or whether he found them to be credible. Also, no assessment was made with regard to how these documents affected the Officer's determination of whether the Applicant is homosexual and whether he faces a reasonable chance of persecution.

[36] The Applicant's affidavits are material evidence that contradict the Officer's conclusion. Accordingly, we can assume that they were given little or no weight by the Officer. The Applicant submits that the Officer was obliged to provide reasons why the affidavits were not relevant or trustworthy. A failure to provide such reasons constitutes an error, since the RPD must acknowledge evidence that contradicts its findings. See, for example, *Jean v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1414, [2006] F.C.J. No. 1768.

[37] The Applicant further submits that the Officer erred in failing to analyze the Applicant's affidavits. While the Officer may prefer one piece of evidence over another, the Officer was obligated to provide reasons for his preference. See, for example, *Castro v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1165, [2005] F.C.J. No. 1923 at paragraph 34 and *Mohacsi v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 429, [2003] 4 F.C. 771.

Procedural Fairness

[38] The Applicant's affidavits clearly state that he is homosexual. The Officer decided otherwise, even though the Applicant swore this information to be true. The Applicant submits that this is clearly a finding on credibility that warranted an oral hearing under section 167 of the Act.

[39] The Officer failed to conduct a proper assessment of the Applicant's sexuality and simply determined that he is not homosexual. Nothing in the documentary materials or evidence contradicts the Applicant's claim. Thus, the Officer simply did not believe that the Applicant was telling the truth. This was an assessment of credibility.

[40] A similar error was made by a PRRA officer in *Zokai v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1103, [2005] F.C.J. No. 1359 where it was held that the Officer's failure to give reasons for refusing an oral hearing was a breach of procedural fairness. Moreover, it was held in *Tehrankari v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No.

1420 at paragraph 6 that “if the Minister and his officials doubt any part of the applicants’ evidence, they must provide the applicant with an oral hearing.”

[41] Since credibility was an issue in this case, an oral hearing should have been granted. This is supported by *Tekie v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 27, 50 Imm. L.R. (3d) 306 in which Justice Phelan found that “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.”

Unreasonable treatment of evidence

[42] The Applicant submits that the Officer erred in simply dismissing the photographs and forms adduced by the Applicants and saying that “I do not find these documents to be evidence of the applicant’s homosexuality.”

[43] The Applicant submits that the Officer was obligated to give reasons for disregarding this evidence. By dismissing the evidence without considering any alternative evidence, the Officer made a credibility assessment. Such an assessment was in error because the evidence could not fairly be dismissed without an oral interview.

[44] Moreover, the Officer made a factual error in finding that the Applicant had adduced “a dozen copies of postcards.” Rather, the Applicant provided three greeting cards from former

boyfriends that included personal messages shared between men in a homosexual relationship. Accordingly, this evidence speaks to the Applicant's claim of being homosexual and serves to contradict the credibility findings of the Board and the first PRRA Officer. Again, the Officer failed to provide reasons as to why this was not evidence of the Applicant's homosexuality and gave them no weight. In effect, this was simply a credibility finding.

[45] Moreover, the Applicant submits that the Officer's errors with regard to the provision of the "postcards" and the number of photos submitted demonstrate a lack of attention given to the evidence by the Officer. These errors also show that the Officer was not even familiar with the evidence before him.

[46] The Officer also erred with regard to the letter from the Applicant's brother. While the Officer stated that the Applicant had not provided any corroborative evidence to support the claim of his brother having received a phone call, a letter written by the Applicant's brother that corroborated the Applicant's story was attached to the affidavit. The Officer erred by not providing any reason as to why this evidence was not considered. Moreover, the Officer erred in finding that no corroborative evidence existed, while overlooking the evidence that was adduced by the Applicant's brother.

[47] The Officer also erred in his consideration of country condition documentation. The Officer's determination that country conditions had not deteriorated was unreasonable, since the Penal code of Pakistan criminalizes homosexual acts with a punishment of up to life in prison and

possible corporal punishment. Moreover, Islamic law (which can also be legally enforced), calls for up to 100 lashes or death by stoning. In this instance the agent of persecution is the state itself.

[48] The Applicant adduced evidence from Amnesty International that even if such laws are not used to imprison gay and lesbian people, in many cases they provide the context for discrimination and violence against these groups.

[49] Moreover, the Applicant submits that even if he is not brought to Court he will still be at risk, since "police recurrently take money and/or sex" from known homosexuals.

[50] The Applicant provided a vast amount of unequivocal documentary evidence about the risks faced by homosexuals in Pakistan. Nonetheless, the Officer made a contrary finding without relying on any of the evidence provided.

The Respondent

[51] The Respondent submits that the Applicant's further affidavit, which was executed on August 24th, is not admissible for this judicial review. This is because the affidavit was not before the Officer at the time the PRRA decision was made. See *Ontario Association of Architects v. Association of Architectural Technologists of Ontario*, 2002 FCA 218, [2003] 1 F.C. 331 at paragraph 30.

[52] The Respondent submits that this application ought to be summarily dismissed because the Applicant has not come to the Court with clean hands. See *Gazlat v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 532, [2008] F.C.J. No. 677. In this instance, the Applicant failed to comply with Canadian law by not appearing for removal. He was then arrested and deported. Accordingly, the Respondent submits that the Court ought to refuse to exercise its equitable jurisdiction to consider this application.

[53] Moreover, the Federal Court of Appeal decided in *Perez* that a PRRA application for judicial review is moot after the applicant has been removed from Canada. Indeed, a PRRA has to be determined before the applicant is removed from Canada.

[54] While the Applicant concedes that the PRRA application is moot, he requests that the Court use its jurisdiction to hear the matter nonetheless. However, the circumstances of this case are similar to those in *Perez* in which Justice Martineau declined to hear the matter. Justice Martineau's decision was upheld by the Court of Appeal.

[55] While Justice Martineau acknowledged that an adversarial context still existed, he found that judicial economy did not allow the Court to hear the application. Although he recognized that there could be an advantage if the PRRA was successful, he cited *Figurado v. Canada (Solicitor General)*, 2005 FC 347, [2005] F.C.R. 387 which found that "this hypothetical advantage results in adding a supplementary burden to the judicial system and scarce resources already greatly in demand in immigration matters."

[56] In consideration of the third factor, Justice Martineau found that to hear the matter might be an encroachment upon the proper law-making function of the Governor-in-Council. Moreover, he found that to hear the judicial review would "in essence, amount to an indirect review of the merits of [the stay motion judge's] decision on the legality of the enforcement of the removal order." *Perez*, at paragraph 34.

[57] Because of the similarities between the case at hand and *Perez*, the Respondent submits that the Court should decline to exercise its discretion to hear the application.

Correct Considerations

[58] With regard to the PRRA at issue, the Respondent submits that the Officer was correct to apply *issue estoppel* to the case at hand. This was confirmed by Justice Mandamin when he dismissed the Applicant's application for stay. The instructions for applying issue estoppel are set out in sections 5.1 and 5.7 of the PP3 Pre-removal Risk Assessment (PRRA) Manual. Although this manual predates *Raza*¸ the Respondent submits that these instructions do not contradict *Raza*.

[59] The Officer was correct in determining that only risk factors that had arisen since the last PRRA would be considered in the second PRRA application. Furthermore, the Respondent submits that since the Manual does not prohibit the consideration of new evidence, it does not conflict with the principles set out in *Raza*. The Officer committed no error, since he considered the new evidence provided by the Applicant, including the cards, photographs, and letter from the

Applicant's brother. In this case, the Applicant is simply challenging the weight given by the Officer to the evidence and his findings of fact. However, these findings must be approached with a high degree of deference, given the Officer's specialized expertise in risk assessment. As the Court held in *Augusto v. Canada (Solicitor General)*, 2005 FC 673, [2005] F.C.J. No. 850 at paragraph 9, "in the absence of having failed to consider relevant factors or having relied upon irrelevant ones, the weighing of the evidence lies within the purview of the officer conducting the assessment."

[60] The Officer's reasons show that he considered the letter from the Applicant's brother even though it was not specifically mentioned in the Decision. The brother's letter makes reference to threatening phone calls and, in his reasons, the Officer considered that the family had received threatening phone calls. Consequently, this letter was clearly not ignored as alleged by the Applicant.

[61] Moreover, an officer is presumed to have considered all of the evidence and need not specifically make reference to all adverse evidence when making a decision. See *Hassan v. Canada (Minister of Employment and Immigration)*(1992), 147 N.R. 317, [1992] F.C.J. No. 946 and *Florea v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 598 at paragraph 1.

[62] It is not the Court's job to reweigh the evidence before the Officer. In this instance, the Officer's Decision was open to him on the record, and the Applicant has not shown that any evidence was ignored.

No oral hearing required

[63] The Respondent submits that the Officer did not make a finding of credibility that would require an oral hearing. Rather, he reviewed the evidence and determined that the Applicant had not established that he would be at risk if returned to Pakistan. It was the Applicant's burden to prove the claim, and he failed to discharge this burden.

[64] The Applicant's credibility was not at issue in this case. Consequently, no hearing was required. Rather, the Officer determined that the Applicant had not proven a risk to him based upon objective evidence. The Applicant was determined to not be a person in need of protection because of an absence of personalized risk, not because of a lack of credibility. See, for example, *Selliah v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 872, 256 F.T.R. 53 at paragraph 27.

[65] The RPD had previously determined that the Applicant's claim was not credible. Accordingly, there were no issues as to the Applicant's credibility to be determined in the PRRA application. The Officer was entitled to rely on the previous decision of the RPD. Moreover, it would be incongruous for the PRRA Officer to reach a conclusion inconsistent with the credibility finding of the RPD which was accepted by a judge on judicial review. See *Saadatkhani v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 614, [2006] F.C.J. No. 769 at paragraph 5; and *Yousef v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 864, 296 F.T.R. 182 at paragraphs 20 and 21.

Personalized risk not established

[66] The Officer reasonably determined that the country conditions in Pakistan did not establish a personalized risk to the Applicant, since the documentary evidence was general in nature. The onus is on the Applicant to make a connection between the documentary evidence and his specific circumstances. It is not enough for the Applicant to show that a country simply has problems with human rights. See *Jarada v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 409, [2005] F.C.J. No. 506 at paragraph 28 and *Ahmad v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 808, [2004] F.C.J. No. 995 at paragraph 22.

ANALYSIS

Mootness

[67] The parties agree that the application is now moot. The Applicant, however, urges the Court to exercise its jurisdiction to hear and decide this moot matter.

[68] Justice Martineau recently dealt with a very similar set of facts in *Perez* and closely examined the considerations for hearing a moot matter and why he felt he should not exercise his jurisdiction in that case. Justice Martineau's decision was affirmed by the Federal Court of Appeal.

[69] Notwithstanding these recent decisions, the Applicant says that the Court should exercise its discretion and hear the present application based upon factors established by the Supreme Court of

Canada in *Borowski*. These factors are: the continued existence of an adversarial context; a collateral advantage (a positive decision by a PRRA officer would form the foundation for an application to return to Canada under section 52(1) of IRPA); the expenditure of judicial resources (there are issues that are likely to be raised in future cases that the Court should settle now); and a number of other factors, such as conflicting decisions on a serious issue that require clarification.

[70] As was the case in *Perez* and for the same reasons established in *Perez* I agree with the Applicant that an adversarial context continues to exist in the present case.

[71] The Applicant says that a re-hearing in the present case could have positive collateral consequences and could settle issues that are likely to be raised in future cases.

[72] The Applicant says, in the present case, a positive decision by a PRRA officer on re-determination would provide him with a foundation for an application to return under section 52(1) of IRPA. He also says that this Court could settle issues with regard to the continuing validity of sections 5.1 and 5.7 of the PP3 Manual in light of the *Raza* decision, or whether the Court has the authority to order the Minister to return an applicant pending a re-determination.

[73] While I note these possible advantages, I do not think they overcome the problems and objections identified by Justice Martineau in *Perez*:

> **30** However, as mentioned by Justice Noël in *Sogi*, at paragraphs 42 and 43, "a moot issue must not unduly use up the resources of our judicial system [...] It must be asked whether a judicial solution to the issue could have concrete consequences on the rights of the parties

[...]". In the case at bar, the Court is not entitled to determine whether the applicant is suffering persecution in Mexico because he is both gay and HIV positive. Neither can this Court make a determination on the availability of state protection in Mexico. The only practical advantage, if there is one, would be that the Court could order that the matter be re-determined by another PRRA officer. I doubt very much that the Court would have the power to order that the applicant be returned to Canada, at the costs of the Government of Canada, during that redetermination. Accordingly, it is only where there is a positive reassessment of the alleged persecution and risk that the applicant could then ask that authorization be granted to return to Canada (and apply for permanent residence). "But this hypothetical advantage results in adding a supplementary burden to the judicial system and scarce resources already greatly in demand in immigration matters" (*Figurado*, at para. 47).

31 With respect to the third criteria, what I said in *Figurado* at paragraph 48, is informative:

> Finally, by ordering a PRRA officer to reconsider an application for protection after an applicant has been removed from Canada, I am not certain that in so doing, the Court would not be departing from its traditional role as the adjudicative branch in our political framework. In such a case, it could be said that a redetermination ordered by the Court amounts or comes very close to the establishment of a new category of persons in need of protection, persons removed from Canada who continue to claim outside Canada that they are at risk. I note that section 95 of the IRPA already defines and establishes the categories of "protected persons" to which refugee protection is conferred. In this regard, I note that under the IRPA Regulations, a foreign national who is outside Canada already has the right to apply for a permanent resident visa as a member of the Convention refugees abroad class, the country of asylum class and the source country class (paragraph 70(2)(c) of the IRPA Regulations). In these circumstances, it is not unreasonable to infer that refugee protection should be limited to persons outside Canada who fall under one of these categories.

32 In *Nalliah*, at paragraph 22, Justice Gibson also writes:

> Section 232 of the Immigration and Refugee Protection Regulations 9 provides for a stay of removal where a PRRA application is made, which continues, generally speaking, until the PRRA application is rejected if such be the case. Such was the case on the facts of this matter. It is noteworthy that the same Regulations do not provide for a continuation of the stay where an application for judicial review of a PRRA decision is made, whether or not leave is granted on that application. Thus, the

> Governor-in-Council, acting under authority granted by Parliament, saw fit not to extend the section 232 stay to circumstances such as those underlying this application for judicial review. In the result, it remained open to my colleague Justice Snider to deny a discretionary judicial stay and, when she did so, to the Respondent to remove the Applicant notwithstanding the Applicant's allegation of serious risk of irreparable harm.
>
> **33** Thus, I find it very hard to accept, in law, that what was once a legal action of the government (the enforcement of the removal order) may become illegal afterwards simply by judicial dicta, especially since the Motions Judge (Justice Blanchard in this case) refused to grant a stay of execution. To be "illegal", the Applications Judge must later declare that any order quashing the impugned decision made by the PRRA officer applies *nunc pro tunc* (or retroactively) to one day prior to the applicant's removal. Again, I doubt very much that the Court has the power, from a legal point of view, to make such an order.
>
> **34** I am also of the opinion that my hearing the judicial review in this instance, would, in essence, amount to an indirect review of the merits of Justice Blanchard's decision on the legality of the enforcement of the removal order. It bears reiterating that Justice Blanchard determined, based on the evidence before him, that the applicant had not established that he would suffer irreparable harm if returned to Mexico. Accordingly, even assuming a serious issue was raised, the balance of convenience favored the immediate execution of the removal order. It was open to my colleague Justice Blanchard to deny a discretionary judicial stay and, when he did so, it was equally open to the respondents to seek to remove the applicant.
>
> **35** The situation before me thus, raises a concern for judicial economy and, as stated Justice Gibson in *Nalliah* and *Thamotharampillai,* above, may be "inappropriate as an encroachment on the proper law-making function of the Governor-in-Council."

[74] I have to bear in mind that Justice Martineau’s approach and his conclusions on this issue have been endorsed by the Federal Court of Appeal.

[75] Nor do I think there are really conflicting decisions in this Court. Justice Mandamin in considering the stay application that came before him may have considered or discussed whether or not he thought the PRRA officer erred, but his decision is clearly based upon the Applicant's inability to establish irreparable harm on the materials and arguments that were made before him. It is not possible for the Court to tell whether the same arguments were made before Justice Campbell in relation to the second PRRA application, and Justice Heneghan who granted leave on the basis of an arguable issue. I do not see that there is anything I could do, or should do, on these facts. Even if there were a conflict, I do not believe that I should be conducting a review, even an indirect review, of the merits of decisions made by other judges of this Court.

[76] In conclusion, notwithstanding the able arguments of counsel for the Applicant, and notwithstanding the fact that I have considerable sympathy for the situation in which the Applicant presently finds himself, I am unable to distinguish this case in any material way from *Perez*, which was affirmed by the Federal Court of Appeal. I also notice that Justice Kelen came to a similar conclusion in the recent case of *Villalobo v. Canada (Minister of Citizenship and Immigration)* 2009 FC 773, [2009] F.C.J. No. 909.

[77] For these reasons, having determined that the application for judicial review is moot, the Court also declines to exercise its discretion to hear this application for judicial review, notwithstanding its mootness.

[78] Counsel are requested to serve and file any submissions with respect to certification of a question of general importance within seven days of receipt of these Reasons for Judgment. Each party will have a further period of three days to serve and file any reply to the submission of the opposite party Following that, a Judgment will be issued.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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