Federal Court  Cour fédérale

Date: 20110224

Docket: IMM-1573-10

Citation: 2011 FC 221

Ottawa, Ontario, February 24, 2011

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

MOHAMMAD AHSAN ULLAH

Applicant

and

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

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), for judicial review of a decision of a pre-removal risk assessment officer (the officer), dated February 18, 2010, wherein the officer determined that the applicant would not be subject to risk of torture, risk to life or risk of cruel and unusual treatment or punishment if returned to Pakistan.

[2] The applicant requests an order setting aside the decision of the officer and remitting it matter back for redetermination by a different officer.

Background

[3] Mohammad Ahsan Ullah (the applicant) was born on November 24, 1975 and is a citizen of Pakistan.

[4] The applicant became involved in the political branch of the Muttahida Quami Movement (MQM-A) while attending college. He worked on election campaigns and held fundraisers. Because of these activities, he faced threats from members of the terrorist faction known as the MQM Haqiqi (MQM-H). He stayed with friends and returned home infrequently.

[5] On June 28, 2001, the applicant returned home. Several people, who the applicant alleges were MQM-H members, broke into his house. While attempting to escape, the applicant was shot and wounded. As a result, he has been diagnosed with complete paraplegia.

[6] The applicant entered Canada on October 11, 2001. He applied for refugee status but was found to be ineligible based on subsection 34(1) of the Act. In 2006, he requested Ministerial relief under subsection 34(2) at an inadmissibility hearing of the Immigration Division of the Immigration and Refugee Board. The applicant has not received a decision on the relief requested under subsection 34(2) of the Act.

[7] The applicant submitted a pre-removal risk assessment (PRRA) in January 2010. His PRRA application was rejected in March 2010.

Officer's Decision

[8] The determinative issue for the officer was lack of sufficient objective evidence.

[9] The officer found that the applicant was someone described in subsection 112(3) of the Act due to his inadmissibility based on his membership in an organization engaged in terrorism as per subsection 34(1) of the Act.

[10] The officer found that the applicant provided insufficient evidence that the attack on him was a result of his membership in MQM-A or that the attackers were MQM-H members. The applicant did not provide evidence about how he knew the attackers were MQM-H, how they became aware that he was present at his home and why he would be targeted. The applicant provided a newspaper article that stated that the attack was random and said nothing about it being politically motivated or perpetrated by MQM-H members. The officer found the applicant's statements to be vague and general.

[11] The officer found that the applicant did not provide sufficient information about his role in MQM-A. The applicant's statement about his activities were very general, he did not provide details about when he worked for MQM, how often or what his position was. The letter from the head of the MQM-A notes only that the applicant was a supporter. The officer concluded that there was

insufficient evidence that the applicant fits the profile of a person likely to draw the interest of anyone in Pakistan.

[12] The officer concluded that the applicant will face the same generalized risk of violence as the entire population and would not likely face a risk of torture, death or cruel and unusual treatment or punishment if returned to Pakistan.

Issues

[13] The applicant submitted the following issues for consideration:

1. Did the officer err in not deferring removal proceedings pending the determination of the applicant's application for Ministerial relief under subsection 34(2) of the Act?

2. Did the officer err by not convoking a hearing into the PRRA application of the applicant?

3. Did the officer err in law in his or her interpretation and application of the definition of a person in need of protection as defined in section 97 of the Act?

4. Did the officer err in law basing his or her decision on an erroneous finding of fact that he made in a perverse or capricious manner or without regard for the material before him?

5. Did the officer render a decision that is unreasonable, having regard to the evidence before him or her so as to amount to an error of law?

6. Did the officer err by ignoring evidence and misinterpreting the evidence including sworn testimony, documentary evidence and human rights records?

[14] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the officer err in not deferring the applicant's removal from Canada pending a determination of his application for Ministerial relief pursuant to subsection 34(2) of the Act?

3. Did the officer err by not holding a hearing pursuant to subsection 113(b) of the Act?

4. Did the officer err by ignoring probative evidence?

Applicant's Written Submissions

[15] The applicant submits that the officer erred in not providing reasons for his refusal to defer the proceedings prior to a decision on the application for Ministerial relief made pursuant to subsection 34(2) of the Act.

[16] The applicant submits that the officer erred by not convoking an oral hearing. A hearing is required when credibility is in issue. The applicant submits that the officer's finding that there was insufficient objective evidence of the applicant's role with the MQM-A or the identity of his attackers was essentially a finding of credibility and an oral hearing should have been convoked.

[17] The applicant submits that the officer ignored probative evidence before him. There was much evidence before the officer that the applicant, as a member of the MQM-A, faces a personalized risk not shared with the entire population in Pakistan. The officer made no reference to the documentary evidence which demonstrates that MQM-A members face a personalized risk in Pakistan. The officer therefore erred by ignoring evidence.

Respondents' Written Submissions

[18] The respondents submit that the applicant did not meet his onus to provide sufficient evidence that his removal to Pakistan would subject him personally to a risk to his life or to a risk of cruel and unusual treatment that is not faced generally by other individuals. The applicant failed to submit sufficient objective evidence to indicate how he knew his attackers were MQM-H members, how they became aware of his return home or why he would be targeted. There was further evidence that the attack was random. It was open to the officer to conclude that the applicant had not established a link between his personal circumstances and a risk defined in section 97 of the Act.

Analysis and Decision

[19] **Issue 1**

What is the appropriate standard of review?

Generally, the standard of review for a PRRA decision overall is that of reasonableness (see *Wang v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 799, at paragraph 11).

[20] Issues of procedural fairness arising from the determination of a PRRA application will be determined on the correctness standard, which, typically, includes the right to be heard (see *Wang* above, at paragraph 11).

[21] It should be noted that issues regarding the right to be heard arising from the application of subsection 113(b) of the Act are not necessarily reviewed on the correctness standard. As stated by

Mr. Justice Yves de Montigny in *Iboude c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2005 FC 1316 at paragraph 12, subsection 113(b) of the Act is clear that the Minister is not obligated to grant a hearing. In deciding whether to hold a hearing, the PRRA officer applies the facts to the factors outlined in section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations). This is a determination of mixed fact and law reviewable on the standard of reasonableness (see *Karimi v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1010 at paragraph 17). However, if there is no indication that the officer turned his mind to the section 167 factors or the issue of whether to hold an oral hearing, this does raise concerns of procedural fairness. As such, the absence of an oral hearing, in the case at bar, should be reviewed on the standard of correctness (see *Karimi* above, at paragraph 17).

[22] The other issues raised will be reviewed on the standard of reasonableness.

[23] **Issue 2**

Did the officer err in not deferring the applicant's removal from Canada pending a determination of his application for Ministerial relief pursuant to subsection 34(2) of the Act?

The officer deciding the applicant's application was a PRRA officer from Citizenship and Immigration Canada. If the applicant wished to submit a request to defer his removal, this should have been directed to the Canadian Border Services Agency to be assessed by an inland enforcement officer. I have reviewed the applicant's PRRA submissions dated February 1, 2010 and I note that the deferral request is not noted. As well, I have reviewed the certified tribunal record and I did not locate a copy of the letter requesting deferral. It is also important to note that a removal date had not been set at the date of the hearing. It would not make sense to order a deferral of a

removal that has not yet been scheduled. Consequently, the officer did not make a reviewable error in failing to defer the applicant's removal pending a determination of his application for Ministerial relief pursuant to subsection 34(2) of the Act.

[24] **Issue 3**

Did the officer err by not holding a hearing pursuant to subsection 113(b) of the Act?

When applying for protection, a person may make written submissions in support of their application pursuant to subsections 161(1) and (2) of the Regulations. An oral hearing is not required in the normal course of deciding a PRRA application.

[25] A hearing may be held under subsection 113(b) of the Act if the Minister is of the opinion that a hearing is required based on the factors set out in section 167 of the Regulations. The language of subsection 113(b) signifies that the holding of an oral hearing is always discretionary having regard for the factors identified in section 167 of the Regulations (see *Begashaw v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1167, at paragraphs 15 and 19). The factors to be considered which are set out in paragraphs (a), (b) and (c) of section 167 of the Regulations should be read cumulatively. In *Cosgun v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 400 Mr. Justice Paul Crampton at paragraph 32 states that:

> Given the presence of the conjunctive word "and" between paragraphs (b) and (c) above, it is clear that the factors set forth in paragraphs 167(a), (b) and (c) are cumulative. … The parties agree that if all three factors in section 167 were satisfied, a PRRA Officer would be obliged to hold a hearing and that if one of the factors set forth (b) or (c) is not satisfied then a hearing would not be required.

[26] Thus, based on paragraphs (a), (b) and (c) of section 167, an applicant must establish that there is evidence which raises concerns about the applicant's credibility and is related to section 97, that this evidence is central to the decision on the application for protection and that this evidence, if accepted, would justify allowing the application for protection.

[27] A finding of insufficient evidence may reveal that the officer was actually concerned about the credibility of the applicant or the evidence. This is noted throughout the Federal Court jurisprudence. In *Zokai v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1103 at paragraph 12, Mr. Justice Michael Kelen held that:

> In refusing to accord weight to the applicant's story without corroborating evidence, the PRRA Officer, in effect, concluded that the applicant was not credible. In my view, given these credibility concerns, it was incumbent on the Officer to consider the request for an oral hearing and to provide reasons for refusing to grant the request.

[28] Other examples of officers purporting to reject applicants' applications on the basis of insufficient evidence where they in fact made their decisions based on credibility grounds are found in *Begashaw* above, at paragraph 20; *Liban v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1252 at paragraph 14 and *Haji v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 889 at paragraphs 14 to 16).

[29] Applicants are required under subsection 10(1) of the Regulations to submit all information, documents and evidence required by the Regulations and the Act. As such, it is open to an officer to reject an application on the basis that the applicant has submitted insufficient evidence. I agree with Mr. Justice Crampton's analysis in *Herman v. Canada (Minister of Citizenship and Immigration)*,

2010 FC 629, at paragraph 17, where he states that the cases noted above regarding findings of insufficiency of evidence:

> … do not stand for the proposition that a PRRA Officer in essence makes an adverse credibility finding every time he or she concludes that the evidence adduced by an Applicant is not sufficient to meet the Applicant's evidentiary burden of proof. In each of those cases, it was clear to the Court that the PRRA Officer either had made a negative credibility finding, or simply disbelieved the evidence presented by the Applicant. This is very different from not being persuaded that an Applicant has met his or her burden of proof on the balance of probabilities.

[30] Simply because the officer in this case made a finding that the applicant had presented insufficient evidence, does not necessarily mean that he made a negative credibility finding.

[31] The officer noted that the applicant helped with election campaigns and fundraising for MQM-A, but found that the letter from the head of the organization stated that the applicant was only a supporter. The officer also found that the newspaper article submitted by the applicant on the incident where he was shot described the event as a random act.

[32] The officer found that the applicant presented no evidence on:

1. when and how often he did work for MQM-A;
2. the nature of the previous threats he received from MQM-H, how often and when these threats occurred and under what circumstances;
3. how he knew that the men who shot him were MQM-H members;
4. why he believed that the attack on him was a result of his membership in MQM-A; and

5. how the MQM-H members became aware that he was present at his home.

[33] I have reviewed the material submitted by the applicant in his PRRA application. He did not provide information on any of these points of concern raised by the officer. The only information the applicant presented about his role in MQM-A and the threats he faced from MQM-H was the following:

> I first became involved in the MQM-A through its student wing , the APMSO, when I started attending college in 19992 or 1993. I have worked for the party in election campaigns and other activities such as fundraising. My MQM-A involvement became such that it was dangerous for me to remain at home. Both my brother (also involved in activities for the MQM) and I faced threats from members of the MQM-H to stop our political activity, and because of these threats we began staying with friends at various homes and only returning to our own home infrequently.

[34] I would then restate the holding of Mr. Justice Paul Crampton from paragraph 18 of *Herman* above:

> …it was reasonably open to the PRRA Officer to conclude, without making an adverse credibility finding, that the evidence adduced was not sufficient to establish, on a balance of probabilities, the claims advanced by the Applicant.

[35] More specifically, it was reasonable for the officer to conclude that the applicant had not met the onus to establish his membership in the MQM-A nor that he personally faced a risk to his life directly as a result of such membership.

[36] **Issue 4**

Did the officer err by ignoring probative evidence?

The applicant submitted that the officer made no reference to any of the documentary evidence which demonstrates that members of the MQM-A face a personalized risk in Pakistan and that therefore, the officer erred by ignoring evidence.

[37] However, the officer did not find that members of the MQM-A do not face any risks in Pakistan, which is the crux of the documentary evidence provided by the applicant in his application. Rather, as discussed above, the officer found that there was insufficient evidence regarding the nature of the applicant's involvement in the MQM-A and insufficient evidence about the threats and violence he personally had faced from the MQM-H. I do not find that the officer ignored relevant evidence.

[38] As a result, the application for judicial review must be dismissed.

[39] The applicant did not wish to submit a proposed serious question of general importance for my consideration for certification. As a result of my findings on the deferral issue, the respondents did not wish to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[40] **IT IS ORDERED that** the application for judicial review is dismissed.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

Immigration and Refugee Protection Act, 2001, c. 27

34.(1) A permanent resident or a foreign national is inadmissible on security grounds for	34.(1) Emportent interdiction de territoire pour raison de sécurité les faits suivants :
(a) engaging in an act of espionage or an act of subversion against a democratic government, institution or process as they are understood in Canada;	a) être l'auteur d'actes d'espionnage ou se livrer à la subversion contre toute institution démocratique, au sens où cette expression s'entend au Canada;
(b) engaging in or instigating the subversion by force of any government;	b) être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force;
(c) engaging in terrorism;	c) se livrer au terrorisme;
(d) being a danger to the security of Canada;	d) constituer un danger pour la sécurité du Canada;
(e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or	e) être l'auteur de tout acte de violence susceptible de mettre en danger la vie ou la sécurité d'autrui au Canada;
(f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b) or (c).	f) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas a), b) ou c).
34(2) The matters referred to in subsection (1) do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be	34(2) Ces faits n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui convainc le ministre que sa présence au Canada ne serait nullement préjudiciable à l'intérêt

detrimental to the national interest.	national.
72.(1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72.(1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
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	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	(iii) la menace ou le risque ne

incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	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.
112(3) Refugee protection may not result from an application for protection if the person	112 (3) L’asile ne peut être conféré au demandeur dans les cas suivants :
(a) is determined to be inadmissible on grounds of security, violating human or international rights or organized criminality;	a) il est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée;
(b) is determined to be inadmissible on grounds of serious criminality with respect to a conviction in Canada punished by a term of imprisonment of at least two years or with respect to a conviction outside Canada for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years;	b) il est interdit de territoire pour grande criminalité pour déclaration de culpabilité au Canada punie par un emprisonnement d’au moins deux ans ou pour toute déclaration de culpabilité à l’extérieur du Canada pour une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d’un emprisonnement maximal d’au moins dix ans;
(c) made a claim to refugee protection that was rejected on the basis of section F of Article 1 of the Refugee Convention; or	c) il a été débouté de sa demande d’asile au titre de la section F de l’article premier de la Convention sur les réfugiés;
(d) is named in a certificate referred to in subsection 77(1).	d) il est nommé au certificat visé au paragraphe 77(1).

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

Immigration and Refugee Protection Regulations, SOR/2002-227

10.(1) Subject to paragraphs 28(b) to (d), an application under these Regulations shall	10.(1) Sous réserve des alinéas 28b) à d), toute demande au titre du présent règlement :
(a) be made in writing using the form provided by the Department, if any;	a) est faite par écrit sur le formulaire fourni par le ministère, le cas échéant;
(b) be signed by the applicant;	b) est signée par le demandeur;
(c) include all information and documents required by these Regulations, as well as any other evidence required by the Act;	c) comporte les renseignements et documents exigés par le présent règlement et est accompagnée des autres pièces justificatives exigées par la Loi;
(d) be accompanied by evidence of payment of the applicable fee, if any, set out in these Regulations; and	d) est accompagnée d'un récépissé de paiement des droits applicables prévus par le présent règlement;
(e) if there is an accompanying spouse or common-law partner, identify who is the principal applicant and who is the accompanying spouse or common-law partner.	e) dans le cas où le demandeur est accompagné d'un époux ou d'un conjoint de fait, indique celui d'entre eux qui agit à titre de demandeur principal et celui qui agit à titre d'époux ou de conjoint de fait accompagnant le demandeur principal.

161.(1) A person applying for protection may make written submissions in support of their application and for that purpose may be assisted, at their own expense, by a barrister or solicitor or other counsel.

161.(1) Le demandeur peut présenter des observations écrites pour étayer sa demande de protection et peut, à cette fin, être assisté, à ses frais, par un avocat ou un autre conseil.

(2) A person who makes written submissions must identify the evidence presented that meets the requirements of paragraph 113(a) of the Act and indicate how that evidence relates to them.

(2) Il désigne, dans ses observations écrites, les éléments de preuve qui satisfont aux exigences prévues à l'alinéa 113a) de la Loi et indique dans quelle mesure ils s'appliquent dans son cas.

167. For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors are the following:

167. Pour l'application de l'alinéa 113b) de la Loi, les facteurs ci-après servent à décider si la tenue d'une audience est requise :

(a) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;

a) l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur;

(b) whether the evidence is central to the decision with respect to the application for protection; and

b) l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;

(c) whether the evidence, if accepted, would justify allowing the application for protection.

c) la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

FEDERAL COURT

SOLICITORS OF RECORD

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