Federal Court  Cour fédérale

Date: 20140707

Docket: IMM-3163-13

Citation: 2014 FC 661

Ottawa, Ontario, July 7, 2014

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

NAIM CEKAJ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is the third application for judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) of a Pre-Removal Risk Assessment (PRRA) decision for this applicant. The respondent did not oppose leave and failed to file a Record with submissions to support this decision. This leaves the Court to infer that they do not disagree with the applicant otherwise some argument would have been submitted to defend the decision.

I. FACTS

[2] The applicant is a 40 year-old male citizen of Albania who arrived in Canada on January 1, 2008 with his wife and two daughters. He claimed refugee protection but his application was denied on August 20, 2010. In its decision the Refugee Protection Division of the Immigration and Refugee Board (the Board) found that the applicant lacked credibility due to inconsistencies in his testimony. This Court dismissed his application for leave and judicial review of that decision. The applicant submits that he is at risk of persecution or harm in Albania due to his involvement in a blood feud with the Shabaj family.

[3] The applicant applied for a PRRA on February 6, 2011 and a negative PRRA decision was rendered on October 12, 2011. He sought judicial review of the PRRA decision and the respondent consented to have his PRRA redetermined by a different officer on February 6, 2012. The second negative PRRA decision was rendered on April 16, 2012 and the applicant again applied for judicial review of the decision. I granted him a stay of removal on May 30, 2012. Justice Rennie of this Court allowed the application for judicial review of the second PRRA decision on December 20, 2012 in *Cekaj v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1531 [*Cekaj*] and the matter was sent back for redetermination by a different officer. The current application concerns the March 4, 2013 decision of a Senior Immigration Officer (the Officer) once again denying the applicant's PRRA application.

II. DECISION UNDER REVIEW

[4] The Officer summarized the Board's refugee claim decision in great detail, focusing on the issue of credibility, following which she found that the applicant had not rebutted the conclusions of the Board. The Officer noted that the risks cited by the applicant in his PRRA application were the same as those heard and assessed by the Board.

[5] The Officer then assessed the documentary evidence submitted in the PRRA application including two translated copies of attestation letters by the Committee of Nationwide Reconciliation (CNR) which confirmed its attempts to mediate the feud and two notarized statements by Adem Isufi, a community elder involved in the attempted mediation. The Officer found that these documents only confirmed that the blood feud was declared after the applicant arrived in Canada and that he therefore could not reasonably have been aware of the feud at the time he made his refugee claim on January 1, 2008.

[6] The Officer concludes that the applicant has failed to rebut the inconsistencies, implausibilities, and credibility issues raised by the Board and that the evidence before her does not demonstrate that the applicant would face additional forward-looking personalized risks that were not contemplated by the Board if returned to Albania.

III. ANALYSIS

[7] The determinative issue in this application is the Officer's treatment of the documentary evidence submitted by the applicant in support of his PRRA application. It was incumbent upon

the Officer to conduct an adequate analysis of this evidence, which I find she has failed to do. The Officer's treatment of the personal documentary evidence submitted by the applicant as well as the country condition documents tendered to demonstrate a lack of state protection, were both inadequate and unreasonable.

[8] In *Cekaj* at para 18, Justice Rennie considered a different PRRA officer's treatment of the same documentary evidence in the previous PRRA decision, namely the attestation letters from the CNR, the letter from the community elder, as well as the letter from the applicant's brother, and found it to be unreasonable, stating:

> In my view, the Officer's treatment of the evidence cannot be characterized as justified, transparent or intelligible. The Officer displayed a pattern of rejecting evidence for reasons that do not withstand scrutiny. It appears that the Officer employed standardized phrases, such as considering the evidence vague, without actually engaging with the content of the evidence in question.

[9] In my opinion, the Officer in the present case has once again failed to properly consider the documentary evidence submitted. The Officer has rejected the probative value of these key pieces of evidence without reasonable explanation and has made findings of fact that are not based on the evidence before her.

[10] When considering both the attestations from the CNR as well as the letter submitted from Mr. Isufi, the Officer states that "they do not add to the information concerning personal risk and do not enlighten as to new risk developments for the applicant in Albania" I disagree. The letters do provide new evidence of the blood feud and the involvement of the CNR and community elders in attempted mediations of the feud. Unless the Officer is of the opinion that there are

concerns as to the authenticity of the letters, they do present relevant evidence as to the existence of present or prospective risk for the applicant were he to return to Albania.

[11] Further, while assessing the CNR letters, the Officer notes that their author, Mr. Marku, "has not provided corroborating evidence to support how he has come to know the reason for the blood feud". The letter dated February 10, 2012 mentions that the CNR has worked with missionaries representing the elders of the villages in the area and specifically names three of them, including Adem Isufi. I agree with the applicant that is reasonable to assume that it is through this source that the CNR came to have information about the feud. This is further supported by the letter provided from Mr. Isufi where he states that he has "personal knowledge and experience for the continuing blood feud between the Shabaj and the Cekaj families since February of the year 2008". While it was open to the Officer to assess whether the new evidence credibly demonstrated new risk developments since the Board's decision, her reasons for discounting this evidence do not withstand scrutiny.

[12] The Officer's treatment of the letter submitted from the applicant's brother demonstrates the same errors in reasoning. The Officer observes that the letter lacks credibility because it does not explain how the applicant's brother was able to obtain medication for his mother if the entire family is in self-confinement and why only one of his daughters was threatened. I find that it was not reasonable for the Officer to have discounted this evidence based on these unfounded speculations.

[13] The Officer's analysis of the objective country condition evidence demonstrated the same error found by Justice Rennie in *Cekaj* at para 21 where he writes:

> Finally, the Officer asserted that the applicant's country condition evidence did not assist his claim because it did not demonstrate that the applicant faces a personalized risk. Country condition evidence is not tendered to demonstrate the personalized nature of a claim. Rather, it is relevant to the question of whether the applicant could reasonably expect state protection.

[14] Here, again, the Officer has failed to properly consider the country condition evidence submitted, stating that:

> While I accept that blood feuds exist in Albania, it is determined that these reports describe general country conditions or refer to specific individuals, events or persons not similarly situated to the applicant in Albania. The applicant is not mentioned by name in these submissions and he has not linked the contents to his personal, forward-looking risk in Albania.

[15] This is an unreasonable treatment of the country condition evidence. There is no necessity that the applicant be named personally in country condition evidence, which is submitted to demonstrate the existence of state protection. As found by Justice Rennie in *Cekaj* at para 27, since the country condition evidence shows that "there may be individual cases where the protection is insufficient. In this context, the error in rejecting the evidence with respect to the applicant's particular situation takes on greater significance".

[16] In summary, the Officer's treatment of the documentary evidence was inadequate and unreasonable. The decision does not fall within the range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

IV. DIRECTIONS

[17] Given that this is the third application for judicial review of the applicant's PRRA, and considering that similar errors were made in the treatment of the evidence as were previously found by Justice Rennie in *Cekaj*, the applicant has asked the Court to issue a directed verdict pursuant to section 18.1(3)(b) of the *Federal Courts Act*, RSC 1985, c F-7 to the effect that the applicant has met his evidentiary burden for a positive PRRA decision.

[18] While I recognize that the issuing of directions that amount to a directed decision is within the jurisdiction of the Court under section 18.1 (3)(b), it is "an exceptional power that should be exercised only in the clearest of circumstances" (*Rafuse v Canada (Pension Appeals Board)*, 2002 FCA 31). In the context of determinations of whether an applicant is a Convention refugee or person in need of protection, for example, the Court has issued these directions when the only conclusion that was open to the Board was to find that the applicant was a Convention refugee (*Attakore v Minister of Employment and Immigration*, (1989) 99 NR 168 (FCA) at 170; *Bindra v Canada (Minister of Employment and Immigration)*, (1992) 18 Imm LR (2d) 114 (FCA) at paras 17-18).

[19] Where there are issues of fact that remain to be resolved it is appropriate for the Court to refer the matter back for a new hearing rather than issue directions amounting to a directed decision (*Turanskaya v Canada (Minister of Citizenship and Immigration)*, (1997) 145 DLR (4th) 259, 210 NR 235 (FCA) at para 6). This is the case here where there are still factual determinations to be made.

[20] Therefore, I would allow this application for judicial review and order it be reconsidered by a different PRRA officer with the following direction:

> On the reconsideration of the applicant's application, the Officer must conduct a thorough and adequate analysis of the documentary evidence submitted to determine if it is established that the applicant would face a present or prospective risk if he were returned to Albania regardless of whether or not he was at risk at the time of his refugee claim, in accordance with the reasons given in this decision as well as the earlier reasons in *Cekaj*.

V. COSTS

[21] At the hearing the applicant made a request for costs in the amount of $5,000. I find that the respondent's conduct in appearing before this Court without having filed any Record to be unacceptable. Such an action not only forces the applicant and the Court to participate in a hearing that may have been unnecessary as the application for leave to commence an application for judicial review was unopposed, it also deprives the Court of having the benefit of arguments from both parties. I find that these circumstances amount to "special reasons" for awarding costs in the context of an application for judicial review under Rule 22 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22 as the respondent has acted improperly in these proceedings and has unnecessarily prolonged proceedings (*Johnson v Canada (Minister of Citizenship and Immigration*), 2005 FC 1262 at para 26). In my opinion a reasonable lump sum award of costs in the circumstances would be $2,500.00 and I will so order that it be paid by the respondent.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted, the decision of the Officer is set aside and the matter is remitted to a different Officer for redetermination in accordance with the following direction:

> On the reconsideration of the applicant's application, the officer must conduct a thorough and adequate analysis of the documentary evidence submitted to determine if it is established that the applicant would face a present or prospective risk if he were returned to Albania regardless of whether or not he was at risk at the time of his refugee claim, in accordance with the reasons given in this decision as well as the earlier reasons in *Cekaj*.

2. Costs are awarded against the respondent in the amount of $2,500.00, payable forthwith.

"Danièle Tremblay-Lamer"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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