Federal Court  Cour fédérale

Date: 20150223

Dockets: IMM-5896-13
IMM-6271-13

Citation: 2015 FC 234

Toronto, Ontario, February 23, 2015

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

ATEF ALI ABUSANINAH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This case revolves around a unique set of facts. Unique facts often give rise to unique case law, as one learns in law school. This case is no different.

[2] This judicial review [JR] was filed pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*, the Act]. For the purposes of these written reasons, it combines two applications for judicial review (IMM-5896-13 and IMM-6271-13), which were filed in response to three negative pre-removal risk assessment [PRRA] decisions dated July 23, August 6 and August 12, 2014. These three decisions were all made in respect of the same Applicant, the August decisions being rendered due to subsequent evidence that was filed by the Applicant in support of his original PRRA application.

[3] As a preliminary issue, counsel for both the Applicant and Respondent agreed at the hearing to argue the two applications simultaneously, due to similar underlying facts, evidence and legal issues. Copies of these reasons will be placed in both files.

II. The Facts

[4] The Applicant originally came to Canada to study in 2010 from his native country, Libya. His family, perceived Gadhafi supporters, has suffered tremendously in the aftermath of regime change. His father, who owned a car dealership, sold vehicles to the army through one of the Applicant's uncles, who had been a high-ranking military official in Gadhafi's army. Both that uncle, as well as another uncle, were killed in post-2011 revolution violence. The car dealership was burned and destroyed. The Applicant's father was arrested, and currently remains imprisoned without trial.

[5] The Applicant returned to Libya in 2012, to see if he could assist his family in light of the violence enveloping his home, and specifically to assist his mother and sisters given his father's

arrest. However, the Applicant was kidnapped upon entry to Libya at Tripoli's international airport, where he was interrogated, beaten, and ultimately only released after the payment of a significant amount of money. He quickly returned to Canada to escape what he feared would be continued torture, or even death, due to his family's relationships and perceived ties to the former government of Colonel Gadhafi.

[6] Once in Canada, the Applicant became involved in a fight in a restaurant. While no one was hurt, he was found guilty on four of nine counts, including assault, and spent 76 days in pre-trial custody.

[7] At trial, the Applicant was given a suspended sentence of 18 months. This led to a finding of inadmissibility for serious criminality under paragraph 36(1)(a) of *IRPA*, resulting in ineligibility to continue with his claim for refugee status. His allegations of persecution and fear of torture in Libya were therefore never heard by the Immigration and Refugee Board [IRB].

[8] It was for this reason that the Applicant filed his PRRA application and subsequent evidence, which were decided negatively in the three decisions mentioned above. A deportation date was assigned, and the Applicant received a stay of deportation order from Justice Snider of this court on October 1, 2013 (under IMM-5896-13).

III. Decisions Under Review

[9] The three decisions under review as noted above are as follows.

[10] First, an initial PRRA officer [First PRRA Officer] reviewed and refused the PRRA application decision on July 23, 2013 [First PRRA Decision] (Certified Tribunal Record for IMM-6271-13 [CTR], pp 35-45). The First PRRA Officer retired at the end of July, 2013, and the file was transferred to another officer.

[11] Second, the subsequent PRRA Officer [Second PRRA Officer] issued an undated decision (CTR, p 14), which, for the purposes of these Reasons, I will refer to as "Addendum No. 1", as that is how CIC referred to it in internal correspondence (CTR, p 15). Addendum No. 1 appears to have been decided on August 6, 2013 - since that is the date entered into CIC's information system, the Field Operations Support System [FOSS] (CTR, p 172).

[12] Third, the Second PRRA Officer then issued a second decision one week later, on August 12, 2013 (CTR pp 2-3), which I will refer to as Addendum No. 2, as this is the title of the form on which the decision is written. Both Addendums upheld the negative decision by the First PRRA Officer.

IV. Issues

[13] Three issues were raised in these JRs:

1. Did the Second PRRA Officer fetter his discretion in the two "Addenda" decisions by relying on the First PRRA Officer's decision?
2. Was there a denial of procedural fairness when the First PRRA Officer failed to afford the Applicant an oral hearing?

3. Did the Second PRAA Officer unreasonably give little weight to the Affidavits filed after the First PRRA Decision?

V. Positions of the Parties

A. *Issue 1: Fettering of Discretion*

[14] The Applicant argues that the decision maker must consider the totality of evidence before coming to a decision, and cannot rely on another decision as a starting point. This is not to say that the Second PRRA Officer cannot place some reliance or weight on the earlier decision, but that he must ultimately come to his own decision after having considered the entirety of the record before him.

[15] The Applicant argues that the Second PRRA Officer did not undertake such a complete review. In fact, the mere labelling of the decision as an "addendum" is problematic, as Burton's Legal Thesaurus defines addendum as "an addition to a completed written document": *Burton's Legal Thesaurus*, 4th ed.

[16] The Respondent, on the other hand, contends that while the Second PRRA Officer's choice to refer to the documents as addenda was awkward, he had nonetheless reviewed the entire file, and therefore in no way fettered his discretion. Furthermore, there was absolutely no way around having a second officer involved, given that the First PRRA Officer retired in the midst of the process.

B. *Issue 2: Opportunity for an Oral Hearing*

[17] The Applicant contends that procedural fairness required an oral hearing, as did the relevant legal provisions (*IRPA*, s 113; *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations], s 167), due to the fact that the Officer made various "insufficiency of evidence" findings, which were rather veiled credibility findings. The Respondent, on the other hand, argues that there was simply a lack of sufficient objective evidence to prove the Applicant's fear, and that the findings were not based on credibility. Therefore, all the procedural requirements for the PRRA were met.

C. *Issue 3: Improper Treatment of Affidavits*

[18] The Applicant further argues that the Second PRRA Officer committed a reviewable error in giving affidavits from the Applicant's mother and uncle little or no weight. The Respondent counters by emphasizing that it was up to the Second PRRA Officer to decide the weight to give the evidence, and it is not the role of this court to reweigh the facts or the evidence.

VI. Standard of Review

[19] The appropriate standard of review for whether a PRRA officer has had a proper regard to all the evidence in coming to their decision is reasonableness (*Selduz v Canada (Citizenship and Immigration)*, 2009 FC 361 at para 9; *Alvarez v Canada (Citizenship and Immigration)*, 2014 FC 564 at paras 19-20).

[20] The parties differ with respect to whether the denial of an oral hearing in this circumstance was a breach of natural justice. The Applicant argues that due to the veiled credibility findings, a correctness standard should be applied. The Respondent counters that the reasonableness standard governs because the case law holds that a deferential standard applies where a PRRA officer addresses the request for an oral hearing.

[21] Although there has been some disagreement in the treatment of the standard of review with respect to whether the PRRA Officer erred by failing to conduct an oral hearing, the recent jurisprudence of this Court has held that it is judged on the deferential standard of reasonableness (*Ibrahim v Canada (Minister of Citizenship and Immigration),* 2014 FC 837 at para 6; *Bicuku v Canada (Minister of Citizenship and Immigration)*, 2014 FC 339 at paras 16-20; *Ponniah v Canada (Minister of Citizenship and Immigration)*, 2013 FC 386 at para 24; *Mosavat v Canada (Minister of Citizenship and Immigration)*, 2011 FC 647 at para 9).

VII. Analysis

[22] I am of the view that the decisions under review were unreasonable due to errors in the treatment of each of the three issues raised by the applicant. The problems inherent in them are explained below.

A. *Issues 1 and 3: Fettering of Discretion and Improper Treatment of Affidavits*

[23] I will address these two issues together, because in my view, they are inextricably linked.

[24] As I will explain below, an officer cannot simply adopt another officer's decision, but must make their decision on the totality of the evidence and after having considered all of the facts. The Applicant points out that the mere use of the word addendum to describe the decisions reflects the fact that the Second PRRA Officer fettered his discretion. While I accept that the choice of "Addendum" as a title in both the email to CBSA and the August 12 PRRA decision was not ideal, that choice does not in and of itself negate the validity of the outcome. Ultimately, "Addendum" is just a label. What counts is what the administrative decision maker does in fulfilling his or her function, and if she or he provides a fair hearing, whether written or oral.

[25] I have serious doubts as to whether the Second PRRA Officer properly fulfilled his function, due to the reasons given in his two Addenda - both in terms of form (sufficiency of reasons) and content.

[26] Specifically, the Second PRRA Officer wrote in Addendum No. 1:

> Further submissions were received dated 31 July 2013 in the form of an e-mail and attachment. Therefore, this file is being re-opened in order to assess what, if any, impact these new submissions will have had on the previous negative PRRA decision by [the First PRRA Officer].
>
> (CTR, p 14)

[27] After reviewing the new materials, namely (i) submissions from counsel and (ii) his uncle's affidavit, the Second PRRA Officer concluded:

> I do not find that the original decision by [the First PRRA Officer] to be affected by these submissions and that the negative decision still stands.
>
> (CTR, p 14)

[28] There is nothing to suggest that the Second PRRA Officer read the file. Indeed, it is unclear what materials he looked at before he came to this conclusion. All that his decision suggests is that he had read the First PRRA Officer's decision.

[29] About one week later, on August 12, 2013, after having received an affidavit from the Applicant's mother, the Second PRRA Officer essentially repeated the last quotation in Addendum No. 2:

> I do not find that the original decision by [the First PRRA Officer] to be affected by these submissions and that the negative decision still stands.
>
> (CTR, p 2)

[30] Again, the Second PRRA Officer provided the Applicant cold comfort in showing that he properly considered the Applicant's danger of returning to Libya, particularly with regard to the new evidence before him, namely affidavits from, his mother and uncle, who were in the midst of the Libyan maelstrom. This is especially disturbing precisely because of the First PRRA Officer's conclusions, which read:

> In addition, I note that the applicant stated that his other uncle, Ismail was kidnapped and shot in May 2012. I also note that the applicant stated Ismail was killed. However, I find that the applicant has provided little objective evidence, such as a medical report or death certificate, in regards to Ismail's death. In addition, I note that the applicant has provided little evidence or information as to when or how he became aware of his uncle's death.
>
> Furthermore, I also find that the applicant has provided little evidence or information that he was imprisoned and beaten upon his return to Libya in January 2012. I note that the applicant stated that he was beaten extensively during his stay in prison in Libya. However, I find that there is little other evidence or information that during the time he was in Libya in January 2012 until he

> returned to Canada in April 2012 that he was put in prison in Libya, and was beaten.
>
> I also note that the applicant has provided little evidence or information that his father is currently imprisoned due to the fact that he is being perceived as a supporter of the Gaddafi regime.
>
> ...
>
> … I find that there is little evidence or information provided by the applicant to support the fact that he or any of his family members were perceived to be or [sic] currently perceived to be a pro-Gaddafi supporter.
>
> (CTR, p 44)

[31] Without going into all the details of his mother's and uncle's affidavits that were properly before the Second PRRA Officer, suffice it to say that they addressed all of the above-cited gaps identified by the First PRRA Officer. Yet, the Second PRRA Officer gives the two affidavits little weight, dismissing their relevance as follows in Addendum No. 2:

> Additional submissions received dated 07 August 2013. The submissions are an affidavit from his mother and from the applicant's uncle.
>
> Regarding the affidavit from the applicant's mother I find, as previously, that the applicant's mother is a person who has a vested interest in the final outcome of this application and therefore I give this affidavit little probative value.
>
> Included also in this submission is an affidavit by the applicant's uncle. Similarly [sic] to the finding of the applicant's mother, I find that this submission as written by the applicant's family member is someone who has a vested interest in the applicant and therefore I also give this affidavit little probative value.
>
> (CTR, p 2)

[32] In addition, in Addendum No. 1, the Second PRRA Officer states, "I find that this is an affidavit written by the applicant's mother; and more likely than not at the request of the applicant" (CTR, p 14).

[33] This conclusion is curious. First, who else should have requested the affidavit, other than the Applicant? No oral hearing was offered to probe any concerns (wrongly, in my view, as is discussed below). Second, in submissions to the officer, counsel unequivocally stated that the Applicant went through great trouble to request these affidavits from his family in Libya, and described the difficulties in finding an interpreter (CTR, p 62). Indeed, the Second PRRA Officer specifically noted submissions from counsel in Addendum No. 1 (CTR, p 14). These submissions, in the form of an eight page July 2, 2013 letter (CTR, pp 55-63), provided detailed new country condition evidence, and also explained in great detail why (because of a 2 month immigration hold at Metro-West Detention Center), it was difficult for the Applicant to coordinate obtaining sworn statements from Libya, but that the affidavits would be forthcoming.

[34] The delay and the course of events leading to the affidavits appear to be completely legitimate explanations. Applicant's counsel provided detailed and timely reasons about why these affidavits were important to the application, namely to corroborate the incidents alleged by the Applicant. Counsel's cover submissions of July 2, 2013 also outlined, in great detail, new objective evidence of country conditions, showing that there would be no state protection for Mr. Abusaninah.

[35] While an officer's assessment of the significance and weight of evidence is to be given deference, this is only the case where the officer's assessment is acceptable and defensible (*Somasundaram v Canada (Citizenship and Immigration)*, 2014 FC 1166 at para 41). In this case, I cannot accept the Second PRRA Officer's blanket dismissal of the new evidence, due to a "vested interest", as acceptable and defensible, particularly in light of the fact that all that this officer relied on to undertake his analysis was the First PRRA Officer's decision, which had specifically commented on a lack of corroborating evidence.

[36] The Respondent, in rebuttal, argues that the Applicant had the benefit of the file being considered afresh by the Second PRRA Officer, a remedy normally only granted upon a successful judicial review.

[37] I am not convinced by the Respondent's argument. Indeed, if one is to characterize the Second PRRA Officer's decisions as "reconsiderations", this implies a critical re-examination of the application, rather than an out-of-hand rejection of all new evidence because it came from close family members.

[38] In my view, no one could have given better evidence than the mother and uncle at the heart of these incidents of violence. The first PRRA Officer criticized the Applicant for failing to provide corroborating evidence from them. The Applicant's uncle, who swears to having picked up the Applicant at Tripoli airport, witnessed the detention first-hand, and then facilitated the Applicant's release from incarceration through a payment of five thousand Dinars (CTR, p 8).

The Applicant's mother, not only corroborated this event, but also the fact that the Applicant's father, her husband, was "kidnapped on 03/09/2011 and is missing to date" (CTR, p 10).

[39] The case law is supportive of the principle that the Board cannot reject evidence simply because it comes from family members who have a close relationship with the claimant. As Justice de Montigny held in *Ugalde v Canada (Minister of Public Safety and Emergency Preparedness*), 2011 FC 458:

> [28] … Presumably, the Officer would have preferred letters written by individuals who had no ties to the Applicants and who were not invested in the Applicants' well-being. However, it is not reasonable to expect that anyone unconnected to the Applicants would have been able to furnish this kind of evidence regarding what had happened to the Applicants in Mexico. The Applicants' family members were the individuals who observed their alleged persecution, so these family members are the people best-positioned to give evidence relating to those events. In addition, since the family members were themselves targeted after the Applicants' departure, it is appropriate that they offer first-hand descriptions of the events that they experienced. Therefore, it was unreasonable of the Officer to distrust this evidence simply because it came from individuals connected to the Applicants.

See also *Ndjizera v Canada (Citizenship and Immigration*), 2013 FC 601 at paras 32-33; *Shilongo v Canada (Citizenship and Immigration)*, 2015 FC 86 at para 29.

[40] Turning back to the Respondent's position regarding reconsideration, I wholeheartedly agree with the Respondent that a second (and third) review of a previously refused PRRA application would be beneficial to an Applicant. However, that holds true if it is a legitimate reconsideration. In this case, the CTR points to the fact that these "reconsiderations" by the Second PRRA Officer were illusory. While it is possible that the Second PRRA Officer reviewed the entire file, the reasons provided in the two addenda do not indicate that this was the case.

[41] Even if the Second PRRA Officer did truly review the entire record and did not just affirm decision of the First PRRA Officer, what is beyond any doubt is that he unreasonably gave little weight to the fresh, corroborating evidence from the Applicant's close family members.

[42] The Respondent cites the following passage from Justice de Montigny in *Zhang v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1381 [Zhang], for the principle that "he who hears must decide" does not apply to administrative decisions.

> [26] I would also reject Mr. Zhang's submissions regarding the principle that "he who hears must decide." As I said in Kniazeva v. Canada (Minister of Citizenship and Immigration), 2006 FC 268, the case law is clear that this principle does not apply to administrative decisions, especially visa officers' decisions. The same is true for immigration officers. Having said this, it is far from clear what weight Officer Maekawa gave to his fellow officer's notes, or to Officer Ng's decision in Mr. Zhang's extension application.

[43] However, I believe this case can be distinguished in several respects. Firstly, *Zhang* was decided in the context of a visa application, not a PRRA. Secondly, *Kniazeva v Canada (Minister of Citizenship and Immigration),* 2006 FC 268 at 19, cited within the passage above, dealt with the whether the party making inquiries needed to be the party making the decision. That is not in dispute in this case – the question, rather, is whether the Second Officer was required to take a fulsome look at the record before coming to an independent conclusion on the matter. Framed in this way, *Zhang* appears to support this proposition:

> [31] However, the question of whether Officer Ng's decision was reasonable given the information she had at the time is not the issue here. Officer Maekawa was presented with evidence countering a number of Officer Ng's findings, in particular her conclusion that Mr. Zhang would not leave the country at the end

> of his authorized period. While he could take the extension decision into consideration, he also had to assess Mr. Zhang's new evidence in support of his claim that Officer Ng's decision was mistaken or did not reflect his true intentions.
>
> [44] While it may have been perfectly acceptable for Officer Maekawa to refuse the restoration application, that could not excuse him from providing Mr. Zhang with some sort of an explanation.

[44] In this case, all indications are that the Second PRRA Officer simply adopted the reasons of the First PRRA Officer, and added some comments about the weakness of the new evidence, without considering the full context, reviewing the background evidence that was before the original decision-maker, and considering the impact of the new evidence on the foundation for the original decision.

[45] The law is clear that decision makers must consider all the evidence, lest their discretion be fettered. In the PRRA context, this includes "an obligation to consider the latest relevant and significant evidence available" (*Chudal v Canada (Minister of Citizenship and Immigration*), 2005 FC 1073 at para 11 [Chudal]). In *Chudal*, Justice Hughes concluded:

> [21]…I will make an Order quashing the decision apparently dated 23 September 2004 and require that the matter be considered by a different Officer having regard not only to the material submitted 8 October, 2004, but all other material that was before the original Officer, since the material must be considered as a whole and not simply as a rebuttal to the decision ultimately revealed on 10 November 2004.
>
> [Emphasis added]

[46] Similarly, in *Jie v Canada (Minister of Citizenship and Immigration)* (1998), 158 FTR 253 at para 7 [Jie], Justice Rothstein, then of this Court, underscored the importance of reconsiderations being unconstrained by the thoughts of previous decision makers :

> [7]….There is nothing wrong with a visa officer having regard to information in prior applications and interviews of the applicant provided the visa officer decides the case on the basis of the evidence before him or her and does not consider himself or herself bound or fettered by previous decisions.

[47] Finally, in Huang v Canada (Minister of Citizenship and Immigration), 2009 FC 135, Justice Zinn wrote:

> [21] It may well be that the officer examining these applications, even with the new evidence, will arrive at the same conclusion as the officer whose decision is under review. Nonetheless, fairness requires that the decision be made with all the evidence before the officer.

[48] The imperative for a new PRRA Officer to thoroughly canvass the original contents of a file which has been transferred to him and for which new evidence has been adduced is obvious. The Second Officer must situate the new evidence in the context of the Applicant's circumstances. The importance of considering matters in their full context is aptly demonstrated by this Court's jurisprudence in *Chudal, Jie* and *Huang*.

[49] Instead, the Second PRRA Officer in this case appears to have relied on the First PRRA Officer's decision as a starting point, without considering the totality of the materials filed earlier, which indicates that he fettered his discretion.

[50] The final point on this issue which must be addressed is the Respondent's attempt to introduce an affidavit from the Second PRRA Officer. I cannot accept this evidence, at least with respect to explanations of how he approached the file, and what evidence he looked at in making his two PRRA Addendum decisions. To do so would amount to an effort to "remedy a defect in the decision by filing further and better reasons in the form of an affidavit" (*Sellathurai v Canada (Minister of Public Safety and Emergency Preparadeness)*, 2008 FCA 255 at paras 46-47. See also: *Barboza v Canada (Minister of Citizenship and Immigration*), 2011 FC 1420 at paras 27-28; *Kaba v Canada (Minister of Citizenship and Immigration*), 2013 FC 1201 at para 9; *Eshraghian v Canada (Minister of Citizenship and Immigration*), 2013 FC 828 at para 22). In these cases, similar attempts to bootstrap administrative decisions by the subsequent filing of affidavits by decision makers have been blocked.

[51] To conclude on the first issue, the Second PRRA Officer's two addenda decisions are unreasonable. The evidentiary record before me does not indicate that he considered all of the evidence. Accordingly he fettered his discretion in arriving at what should have been his own, independent decision.

B. *Issue #2: Failure to Conduct an Oral Hearing*

[52] As I have already found errors with respect to the issue raised above, I shall keep my comments succinct on whether an oral hearing was required, albeit with the hope that they are heeded when this matter is reconsidered.

[53] The First PRRA Officer concluded that there was insufficient evidence of the Applicant's claims regarding his risk in Libya. I have already discussed in detail why there was indeed corroborating evidence for the "reconsideration" decisions that should have been properly considered in the context of all the evidence. Likewise, I have already noted that in his counsel's July 2, 2013 letter, the Applicant provided ample additional country documentation, highlighting the concerns about Libya (CTR, pp 55-62).

[54] Once the Second PRRA Officer had this significant evidence upon which a section 97 risk could be founded, I find that his rejection of the PRRA on the basis of "insignificant evidence" was a veiled credibility finding. This court has, on many occasions, ruled that veiled credibility findings are not acceptable (*Liban v Canada (Citizenship and Immigration), 2008 FC 1252* at para 14; *Yakut v Canada (Citizenship and Immigration)* at para 13).

[55] In this case, the ramifications of a veiled credibility finding were significant, because the law provides that an oral hearing may be held where credibility is determinative, pursuant to subsection 113(b) of *IRPA* and section 167 of the Regulations (*Ibrahim v Canada (Minister of Citizenship and Immigration)*, 2014 FC 837 at para 15).

[56] The Respondent points out, and is entirely correct, that holding such an oral hearing for PRRA proceedings lies at the discretion of the Minister. However, what is also clear is that there is a spectrum of procedural fairness, and the requirement for an oral hearing increases with the impact on the individual's life, liberty and security.

[57] Here, the stakes are particularly high, because the Applicant's risk is one of torture of cruel and unusual punishment, or death. He has never had an opportunity to have his fears heard in Canada, given that he was found ineligible to make a refugee claim due to his conviction.

[58] While there is no doubt that committing a crime has grave consequences, particularly for foreign nationals without status in Canada, the role of a PRRA officer is still to assess the risk to the individual upon return to his country. (*Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68 at para 67).

[59] In the key decision of *Singh v Canada (Minister of Employment and Immigration)*, [1985] 1 SCR 177, the Supreme Court of Canada emphasized the importance of oral hearings:

> 58. Do the procedures set out in the Act for the adjudication of refugee status claims meet this test of procedural fairness? Do they provide an adequate opportunity for a refugee claimant to state his case and know the case he has to meet? This seems to be the question we have to answer and, in approaching it, I am prepared to accept Mr. Bowie's submission that procedural fairness may demand different things in different contexts: see *Martineau*, *supra*, at p. 630. Thus it is possible that an oral hearing before the decision-maker is not required in every case in which s. 7 of the *Charter* is called into play. However, I must confess to some difficulty in reconciling Mr. Bowie's argument that an oral hearing is not required in the context of this case with the interpretation he seeks to put on s. 7 . If "the right to life, liberty and security of the person" is properly construed as relating only to matters such as death, physical liberty and physical punishment, it would seem on the surface at least that these are matters of such fundamental importance that procedural fairness would invariably require an oral hearing. I am prepared, nevertheless, to accept for present purposes that written submissions may be an adequate substitute for an oral hearing in appropriate circumstances.
>
> 59. I should note, however, that even if hearings based on written submissions are consistent with the principles of fundamental justice for some purposes, they will not be satisfactory for all purposes. In particular, I am of the view that

> where a serious issue of credibility is involved, fundamental justice requires that credibility be determined on the basis of an oral hearing. Appellate courts are well aware of the inherent weakness of written transcripts where questions of credibility are at stake and thus are extremely loath to review the findings of tribunals which have had the benefit of hearing the testimony of witnesses in person: see *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, at pp. 806-08 (*per* Ritchie J.) I find it difficult to conceive of a situation in which compliance with fundamental justice could be achieved by a tribunal making significant findings of credibility solely on the basis of written submissions.

[60] The First PRRA Officer addressed the request for an oral hearing made in the original June 7, 2013 PRRA submissions. After reviewing the PRRA Policy Manual PP3, the First PRRA Officer concluded in his decision:

> I note that the purpose of the hearing is to "address the complicated issue of credibility of the applicant, where the evidence raises a serious issue of credibility, the evidence is central to the decision to be rendered, and the evidence, if accepted would justify allowing the application." I note that I am not questioning the applicant's credibility in this decision. Therefore, I find that an oral hearing will not be necessary in rendering a decision.
>
> …
>
> Furthermore, I also find that the applicant has provided little evidence or information that he was imprisoned and beaten upon his return to Libya in January 2012. I note that the applicant stated that he was beaten extensively during his stay in prison in Libya. However, I find that there is little other evidence or information during the time he was in Libya in January 2012 until he returned to Canada in April 2012 that he was put in prison in Libya, and was beaten.
>
> (CTR, pp 42 and 44) [Emphasis added]

[61] The First PRRA Officer did not explain why it is that the detailed evidence contained in the Applicant's affidavit was insufficient to establish the above. Unlike the circumstances of

Ferguson v Canada (Citizenship and Immigration), 2008 FC 1067 at para 4, for example, wherein the Applicant did not provide sworn evidence of the critical facts, here, the Applicant provided a sworn affidavit, which was very specific regarding the details of his kidnapping and the beating he received in prison. However, the First PRRA Officer then proceeded to make the following finding:

> I accept that those who are viewed as Gaddafi supporters or pro-Gaddafi may be targeted by various groups in Libya, and that the treatment they receive may amount to persecution, torture, risk to life or cruel and unusual treatment or punishment. I note that in his affidavit the applicant stated that he and his family are perceived as Gaddafi supporters. However, I find that there is little evidence or information provided by the applicant to support the fact that he or any of his family members were perceived to be or [sic] currently perceived to be a pro-Gaddafi supporter.
>
> (CTR, p 44)

[62] This demonstrates the same error in reasoning as Justice O'Keefe pointed out in *Prieto v Canada (Minister of Citizenship and Immigration)*, 2010 FC 253 at paras 39-43, where the Officer's conclusion that the evidence did not support that the applicant's fear could only have been reached with a negative credibility finding.

[63] The First PRRA Officer accepted that those who are viewed as Gadhafi supporters are persecuted. If the Applicant is believed (ie. he is credible), then he and his family, as persons who are viewed as Ghadafi supporters, would be at risk. Since the First PRRA Officer found "that there is little evidence or information provided by the applicant to support the fact that he or any of his family members were perceived to be or [sic] currently perceived to be a pro-Gaddafi supporter" (CTR, p 44), it is clear that his conclusion that the Applicant had not established he was at risk, could only have been reached with a negative credibility finding.

[64] As such, it was unreasonable, in the circumstances of this case, for the both the First PRRA Officer, and the Second PRRA Officer, who was further equipped with fresh affidavit evidence, not to grant an oral hearing.

VIII. Conclusion

[65] This application for judicial review is allowed and will be sent back for reconsideration by a new decision maker.

[66] No questions were proposed for certification, and none arose.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed and the matter is remitted to a differently constituted panel for re-determination.

"Alan Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-5896-13 IMM-6271-13
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