Federal Court  Cour fédérale

Date: 20190614

Docket: IMM-1595-18

Citation: 2019 FC 812

Ottawa, Ontario, June 14, 2019

PRESENT: Mr. Justice Favel

BETWEEN:

ALI GUL

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [IRPA] against a negative Pre-Removal Risk Assessment decision [PRRA] of an Immigration Officer [the Officer] dated March 5th, 2018. In this PRRA, the Officer determined that the Applicant would not be subject to a risk of torture, a risk of

persecution, or face a risk to life or risk of cruel and unusual treatment or punishment if removed to Ukraine.

II. Background

[2] The Applicant is a citizen of Turkey and he became a permanent resident of Ukraine in 2013. He first arrived in Canada as a student in 1999. He made a refugee claim upon entering Canada that was refused in March 2000 and he departed shortly thereafter. Since leaving Canada, the Applicant had been living in Ukraine.

[3] The Applicant re-entered Canada in July 2017. He was ineligible to make a refugee claim and was issued an exclusion order, so he applied for a Pre-Removal Risk Assessment in August 2017.

[4] The Applicant left Turkey in 1995 to pursue his education and has since obtained permanent resident status in Ukraine. During this time he became involved with Hizmet, a movement considered by the Turkish government to be a terrorist organization. Among his activities with the Hizmet movement, the Applicant worked as a teacher, and later as vice-principal for Meridian International School, a Hizmet-affiliated school in Ukraine. The Applicant also volunteered at the Turkish-Ukrainian Cultural Centre, a Hizmet-affiliated organization, and opened an account with Bank Asya in Turkey, a participatory bank that is considered to be affiliated with Hizmet. The Turkish government closed this institution.

[5] In November 2016, a friend of the Applicant who had also been involved in the Hizmet movement was mugged and his passport was stolen. The Applicant believes that this mugging occurred because he was known to be a member of the Hizmet community, and he alleges that Turkish Embassy refused to replace his passport because he was involved with Hizmet. The Applicant, along with other members of the Hizmet community also received anonymous, threatening phone calls and his car was vandalized.

[6] The Applicant left Ukraine, as he feared that it was only a matter of time before the Turkish government reached across the border into Ukraine or Ukraine began deporting people at the Turkish state's request. The Applicant alleges that as a consequence of the close proximity between Turkey and Ukraine, and as a result of Turkey's stated intention to destroy Hizmet all over the world and Turkey's success in arranging the deportation, extradition, or kidnapping of Hizmet members in various countries, he fears for his life in both countries.

III. Impugned Decision

[7] The Officer rejected the Applicant's PRRA application on March 5, 2018, on the basis that the Applicant had not provided sufficient evidence to demonstrate that there was more than a mere possibility that he will be persecuted in Ukraine. The Officer also found that the Applicant had not provided sufficient evidence to demonstrate that he would be more likely than not to face a risk of torture, a risk to life, or a risk of cruel and unusual treatment or punishment, and thus concluded that the Applicant was neither a Convention refugee nor a person in need of protection.

[8] The Officer noted that although the coup attempt in Turkey occurred on July 15, 2016, the Applicant continued to work at the Meridian International School and the Syaivo Cultural Centre until July 2017, when he came to Canada. The Officer found it significant that the Applicant had not included any explanation as to why he remained in Ukraine at the two suspected locations, working and volunteering for an additional year after the coup if he was fearful for his life.

[9] The Officer acknowledged that the Applicant is a citizen of Turkey. However, he considered that since Applicant is also a Permanent Resident of Ukraine and that the objective evidence provided did not corroborate that he too would be of interest to the Ukrainian authorities as a Hizmet supporter, the Officer concluded that the Applicant did not face a personalized risk in Ukraine.

[10] Overall, the Officer found that there was insufficient evidence to support that the Applicant as a vice-principal of a Meridian International School, or a volunteer of the Syaivo Cultural Centre would also be followed and threatened upon his return to Ukraine. The Applicant therefore did not meet the definition of a Convention Refugee or a person in need of protection as per s. 96 and 97 of the IRPA.

IV. Issues

[11] After reviewing both parties' written submissions, the Court finds that the following issues need to be addressed:

1. Did the Officer err in not holding an oral hearing?
2. Did the Officer err in rejecting central evidence?
3. Was the Officer's analysis of the Applicant's risk reasonable?

[12] As I recently articulated in *Farah v Canada (Citizenship and Immigration)*, 2018 FC 1162 at paragraph 7 in light of the different paths taken by this Court, the standard of review applicable to a PRRA officer's decision to allow an oral hearing should be that of reasonableness as "the decision on that issue turns on interpretation and application of the officer's governing legislation" (*Balogh v Canada (Citizenship and Immigration)*, 2017 FC 654 at paras 21-23). The standard of review applicable to the first issue is therefore that of reasonableness.

[13] With regards to the second issue, the Applicant argues that a failure to consider evidence is a breach of procedural fairness because "reasonableness and deference can have no role when there is no assessment of the evidence" (*Varga v Canada (Citizenship and Immigration)*, 2013 FC 494 at para 6). The Respondent has made no submissions on the standard of review applicable to this issue.

[14] The Court agrees with the Applicant. The Federal Court has often iterated that failing to take account of relevant items of evidence represents a mistake of law *(Mukilankoy v Canada (Citizenship and Immigration)*, 2017 FC 161 at para 22; *Alahaiyah v Canada (Citizenship and Immigration)*, 2015 FC 726 at para 17; *Uluk v Canada (Citizenship and Immigration)*, 2009 FC 122 at para 16; *Esmaili v Canada (Citizenship and Immigration)*, 2013 FC 1161 at para 15). As

such, the applicable standard of review for question 2, and for procedural fairness generally, is that of correctness.

[15] The assessment of evidence and inferences to be drawn therefrom being at the core of the expertise of PRRA officer, the applicable standard of review for the third issue is reasonableness *(Zdraviak v Canada (Citizenship and Immigration)*, 2017 FC 305 at paras 6-7). The Court will therefore not intervene so long as the Officer's conclusions are transparent, justifiable and intelligible.

V. Relevant legislation

[16] The following provisions of the IRPA 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 unable or, by reason of that fear, unwilling to return to that country.	b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Person in need of protection	**Personne à protéger**
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 incidental to lawful sanctions, unless imposed in disregardof 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.

[17] The following provisions of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRP Regulations] are applicable in these proceedings:

Hearing — prescribed factors	**Facteurs pour la tenue d'une audience**
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.

VI. Analysis

[18] For the following reasons, the application for judicial review is dismissed. There is no reviewable error for the Court to intervene in the present application for judicial review.

[19] In a PRRA application, it is trite law that the Applicant bears the burden of proof *(Ferguson v Canada (Citizenship and Immigration)*, 2008 FC 1067 at para 21 [*Ferguson*].

A. *Did the Officer err in not holding an oral hearing?*

[20] The Applicant argues that the Officer made two implicit credibility findings. First, the Officer drew a negative inference as to subjective fear regarding the Applicant's delay in leaving Ukraine. Second, the Officer drew a negative inference from the lack of evidence corroborating the letter of support provided by the General Director of the Ukrainian-Turkish Cultural Centre. The Applicant maintains that it is settled law that it is an error to require corroborating evidence for a letter of support unless the credibility of the statements is in doubt (*Galamb v Canada* (MCI), 2018 FC 135). The Applicant argues that the Officer circumvented the requirement to make credibility findings in clear and unmistakable terms by framing these findings as findings of insufficient evidence. As a result, the Applicant maintains that the officer's failure to convoke an oral interview in order to make a clear, valid credibility finding, constituted a breach of procedural fairness. The Applicant further argues that considering that the RPD decision on which the Officer relied was made nearly twenty years prior, an oral interview was necessary in order for the Officer to meet the requirements of procedural fairness.

[21] The Respondent argues that the Officer had no duty to provide an oral hearing because the Officer made no credibility finding. The Respondent maintains that the elements of the decision referred to by the Applicant are simply two of the facts considered by the Officer to assess whether there was sufficient evidence of risk. The Officer assessed the evidence as a whole and reasonably concluded that there was insufficient evidence to establish that the Applicant was at risk in Ukraine. The Respondent maintains that the mere fact that the Applicant

makes claims to the contrary does not transform a reasonable finding into an adverse credibility inference that necessitates an oral hearing.

[22] The Respondent further argues that the absence of corroborative evidence was only one of a number of deficiencies in the letter from the Director General: the Officer also noted that the author did not indicate that the attack that he suffered was due to his position as Director General of the cultural centre and did not indicate that other members of the organization, other than the Applicant had been similarly threatened or harassed.

(1) Did the Officer make veiled credibility findings?

[23] Identifying veiled credibility findings is a fact-specific exercise (*Lopez Puerta v Canada*, 2010 FC 464). While a distinction must be made between an adverse credibility finding and a finding of insufficient evidence, in practice this distinction is difficult to draw (*Gao v Canada (Citizenship and Immigration)*, 2014 FC 59 at para 32, *Strachn v Canada (Minister of Citizenship and Immigration)*, 2012 FC 984 at para 34). Generally speaking, the Court must look beyond the express wording of the officer's decision in order to determine whether, in fact, the applicant's credibility was at issue (*Ferguson* at para 16).

[24] The Court has found veiled credibility findings in cases where an officer gave no weight to the applicant's story and professed fears, effectively implicitly rejecting the applicant's evidence as not credible (see for example *Zokai v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1103), in cases where an officer doubted the truthfulness of an Applicant's testimony without providing a valid reason (see for example *Whudne v Canada*

(MCI), 2016 FC 1033, at para 20 [*Whudne*], *Chekroun v Canada (Citizenship and Immigration)*, 2013 FC 737 at para 68), and where officers' findings were based on contradictions in sworn evidence (see *Whudne* at para 20).

[25] In the present matter, the Officer's reasons do not indicate that the Officer made a veiled credibility finding.

[26] First, the Officer's finding with regards to the Applicant's decision to remain in Ukraine after the coup does not imply that the Officer disbelieves the Applicant's evidence. It is a finding of fact that speaks to the Applicant's lack of subjective fear. The Officer emphasized that the Applicant did not provide an explanation as to why he remained in Ukraine working and volunteering for two Hizmet-connected organizations if he was fearful for his life.

[27] Second, the Officer's finding with regard to the Director General's letter did not imply that they disbelieved the content of the letter nor the Applicants' claims that he received threatening phone calls, that he was harassed, and that his car had been broken into. Rather, the Officer concluded that this evidence was insufficient to substantiate the speculation that these acts were related to the Applicants' employment or his volunteer work with Hizmet-related organizations. It was reasonable for the Officer to find that this evidence could not corroborate that the Applicant would be of personal interest to the Ukranian authorities. This does not constitute a credibility finding.

(2) Did the Officer err in failing to convoke an interview with the Applicant?

[28] An interview—or oral hearing—is not available as a right in a PRRA application. Subsection 113(b) of the IRPA states that a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required. The prescribed factors are set out in section 167 of the IRP Regulations. These clarify that an oral hearing is generally required within the context of a PRRA if there is a credibility issue regarding evidence that is central to the decision and which, if accepted, would justify allowing the application (*Ullah v Canada (Minister of Citizenship and Immigration)*, 2011 FC 221).

[29] An interview was not required in this matter, in view of the Court's finding above, as credibility was not at issue before the PRRA Officer. Furthermore, the Court cannot agree with the Applicant's contention that the Officer should have convoked an interview on the basis that the RPD decision on which he relied was made nearly twenty years prior. In *Arenas Pareja v Canada (Citizenship and Immigration)*, 2008 FC 1333 at para 24 [*Pareja*], the Court clearly established that if credibility is not at issue before the PRRA, an applicant is not entitled to an oral hearing before the PRRA officer simply because his second refugee claim has not been heard by the IRB.

[30] The facts in *Pareja* resemble those in the case before this Court. The Applicant was a Mexican citizen who first arrived in Canada in 1990, his claim refugee protection was dismissed the same year. The Applicant returned to Canada in 2007, at which point he attempted to file a refugee claim, which was deemed ineligible under paragraph 101(1)(b) of the IRPA, given the IRB's previous refusal of his refugee claim. The Applicant filed for a PRRA. The Officer rejected the PRRA on the basis that the applicant had not satisfied his burden to establish the merits

of his allegations, and specifically had not established that he was personally targeted by drug traffickers or by corrupt police officers. In his reasons, Justice Lagacé emphasized that the right to a hearing before the PRRA officer may exist when credibility is a key factor in the officer's decision, concluding at para 26:

> [26] The applicant would have not gained anything from a hearing since he had ample opportunity to make his arguments and to submit all of the documentary evidence and written submissions deemed necessary to support his claims. The PRRA officer did not determine in her decision that the applicant lacked credibility, but rather that he had not satisfied his burden of proof establishing a personalized risk. This finding is perfectly justified and possible in terms of the evidence offered in this matter and the law. In short, it is once again a reasonable finding that does not justify the intervention of this Court.

[31] As such, the Officer's decision not to conduct an interview with the Applicant was reasonable.

B. *Did the Officer err in rejecting central evidence?*

[32] The Applicant argues that on two issues the Officer ignored evidence entirely such that it constitutes a breach of procedural fairness. First, the Officer found that the student transcripts of the Applicant's son and the documents referring to his credit card did not provide evidence of any risk to the Applicant. The Applicant argues that these documents were intended to demonstrate that he worked and sent his children to Hizmet-related schools and banked at Bank Asya and that this should have constituted evidence that the Applicant had documented longstanding connections to Hizmet. The Officer thus erred in refusing to assess this relevant evidence. Second, the Applicant argues that in concluding that the Applicant had not provided objective evidence to support the alleged relationship between Ukraine and Turkey, the Officer

ignored or rejected the Applicant's own statements, the statements contained in General Director's letter of support, and the articles submitted by the Applicant which corroborate this connection.

[33] The Respondent argues that the Officer did not ignore the evidence referred to by the Applicant. The Officer considered the bank and school records, but found that these documents did not establish risk: firstly there was no firm evidence publicly linking the Applicant's son's school to the Hizmet movement, and secondly, the bank statements did not establish that permanent residents of Ukraine, who are clients of Bank Asya, are at risk from the Turkish authorities. While the country reports submitted by the Applicant do mention that public servants in Turkey have been dismissed if they are suspected of having links to the Hizmet movement and that one of the criteria used for the dismissals was making monetary contributions to the Bank Asya, the same reports were silent with regards to the risk to clients of Bank Asya who are not Turkish public servants and who are living in Ukraine. The Respondent further argues that the Applicant's own evidence indicates that although there was a claimed link between these organizations and the Hizmet movement, that link was vehemently denied, and there does not appear to have been any repercussions on these institutions from media reports linking them to the movement.

[34] The Court is persuaded by the argument of the Respondent. The Officer did not ignore the evidence cited by the Applicant. There is little in the transcript and bank statements that would corroborate the Applicant's risk. To the extent that they are relevant, it is only with respect to the Applicant's connection to Hizmet. This element has not been called into question

by the Officer: the issue is not whether the Applicant is connected to Hizmet, but rather whether there is sufficient evidence that the Applicant would be personally of interest to the Ukrainian authorities as a teacher and volunteer in Hizmet-related institutions. The transcript and bank statement do not corroborate the purported risk to the Applicant and, as such, the Officer did not err by giving a low probative value to this evidence.

C. *Was the Officer's analysis of the Applicant's risk reasonable?*

[35] The Applicant argues that the Officer's analysis of risk was unreasonable in two respects.

[36] First, the Applicant submits that generally an officer must first determine whether an applicant's statements and personal evidence as to their profile and past experiences are credible. If the officer concludes that they are, they may rely on the applicant's evidence and statements about their profile. However, the Applicant argues that in this case, the Officer made no proper findings of credibility or subjective fear. The Applicant maintains that the Officer's failure to properly assess his credibility or subjective fear renders the decision presumptively unreasonable.

[37] Second, the Applicant maintains that the Officer's assumption that there is insufficient evidence of risk did not constitute a reasonable decision, as the Officer merely asserted that there was insufficient evidence, without any explanation or reasoning for why the evidence which the Applicant did submit did not give rise to risk.

[38] The Respondent counters that the Applicant's suggestion that the Officer was required to make a finding on subjective fear or credibility before assessing the well-foundedness of his claim has no support in law. The onus was on the Applicant to establish, with sufficient evidence that he is at risk in Turkey and Ukraine. Once the Officer concluded that the evidence was insufficient, the inquiry was complete.

[39] The Respondent further argues that the Officer explained why the evidence was insufficient. The Officer explained that the Applicant did not produce any evidence indicating that he is at risk due to his affiliation with the school or cultural centre. The Applicant did not point to a single instance where a permanent resident of Ukraine was extradited to Turkey for any alleged affiliation with the Hizmet movement. Additionally, the fact that the Applicant continued to work at the school and volunteer at the cultural centre for a year after the attempted coup undermines the suggestion that his affiliation with the school or cultural centre puts him at risk, as does his failure to provide corroborative evidence that ought to have been reasonably available to him.

[40] The Applicant is correct in indicating that when a PRRA applicant offers evidence the officer may engage in two separate assessments of that evidence. First, he may assess whether the evidence is credible. Second, if the trier of fact finds that the evidence is credible, then an assessment must be made as to the weight that is to be given to it (*Ferguson* at paras 25-26). However, as recently confirmed by this court in *Perampalam v Canada (Citizenship and Immigration)*, 2018 FC 909 at para 30, it is open to the trier of fact, in considering the evidence, to move immediately to an assessment of weight or probative value without considering whether

it is credible. This will usually occur if the trier of fact is of the view that the answer to the first question is irrelevant because the evidence is to be given little or no weight, even if it is found to be reliable evidence.

[41] This was precisely what occurred in the case at bar. The evidence presented by the Applicant, while credible on its face, was not corroborative of the Applicant's stated risk which he would face if returned to Turkey. It was therefore reasonable for the Officer to limit his analysis to the probative value of this evidence.

[42] Furthermore, the Court is not persuaded by the Applicant's argument that the Officer merely asserted that there was insufficient evidence, without any explanation or reasoning. The Officer explained the limitations of the evidence provided by the Applicant, namely that it did not demonstrate that the members of the organizations to which the Applicant adhered have or were likely to be at risk, and that that they did not demonstrate that the Applicant would be at risk as a schoolteacher and volunteer worker with Hizmet-related organizations.

[43] The Officer then acknowledged a letter submitted from the General Director of the Ukrainian-Turkish Cultural Centre wherein he stated that he was beaten, robbed, and often received threatening phone calls. In this letter, the General Director also remarked that he was aware that the Applicant had received similar threatening phone calls many times, that he was harassed, that his car had been broken into and that he believed that if the Applicant stayed in the Ukraine he would face increasing threats and even danger to his life. However, the Officer found that little probative value could be given to this letter, since the General Director had not

provided any corroborating evidence to substantiate his statements, nor did the letter establish that the incidents referred to occurred due to the author's position.

[44] The Officer also considered the student transcripts of the Applicant's son and the documents referring to the Applicant's credit card, but concluded that these documents did not provide evidence of any risk to the Applicant, nor did they corroborate the Applicant's stated risk which he would face if returned to Turkey.

[45] The Officer's analysis of subjective and objective risk was therefore reasonable.

VII. Conclusion

[46] The application for judicial review is dismissed. No question of general importance is certified. There will be no order as to costs.

JUDGMENT in IMM-1595-18

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed. There is no question of general importance for certification and none arises. There is no Order as to costs.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Barbara Jackman	FOR THE APPLICANT
Daniel Engel	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Jackman Nazami & Associates Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT