Federal Court  Cour fédérale

Date: 20200127

Docket: IMM-1829-19

Citation: 2020 FC 143

Ottawa, Ontario, January 27, 2020

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

MITA AKRAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant seeks judicial review of a Pre-Removal Risk Assessment [PRRA] decision that determined that she would not be subject to risk of persecution, risk to life or risk of cruel and unusual punishment if she returned to her country of nationality. The impugned decision is the Applicant's second PRRA application, and is the latest in a series of proceedings before Canadian and international tribunals.

[2] Within the context of the PRRA application, the Applicant submitted evidence that her son obtained immigration status in the United Kingdom on grounds similar to those invoked by the Applicant. On this issue, I find that the PRRA officer was reasonable to give no weight to this evidence.

[3] The Applicant also submitted a hospital discharge certificate showing that her husband suffered a fracture to his radius and head injuries, as well as evidence related to her husband's disappearance following the injuries. According to the Applicant, this evidence justifies her heightened fear of being a victim of an inter-family vendetta. The PRRA officer attached little to no weight to the evidence and determined that the hospital records are inconsistent with an assault because they do not provide evidence of her husband's "leg" injury. However, the radius is a bone found in the forearm—not the "leg." On account of the importance of this determination in the PRRA decision, this misapprehension of the evidence is unreasonable and is cause for judicial review.

II. Background

[4] The Applicant is a citizen of Bangladesh. She came to Canada in January 2011 to visit her daughter. In February 2011, she claimed refugee protection for fear of being targeted and killed by a group of thugs in Bangladesh led by her first cousin, who also works as a police inspector in Bangladesh. Her fear stems from an inter-family feud between her family and her first cousin's family resulting from the abusive marriage between her sister and her first cousin's brother.

[5] The Applicant's brother is a British citizen who helped her sister escape to the United Kingdom, where she eventually gained asylum status. Upon their father's death, her brother returned to Bangladesh. During his stay, he was assassinated by her first cousin's family. The killers were convicted and sentenced to death in 2007. However, the convictions were overturned on appeal in January 2013.

[6] The Applicant arrived in Canada on January 6, 2011, after obtaining a temporary resident visa. The Applicant then filed a refugee protection claim on February 2, 2011.

[7] The refugee claim was then transferred to the Refugee Protection Division [RPD]. At the RPD stage, the Applicant affirmed that her cousin's gang of thugs would kill her, and claimed that she would suffer a fate similar to that of her brother if she were to return to Bangladesh. She also worried that her country of citizenship would not protect her from the vendetta threats because of the current human rights situation in the country and the influence of a patriarchal culture.

[8] On March 15, 2013, the RPD denied her refugee protection claim because it concluded that there was a lack of evidence as to the Applicant's connection to the murder case and subsequent death threats. Instead, the RPD determined that the threats arose from criminal motivations and are, thus, not covered by section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The RPD also found that the Applicant's claims about her own risks in relation to her brother's murder were untrue. The RPD had doubts about the Applicant's connection to the fear of persecution. In particular, the RPD noted that the Applicant was not

involved in the murder case, and attached considerable weight to a letter from the widowed sister-in-law that failed to mention her as a target of a death threat (despite mentioning other family members).

[9] After the RPD decision, the Applicant then brought a series of challenges to her removal. First, the Applicant's application to commence judicial review of the RPD's decision was denied on May 7, 2013. The Applicant's departure for Bangladesh was scheduled for January 17, 2014. Then, the Canada Border Services Agency received an interim measure request from the United Nations Human Rights Committee [UNHRC] on January 7, 2014 (the complaint alleged that her removal would violate her right to life and freedom from cruel, inhuman or degrading treatment or punishment). The UNHRC rejected the complaint on April 1, 2016; the Applicant was then informed that she would have to leave Canada.

[10] In the meantime, the Applicant filed a PRRA application on April 1, 2014; the application was refused on September 5, 2014, and the Federal Court rejected her application to commence judicial review on January 29, 2015. Following these proceedings, the Applicant applied for permanent residency on humanitarian and compassionate [H&C] grounds on January 29, 2015. The application was rejected on September 29, 2017, and an application for judicial review of the decision was refused on March 5, 2018.

[11] The Applicant also unsuccessfully applied for a PRRA in February 2018. In August 2018, the Applicant filed another application for permanent residency on H&C grounds. There is

no decision on that application. From November 2017 to March 2019, the Applicant filed three requests for deferral of her removal. All of her requests were denied.

III. The Decision Under Review

[12] The matter before me relates to the Applicant's challenges of her second PRRA application, which she filed in February 2018. In essence, the Applicant reiterated the same risks as those alleged in her previous PRRA and RPD applications, yet presented three new claims:

(i) First, the Applicant affirmed that her son and other family members were granted refugee protection in the United Kingdom in February 2016.

(ii) Second, the Applicant stated that her husband was attacked in May 2015. In support of her claim, she submitted a hospital discharge certificate, a diary entry of the incident and photos of her husband wrapped in bandages.

(iii) Third, the Applicant affirmed that her husband disappeared in August 2015 and submitted her niece's diary entries and two missing person notices from a newspaper.

[13] The second PRRA application was denied on May 31, 2018, because the PRRA officer determined that the Applicant would not be subject to risk of persecution, torture, risk to life or risk of cruel and unusual treatment or punishment if she returned to Bangladesh.

[14] The PRRA officer gave "no weight" to documents about her son's immigration situation. Regarding the attack on her husband and his subsequent disappearance, the PRRA officer

concluded that the Applicant failed to provide sufficient evidence. This determination was based on the PRRA officer giving little to no weight to photographic evidence (that was of "very poor quality" and that was "not dated, identified or certified"), a hospital discharge certificate (that did not contain a "description of injuries consistent with an assault"), and a "poorly translated" diary entry that does not mention the Applicant's involvement in the incident.

IV. Preliminary Issue

[15] Exhibits C and D to the Applicant's affidavit, which can be found in the Applicant's record, were not before the PRRA officer. Exhibit C includes her counsel's submissions and evidence related to a motion for stay of deportation, while Exhibit D includes her counsel's further submissions and evidence for the deferral of the removal order.

[16] These exhibits are not in the certified tribunal record. In any event, these submissions are inadmissible because they are an attempt to introduce facts that were not before the relevant decision-maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19; *Homaire v Canada (Citizenship and Immigration)*, 2019 FC 1197 at para 23). There are exceptions to this rule, but I fail to see how these exhibits fall under any of these exceptions. As a result, I give those exhibits no weight.

V. Issues

[17] The overarching issue in the present case is the PRRA officer's assessment of the evidence that arose after the first PRRA decision. This issue may be divided into two questions:

(1) Does the doctrine of *res judicata* apply to this matter?

(2) Was the PRRA officer's analysis of newly submitted evidence reasonable?

VI. Standard of Review

[18] The Applicant submits that the PRRA officer's decision is reviewable on a correctness standard due to the "life-or-death" nature of the decision, and the Canadian immigration system's alleged tendency to disregard key pieces of evidence in making risk assessments. In response, the Respondent argues that none of the circumstances warranting a departure from the reasonableness standard of review.

[19] The Applicant has failed to persuade me that this case involves one of the rare circumstances that warrant a departure from the presumptive standard of reasonableness, as recognized in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23 [*Vavilov*]. The Applicant's argument refers to the "constitutional questions" and "general questions of law of central importance to the legal system as a whole" exceptions to the presumption of reasonableness standard of review (*Vavilov* at para 53). These exceptions are inapplicable to this case because the issues at bar do not engage with the constitutionality of particular administrative acts *per se*; nor are they likely to send shockwaves through the entire legal system (*Vavilov* at paras 55-61). The mere fact that the questions are important to the parties is insufficient to overturn the presumption of reasonableness review (*Musasizi v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 5 at para 17). As a result, I conclude that the reasonableness standard of review applies to the case at bar.

VII. Analysis

(1) Does the doctrine of *res judicata* apply to this matter?

[20] In the case at bar, the Applicant presents a series of arguments that have already been addressed—and dismissed—by the RPD.

[21] The first such argument is the Applicant's claim that she would be subjected to an unacceptable risk if she were to return to Bangladesh because of the political conditions in her country of nationality. The RPD addressed this concern in its March 15, 2013 decision. At paragraph 26, the RPD noted that "corruption is rampant" in Bangladesh, yet concluded, "that no specific political connection of [the Applicant's first cousin] has been established" and that "the claimant has not effectively documented important allegations."

[22] The second such argument is the Applicant's claim that her deportation would put her in danger of extrajudicial execution by her brother's killers. This too was addressed by the RPD. Throughout the decision, the RPD expressed doubt about the facts related to her fear of extrajudicial execution, and concluded that her claims were "untrue." The RPD simply did not believe there was enough evidence "for the claimant's allegations of threats and thuggery". The tribunal also could "not see why the claimant would be a target of [her first cousin]."

[23] These arguments are barred by the doctrine of *res judicata* because these same issues have been decided by the RPD (*Tapambwa v Canada (Citizenship and Immigration)*, 2019 FCA 34 at para 66). This Court has already refused leave for judicial review of the RPD decision. As a result, the RPD's findings of fact become *res judicata* (*Roberto v Canada*

(Citizenship and Immigration), 2009 FC 180 at para 19; *Eid v Canada (Citizenship and Immigration)*, 2010 FC 639 at para 4). In the absence of an excessive injustice, the Court will apply the doctrine of *res judicata* (*Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44; *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19).

[24] There are several good reasons for this rule. The PRRA is not intended to be an appeal or reconsideration of the RPD decision (*Nebie v Canada (Citizenship and Immigration)*, 2015 FC 701 at para 36). It is intended to assess new risk developments between the RPD hearing and the removal date (*Kaybaki v Canada (Minister of Citizenship and Immigration)*, 2004 FC 32 at para 11). This purpose is evident in Parliament's decision to limit the PRRA's ambit of evaluation to evidence that arose after a rejection or evidence that was not reasonably available at the time of the rejection of the claim (paragraph 113(a) of the IRPA). Limiting the scope of inquiry avoids the wasteful use of judicial resources and abusive litigation (*Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 at para 12).

[25] I should add that respect for the principle of *res judicata* also ensures that parties follow the statutory appeal and judicial review procedures and address their concerns to the appropriate decision-maker.

[26] Considering the absence of compelling reasons to overturn the presumption of the *res judicata*, I reject this set of arguments.

(2) Was the PRRA officer's analysis of newly submitted evidence reasonable?

[27] The Applicant submits that the PRRA officer ignored the "oodles" of evidence showing that the risk of persecution she faces is higher than it was at the time of the first PRRA decision. The evidence may be grouped into three elements.

A. First element – the asylum decisions of her family members

[28] The first element relates to the asylum decisions of her family members, including her son's successful asylum claim before the First-tier Tribunal in the United Kingdom in February 2016, and another family member's successful subsidiary protection claim before France's National Court of Asylum (*Cour nationale du droit d'asile*) in January 2017. The Applicant submits that these decisions and the resulting judicial determinations of fact provide further evidence of her claims.

[29] The PRRA officer determined that these decisions bore little weight with respect to the Applicant's claims. I believe that this determination is reasonable. While these decisions were generated after the first PRRA decision, they involved facts that occurred prior to the first PRRA decision and that could have been relayed at that stage. Moreover, in the absence of a specific legislative provision, the decisions and factual determinations of foreign courts do not bind Canadian courts.

B. Second element – evidence of assault

[30] The Applicant also submitted evidence relating to her husband's injuries to support her claim that someone close to her was a victim of the ongoing family vendetta. The Applicant submitted a hospital discharge certificate, which was signed by two medical doctors and contained the following diagnosis: "[u]pper part of shaft of radius (left) & head injury". The certificate also notes a "fracture of upper part of shaft of radius (lt)" and lists a series of treatments for the husband (i.e., antibiotics, painkillers and supplements to improve bone health). The Applicant also submitted a general diary that indicates that the husband's hand was broken, and photographs showing a bandaged man lying in a hospital bed.

[31] In its decision, the PRRA brushed aside this evidence. The PRRA officer gave "no weight" to the photographic evidence because the photos were not dated, identified, or certified. The PRRA officer gave "no weight" to the general diary because it was poorly translated and does not mention the "husband's leg [injury]". The PRRA officer also gave "little weight" to the hospital discharge certificate because the document did not contain a "description of injuries consistent with an assault". The PRRA officer also noted that the hospital discharge certificate showed that the husband was treated "for a fracture of his leg" [emphasis added].

[32] The PRRA officer's decision to attach little to no weight to this evidence is unreasonable for two reasons.

[33] First, the PRRA officer's determination that evidence showing a "head injury" and a "fracture of upper part of shaft of radius" is not "consistent with an assault" without any further evidence is unreasonable because it defies common sense.

[34] Second, and in fairness to the PRRA officer, as counsel for the Minister pointed out (and I commend her for her transparency and exemplary conduct that shows how an officer of the court should deal with evidence that is highly relevant yet not in his or her favour), the PRRA officer seems to have misunderstood this evidence in thinking that the radius is a leg bone. Rather, the "radius", according to the third definition provided by the *Canadian Oxford Dictionary* (Second Edition, Oxford University Press, 2004 at 1274), is "the thicker and shorter of the two bones in the human forearm". Injuries of this nature, in addition to the head injuries noted on the hospital discharge certificate, may at times suggest an assault.

[35] Given the misapprehension on the part of the PRRA officer, I find the determination as to the weight givent to these documents not to be reasonable, and to be determinative of the overall decision (*Vavilov* at para 126).

C. Third element – evidence of disappearance

[36] Finally, the Applicant submitted several pieces of evidence related to her husband's alleged disappearance on August 15, 2015, including an August 27, 2015 diary entry (written by her niece), two disappearance notices from a newspaper (which were of the niece's own doing and which list her as a contact person) and a notarized document that attests to the disappearance of the husband. The PRRA officer noted several evidentiary problems with these documents:

"[the] translation is of poor quality", "it is not demonstrated that the translator is a member in good standing of an organization of translators", and "the author [of the documents] is not formally identified." As a result, the PRRA officer gave no weight to these documents because the reliability of the sources was not established. Moreover, the PRRA officer noted that the Applicant did not submit "further evidence regarding additional efforts made by the family and the police to find the missing person to show the status of this missing person's case."

[37] According to the Minister, this weight determination is reasonable because these documents were the result of the niece's efforts and because the Applicant failed to provide evidence of the additional efforts to find the missing person. In isolation, I would tend to agree with the Minister. While minor translation discrepancies (*Mohamud v Canada (Citizenship and Immigration)*, 2018 FC 170 at paras 7–9) or the sole fact that a family member prepared documents (*Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14 at paras 43-45) should not automatically lead decision-makers to dismiss certain pieces of evidence, in this case, the numerous evidentiary problems with these documents justify the PRRA officer's decision to doubt the persuasiveness of the evidence.

[38] However, this third element of evidence should be reconsidered because the PRRA officer's unreasonable dismissal of the evidence of assault may have tainted the officer's evaluation of the evidence of disappearance.

VIII. Conclusion

[39] Accordingly, I would grant the application for judicial review.

[40] The PRRA officer's dismissal of the medical evidence was not reasonable, and it may have been determinative of how the officer considered the disappearance evidence and of the overall decision.

[41] As a result, I return the matter to the same PRRA officer to reconsider the medical evidence pertaining to the alleged assault of the husband and his subsequent disappearance (*Vavilov* at para 142). Reconsideration should be confined to these two issues; the officer need not examine evidence that has already been addressed by other tribunals and that, by this decision, need not be reviewed.

JUDGMENT in IMM-1829-19

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is granted.

2. I return the matter to the same Pre-Removal Risk Assessment officer to reconsider the medical evidence pertaining to the alleged assault of the husband and his subsequent disappearance.

3. No question for certification was submitted, and none arose.

"Peter G. Pamel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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