Federal Court  Cour fédérale

Date: 20220408

Docket: IMM-3510-21

Citation: 2022 FC 512

Ottawa, Ontario, April 8, 2022

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

RICARDO SCOTLAND
KALYSSA JORDAN

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review by the Applicant pursuant to s. 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], of an adverse Pre-Risk Removal Assessment [PRRA] by a Senior Immigration Officer [Officer] dated November 2, 2020 [Decision].

II. Facts

[2] The Applicants are a 42-year old father [Principal Applicant] and his 18-year old daughter [Minor Applicant], both citizens of Barbados. In October 2010, the Principal Applicant alleges he was attacked by members of a gang in Barbados after witnessing a stabbing and reporting it to the police. The Principal Applicant says he made multiple attempts to seek police protection to no avail. In November 2010, the Applicants fled Barbados and in December 2010, made claims for refugee protection.

[3] In May 2012, the Applicants' refugee claims were denied. In January 2013, judicial review was granted and the matter was sent back to the RPD for. In November 2017, the RPD denied the Applicants' redetermination of their refugee claims. In December 2018, the Applicants applied for a PRRA. Their PRRA was rejected November 2, 2020, which Decision is the subject of this judicial review.

III. Decision under review

[4] As a preliminary threshold issue, the Applicants submitted what they alleged was new evidence. They filed the following to be assessed by the Officer:

1. Affidavit of the principal applicant, sworn January 16th, 2019
2. Letter from the principal applicant's mother, dated December 28th, 2018
3. Letter from the principal applicant's sister, dated December 21st, 2018

> 4. Country documentation which discusses crime, violence, guns, violence related to guns etc.

[5] The Officer found these four items were not new evidence and provided the following reasons, which the Applicants say do not comply with relevant jurisprudence:

> While I have read and carefully considered the affidavit and the letters provided by the applicants (items #1, #2 and #3), I do not find it is new evidence as the information contained in it is not significantly different from what was previously provided at the applicants' protection hearing. I also find that they do rebut the significant findings of the RPD panel that is, it's finding that adequate state protection is available to the applicants in Barbados. I have also reviewed item #4 and I find it is general in content, does not address the material aspects of this PRRA application and does not overcome any of the significant findings of the RPD panel, in particular it's finding that adequate state protection is available to the applicants in Barbados.

[6] In this finding, the Officer relied on *Raza v Canada (Citizenship and Immigration)*, 2006 FC 1385 [*Raza FC*] where Justice Mosley held:

> [22] It must be recalled that the role of the PRRA officer is not to revisit the Board's factual and credibility conclusions but to consider the present situation. In assessing "new information" it is not just the date of the document that is important, but whether the information is significant or significantly different than the information previously provided: *Selliah*, above at para. 38. Where "recent" information (i.e. information that post-dates the original decision) merely echoes information previously submitted, it is unlikely to result in a finding that country conditions have changed. The question is whether there is anything of "substance" that is new: *Yousef*, above at para. 27.
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> [Emphasis added]

[7] On appeal, the Federal Court of Appeal put the test this way in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 [*Raza FCA*]:

[13] As I read paragraph 113(*a*), it is based on the premise that a negative refugee determination by the RPD must be respected by the PRRA officer, unless there is new evidence of facts that might have affected the outcome of the RPD hearing if the evidence had been presented to the RPD. Paragraph 113(*a*) asks a number of questions, some expressly and some by necessary implication, about the proposed new evidence. I summarize those questions as follows:

1. Credibility: Is the evidence credible, considering its source and the circumstances in which it came into existence? If not, the evidence need not be considered.

2. Relevance: Is the evidence relevant to the PRRA application, in the sense that it is capable of proving or disproving a fact that is relevant to the claim for protection? If not, the evidence need not be considered.

3. Newness: Is the evidence new in the sense that it is capable of:

> (a) proving the current state of affairs in the country of removal or an event that occurred or a circumstance that arose after the hearing in the RPD, or
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> (b) proving a fact that was unknown to the refugee claimant at the time of the RPD hearing, or
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> (c) contradicting a finding of fact by the RPD (including a credibility finding)?
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> If not, the evidence need not be considered.

4. Materiality: Is the evidence material, in the sense that the refugee claim probably would have succeeded if the evidence had been made available to the RPD? If not, the evidence need not be considered.

5. Express statutory conditions:

> (a) If the evidence is capable of proving only an event that occurred or circumstances that arose prior to the RPD hearing, then has the applicant established either that the evidence was not reasonably available to him or her for presentation at the RPD hearing, or that he or she could not reasonably have been expected in the circumstances

> to have presented the evidence at the RPD hearing? If not, the evidence need not be considered.
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> (b) If the evidence is capable of proving an event that occurred or circumstances that arose after the RPD hearing, then the evidence must be considered (unless it is rejected because it is not credible, not relevant, not new or not material).

[8] The Officer found the Applicants' alleged new evidence was not significantly different from what was previously provided at the Applicants' protection hearing. The Officer also found the alleged new evidence did not rebut the significant finding of the RPD that adequate state protection is available to the Applicants in Barbados. The Officer stated, on the law, that a PRRA application cannot be allowed to become a second refugee hearing, citing to *Escalona Perez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1379 [per Snider J] at para 5 [*Escalona Perez*], a point on which there is no disagreement.

[9] Therefore, the Officer concluded there was insufficient evidence to demonstrate whether the Applicants are at risk in Barbados under s. 96 or s. 97 of *IRPA*.

IV. Issues

[10] The Applicants submit the issues are as follows:

1. Did the PRRA officer err by refusing to admit the Applicants' new evidence?
2. Did the PRRA Officer err by endorsing the RPD's decision without conducting an independent assessment of the Applicants' evidence and submissions?
3. Did the PRRA officer err by exclusively requiring the Applicants to rebut the findings of the RPD?

[11] Respectfully, I agree with the Respondent and submit the issue is whether the Decision is reasonable, however I will discuss each of the Applicants' issues.

V. Standard of Review

[12] In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, issued at the same time as the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the majority per Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

> [31] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
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> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
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> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that

> any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).
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> [Emphasis added]

[13] The Supreme Court of Canada in *Vavilov* at para 86 states, "it is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, the decision must also be justified, by way of those reasons, by the decision-maker to those to whom the decision applies," and provides guidance that the reviewing court decide based on the record before them:

> [126] That being said, a reasonable decision is one that is justified in light of the facts: *Dunsmuir*, para. 47. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them: see *Southam*, at para. 56. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. In *Baker*, for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant evidence, which led to a conclusion that there was a reasonable apprehension of bias: para. 48. Moreover, the decision maker's approach would *also* have supported a finding that the decision was unreasonable on the basis that the decision maker showed that his conclusions were not based on the evidence that was actually before him: para. 48.
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> [Emphasis added]

[14] Moreover, *Vavilov* requires the reviewing court to assess whether the decision subject to judicial review meaningfully grapples with the key issues:

> [128] Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" (*Newfoundland Nurses*, at para. 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para 16). To impose such expectations

> would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39.

VI. Analysis

A. *Is the Decision reasonable?*

(1) Did the PRRA officer err by refusing to admit the Applicants' new evidence?

[15] A principle focus of the Applicants' submissions was that the Officer erred in rejecting the Applicants' affidavit and letters from their family (items #1 to 3). The Applicants submitted a letter from the Principal Applicant's sister stating among other things, "Recently my younger brother was attacked and hit in the head while walking because they said his brother was an informant for the police." The Applicants submit this evidence post-dated the RPD decision and thus, the Officer erred in rejecting the evidence on the basis it was not "significantly different than what was before the RPD" nor did it "rebut the RPD's state protection finding."

[16] However and with respect, assessing new evidence involves considering not just the date of the document, but "whether the information is significant or significantly different than the information previously provided", see *Raza FC* at para 22, which was affirmed by the Federal Court of Appeal in *Raza FCA*.

[17] The Respondent submits, and it is not disputed that the Applicants previously advanced evidence from the Principal Applicant's mother, brother and sister about receiving threats from alleged gang members. Of particular concern were the contradictions contained in the siblings' affidavits.

[18] With respect to the evidence surrounding the alleged attack on the brother, and while this alleged attack was not before the RPD, violence and threats of violence were. In addition, the Principal Applicant had alleged at the RPD that his younger brother had been assaulted - but the RPD found the attack was not related to the Principal Applicant's claim. With respect, I am unable to conclude this allegedly "new" evidence is significantly different from the information already provided to the RPD. Instead, and in my view, this evidence demonstrates more of the same risk already assessed, namely violence or threats thereof towards the brother. The Officer in my view reasonably considered the "new evidence" and found it "restated materially the same information which they presented to the RPD…." With respect, I am unable to conclude this evidence is significantly different from the information provided to the RPD. Instead, and in my view, this evidence reasonably demonstrates more of the same risk already assessed, namely violence or threats thereof towards the brother.

[19] More to the point, this alleged incident does not overcome the adequate state protection finding, which was the determinative issue before the RPD. In this connection the RPD held:

> [59] The panel finds it objectively reasonable to assume that the claimant remains capable of seeking protection from Barbadian authorities and would be capable of attempting to seek serious protection efforts from them, e.g. by going to the specific anti-gun to request protection from police officers there if necessary to

> protect himself and the minor claimants from unknown men from the Red Zone Gang.
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> …
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> [63] For all of the previous reasons, the panel finds that the nature of the evidence before me as to a lack of state protection for these particular claimants in Barbados unfortunately falls very far short of a 'clear and convincing' case type. As the minor claimant relies upon the narrative of her father, the panel finds that she is not persuaded that, on a balance of probabilities, the Barbadian authorities would not be reasonably forthcoming with serious efforts to protect the claimants from a criminal gang if they were to return to Barbados now. The panel therefore finds, on the evidence, that the claimants have not rebutted the presumption of state protection with clear and convincing evidence.

[20] In my view, the attack on the brother does not address or displace the RPD's finding either that state protection would be reasonably forthcoming if the Principle Applicant returned, or with respect to the availability of the anti-gun unit.

[21] The Applicants also submit the Officer erred in rejecting the new country condition evidence – item #4. In this connection, findings on state protection by the RPD must generally be taken as given. I note that leave to judicially review the RPD's decision was refused by this Court April 5, 2018.

[22] The onus is squarely on the Applicants to rebut the RPD's findings of state protection. To succeed, the Applicants must persuade the Officer, and now this Court, that the country condition evidence reporting a recent and significant increase in gun violence in Barbados, would reasonably have succeeded in rebutting the RPD's finding of adequate state protection.

[23] The Applicants submit the Officer's dismissal of the evidence as "general" is unreasonable. I disagree. While there are media reports of senior officials including the Prime Minister, Minister of Home Affairs and a senior government criminologist decrying increased gun crime and homicide in Barbados, there is no specific evidence pointing to a change in the adequacy of state protection. Thus, the proffered new evidence is reasonably described as "general."

[24] The RPD concluded that while not perfect, adequate state protection exists. The RPD specifically considered the homicide rate and incidence of violent crime. The RPD concluded there were "significant fluctuations" in the homicide rate in Barbados, which at that time was decreasing, but nonetheless found that state protection was reasonably forthcoming, and in particular, that the Applicant would be able to approach the anti-gun unit:

> [54] The panel notes although levels of violent crime have remained relatively low, crimes against the person are issues of considerable and increasing concern among the Barbados population and require special attention in order to maintain adequate levels of perceived citizen security. However, homicide rates have experienced significant fluctuation since 2000. It is important to note, however, that although there was a slight increase in 2013 over the previous year, the rate of homicide has been declining steadily since 2010. The panel notes that other violent crimes such as rape and robbery have experienced limited fluctuation over the past decade with both crimes revealing 2013 rates that are lower than 10 years prior. For all major violent crimes, Barbados compares favourably to many of its Caribbean neighbours such as the Bahamas, Jamaica, and Trinidad and Tobago.
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> …
>
> [59] The panel finds it objectively reasonable to assume that the claimant remains capable of seeking protection from Barbadian authorities and would be capable of attempting to seek serious protection efforts from them, e.g. by going to the specific anti-gun to request protection from police officers there if necessary to

> protect himself and the minor claimants from unknown men from the Red Zone Gang.
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> [63] For all of the previous reasons, the panel finds that the nature of the evidence before me as to a lack of state protection for these particular claimants in Barbados unfortunately falls very far short of a `clear and convincing' case type. As the minor claimant relies upon the narrative of her father, the panel finds that she is not persuaded that, on a balance of probabilities, the Barbadian authorities would not be reasonably forthcoming with serious efforts to protect the claimants from a criminal gang if they were to return to Barbados now. The panel therefore finds, on the evidence, that the claimants have not rebutted the presumption of state protection with clear and convincing evidence.
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> [Emphasis added]

[25] In my respectful view, on the issue of the proffered new evidence, the Officer reasonably noted, “The purpose of the PRRA is not to reargue the facts that were before the RPD. The decision of the RPD is to be considered as final with respect to the issue of protection under s. 96 or s. 97, subject only to the possibility that new evidence demonstrates that the applicant would be exposed to a new, different or additional risk that could not have been contemplated at the time of the RPD decision”, per Justice Snider in *Escalona Perez, supra* at para 5.

[26] With respect, having considered the record, I am not persuaded the additional country condition evidence overcomes the significant findings of the RPD, in particular it’s finding that adequate state protection is available to the Applicants in Barbados as is the anti-gun unit. The Officer’s findings are justified on the facts and constraining law.

[27] The Applicant also argues more generally that the reasons of the PRRA Officer are inadequate. I disagree. On this preliminary evidentiary point, the reasons are clearly stated. The Officer reasonably cited to the applicable constraining law concerning new evidence, and applied it to the material submitted. The Officer reasonably considered the alleged new evidence and submissions and found it did not meet the tests for the admissibility of new evidence because it was significantly the same as that asserted before the RPD, and did not rebut the findings of the RPD. The Officer was not required to say more than was said.

(2) Did the PRRA Officer err by endorsing the RPD's decision without conducting an independent assessment of the Applicants' evidence and submissions?

[28] The Applicants submit the Officer erred by endorsing the RPD's decision without conducting an independent assessment of the Applicants' evidence and submissions. The Applicants submit while it is open to a PRRA officer to give deference to the findings of the RPD, it cannot simply endorse the findings of the RPD, (*Thanapalasingam v Canada (Citizenship and Immigration),* 2021 FC 699 [per Heneghan J] at para 11-14). This I think misstated the ratio of the case. In addition I note this judgment is distinguishable because here, the Officer dealt with the evidence first and then provided reasons (brief but adequate) why the alleged new evidence did not meet the legal tests for "new evidence". The Officer grappled with the key issue, which was state protection. The Officer also found the purported new evidence was "not significantly different from what was previously provided at the applicants' protection hearing", it did not "rebut the significant findings of the RPD panel that is, it's finding that adequate state protection is available", and it did not "address the material aspects" of this PRRA application.

[29] In *Taho v Canada (Citizenship and Immigration)*, 2020 FC 706, Justice McHaffie held:

> [23] While acknowledging that the letter postdated the RPD's decision, the officer concluded that it was "not significantly different" from what the Tahos had provided at their RPD hearing. The officer cited Justice Mosley's observation in *Raza* that assessing new information involved considering not just the date of the document, but whether the information is significantly different from the earlier information: *Raza v Canada (Citizenship and Immigration)*, 2006 FC 1385 at para 22, aff'd 2007 FCA 385 at para 16. Where information that postdates the original decision merely echoes information previously submitted, it is unlikely to result in a finding that country conditions have changed: *Raza (FC)* at para 22. The officer concluded that the Tahos had materially restated the same information presented to the RPD and had not rebutted the RPD's findings. They therefore concluded that they had insufficient evidence to arrive to a different conclusion from that of the RPD.
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> …
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> [26] Here, the Tahos did not provide any specific evidence of new events that postdated the RPD's decision to show that the blood feud was ongoing. They provided a letter that simply stated that members of the other family "continue to show up" and that Ms. Taho's parents had lost their peace "these last seven years." The officer was not required to undertake an extensive assessment or have the full RPD record before them to reasonably conclude that such evidence was not significantly different from what had been presented to the RPD.
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> [27] Whether or not the officer ultimately rejected the letter, a reading of the officer's reasons shows that they did consider the evidence, including the content of the letter. They nonetheless found that it did not rebut the finding of the RPD regarding state protection and, consequently, believed that there was insufficient evidence to reach a different conclusion. In any event, even if the parents' letter was sufficient to rebut the RPD's conclusion as to the existence of an ongoing blood feud, it would not affect the officer's determination on adequate state protection, which is determinative.

[30] Similarly in this case, the Officer found the purported "new evidence" did not rebut any of the findings of the RPD and therefore was insufficient evidence to allow them to arrive at a

different conclusion from the RPD. In my respectful view, the Decision was not unreasonable on this account.

(3) Did the PRRA officer err by exclusively requiring the Applicants to rebut the findings of the RPD?

[31] The Applicants submit the Officer erred by exclusively requiring the Applicants to rebut the finding of the RPD. They submit that while a PRRA officer may give significant weight to the findings of the RPD, the analysis is not limited to whether or not the Applicants may rebut the findings of the RPD because an officer is not bound by the findings of the RPD (*Cheema v Canada (Citizenship and Immigration*), 2020 FC 1055 [per McHaffie J] at para 26 [*Cheema*]). However, I note on a more fulsome reading that para 26 of *Cheema* states*:*

> [26] The first possibility is that the PRRA officer questioned the very fact that Ms. Azhar was at risk, *i.e.*, that they did not accept that Mr. Safdar and others were dangerous people who had threatened and attacked Ms. Azhar, and that she was subject to a fatwa. The Minister does not contend that the PRRA officer questioned these facts. Notably, the attack on Ms. Azhar was the basis of her successful refugee claim, to which the PRRA officer referred without questioning its correctness. While a PRRA officer is not bound to accept the conclusions of the Refugee Protection Division (RPD) regarding another person's successful claim for refugee protection, if the PRRA officer rejected the RPD's findings regarding Ms. Azhar, one would expect an express finding in this regard and an explanation for doing so: *Ruszo v Canada (Citizenship and Immigration)*, 2019 FC 296 at paras 11–12.

[32] Therefore, *Cheema* does not stand for *dicta* raised by the Applicants. Moreover, the Applicants submit in accepting new evidence under section 113 of *IRPA*, the Officer must conduct an independent assessment of the Applicant's application. There is no merit in this

submission because the Officer conducted the required assessment and held it did not meet the legal tests for new evidence, a decision which as found above, was reasonable.

VII. Conclusion

[33] In my respectful view, the Decision is transparent, intelligible and justified based on the facts and constraining law before the decision maker. Therefore, judicial review must be dismissed.

VIII. Certified Question

[34] Neither party proposed a question of general importance, and none arises.

JUDGMENT in IMM-3510-21

THIS COURT'S JUDGMENT is that judicial review is dismissed, no question of general importance is certified and there is no Order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Subodh S. Bharati	FOR THE APPLICANTS
Prathima Prashad	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Subodh S. Bharati Barrister & Solicitor Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT