Federal Court  Cour fédérale

Date: 20220419

Docket: IMM-3315-21

Citation: 2022 FC 554

Toronto, Ontario, April 19, 2022

PRESENT: Mr. Justice Diner

BETWEEN:

KALALA TSHILUMBA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, seeks judicial review, pursuant to s 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] of a decision of a senior immigration officer (the Officer) refusing his application for a pre-removal risk assessment [PRRA]. For the reasons that follow, I agree that the matter should be redetermined.

I. Background

[2] A citizen of the Democratic Republic of Congo (DRC), the Applicant obtained South African permanent residency in 2008 after having been recognized as a refugee. He left South Africa in December 2018 and entered Canada. He fears returning to South Africa due to several xenophobic attacks suffered by him and his family over the years there, based on their ethnicity and nationality as foreign-born African refugees.

[3] The Applicant was ineligible for a claim before the Refugee Protection Division pursuant to s 101(1)(d) of the *IRPA* given his status in South Africa. Instead, he submitted a PRRA indicating his understanding that his risk would be assessed pursuant to s 115(1) of the *IRPA*, with respect to the existence of risks in his asylum country, South Africa, and not the DRC. He also requested the opportunity to make submissions regarding a risk of return to the DRC in the event the reviewing officer wished to consider submissions on that issue.

II. PRRA Decision under review

[4] In a 15-page decision dated February 11, 2021, the Officer considered the personalized and country condition evidence submitted by the Applicant, and accepted that, based on the incidents that they experienced, he and his wife and children had faced xenophobia in South Africa. The Officer also observed the well-documented instances of widespread xenophobic violence in South Africa in the preceding years as well as the measures taken by state actors in response.

[5] The Officer also recognized systemic shortfalls in responding to attacks against foreigners in South Africa, before noting that the Applicant and his family had nonetheless been successful in obtaining status, travelling and establishing themselves financially there, as well as accessing the education system for their children. The Officer concluded that the Applicant had failed to meet his burden of establishing the inadequacy of state protection available to him in South Africa.

[6] Regarding the DRC, the Officer noted that no assessment of risk was necessary. However, he went on to assess the conditions there, noting the Applicant's failure to meet his burden of providing documentary evidence. The Officer concluded on the basis of objective country condition evidence alone that the risks to the Applicant in the DRC did not support a positive risk assessment.

[7] Based on the assessments of the conditions in both countries, the Officer concluded that the Applicant had failed to provide the necessary evidence to meet his onus under either s 96 or s 97 of the *IRPA* and refused the PRRA.

III. Analysis

[8] I will begin with the procedural fairness flaw – namely the fact that the Officer assessed the risk of returning to the DRC without providing the Applicant with an opportunity to respond or provide input. When considering the duty of procedural fairness, this Court must answer the question as to whether "a fair and just process was followed having regard to all the

circumstances" (*Gordillo v. Canada (Attorney General)*, 2022 FCA 23 at para 63; *Osman v. Public Service Alliance of Canada*, 2021 FCA 227 at para 7).

[9] The Applicant cites *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*] at paragraph 77 and *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, at paragraph 25 in support of the principle that procedural fairness must be sensitive to all of the circumstances and that a greater expectation of procedural fairness is warranted as the impact of the decision on the individual becomes more significant. Where, as here, the consequence to the Applicant is removal from Canada to a country where he may face risks threatening his "life, liberty, dignity or livelihood" (*Vavilov*, at para 133), he submits that greater procedural protections apply.

[10] The Applicant's PRRA submissions stated that the focus of his application would be on risks in South Africa pursuant to s 115(1). However, he explicitly requested an opportunity to make submissions regarding DRC risks if the Officer decided to consider that issue. In the Decision, the Officer recognized that it was not necessary to consider risks in the DRC. However, the Officer nonetheless proceeded to precisely that analysis without either notifying the Applicant, or seeking further submissions.

[11] The Applicant submits that without knowing that risks in the DRC would be assessed, and that having failed to inform him that such an assessment would be conducted, the Officer breached the duty of procedural fairness. He argues that the Officer's approach was analogous to relying on information that he was unaware would be considered, since he did not know or have

the opportunity to answer to the case he was expected to make. He contends the Officer's duty to provide notice was made greater given the Canada Border Services Agency (CBSA) policy of temporary suspension of removals to the DRC due to the dangers there.

[12] The Respondent counters that having reasonably assessed the Applicant's risk in South Africa, and given that the Applicant cannot be returned to the DRC because of the principle of *non-refoulement*, which is codified by s 115(1) of the *IRPA*, the Officer's treatment of the risks in the DRC are irrelevant and completely extraneous. In other words, the Respondent does not make any argument defending the procedural fairness of the process under the circumstances, choosing instead to submit that in any case, the breach was immaterial to the outcome of an otherwise reasonable decision and does not justify a redetermination.

[13] Furthermore, the Respondent invites the Court to apply the exceptional approach described by the Supreme Court in *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, 1994 CanLII 114 (SCC), [1994] 1 S.C.R. 202, at pp. 228-30 [*Mobil Oil*] and referred to in *Vavilov* whereby a reviewing Court may, in limited scenarios, decline to remit a matter despite a reviewable error, where it is evident that a particular outcome is nonetheless inevitable, and remitting the matter would thus serve no useful purpose.

[14] I am unable to agree with the Respondent. Having regard to all the circumstances, the Officer's decision to assess the Applicant's risk in the DRC in spite of the Applicant's explicit request to be allowed to make submissions on that issue if considered, breached the duty of procedural fairness.

[15] As to the Respondent's argument that the breach was irrelevant to an otherwise reasonable decision and would not have changed the outcome, I cannot agree that such an approach would be in keeping with the Supreme Court's guidance in *Vavilov* or *Mobil Oil*. In *Canada (Attorney General) v. McBain*, 2017 FCA 204 [*McBain*], at paragraphs 9 and 10, Justice Boivin stated for the Federal Court of Appeal that:

> [9] Breaches of procedural fairness will ordinarily render a decision invalid, and the usual remedy is to order a new hearing (*Cardinal v. Director of Kent Institution*, 1985 CanLII 23 (SCC), [1985] 2 S.C.R. 643, [1985] S.C.J. No. 78 (QL)).
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> [10] Exceptions to this rule exist where the outcome is legally inevitable ([*Mobil Oil*] at paras. 51-54) or where the breach of procedural fairness has been cured in the appellate proceeding (*Taiga Works Wilderness Equipment Ltd. v. British Columbia (Director of Employment Standards)*, 2010 BCCA 97, [2010] B.C.J. No. 316 (QL) at para. 38 [*Taiga Works*]).
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> (Emphasis added; see also *Canada (Attorney General) v. Burke*, 2022 FCA 44 at para 117)

[16] In *Mobil Oil*, at paragraph 53, the Supreme Court noted that "ordinarily the apparent futility of a remedy will not bar its recognition" but that limited circumstances can sometimes warrant a refusal to provide relief in spite of a breach to administrative law principles. In that case, the Court found a particular legal question, which had an inevitable answer, was at play (*Mobil Oil* at para 53). This provides context for the Federal Court of Appeal's description of this exception applying where the outcome is legally inevitable (*McBain* at para 9-10; see also *Quele c. Canada (Citoyenneté et Immigration)*, 2022 CF 108 at paras 32-34; *Abdelrahman v. Canada (Citizenship and Immigration)*, 2021 FC 527 at paras 22-24).

[17] Here, by contrast, I cannot agree that the outcome of a redetermination is legally inevitable. The Respondent says that the only relevant element to the Officer's assessment was that of state protection in South Africa, which the Minister asserts was reasonably assessed. I am not persuaded by this argument either. There are weaknesses in that part of the decision as well, given the fact that the Officer relied primarily on efforts to combat xenophobia for foreigners, but failed to grapple with key evidence.

[18] Indeed, even in the Officer's discussion of the state initiatives to address the issue and the report that the Officer relied on, there were internal inconsistencies as to whether the initiatives were having any effect, which the Applicant seizes on to suggest the Officer failed to apply the appropriate analysis to state protection, namely considering whether the protection the Applicant could expect to receive would be adequate.

[19] I note that similar flaws were pointed out by Justice Mactavish with respect to a Somali with refugee status in South Africa in *Omar v. Canada (Citizenship and Immigration)*, 2017 FC 458. First, at paragraph 21, Justice Mactavish pointed out the flaws with respect to selectively relying on evidence on xenophobia. Second, and somewhat related to that first finding, Justice Mactavish noted the error in the legal test applied with respect to the availability of adequate state protection (at para 30).

[20] Given the similar intelligibility weaknesses on the reasonableness analysis in this examination of the Applicant's experiences in South Africa, and whether state protection would

be adequate, I cannot say that the decision fell within a range of reasonable acceptable outcomes (*Vavilov* at para 86).

[21] However, and more importantly, even if I were to conclude that the decision was reasonable, this would not be equivalent to finding the outcome of the Officer's decision is properly described as legally inevitable. Returning to the procedural fairness question and specifically the reliance on *Mobil Oil* by the Respondent, one cannot say that there is a single and inevitable outcome. Indeed, reasonableness review is, by its very definition, not centred on the correctness of the decision, or the conclusion the Court would reach in the decision maker's place (*Vavilov* at paras 12-15). For that reason, finding a decision to be reasonable or not, especially in the present circumstances, is not equivalent to finding the outcome to be inevitable.

[22] Unlike the Respondent's argument would suggest, the exception to the rule that a procedurally unfair decision be set aside is not so broad as to encompass any circumstance where the breach did not affect the outcome of the decision, or where the same outcome is probable or even highly probable. The outcome must be inevitable, which translates to a categorically singular outcome, which there can be no denying. I am not convinced that is the case here. Specifically, given that the Officer did not question veracity of the past incidents to which the Applicant and his family were subjected, the Officer had an obligation to properly consider the evidence in light of the protection the Applicant could expect to receive in South Africa.

IV. Conclusion

[23] In the face of a clear breach of procedural fairness, to apply *Mobil Oil* as I have been asked to do, the record must make it clear that a single legal outcome is inevitable such that remitting the matter for redetermination would serve no useful purpose. Here, given the problems that the Applicant has pointed out with the reasonableness of the Decision, I do not find it appropriate to apply *Mobil Oil* to overcome the procedural issue. The matter must be remitted for redetermination.

JUDGMENT in file IMM-3315-21

THIS COURT'S JUDGMENT is that:

1. The Application for judicial review is granted.
2. The pre-removal risk assessment is set aside and remitted for redetermination by another officer.
3. No questions for certification were proposed and I agree that none arise.
4. No costs will issue.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Ronald Shacter	FOR THE APPLICANT
Lorne McClenaghan	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Silcoff, Shacter Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT