Federal Court  Cour fédérale

Date: 20230719

Docket: IMM-6593-21

Citation: 2023 FC 981

Toronto, Ontario, July 19, 2023

PRESENT: Justice Andrew D. Little

BETWEEN:

NAVJOT SINGH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant applied for judicial review of a pre-removal risk assessment ("PRRA") decision dated July 30, 2021, made by a senior immigration officer under section 112 of the *Immigration and Refugee Protection Act,* SC 2001, c 27 (*"IRPA"*). The officer concluded that the applicant provided insufficient evidence and determined that he would not be subject to risk of persecution, torture, risk to life or risk of cruel and unusual treatment or punishment if he returned to India.

[2] The applicant requested that the Court set aside the decision and remit his application back for redetermination by a different officer. The applicant argued that he was deprived of procedural fairness due to the incompetence of his former lawyer. He also argued that the officer's decision was unreasonable, applying the principles in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653.

[3] For the following reasons, I conclude that the application must be dismissed.

I. Events Leading to this Application

[4] The applicant is a 28-year old citizen of India. On September 19, 2017, the applicant obtained a multiple entry visa to Canada.

[5] On October 12, 2017, the applicant entered Canada. He made a claim for refugee protection under the *IRPA*.

[6] In March 2020, CBSA determined that the applicant was no longer eligible to make a refugee claim due to serious criminality. On March 9, 2021, a deportation order was issued.

[7] On March 18, 2021, Immigration, Refugees and Citizenship Canada ("IRCC") served the applicant with a PRRA application, which he completed and filed on April 1, 2021. Additional submissions were due to IRCC on April 17, 2021, but the applicant did not submit any.

[8] In late April 2021, the applicant communicated with a lawyer, Ms Kapoor.

[9] On June 2, 2021, IRCC provided the applicant an additional 30 days to make submissions.

[10] On July 2, 2021, the applicant sent an email to IRCC requesting an extension of time. He advised that he was experiencing trouble obtaining documents due to the COVID-19 pandemic and required more time to submit all his papers properly.

[11] On July 6, 2021, the officer assigned to conduct the PRRA application denied his request and gave the applicant until July 14, 2021 to provide documents. The officer informed the applicant that if the items were not received by July 14, 2021, a decision would be made on the information available.

[12] On July 14, 2021, the applicant submitted another extension request, which the same officer denied on July 16, 2021. As with the previous extension request, the applicant did not indicate which documents he was having trouble obtaining and did not provide evidence of his efforts. The officer informed the applicant that a decision would be made based on information available at the time.

[13] By letter and attached reasons dated July 30, 2021, the officer rejected the applicant's PRRA application. The officer concluded that the applicant provided insufficient evidence to establish, on a balance of probabilities, that there was more than a mere possibility the applicant would face persecution, a personal danger of torture, a risk to life, or a risk of cruel and unusual treatment if he returned to India.

[14] The officer's reasons also set out the events leading to the PRRA decision, including the applicant's requests for an extension of time to file supporting materials on July 2 and July 14, 2021, and the reasons why the officer denied those requests.

II. Analysis

[15] This application raises three issues:

A. Was there a breach of procedural fairness or natural justice due to the incompetence of the applicant's former counsel?

B. Was the officer's PRRA decision unreasonable?

C. Did the officer make a veiled credibility finding and erroneously fail to conduct an oral hearing?

[16] I will address these issues in turn.

A. Was there a breach of procedural fairness or natural justice due to the incompetence of the applicant's former counsel?

[17] This issue occupied most of the hearing in this Court. It goes to the applicant's right to a full and fair opportunity to present his position on the PRRA application.

[18] The Court's review of procedural fairness issues generally attracts a fairness approach, akin to correctness. At a high level, the Court determines whether the procedure used by the decision maker was fair, having regard to all of the circumstances including the nature of the substantive rights involved and the consequences for the individual(s) affected: *Adeshina v Canada (Citizenship and Immigration)*, 2022 FC 1559, at para 12; *Obasuyi v Canada (Citizenship and Immigration)*, 2022 FC 508, at para 13. See generally, *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196, [2021] 1

FCR 271, at para 35; *Canadian Pacific Railway Company v Canada (Attorney General),* 2018 FCA 69, [2019] 1 FCR 121, at paras 54-55.

[19] The applicant's position was that he hired Ms Kapoor as his lawyer, but she failed to do anything for him including obtaining additional time for him to file documents to support his refugee claim. He claimed that there was an abrupt stop of communication with him and that as his lawyer, Ms Kapoor did not provide guidance concerning what personal documents to provide to IRCC while waiting for copies of documents in India or the repercussions of failing to submit additional evidence to support his PRRA.

[20] As my colleague Justice Sadrehashemi stated in *Adeshina*, the Court has held that an applicant must establish three components to establish a breach of procedural fairness or natural justice due to the ineffective assistance of counsel or representative in immigration proceedings:

a) The representative's alleged acts or omissions constituted incompetence;

b) There was a miscarriage of justice in the sense that, but for the alleged conduct, there is a reasonable probability that the result of the original hearing would have been different; and

c) The representative was given notice and a reasonable opportunity to respond.

See *Adeshina*, at para 13 (citing *Guadron v Canada (Minister of Citizenship and Immigration),* 2014 FC 1092, at para 11; *R v GDB,* 2000 SCC 22, [2000] 1 SCR 520, at para 26). See also *Ghorbanniay Hassankiadeh v Canada (Citizenship and Immigration),* 2023 FC 33 at para 8; *Zhou v Canada (Citizenship and Immigration),* 2022 FC 1046, at para 15; *Galyas v Canada (Citizenship and Immigration),* 2013 FC 250, at para 84.

[21] For the following reasons, I conclude that the applicant's position does not succeed, for reasons related to the first two elements of the test. The applicant gave Ms Kapoor an opportunity to respond, so it is not disputed that the third element was met.

(1) **The evidence does not show that the applicant had a lawyer**

[22] First, the applicant has not persuaded me that he engaged Ms Kapoor as his lawyer or reasonably believed that she agreed to provide legal services to him as his lawyer.

[23] The applicant referred to the following definition of "client" in the Law Society of Ontario's *Rules of Professional Conduct*, at Section 1.1 (Definitions):

> "client" means a person who:
>
> > (a) consults a lawyer and on whose behalf the lawyer renders or agrees to render legal services; or
> >
> > (b) having consulted the lawyer, reasonably concludes that the lawyer has agreed to render legal services on their behalf and includes a client of the law firm of which the lawyer is a partner or associate, whether or not the lawyer handles the client's work;

[24] The respondent did not propose another definition or refer to case law suggesting a different test or standard to determine whether a professional legal relationship arose between the applicant and Ms Kapoor as a lawyer in Ontario.

[25] I note that, after referring to the definition above, Daley RSJ made the following statement in *Correct Group Inc. v Cameron*, 2019 ONSC 3901, at para 51:

> There are several signs or indicia that would establish the presence of a solicitor and client relationship and not all need to be present. Some of the signs include: (i) meetings between the lawyer and the

> parties; (ii) correspondence between the lawyer and the parties; (iii) a bill rendered by the lawyer to the party; (iv) instructions given by the party to the lawyer; (v) the lawyer acting on the instructions given; (vi) statements made by the lawyer to the effect the lawyer is acting for the party; (vii) legal advice given by the lawyer to the party; and (viii) legal documents created by the lawyer for the party: *Jeffers v. Calico Compression Systems,* 2002 ABQB 72, at para 8

[26] In the cited passage in *Jeffers,* Hawco J noted that it was

> not necessary that a person formally retain a lawyer by way of letter or other document before a solicitor / client relationship can be found. Nor is it necessary that there be an account rendered by the lawyer to the complaining party or that an account be paid by the complaining party to the lawyer.

I agree. See *Jeffers v Calico Compression Systems,* 2002 ABQB 72, at para 8.

[27] The applicant filed two short affidavits on this application. The second sought to "clarify" some evidence in the first.

[28] In his first affidavit affirmed on October 31, 2021, the applicant stated that he had difficulty finding counsel to file supporting documents and written submissions for his PRRA. He stated that in July 2021, he approached Ms Kapoor to assist him with the PRRA. Ms Kapoor speaks Punjabi, like the applicant.

[29] The applicant's affidavit stated:

> Ms Kapoor made a request for extensions. She sent an email from her email address. I do not remember the exact date when the extension requests were sent but I believe that this happened before July 30, 2021."

[30] The applicant's affidavit stated that he did not have any supporting documents with him for his PRRA and was waiting for these documents from India. They were delayed due to the pandemic. He stated that Ms Kapoor provided him with "no guidance about what [he] should provide to the PRRA officer, while [he] was waiting for these documents to arrive. As a result, no supporting documents or written submissions were filed."

[31] The applicant's affidavit stated:

> It was my understanding that Ms Kapoor was acting as my counsel. She agreed verbally that she will help me. This was reassured to me by the fact that she contacted the PRRA officer on my behalf.

[32] The affidavit stated that after the extension request was sent, he tried to communicate with Ms Kapoor on numerous occasions and she did not respond. It also stated that he did not approach other lawyers because it was his understanding that Ms Kapoor was his lawyer.

[33] The applicant's affidavit highlighted that he was an immigrant from India with limited English language skills who was struggling financially and did not understand what was required of him without the assistance of counsel and an interpreter.

[34] The applicant's supplementary affidavit affirmed on September 28, 2021 (*sic*: 2022), "clarif[ied] the previous information" provided in his first affidavit. He also advised that he had "very recently come across proof of his communication" with Ms Kapoor, which had had to recover from another phone he did not use and was not working well.

[35] The applicant advised that it was he, not Ms Kapoor, who sent the extension requests to the officer. He maintained that it was his "understanding that Ms Kapoor sent extension requests to the PRRA officer as well", based on his communication with Ms Kapoor through a phone call by WhatsApp.

[36] The applicant attached, as proof of his communication with Ms Kapoor, screenshots of documents sent by someone in communication with "Shireen Kapoor" on April 22 and April 28, 2021. In the record, the applicant's only text communications to Ms. Kapoor were, first, on May 4, 2021 ("Hi mam") and second, sometime after July 7, 2021 – apparently on August 15, 2021. On the second occasion, the applicant sent a letter from IRCC dated July 7, 2021. The communications from the applicant on the second occasion were "Hi mam", "Can you call me", and "Hnji mam", to which Ms Kapoor replied "hanji let me see" and the applicant said "OK".

[37] The applicant's supplementary affidavit further clarified that he had approached Ms Kapoor as early as in April 2021 (rather than in July 2021). He added that Ms Kapoor "did have [him] execute a Use of Representative Form, which she sent to [him] by WhatsApp, which further gave [him] an idea that she was acting as [his] representative". He repeated that he was struggling financially and that any delays caused in his application were connected to his struggle to pay for legal fees associated with supplementary documentation for the application.

[38] The applicant did not file a copy of an executed Use of Representative Form in this proceeding. The WhatsApp communications suggest that a Use of Representative Form was sent to him by Ms Kapoor in PDF on April 28, 2021. Below the PDF image of a Use of

Representative Form there are very small screenshots of 3 pages of one or more documents (and a screenshot that says +8), but unfortunately I cannot read them. (The applicant suggested they were his PRRA forms.)

[39] The evidence does not show that the applicant completed a Use of Representative Form, or that he sent one to Ms Kapoor or that the IRCC received one.

[40] The applicant's supplementary affidavit also did not provide any additional information about the communications between him and Ms Kapoor in late April 2021 (if any), or any communications between late April and several months later when the applicant contacted Ms Kapoor by text message via WhatsApp. His affidavit did not describe any telephone call or other communications arising from that WhatsApp exchange.

[41] As noted, the applicant provided Ms Kapoor with the opportunity to respond to the applicant's position that she was his counsel. By email to the applicant's counsel, she provided her response to the "false allegations regarding my professional conduct with" the applicant. Ms Kapoor advised that she:

> checked all [her] records and [has] no formal retainer or oral commitment with the client. Infact [she has] been out of Canada for almost 6 months now.
>
> No fees has been collected by [her] or [her] office in lieu of the same. There is no Use of representative form.
>
> [She has] specifically informed the client that till the time his documents are not available from India. [she] would not be able to take up this matter and that was [her] last conversation with him.

[42] For the following reasons, I conclude that the evidence filed on this application does not support a finding that Ms Kapoor was the applicant's legal counsel or that the applicant was her client.

[43] As the applicant's counsel properly acknowledged at the hearing in this Court, there is no objective evidence that a professional legal relationship began at any time. The evidence contains no communications between the applicant and the lawyer suggesting the creation of a professional relationship, such as a request for assistance, or sending any confidential or personal information. There is no evidence of communications about the applicant's refugee claim or about seeking an extension of time to file additional documents. The applicant did not file a signed Use of Representative Form – there is only a message sending such a PDF of that form to the applicant. There is no evidence that Ms Kapoor took any steps on his behalf or that he asked her to do so.

[44] The applicant's first affidavit stated that Ms Kapoor sent requests to IRCC for extensions of time. His supplementary affidavit advised that in fact he did so himself, but it was his understanding that Ms Kapoor sent extension requests to the officer as well. However, the applicant's supplementary affidavit did not attach any email from her to IRCC concerning a time extension and he did not point to any other evidence to support his understanding.

[45] The officer only dealt directly with the applicant, by email. The Certified Tribunal Record contained no emails between the officer and Ms Kapoor at any time. The applicant's emails to the officer on July 2, 2021 and July 14, 2021, did not refer to Ms Kapoor or to a

lawyer, nor did the applicant copy her on his emails to the officer. The applicant's July 14 email to the officer repeatedly uses the first person "I" in relation to his efforts to obtain documents, leaving no impression that the applicant had legal counsel.

[46] In sum, the evidence in the record is that the applicant was in communication with Ms Kapoor in late April 2021. There are no details about the content of their communications, apart from the applicant's receipt of a PDF Use of Representative Form. Then there is a long gap of several months, during which the applicant himself communicated with the PRRA directly, by email, and without reference to a lawyer. He requested extensions of time and the officer dealt with him. Sometime in summer 2021, the applicant again contacted Ms Kapoor. There is no evidence filed on this application that sets out the contents of their communications or that objectively supports the applicant's understanding of the situation at that time.

[47] On the evidence filed on this application, I am unable to conclude that the applicant was Ms Kapoor's client. The evidence does not support the presence of a professional legal relationship – in the words of the LSO's *Rules of Professional Conduct*, Ms Kapoor did not render or agree to render legal services on the applicant's behalf. Nor does it realistically or reasonably support the applicant's position in his affidavit that she was acting as his counsel or representative. Based on the evidence in the record, the applicant did not reasonably conclude that Ms Kapoor agreed to render legal services on his behalf.

[48] I observe that none of the signs or indicia set out in *Correct Group Inc* are present in the record in this case, apart from the WhatsApp communications just analyzed.

[49] I conclude that the applicant's submissions concerning procedural fairness and natural justice argument cannot succeed because the evidence does not show that the applicant had legal counsel who could be alleged to have acted incompetently.

[50] In the circumstances, I will also consider the second element of the legal test, which leads to the same result.

(2) No Evidence to Support a Miscarriage of Justice

[51] Second, I agree with the respondent that the evidence on this application does not demonstrate that any inaction by the alleged legal representative has led to a miscarriage of justice. The applicant has not demonstrated a reasonable probability that the result of his PRRA application, or his application requesting for more time to file documents for that PRRA, would have been different if counsel had taken steps on his behalf.

[52] The applicant did not file evidence in this proceeding related to possible risks if he returns to India that was not before the officer. Without such evidence – for example, the documents the applicant advised he was waiting for in 2021 – any argument about a miscarriage of justice, or any prejudice to him, is speculative. See: *Ghorbanniay Hassankiadeh*, esp. at paras 14-15 and 18-19; *Zhou*, at paras 21-28.

[53] The present case is not akin to *Brown v Canada*, 2012 FC 1305, cited by the applicant. In *Brown*, the Court was persuaded that the "insufficiency of evidence issues could have been addressed by [the consultant] had he demonstrated the professionalism to elicit a proper PRRA

narrative and to do the basic gathering of documents": *Brown*, at para 68. The factual circumstances here are not analogous to *Brown* and I cannot reach a similar conclusion to that case because the applicant did not adduce or refer to any evidence that could have been gathered to support his PRRA: see the analysis in *Brown*, at paras 63-69.

[54] Accordingly, I must conclude that the applicant's principal position that he was denied procedural fairness or natural justice cannot succeed.

B. Was the officer's PRRA decision unreasonable?

[55] The standard of review of the officer's substantive decision on the PRRA is reasonableness, as described in *Vavilov*: *Bah v Canada (Citizenship and Immigration)*, 2023 FC 570, at para 11; *Nekenkie v Canada (Citizenship and Immigration)*, 2023 FC 271, at para 16.

[56] Reasonableness review is a deferential and disciplined evaluation of whether an administrative decision bears the hallmarks of transparency, intelligibility and justification: *Vavilov*, at paras 12-13 and 15. The starting point is the reasons provided by the decision maker, which are read holistically and contextually, and in conjunction with the record that was before the decision maker. A reasonable decision is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrained the decision maker: *Vavilov*, esp. at paras 85, 91-97, 103, 105-106 and 194; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, [2019] 4 SCR 900, at paras 2, 28-33, 61.

[57] In my view, the applicant has not shown that the officer's decision was unreasonable.

[58] A PRRA is the last formal risk assessment given to qualifying individuals before they are removed from Canada. The PRRA process seeks to ensure that those individuals are not sent to a country where their lives would be in danger or where they would be at risk of persecution, torture, or other cruel and unusual treatment or punishment, consistent with Canada's obligations under international law: see *Valencia Martinez v Canada (Citizenship and Immigration),* 2019 FC 1, at para 1; *Revell v Canada (Citizenship and Immigration),* 2019 FCA 262, at para 11.

[59] The officer denied the applicant's PRRA application on the basis that the applicant provided insufficient evidence to establish that he would be subject to risk of persecution, torture, risk to life or risk of cruel and unusual treatment or punishment if returned to India.

[60] The officer was aware that that the applicant identified India as the country in which he would be at risk of persecution. The officer's reasons, under the heading "Risk Assessment," found that the applicant did not identify specific risks for consideration in his PRRA form and made no additional submissions. The officer noted that the applicant claimed in his Basis of Claim ("BOC") narrative that he was at risk from the Kurbani Dal group of Baba Gurmit Ram Rahum or Sirsa. The officer stated that there was no evidence on file to support these statements, and the applicant did not indicate the same risks in his PRRA submissions.

[61] The record supported the office's findings. It reveals that, in the applicant's PRRA form:

a) where the applicant is asked to describe the incidents that caused him to seek protection, the form was blank;

b) where the applicant is asked what protection he sought, he wrote "submissions to follow"; and

c) under the heading Supporting Evidence, the applicant wrote: “Evidence to follow.”

[62] The officer examined recent and publically available documentation regarding country conditions and human rights in India. While the documentation indicated problems in India that were cause for concern, the officer concluded that applicant did not show any connection to the conditions present in the country. The applicant’s submissions in this Court did not challenge that conclusion.

[63] In my view, it was open to the officer to conclude on the record that the applicant provided insufficient evidence to establish a risk on his return to India. The officer’s decision was not untenable in light of the relevant factual constraints: *Vavilov,* at paras 91-96 and 101; *Canada Post,* at paras 32, 35, 39.

[64] I conclude that the applicant has not demonstrated that the officer’s decision dated July 30, 2021, was unreasonable, applying the principles in *Vavilov*.

C. Did the officer make a veiled credibility finding and erroneously fail to conduct an oral hearing?

[65] The applicant submitted that the officer’s reasons contained a veiled negative credibility finding against the applicant. He argued that the negative finding should have caused the officer to convoke an oral hearing for this PRRA application.

[66] The standard of review for this analysis is immaterial because, whether viewed from a reasonableness or a fairness/correctness perspective, the outcome is the same.

[67] The applicant relied on a single comment in the officer's reasons: "No evidence is on file to support the risk statements in the applicant's BOC and I note that applicant does not indicate the same risks in his PRRA submissions" [underlining added].

[68] I find no basis in the underlined passage for the officer to convoke an oral hearing. Reading this single comment in the context of the rest of the officer's reasons, and considering the reasons in substance, it is evident that the issue for the officer was the insufficiency of the applicant's evidence of risk on his return to India. The issue was not the credibility of the applicant or his evidence, but the absence of evidence to support the applicant's PRRA beyond what was contained in his BOC. See *Ihejieto v Canada (Citizenship and Immigration),* 2022 FC 1151, at paras 7 and 14; *Iwekaeze v Canada (Citizenship and Immigration),* 2022 FC 814, at paras 27-29. In addition, the officer's single comment was far from central or material to the outcome of the PRRA decision. This case is therefore substantively different from *B147,* on which the applicant relied: see *B147 v Canada,* 2018 FC 843, at paras 16, 23.

[69] Accordingly, the applicant's argument on veiled credibility did not establish a basis for this Court to intervene against the officer's PRRA decision.

III. Conclusion

[70] For these reasons, this application for judicial review must be dismissed.

[71] Neither party proposed a question to certify for appeal and none will be stated.

JUDGMENT in IMM-6593-21

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.

2. No question is certified for appeal under paragraph 74(*d*) of the *Immigration and Refugee Protection Act*.

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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