Date: 20070111

Docket: IMM-6826-05

Citation: 2007 FC 22

Ottawa, Ontario, January 11, 2007

PRESENT: The Honourable Madam Justice Dawson

BETWEEN:

FUAD AL MANSURI AND NURIA BEN AMER

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS AND THE SOLICITOR GENERAL

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Al Mansuri and his wife, Nuria Ben Amer, are citizens of Libya. They bring this application for judicial review of the negative decision made by an officer in respect of their pre-removal risk assessment (PRRA). For the reasons that follow, I have determined that:

(i) It was not appropriate in the circumstances of this case for the applicants to raise arguments based upon the *Canadian Charter of Rights and Freedoms* (Charter), the constitution and international convention, for the first time, in their further

memorandum of fact and law. The Court exercises its discretion not to allow the issues to be argued.

(ii) The officer was not required to hold an interview with Mr. Al Mansuri because her negative decision did not turn on finding him to be incredible.

(iii) The officer was not required to provide the applicants with an opportunity to comment upon two documents the officer relied upon, because the documents were available in the public domain, originated from a well-known source and were general in nature describing conditions in Libya for failed asylum claimants. In view of that, and the content of the documents the applicants did submit to the officer, the applicants were not deprived of a meaningful opportunity to fully and fairly present their case as to risk.

(iv) The officer's credibility or plausibility findings were not perverse.

(v) The officer's decision was reasonable and withstands a somewhat probing examination.

(vi) The officer did not err by failing to consider the interests of the applicants' Canadian-born children when assessing the risks involved in removing the applicants.

PRELIMINARY ISSUE

[2] The applicants raised for the first time, in their further memorandum of fact and law, a series of issues based upon section 7 of the *Charter*, the *Convention on the Rights of the Child*, and sections 91, 92 and 95 of the *Constitution Act, 1867*. The respondent raised a preliminary objection as to whether the applicants are entitled to raise these new issues.

[3] The application for leave and for judicial review, filed on behalf of Mr. Al Mansuri and his wife, was required by Rule 5(1)(*f*) of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22 (Rules), to set out "the grounds on which the relief is sought, including a reference to any statutory provision or Rule to be relied on". The grounds specified in the application were:

> a) The PRRA office failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
>
> b) The PRRA office acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction in determining that the Applicants were not subjects of risk of persecution, danger of torture, risk to life of cruel and unusual treatment or punishment;
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> c) The PRRA office based its decision on erroneous findings of fact that it made in a perverse or capricious manner or without regard to the material before it in determining that the Applicants were not subject to risk etc.;
>
> d) The PRRA office acted in a way that was contrary to law;
>
> e) Such further and other grounds as counsel may advise and this Honorable Court may permit. [quoted *verbatim*]

[4] The applicants perfected their application for leave by filing their application record. Rule 10(2)(*e*) required that the record contain "a memorandum of argument which shall set out concise written submissions of the facts and law relied upon by the applicant for the relief proposed should leave be granted". The memorandum of argument enumerated the following seven issues [again quoted *verbatim*]:

> 1. Whether the PRRA officer denied the Applicants' statutory and common-law right to natural justice in not conducting an

interview where there were issues of credibility on the PRRA?

2. Whether the Applicants' rights to natural justice fairness, and a fair PRRA assessment were breached in the officer placing seismic emphasis on peripheral evidence, which she exhumed herself, without giving the Applicants an opportunity to a focused reply?

3. Whether the PRRA officer engaged in:
(a) Perverse credibility analysis; and/or
(b) Perverse findings of "implausibility"?

4. Whether the PRRA officer made perverse and capricious findings and conclusions without evidence and in disregard to the evidence, and by ignoring and misstating evidence?

5. Whether the PRRA officer made an "unreasonable" decision contrary to the Supreme Court of Canada's decision in *Baker*?

6. Whether the best interests of the Applicants' Canadian born children were completely ignored in the PRRA assessment for which the decision ought to be set aside?

7. Whether, in all the circumstances of the case, the Applicants' rights to a fair "hearing" or consideration of their PRRA application were breached or denied?

[5] Leave was granted on the basis of that application and the order granting leave authorized the applicants to file a further memorandum of fact and law. In the further memorandum of fact and law filed by the applicants the new issues were raised. The further memorandum stated the issues as follows:

2. Whether the Applicant's removal is constitutionally barred in that, while there is *no* constitutional "right" to receive permanent resident status:

(a)

(i) section 7 of the *Charter* guarantees that the Applicant's child(ren) have his presence in Canada, in accordance with a constitutional right of parents,

under s. 7 of the *Charter*, and children to maintain a parent-child relationship, in accordance with *R.(B) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315; and

(ii) the best interests of the child(ren), as statutorily mandated under s. 25 and s. 3(3)(d) and (f) of the *IRPA*, and the rights set out in the *Convention on the Rights of the Child* are a substantive and procedural s. 7 *Charter* right as contemplated but not argued not decided in the *Baker* decision?

(b) While there is no constitutional "right" to receive permanent resident status, ss. 91, 92 and 95 of the *Constitution Act, 1867* bar the deportation of a parent of a Canadian-born child in that,

(i) s. 95 grants concurrent jurisdiction over immigration to the Province(s), where not "repugnant" to federal law (ie. not trampling on exclusive jurisdiction of Federal Parliament);

(ii) s. 92(13) grants the Province *exclusive* jurisdiction over custody and access over children, under property and civil rights; and therefore the Applicant has a constitutional right, under ss. 91, 92, 95 of the *Constitution Act, 1867*, and section 7 of the *Charter*, not to have his parent child relationship, or his custody and access to his Canadian children interfered with or removed by way of deportation?

[emphasis in original]

3. Whether, with respect to the Canadian children, there is, particularly in light of ss. 91, 92, and 95 of the *Constitution Act, 1867*, and under ss. 6, 7, and 15 of the *Charter*, a constitutional "omission", as contemplated and set out by the SCC in *Vriend*, in that removal breaches the Applicants' ss. 6, 7, and 15 *Charter* rights, by way of *Charter* (Constitutional) omission, to so deny the parent-child relationship, and interfere with the rights, obligations and duties of parents vis-à-vis Canadian children based solely on family affiliation and nationality, and a differential treatment

of lack of protection vis-à-vis other Canadian children whose parents are in Canada with status?

4. Whether, under the circumstances, the Applicant has the same constitutional rights pursuant to the PRRA and thus removal is unconstitutional?

[6] The Minister, in the further memorandum of argument filed on his behalf, argues, among other things, that the applicants improperly raised new issues in their further memorandum of fact and law that prejudice him because the time set for adducing further evidence had lapsed by the time the further memorandum was a served upon the Minister. The Minister submits that the Court should not entertain the arguments raised regarding the Charter, or on the *Convention on the Rights of the Child* and the *Constitution Act, 1867*. Reliance is placed by the Minister upon authorities such as *Arora v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 24 (T.D.); and *Garcia v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 645.

[7] When this application for judicial review came on for hearing, the situation was further complicated by the applicants' counsel's candid acknowledgment that he had failed to file the required notice of constitutional question. He asked that the application, or the hearing of the constitutional issues, be adjourned so as to permit service of the required notice. Counsel for the applicants submitted that *Arora* and *Garcia* were wrongly decided in light of the decisions of the Supreme Court of Canada and the Federal Court of Appeal, respectively, in *Native Women's Association of Canada v. Canada*, [1994] 3 S.C.R. 627 and *Stumf v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 590. In the event that the Court determined that the issues could not be raised, counsel for the applicants asked that a question be certified on this point.

[8] Respectfully, for the following reasons, I do not accept the submission of counsel for the applicants that *Arora* and *Garcia* are wrongly decided. First, I find the decision of the Supreme Court in the *Native Women's Association* case to be of little assistance and certainly not to be determinative of the question. What the Supreme Court decided in that case was that the Federal Court of Appeal had not erred by awarding declaratory relief in circumstances where the application in the trial division had sought an order of prohibition. This conclusion flowed from the uniform procedure on applications for judicial review provided for by section 18.1 of the (then) *Federal Court Act*, R.S.C. 1985, c. F-7, and from the fact that the applicants had included a "basket cause" in their prayer for relief. The declaration that was granted flowed from the same violation of *Charter* rights that was argued to establish the claim for prohibition. The Supreme Court expressly noted that no different arguments could have been advanced before it had a declaration been specifically sought from the outset. This is a very different case from one where the applicants seek to advance fundamentally different arguments.

[9] Second, I reject the either/or premise of the applicants' argument that there is either a right to advance new arguments or a blanket prohibition against raising new arguments in a further memorandum of fact and law. Rather, in my view, the jurisprudence is to the effect that it is in any case within the Court's discretion.

[10] Thus, in *Stumf* the Federal Court of Appeal considered it to be "appropriate" to consider the new issue raised before it despite the fact that the issue had not been raised before. The new issue was based on the "undisputed fact" that while the Convention Refugee Determination Division of

the Immigration and Refugee Board knew that one on the refugee claimants before it was a minor child, the Board failed to consider the mandatory requirement of the *Immigration Act* that a representative be designated for that child. The Federal Court of Appeal considered it to be an appropriate exercise of discretion to allow the new issue to be raised because the record disclosed all of the relevant facts, there was no suggestion of prejudice to the Minister if the issue was considered and the designation of a representative could have affected the outcome of the Board's decision not to re-open the claim that had been declared to be abandoned.

[11] In *Garcia*, the Federal Court recognized that in four prior cases applicants had been allowed to raise the issue of the Guideline 7 for the first time in their further memorandum of fact and law. Chief Justice Lutfy was of the view that it was not appropriate to allow the issue to be raised in the case before him. At paragraph 14, he wrote:

> 14 In my view, it was not appropriate for the applicant to raise this issue for the first time in his further memorandum of argument. Here, I adopt the statement of Justice Frederick E. Gibson in *Arora v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 24 (QL) (T.D.) at paragraph 9:
>
> > ...the principle that the Court will deal only with the grounds of review invoked by the applicant in the originating notice of motion and in the supporting affidavit must, I am satisfied, govern. If, as here, the applicant were able to invoke new grounds of review in his memorandum of argument, the respondent would conceivably be prejudice[d] through failure to have an opportunity to address the new ground in her affidavit or, once again as here, to at least consider filing an affidavit to address the new issue. In the result, I determine that the second issue raised on behalf of the applicant is not properly before the Court.

[12] Thus, for these reasons, I am satisfied that in every case it is for the Court to exercise its discretion as to whether to allow issues to be raised for the first time in a party's further memorandum of fact and law. Considerations relevant to the exercise of that discretion, in my view, include:

(i) Were all of the facts and matters relevant to the new issue or issues known (or available with reasonable diligence) at the time the application for leave was filed and/or perfected?

(ii) Is there any suggestion of prejudice to the opposing party if the new issues are considered?

(iii) Does the record disclose all of the facts relevant to the new issues?

(iv) Are the new issues related to those in respect of which leave was granted?

(v) What is the apparent strength of the new issue or issues?

(vi) Will allowing new issues to be raised unduly delay the hearing of the application?

[13] As noted, the list is not exhaustive, and not every factor will be relevant in a particular case. In the present case, I find the following considerations to be relevant.

[14] First, counsel for the applicants could not point to any fact or matter relevant to the new issues that was not known when the application for leave was filed and perfected. In my view, there is no valid reason why the applicants could not have raised these issues on a timely basis.

[15] Second, constitutional issues in particular are to be decided on a full evidentiary record. The Minister may well have wished to file (or to at least consider the need for) additional evidence relating to how other processes (for example the female applicant's pending humanitarian and compassionate application) address the best interests of children. Conceivably, evidence might have been available relevant to section 1 of the *Charter*. Raising complex, new legal issues a month before the application is to be argued after the deadline for the filing of affidavit evidence has expired may well prejudice the Minister. This is a very different situation from the relatively clear-cut legal issue the Court of Appeal allowed to be raised on a complete and non-controversial evidentiary basis in *Stumf*. The new issues in the present case are so different from those originally raised that it is far from clear that the record contains all of the relevant evidence.

[16] Finally, as can be seen from the exposition of the issues as framed in the leave application and the initial memorandum of fact and law, the new issues have nothing in common with the issues upon which the Court granted leave. It is an entirely new case. Given that Parliament has provided that an application for judicial review may only be brought with leave under the *Immigration and Refugee Protection Act*, in my view caution must be exercised when allowing new issues to be raised that were not the subject of the leave application. The exercise of this caution may lead to an assessment of the merits or the apparent strength of the new issues. In the present case, I consider the issues relevant to section 7 of the *Charter* to be authoritatively decided against the applicant in

cases such as *Langner v. Canada (Minister of Employment and Immigration)*, [1995] F.C.J. No. 469 (F.C.A.); *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76 at paragraph 10; and *Augustus v. Gosset*, [1996] 3 S.C.R. 268 at paragraph 53.

[17] In my view, none of these factors militate in favour of allowing the new issues to be argued. For these reasons, in the exercise of my discretion, I conclude that it was not appropriate for the applicants to raise the new issues for the first time in their further memorandum of fact and law and I decline to allow the issues to be argued.

[18] As to certification of a question, the respondent opposes certification of any question on the entitlement of an applicant to raise new issues in a further memorandum of fact and law. In my view, as canvassed above, the law is well-settled that it is, in every case, a matter within the Court's discretion. No question will be certified on this point.

[19] Having dealt with the new issues the applicants sought to raise, I now turn to the consideration of the application as originally framed.

THE BACKGROUND FACTS

[20] Mr. Al Mansuri states that during the years 1991-1994, he worked as a mechanic in the Libyan military, having been drafted into the army. In 1994, he was transferred to the Libyan Intelligence Service, from which he unsuccessfully tried to resign in 1995. In 1998, he was asked to form part of an execution squad. His son was ill at the time so he refused to participate. He claims he was jailed for 18 days for this refusal, during which period his son passed away.

[21] In December 1998, Mr. Al Mansuri was told to assassinate a Libyan national living in Romania. Instead of going to Romania, he and his wife, Ms. Nuria Ben Amer, came to Canada. Upon their arrival on January 1, 1999 they claimed refugee status. Ms. Ben Amer's claim was that she would face persecution due to her association with her husband. The couple have two Canadian-born children.

[22] The Convention Refugee Determination Division (CRDD) denied their refugee claims on December 22, 2000. Regarding Mr. Al Mansuri's claim, it was held that there were serious reasons for considering that he committed or was complicit in crimes against humanity and therefore that his claim fell within the exclusion clauses pursuant to Article 1F(a). The CRDD found that he had personal knowledge of atrocities committed by the Libyan Intelligence Service due to his employment with them. The CRDD found that he was a trusted member of that Service, as he was frequently allowed to leave the country. It also found that Mr. Al Mansuri had several opportunities to leave the country that he did not avail himself of and that therefore he must have supported the aims of the Service.

[23] The CRDD went on to consider inclusion, both for Mr. Al Mansuri and for Ms. Ben Amer (who was not excluded under Article 1F(a)). It found, first, that Mr. Al Mansuri was not likely to have been an assassin, as he was not trained as such. The CRDD then noted that the Libyan authorities were unlikely to order a detention of only 18 days, without interrogation or harassment, for refusing to take part in a firing squad. The CRDD believed that the Libyan authorities would

have been merciless with Mr. Al Mansuri if he had refused to take part in a firing squad as alleged. The CRDD found that it was unlikely that Mr. Al Mansuri refused to participate in the firing squad.

[24] The CRDD concluded that there was insufficient credible evidence on which to find that Mr. Al Mansuri had good grounds for fearing persecution for one or more of the grounds set out in the Convention Refugee definition. His claim was therefore denied. As Ms. Ben Amer's refugee claim was dependent on that of her husband, her claim was denied as well.

[25] An application for leave for judicial review of the CRDD's decision was denied by this Court in May of 2001.

[26] Mr. Al Mansuri and his wife then applied for a PRRA. In addition to the above matters, Mr. Al Mansuri and his wife advanced a risk to them based upon their long absence from Libya and their belief that refugee claimants who return to Libya are subjected to human rights abuses. This risk was said to be heightened because of a meeting held with representatives of the Libyan Embassy in Ottawa that had been coordinated by Canadian immigration officials who were pursuing removal arrangements and so were required to confirm the nationality of Mr. Al Mansuri and his wife.

[27] Mr. Al Mansuri's claim to protection could only be properly considered by the PRRA officer on the basis of the grounds set out in section 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act). This is because Mr. Al Mansuri's claim to refugee protection had been

rejected on the basis of section F of Article 1 of the Refugee Convention (see: paragraph 112(3)(*c*) of the Act).

THE PRRA DECISION

[28] The PRRA officer noted that the CRDD had found Mr. Al Mansuri's story implausible, for the reasons stated above.

[29] New evidence was tendered to the officer—a letter from the Mr. Al Mansuri's father as well as a photocopy of what was alleged to be an arrest order for Mr. Al Mansuri. The officer attributed little weight to this new evidence for the following reasons:

- The arrest order did not specify what crime Mr. Al Mansuri was alleged to have committed.
- The arrest order was issued in 1999, but was not obtained until 2005 when Mr. Al Mansuri's father allegedly got a neighbour to surreptitiously obtain a copy of the order.
- This arrest order was said to be obtained at a time when, according to Mr. Al Mansuri, his family, their home, mail and telephone were all under heavy surveillance.
- The documentary evidence suggested that historically Libya has not relied on arrest orders to apprehend people.
- In the father's letter, the father complains of suffering "annoyances" at the hands of the Intelligence Service as a result of Mr. Al Mansuri's refusal to carry out an order. This was found to be inconsistent with documentary evidence documenting the Intelligence Service's brutal treatment of the families of dissidents.

[30] The officer also considered documentary evidence which stated that returned asylum seekers who are not deemed to be in opposition to the government do not suffer significant harm upon return. Since Mr. Al Mansuri was not, in the officer's view, a person in opposition to the government, he did not face a significant risk upon return. Failing to carry out an order would not

give him a high profile as a political dissenter, and in any event his position was not of enough consequence to warrant the attention of Libyan authorities.

[31] The officer also rejected Mr. Al Mansuri's argument that his meeting with members of the Libyan Embassy in 2004 put him at greater risk if he returned to Libya. The officer found that the meeting was simply to confirm Mr. Al Mansuri's identity and nationality (as non-Libyans had been claiming to be Libyan in order to attain Convention Refugee status).

[32] The officer concluded that there were no grounds for believing that Mr. Al Mansuri would be a person in need of protection under section 97 of the Act. As there was no risk for Mr. Al Mansuri, there was accordingly no risk for Ms. Ben Amer.

[33] The officer declined to take the best interests of the applicants' children into account, stating that a humanitarian and compassionate decision, in which those interests would be considered, was pending.

THE ISSUES

[34] I reframe the issues to be decided as follows:

1. Did the officer deny the applicants' statutory and common law right to natural justice by not conducting an interview where issues of credibility were raised?
2. Did the officer breach the applicants' right to natural justice or procedural fairness by relying upon documentary evidence which the officer obtained, but did not provide to the applicants?

3. Were the officer's credibility or plausibility findings perverse?

4. Did the officer make perverse or capricious findings? Was the decision unreasonable?

5. Did the officer err by ignoring the best interests of the applicants' Canadian children?

THE STANDARDS OF REVIEW

[35] Where issues of procedural fairness are raised, the pragmatic and functional analysis has no application. No deference is owed when determining the fairness of a tribunal's process. See, for example, *Sketchly v. Canada (Attorney General)*, 2005 FCA 404 at paragraphs 52 through 55. Otherwise, I adopt the comments of my colleague Mr. Justice Simon Noël in *Choudry v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 239 where he wrote, at paragraph 8:

> The standard of review applicable to a PRRA decision considered globally and as a whole is reasonableness *simpliciter* (*Figurado v. Canada (Sollicitor General)*, 2005 FC 347, [2005] F.C.J. No. 458, at para 51). An unreasonable decision is a decision that does not stand up to a somewhat probing analysis (*Barreau du Nouveau-Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20, [2003] S.C.J. No. 17, at para. 25; *Canada* (*Director of Investigation and Research) v. Southam*, [1997] 1 S.C.R. 748, [1996] S.C.J. No. 116)). However, where a particular finding of fact is made by the PRRA officer, the Court should not substitute its decision for that of the PRRA officer unless it is demonstrated by the applicant that such finding of fact was made in a perverse or capricious manner or without regard to the material before the PRRA officer (*Figurado v. Canada (Sollicitor General)*, *supra*, at para. 51.

[36] I now turn to the issues raised by Mr. Al Mansuri as reframed.

1. Did the officer deny the applicants' statutory and common law right to natural justice by not conducting an interview where issues of credibility were raised?

[37] The officer noted that Mr. Al Mansuri had provided new evidence. The new evidence most relevant to Mr. Al Mansuri's asserted personal risk was a photocopy of an arrest order and a letter from Mr. Al Mansuri's father. The arrest order was issued approximately three weeks after Mr. Al Mansuri left Libya and was issued by the General Intelligence Office, Investigation and Arrest Section, in Tripoli. It was not clear from the face of the order what violation Mr. Al Mansuri was alleged to have committed.

[38] The officer concluded that this new evidence was not in harmony with the objective documentary evidence. Therefore, the officer found it to be insufficiently persuasive to cause her to arrive at a different conclusion than that reached by the CRDD. The officer further found that when the new evidence was applied against the criteria found in section 97 of the Act, the new evidence did not lead the officer to believe that Mr. Al Mansuri was likely at any risk of torture, cruel and unusual treatment or punishment, or a risk to life.

[39] On Mr. Al Mansuri's behalf it is argued that these were credibility findings that triggered both a statutory and a common law right to an interview. I respectfully disagree.

[40] With respect to the statutory scheme, subsection 113(*b*) of the Act provides:

113. Consideration of an application for protection shall be as follows: […] (b) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is	113. Il est disposé de la demande comme il suit : […] b) une audience peut être tenue si le ministre l’estime requis compte tenu des facteurs réglementaires;

required;

[41] The prescribed factors are set out in section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations) as follows:

For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors are the following:	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.

[42] In my view, the new evidence cannot be said to have raised a serious issue with respect to Mr. Al Mansuri's credibility as required by the statute or any common law right to an interview. Rather, the officer gave reasons as to why she gave little weight to the arrest order and Mr. Al Mansuri's father's letter. As a result of giving little weight to the new evidence, the officer found the evidence before her was not sufficient to cause her to arrive at a different conclusion from that of the CRDD with respect to Mr. Al Mansuri's claim of risk (a claim that was co-extensive with the section 96 claim considered and rejected by the CRDD).

[43] In my view, by doing so the officer did not improperly import a negative credibility finding by the CRDD into her decision. I reach this conclusion for two reasons. First, a hearing is not generally required where the Refugee Protection Division (or its predecessor the CRDD) has heard a claim and made a determination on the credibility of the claimant. Second, the officer did not deny the PRRA application on the basis of Mr. Al Mansuri's credibility. Rather, the officer found that the objective evidence with respect to country conditions did not support a finding of a danger of torture, or a risk to life, or a risk of cruel or unusual treatment or punishment. That finding is a matter distinct from Mr. Al Mansuri's personal credibility.

2. Did the officer breach the applicants' right to natural justice or procedural fairness, by relying upon documentary evidence which the officer obtained, but did not provide to the applicants?

[44] In oral argument the applicants' counsel identified two documents that the PRRA officer relied upon that are characterized by Mr. Al Mansuri and his wife to be extrinsic evidence which the officer was obliged to disclose to them for their comment before the officer reached her decision.

[45] The two documents were attached to bulletins prepared by the Immigration and Nationality Directorate of the United Kingdom Home Office. The bulletins provided guidance to caseworkers dealing with Libyan asylum claims. The first document was a letter from the Foreign and Commonwealth Office dated April 15, 2000 which addressed the issue of the treatment of returnees to Libya. The second document was a bulletin that circulated a report of a fact-finding visit to Libya conducted by Norwegian and Danish immigration authorities in June 2004.

[46] In *Mancia v. Canada (Minister of Citizenship and Immigration)*, [1998] 3 F.C. 461 the Federal Court of Appeal considered whether an officer conducting a review pursuant to the regulations concerning the Post-Determination Refugee Claimants in Canada Class, violated the principles of fairness when the officer failed to disclose, before reaching the decision, documents obtained from public sources concerning general country conditions that the officer relied upon. At paragraphs 26 and 27 the Court wrote as follows:

> 26 The documents are in the public domain. They are general by their very nature and are neutral in the sense that they do not refer expressly to an applicant and that they are not prepared or sought by the Department for the purposes of the proceeding at issue. They are not part of a "case" against an applicant. They are available and accessible, absent evidence to the contrary, through the files, indexes and records found in Documentation Centres. They are generally prepared by reliable sources. They can be repetitive, in the sense that they will often merely repeat or confirm or express in different words general country conditions evidenced in previously available documents. The fact that a document becomes available after the filing of an applicant's submissions by no means signifies that it contains new information or that such information is relevant information that will affect the decision. It is only, in my view, where an immigration officer relies on a significant post-submission document which evidences changes in the general country conditions that may affect the decision, that the document must be communicated to that applicant.
>
> 27 I would therefore answer the certified question as follows, it being understood that each case will have to be decided according to its own circumstances and it being assumed that the documents at issue in a given case are of a nature such as that described above:
>
> > (a) with respect to documents relied upon from public sources in relation to general country conditions which were available and accessible at Documentation Centres at the time submissions were made by an applicant, fairness does not require the post claims determination officer to disclose them in advance of determining the matter;
> >
> > (b) with respect to documents relied upon from public sources in relation to general country conditions which

> became available and accessible after the filing of an applicant's submissions, fairness requires disclosure by the post claims determination officer where they are novel and significant and where they evidence changes in the general country conditions that may affect the decision.

[47] Turning to the facts of this case, the documents in question are in the public domain, are available online, were disseminated by a widely recognized, reliable source of information concerning country conditions (the United Kingdom Home Office) and are general and neutral in their content.

[48] The officer considered the applicants' PRRA submissions dated March 2 and March 18, 2004 and June 20 and July 7, 2005, as well as their submissions relating to risk (February 28, March 24 and July 7, 2005) filed in support of their pending humanitarian and compassionate application. The two documents at issue were therefore, available at the time the applicants made their 2005 PRRA and humanitarian and compassionate risk submissions.

[49] The applicants' February 2005 submissions included reference to:

(i) Amnesty International's report about its February 2004 visit to Libya, its first visit there since 1988.

(ii) Amnesty International's stated concerns as of April 27, 2004 with respect to the arbitrary detention of Libyans returning from abroad.

[50] Ms. Ben Amer’s PRRA application included reference to Amnesty International’s report for the 2004 year that dealt with the fate of returning asylum seekers in Libya.

[51] The March 2005 submissions included reference to a document dated July 2000 from Amnesty International entitled "Amnesty International Canada's Concerns Regarding Returning Asylum Seekers to Libya".

[52] In my view, in light of the ongoing nature of the applicants' submissions with respect to risk, the public availability of the two documents at issue, the notoriety of the United Kingdom Home Office as a reliable source for country condition information, the general nature of the content of the two documents at issue, and the fact that Amnesty International documents on the same point were being submitted to the PRRA officer by the applicants the duty of fairness did not require disclosure of the two documents at issue. With due diligence the documents would have been available to the applicants. In view of that, and the content of the Amnesty International documents which the applicants did submit, the applicants were not deprived of a meaningful opportunity to fully and fairly present their case as to risk.

3. Were the officer's credibility or plausibility findings perverse?

[53] Mr. Al Mansuri says that the officer found that he was excluded from protection under the Convention because of his army training (including his training as a sniper) and his time in the Libyan Intelligence Service (with its brutal record of violence). Mr. Al Mansuri says that in light of

these findings, it was perverse for the officer to also find that it was implausible that Mr. Al Mansuri would be asked to participate in an execution squad or in an assassination attempt or that Mr. Al Mansuri's role would not be sufficient to categorize him as an opponent of the regime so as to attract detention and torture on his return.

[54] Mr. Al Mansuri also points to Libya's human rights record and argues that in light of that record, it was perverse for the officer to find it to be implausible that Mr. Al Mansuri would be detained or targeted or killed on his return to Libya.

[55] In my view, the officer's findings are not necessarily contradictory. One might have sufficient involvement with an intelligence service so as to be excluded by Article 1(F)(a) of the Convention, while still having a sufficiently low profile in the overall Libyan political situation so as not to be considered a threat to the regime. The inconsistency between Mr. Al Mansuri's evidence as to the penalty he received for refusing to take part in a firing squad and the objective documentary evidence supported the officer's finding of implausibility.

[56] The officer reviewed the current evidence before her with respect to conditions in Libya and found that the documentary evidence did not support the risks alleged by the applicants as returning asylum seekers or as a former member of the Intelligence Service. I find there was documentary evidence before the officer to support these conclusions.

4. Did the officer make perverse or capricious findings? Was the decision unreasonable?

[57] Mr. Al Mansuri asserts that the officer read selectively and "actually turned [the following documents] on [their] head":

(i) The Amnesty International report entitled "Time to make human rights a reality".

(ii) The 2004 U.S. Department of State report for Libya.

(iii) The 2004-2005 Amnesty International report for Libya.

(iv) The documents described above at paragraph 45.

[58] I have read these documents carefully. The officer's findings were supported by information in these documents and I am satisfied that the officer did not impermissibly select information out of context. The officer's conclusions were reasonably open to her on the evidence, and, in my view, what the applicants really put in issue is the weight given to the documentary evidence by the officer. That is not a ground for intervention by the Court on judicial review.

[59] Mr. Al Mansuri and his wife also rely upon a December 2005 letter from Amnesty International Canada which postdates the officer's decision. In the letter, the Amnesty International Refugee Coordinator (Toronto Office) states:

> It is the view of Amnesty International that as a former government employee whose *[sic]* has made an asylum claim in Canada, the details of which are known to the Libyan authorities, Mr. Al-Mansuri has a genuine reason to fear that he will experience grave human rights violations upon return to Libya including harassment, intimidation, detention and torture; and as such he should not be removed to that country.

[60] The applicants rely upon the decision of this Court in *Omar v. Canada (Solicitor General)*, 2004 FC 1740 as authority to support the appropriateness of receiving this document, notwithstanding that it postdates the officer's decision. However, the decision in *Omar* is very brief and it is not wholly clear what the circumstances were that the Court found to be so exceptional as to warrant the admission of new evidence on judicial review.

[61] In *Gitxsan Treaty Society v. Hospital Employees' Union*, [2000] 1 F.C.135 the Federal Court of Appeal, at paragraph 13, considered the right to have new evidence considered on an application for judicial review. Mr. Justice Rothstein, writing for the court, stated:

> I think the applicant is correct that on judicial review evidence extrinsic to the record before the tribunal whose decision is being reviewed may be introduced. However, the opportunity to do so is limited to those circumstances in which the only way to get at the want of jurisdiction is by the bringing of such new evidence before the reviewing Court.

[62] I am satisfied that the 2005 Amnesty International letter is not a document that falls within the narrow and exceptional circumstances contemplated by the Federal Court of Appeal in *Gitxsan*. There are no circumstances in this case that justify review of the officer's decision against the Amnesty International letter that was not before the officer. The applicants' important life and security interests are, notwithstanding, protected because this new evidence may be filed on a second PRRA application (see: section 165 of the Regulations) and also on any required motion for a stay of removal.

5. Did the officer err by ignoring the best interests of the applicants' Canadian children?

[63] The officer observed that the children, as Canadian citizens, are not subject to an enforceable removal order. Their best interests were left by the officer to be addressed in the pending humanitarian and compassionate application. The applicants argue that by failing to consider their interests the officer erred in law. They rely upon the decision of this Court in *Varga v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1280.

[64] These reasons were held in abeyance pending the decision of the Federal Court of Appeal in respect of the appeal of this Court's decision in *Varga*. The Federal Court of Appeal's reasons were released on December 1, 2006 and are reported as 2006 FCA 394. In them, at paragraph 20 the Court answered the certified question as follows:

> A PRRA officer has no obligation to consider, in the context of the PRRA, the interests of a Canadian-born child when assessing the risks involved in removing at least one of the parents of that child.

[65] Therefore, the officer did not err as alleged.

[66] For these reasons, the application for judicial review will be dismissed.

CERTIFICATION OF A QUESTION

[67] The applicants ask that a number of questions be certified relating to:

(i) Whether an oral hearing is required under subsection 113(*b*) of the Act and section 167 of the Regulations where a PRRA officer engages in findings of credibility?

(ii) Whether fresh evidence is appropriate on a judicial review of a PRRA decision, as set out in the decision of this Court in *Omar*, cited above?

(iii) Must a PRRA officer take the best interests of Canadian-born children into account in his or her decision?

[68] The Minister opposes certification of any question.

[69] In my view, the first proposed question is not determinative of any appeal because I have found that the officer did not engage in credibility findings within the contemplation of section 113 of the Act or section 167 of the Regulations. In my further view, the second and third questions have already been authoritatively determined by the Federal Court of Appeal.

[70] Therefore, no question will be certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is dismissed.

"Eleanor R. Dawson"

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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