Federal Court  Cour fédérale

Date: 20130110

Docket: IMM-3224-12

Citation: 2013 FC 24

Ottawa, Ontario, January 10, 2013

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

ZAHIR MOHAMMAD

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This judicial review addresses a decision [Decision] by the Respondent's delegate [Ministerial Delegate] under the *Immigration and Refugee Protection Regulations*, SOR/2002-227, s 172(1), denying a Pre-Removal Risk Assessment [PRRA] concerning a former Afghan police officer during the Communist era.

[2] The Decision by the Ministerial Delegate is a follow-up to a positive risk opinion. The Decision deals with whether the Applicant is no longer in danger of torture or death pursuant to the factors in s 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[3] The pertinent provisions are:

172. (1) Before making a decision to allow or reject the application of an applicant described in subsection 112(3) of the Act, the Minister shall consider the assessments referred to in subsection (2) and any written response of the applicant to the assessments that is received within 15 days after the applicant is given the assessments.	**172.** (1) Avant de prendre sa décision accueillant ou rejetant la demande de protection du demandeur visé au paragraphe 112(3) de la Loi, le ministre tient compte des évaluations visées au paragraphe (2) et de toute réplique écrite du demandeur à l'égard de ces évaluations, reçue dans les quinze jours suivant la réception de celles-ci.
(2) The following assessments shall be given to the applicant:	(2) Les évaluations suivantes sont fournies au demandeur :
(a) a written assessment on the basis of the factors set out in section 97 of the Act; and	*a)* une évaluation écrite au regard des éléments mentionnés à l'article 97 de la Loi;
(b) a written assessment on the basis of the factors set out in subparagraph 113*(d)*(i) or (ii) of the Act, as the case may be.	*b)* une évaluation écrite au regard des éléments mentionnés aux sous-alinéas 113*d)*(i) ou (ii) de la Loi, selon le cas.
(2.1) Despite subsection (2), no assessments shall be given to an applicant who is named in a certificate until a judge under section 78 of the Act determines whether the certificate is reasonable.	(2.1) Malgré le paragraphe (2), aucune évaluation n'est fournie au demandeur qui fait l'objet d'un certificat tant que le juge n'a pas décidé du caractère raisonnable de celui-ci en vertu de l'article 78 de la Loi.
…	…

(4) Despite subsections (1) to (3), if the Minister decides on the basis of the factors set out in section 97 of the Act that the applicant is not described in that section,

(a) no written assessment on the basis of the factors set out in subparagraph 113*(d)*(i) or (ii) of the Act need be made; and

(b) the application is rejected.

(4) Malgré les paragraphes (1) à (3), si le ministre conclut, sur la base des éléments mentionnés à l'article 97 de la Loi, que le demandeur n'est pas visé par cet article :

a) il n'est pas nécessaire de faire d'évaluation au regard des éléments mentionnés aux sous-alinéas 113*d)*(i) ou (ii) de la Loi;

b) la demande de protection est rejetée.

Immigration and Refugee Protection Regulations, SOR/2002-227

112. (3) Refugee protection may not result from an application for protection if the person

(a) is determined to be inadmissible on grounds of security, violating human or international rights or organized criminality;

(b) is determined to be inadmissible on grounds of serious criminality with respect to a conviction in Canada punished by a term of imprisonment of at least two years or with respect to a conviction outside Canada for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years;

112. (3) L'asile ne peut être conféré au demandeur dans les cas suivants :

a) il est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée;

b) il est interdit de territoire pour grande criminalité pour déclaration de culpabilité au Canada punie par un emprisonnement d'au moins deux ans ou pour toute déclaration de culpabilité à l'extérieur du Canada pour une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;

(c) made a claim to refugee protection that was rejected on the basis of section F of Article 1 of the Refugee Convention; or	*c)* il a été débouté de sa demande d'asile au titre de la section F de l'article premier de la Convention sur les réfugiés;
(d) is named in a certificate referred to in subsection 77(1).	*d)* il est nommé au certificat visé au paragraphe 77(1).

Immigration and Refugee Protection Act, SC 2001, c 27

II. BACKGROUND

[4] The Applicant is a 73 year old male Afghani whose wife and two adult children also reside in Canada. His 1992 refugee application was denied because, as a police officer under the Communist regime, he was excluded pursuant to Article 1F(a) of the *Convention Relating to the Status of Refugees*, 1951, Can TS 1969 No 6 [Refugee Convention] (crimes against peace, war crimes, crimes against humanity).

> 1 F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

[5] Following a failed judicial review of the refugee decision, a 2006 PRRA found that in accordance with IRPA, s 97, it was more likely than not that the Applicant would face a risk of cruel and unusual treatment of punishment or risk to his life if he were to be returned to Afghanistan.

[6] The Ministerial Delegate reviewed the current circumstances in Afghanistan if the Applicant was to be returned. The Ministerial Delegate concluded that the Applicant's personal characteristics did not match the profiles listed as at risk by UNHCR. Other reports showing potential risk were rejected because they were not supported by other documentary evidence.

[7] The Ministerial Delegate also concluded that the general security situation in Afghanistan had been deteriorating particularly in rural areas where the Taliban is strong. She also concluded that persons associated with previous governments are at no greater risk of torture or cruel or unusual treatment. The Applicant's fear of a Mr. Sayyaf is dismissed as unsupported by other objective credible evidence.

[8] The Ministerial Delegate further rejected, as insufficiently supported by other documentary evidence, the affidavit of a third party that a person similarly situated to the Applicant was kidnapped and murdered by former prisoners. The evidence of risk through retribution found in the 2006 positive PRRA was now deemed insufficient to conclude that such retribution continues to take place.

[9] Significantly, the Ministerial Delegate, in considering the evidence of Afghanistan Relief International that the International Security Force is unable to provide security outside Kabul, found that since the Applicant is originally from Kabul, there is insufficient evidence to conclude that the Applicant is at risk in Kabul.

III. ANALYSIS

[10] There are two real issues in this judicial review:

(a) was the Ministerial Delegate's citation of the incorrect provision of IRPA an error of law?

(b) was the Decision reasonable?

[11] With respect to the first issue, the standard of review is correctness as it goes to the core legal basis for the decision (*Polichtchouk v Canada (Minister of Citizenship and Immigration)*, 2011 FC 552, 389 FTR 301).

With respect to the second issue, it is largely factual and attracts a reasonableness standard (*Yusuf v Canada (Minister of Employment and Immigration)*, [1995] FCJ No 35, 179 NR 11 (FCA)). However, the examination of the facts must be in accordance with legal norms or be focused on the correct legal criteria. (*Sweet v Canada (Attorney General)*, 2005 FCA 51, 2005 CarswellNat 318)

[12] The Decision refers to the inquiry being based on IRPA, s 112(3)*(b)* which deals with serious criminality. This is clearly the wrong provision. The correct provision is s 112(3)*(c)* dealing with section F of Article 1 of the Refugee Convention.

[13] Despite this error, the Decision cannot be overturned on this ground. A fair review of the Decision and conclusions confirms that the Ministerial Delegate understood and relied on the fact that the Applicant had been excluded in accordance with Article 1F(a) of the Refugee Convention.

There was clearly an error but it was immaterial and overturning the Decision on this basis would be a triumph of form over substance.

[14] With respect to the conclusions of the Decision, this is where the Decision fails. While some of the conclusions of the Ministerial Delegate on the materials are arguably suspect, they were open to the Delegate if she had applied her mind to the correct line of inquiry.

[15] The test, when looking at changes to circumstances that led to the previous 2006 positive PRRA, is whether the current circumstances (as contrasted with 2006) are a) substantial, b) effective, and c) durable (*Sahiti v Canada (Minister of Citizenship and Immigration)* 2005 FC 364, 280 FTR 86, a case dealing with changes in Kosovo).

[16] The Ministerial Delegate noted some changed circumstances which one may assume were considered substantial. However, the *ad hoc* nature of amnesty programs for members of former governments is noted without any consideration of their effectiveness or their durability. The amnesty program began in 2009 and there was no assessment in the Decision in early 2012 as to effectiveness or durability.

[17] This failure to consider effectiveness or durability of this amnesty program is significant in a country where the Ministerial Delegate recognizes that lawlessness is rampant. A March 2011 UK Border Agency, Operation Guidance Note (the Report) on Afghanistan notes that protection in Afghanistan is compromised by corruption, ineffective governance, a climate of impunity, lack of impetus for transitional justice, weak rule of law and reliance on traditional dispute resolution

mechanisms. The Report wryly mentions that these traditional mechanisms "do not comply with due process standards".

[18] It is not reasonable to conclude, on the evidence, that the amnesty program is effective and durable even if the Ministerial Delegate had turned her mind to the proper legal test.

IV. CONCLUSION

[19] Therefore, this judicial review will be granted. The decision will be quashed and remitted back to be determined by a different official of the Respondent.

[20] There is no question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted. The decision is quashed and is remitted back to be determined by a different official of the Respondent.

"Michael L. Phelan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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