Date: 20071206

Docket: A-11-07

Citation: 2007 FCA 385

CORAM: **LINDEN J.A.**
SHARLOW J.A.
RYER J.A.

BETWEEN:

SYED MASOOD RAZA
PERVEEN MASOOD RAZA
SYED SALMAN MASOOD RAZA and
SYED OMAIR RAZA by his litigation guardian SYED MASOOD RAZA

Appellants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION and
THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

Heard at Toronto, Ontario, on November 29, 2007.

Judgment delivered at Ottawa, Ontario, on December 6, 2007.

REASONS FOR JUDGMENT BY: SHARLOW J.A.

CONCURRED IN BY: LINDEN J.A.
RYER J.A.

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REASONS FOR JUDGMENT

SHARLOW J.A.

[1] This is an appeal from a judgment of Justice Mosley (2006 FC 1385). He dismissed the appellants' application for judicial review of the decision of a pre removal risk assessment officer, who rejected their application for protection under subsection 112(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "IRPA"). An application under subsection 112(1) of the IRPA is referred to as a "pre removal risk assessment application" or a "PRRA application".

[2] The principal issue in this appeal is the interpretation of paragraph 113(*a*) of the IRPA. Paragraph 113(*a*) deals with the circumstances in which a failed refugee claimant who makes a

PRRA application may present evidence to the PRRA officer that was not before the Refugee Protection Division ("RPD") of the Immigration and Refugee Board.

[3] Justice Mosley summarized, at paragraphs 10 through 12 of his reasons, his conclusions as to the standard of review applicable to a decision of a PRRA officer. Neither party suggested that he erred in his statement of the applicable standard of review, or that he failed to apply the appropriate standard of review. As that issue was not debated, I accept for the purposes of this appeal that the standard of review for questions of law is correctness, for questions of fact is patent unreasonableness, and for questions of mixed fact and law is reasonableness. In my view, nothing in this appeal turns on the standard of review.

[4] Mr. Syed Masood Raza, his wife and their two children are citizens of Pakistan and members of the Shia minority in that country. Mr. Raza suffered attacks in 1994 at the hands of Sipah-e-Sahaba Pakistan extremists because of Mr. Raza's participation in the religious and business affairs of the Shia community. He reported the attacks to the police, to no avail. Mr. Raza left Pakistan on October 3, 1994 and his family left the following December. They lived in Texas without status until 2003, when they came to Canada. Mr. Raza and his family sought refugee protection under the IRPA on the basis that he had been attacked because of his religious faith and that adequate state protection was not available.

[5] The provisions of IRPA describing the conferral of refugee protection are sections 95, 96 and 97, which read in relevant part as follows (provisions referring to criminality and national security, which are not in issue in this case, have been omitted):

95. (1) Refugee protection is conferred on a person when (*a*) the person has been determined to be a Convention refugee or a person in similar circumstances under a visa application and becomes a permanent resident under the visa or a temporary resident under a temporary resident permit for protection reasons; (*b*) the Board determines the person to be a Convention refugee or a person in need of protection; or (*c*) […] the Minister allows an application for protection.	95. (1) L'asile est la protection conférée à toute personne dès lors que, selon le cas : *a*) sur constat qu'elle est, à la suite d'une demande de visa, un réfugié ou une personne en situation semblable, elle devient soit un résident permanent au titre du visa, soit un résident temporaire au titre d'un permis de séjour délivré en vue de sa protection; *b*) la Commission lui reconnaît la qualité de réfugié ou celle de personne à protéger; *c*) le ministre accorde la demande de protection […].
(2) A protected person is a person on whom refugee protection is conferred under subsection (1), […] .	(2) Est appelée personne protégée la personne à qui l'asile est conféré […] .
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion, (*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; […] .	96. A qualité de réfugié au sens de la Convention—le réfugié—la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques : *a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays; […] .
97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality […] would subject them personally (*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité […] exposée : *a*) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if (i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country, (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country, (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and (iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	*b*) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant : (i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays, (ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas, (iii) la menace ou le risque ne résulte pas de sanctions légitimes—sauf celles infligées au mépris des normes internationales—et inhérents à celles-ci ou occasionnés par elles, (iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

[6] The claims of Mr. Raza and his family for refugee protection were rejected by the RPD. The RPD did not doubt Mr. Raza's account of the attacks he suffered. However, the RPD concluded that conditions in Pakistan had changed since his departure, and that adequate state protection was available as of the date of his application for refugee protection. Leave to seek judicial review of that decision was dismissed by the Federal Court on May 5, 2005.

[7] Once the leave application was dismissed, there was no procedure available to Mr. Raza and his family to challenge the decision of the RPD to reject their claim for refugee protection on the basis of a finding of adequate state protection. There is no statutory right of appeal. Subsection 55(1) of the *Refugee Protection Division Rules* (SOR/2002-228) provides for a refugee protection claim to be reopened after it has been decided, but the Federal Court has held that this applies only if the application to reopen is based on an allegation that there was a failure to observe a principle of

natural justice (see, for example, *Ali v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1153, *Lakhani v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 612).

[8] After the RPD rejected the claim of Mr. Raza and his family for refugee protection, they became the subjects of a removal order. Prior to their removal date, they made a PRRA application under subsection 112(1) of the IRPA, as they were entitled to do. The removal order was stayed pending the determination of the PRRA application (section 232 of the *Immigration Regulations*, SOR/2002-227).

[9] Subsection 112(1) reads in relevant part as follows:

112. (1) A person in Canada […] may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force […]	112. (1) La personne se trouvant au Canada […] peut, conformément aux règlements, demander la protection au ministre si elle est visée par une mesure de renvoi ayant pris effet […]

[10] The purpose of section 112 of the IRPA is not disputed. It is explained as follows in the Regulatory Impact Analysis Statement, Canada Gazette, Part II, Vol. 136, Extra (June 14, 2002), at page 274:

The policy basis for assessing risk prior to removal is found in Canada's domestic and international commitments to the principle of non-refoulement. This principle holds that persons should not be removed from Canada to a country where they would be at risk of persecution, torture, risk to life or risk of cruel and unusual treatment or punishment. Such commitments require that risk be reviewed prior to removal.	La justification, au niveau des politiques, de l'examen des risques avant renvoi se trouve dans les engagements nationaux et internationaux du Canada en faveur du principe de nonrefoulement. En vertu de ce principe, les demandeurs ne peuvent être renvoyés du Canada dans un pays où ils risqueraient d'être persécutés, torturés, tués ou soumis à des traitements ou peines cruels ou inusités. Ces engagements exigent que les risques soient examinés avant le renvoi.

[11] Assuming there are no issues of criminality or national security, an application under subsection 112(1) is allowed if, at the time of the application, the applicant meets the definition of "Convention refugee" in section 96 of the IRPA or the definition of "person in need of protection" in section 97 of the IRPA (paragraph 113(*c*) of the IRPA). The result of a successful PRRA application is to confer refugee protection on the applicant (subsection 114(1) of the IRPA).

[12] A PRRA application by a failed refugee claimant is not an appeal or reconsideration of the decision of the RPD to reject a claim for refugee protection. Nevertheless, it may require consideration of some or all of the same factual and legal issues as a claim for refugee protection. In such cases there is an obvious risk of wasteful and potentially abusive relitigation. The IRPA mitigates that risk by limiting the evidence that may be presented to the PRRA officer. The limitation is found in paragraph 113*(a*) of the IRPA, which reads as follows:

113. Consideration of an application for protection shall be as follows: (*a*) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection; […] .	113. Il est disposé de la demande comme il suit : *a*) le demandeur d'asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'il n'était pas raisonnable, dans les circonstances, de s'attendre à ce qu'il les ait présentés au moment du rejet; […] .

[13] As I read paragraph 113(*a*), it is based on the premise that a negative refugee determination by the RPD must be respected by the PRRA officer, unless there is new evidence of facts that might have affected the outcome of the RPD hearing if the evidence had been presented to the RPD.

Paragraph 113(*a*) asks a number of questions, some expressly and some by necessary implication, about the proposed new evidence. I summarize those questions as follows:

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

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

3. Newness: Is the evidence new in the sense that it is capable of:
   (a) proving the current state of affairs in the country of removal or an event that occurred or a circumstance that arose after the hearing in the RPD, or
   (b) proving a fact that was unknown to the refugee claimant at the time of the RPD hearing, or
   (c) contradicting a finding of fact by the RPD (including a credibility finding)?

   If not, the evidence need not be considered.

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

5. Express statutory conditions:

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

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

[14] The first four questions, relating to credibility, relevance, newness and materiality, are necessarily implied from the purpose of paragraph 113(*a*) within the statutory scheme of the IRPA relating to refugee claims and pre removal risk assessments. The remaining questions are asked expressly by paragraph 113(*a*).

[15] I do not suggest that the questions listed above must be asked in any particular order, or that in every case the PRRA officer must ask each question. What is important is that the PRRA officer must consider all evidence that is presented, unless it is excluded on one of the grounds stated in paragraph [13] above.

[16] One of the arguments considered by Justice Mosley in this case is whether a document that came into existence after the RPD hearing is, for that reason alone, “new evidence”. He concluded that the newness of documentary evidence cannot be tested solely by the date on which the document was created. I agree. What is important is the event or circumstance sought to be proved by the documentary evidence.

[17] Counsel for Mr. Raza and his family argued that the evidence sought to be presented in support of a PRRA application cannot be rejected solely on the basis that it “addresses the same risk issue” considered by the RPD. I agree. However, a PRRA officer may properly reject such evidence if it cannot prove that the relevant facts as of the date of the PRRA application are materially different from the facts as found by the RPD.

[18] In this case, Mr. Raza and his family submitted a number of documents in support of their PRRA application. All of the documents were created after the rejection of their claim for refugee protection. The PRRA officer concluded that the information in the documents was essentially a repetition of the same information that was before the RPD. In my view, that conclusion was reasonable. The documents are not capable of establishing that state protection in Pakistan, which had been found by the RPD to be adequate, was no longer adequate as of the date of the PRRA application. Therefore, the proposed new evidence fails at the fourth question listed above.

[19] Justice Mosley found that the PRRA officer’s assessment of the documents was reasonable and was not based on an error of law. I agree. For that reason, I would dismiss this appeal.

[20] Justice Mosley certified the following questions:

> 1. Is "new evidence" for the purposes of s. 113(a) of the IRPA limited to evidence that post-dates and is "substantially different" from the evidence that was before the Refugee Protection Division (RPD)?
>
> 2. Does the standard for the reception of "new evidence" under s. 113(a) of the IRPA require the PRRA officer to accept any evidence created after the RPD determination, even where that evidence was reasonably available to the applicant or he/she could reasonably have been expected to present it at the hearing.

[21] These questions do not lend themselves to simple yes or no answers. I would answer them by referring to the questions listed in paragraph 13 of these reasons.

"K. Sharlow"

J.A.

"I agree
A.M. Linden J.A."

"I agree
C. Michael Ryer J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-11-07
APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE MOSLEY DATED DECEMBER 7, 2006 IN FILE NO. IMM-7269-05	
STYLE OF CAUSE:	Syed Masood Raza et al v. MCI et al
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	November 29, 2007
REASONS FOR JUDGMENT BY:	SHARLOW J.A.
CONCURRED IN BY:	LINDEN J.A. RYER J.A.
DATED:	December 6, 2007

APPEARANCES:

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