Federal Court  Cour fédérale

Date: 20150603

Docket: IMM-7850-14

Citation: 2015 FC 701

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, June 3, 2015

Present: The Honourable Mr. Justice Shore

BETWEEN:

BALEMA NEBIE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review under the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA) of a decision by a pre-removal risk assessment (PRRA) officer concluded that the applicant would not be at risk of persecution or torture, to a risk to his life or to a risk of cruel and unusual treatment or punishment if he returned to Burkina Faso.

II. Facts

[2] The applicant is a 43-year-old citizen of Burkina Faso. He is HIV positive.

[3] After obtaining a visa from the Canadian authorities in Abidjan, Côte d'Ivoire, the applicant arrived in Canada on November 28, 2009, and made a refugee claim soon after.

[4] In support of his refugee claim, the applicant alleged the following facts.

[5] On December 13, 2008, on the anniversary of the deceased journalist Norbert Zongo, the applicant, who worked as a taxi driver, was arrested by the police, who wrongly believed that the applicant participated in an illegal student demonstration. The applicant was detained for a period of four months during which he was tortured and deeply humiliated. Following his escape from prison in April 2009, the applicant fled Burkina Faso for Canada. The applicant's spouse allegedly informed him that one week after his escape from prison, the authorities in Burkina Faso were looking for him at his home (RPD Decision, Applicant's Record, at pp 45 to 52).

[6] On March 19, 2013, the Refugee Protection Division (RPD) rejected the applicant's refugee claim. Although the RPD found the applicant credible, it found that the applicant had not shown that he was persecuted and that the applicant had an internal flight alternative (IFA) in his home village of Koualio.

[7] On July 15, 2013, the Federal Court dismissed the application for judicial review filed by the applicant against this decision.

[8] On March 11, 2014, the applicant filed an application for permanent residence based on humanitarian and compassionate considerations, which was dismissed on September 18, 2014. This application was subject to an application for leave and judicial review in docket IMM-7852-14.

[9] On June 12, 2014, the applicant filed a PRRA application under subsection 112(1) of the IRPA. This application was dismissed on September 18, 2014, and is the subject of this judicial review.

III. Impugned decision

[10] In his assessment, the PRRA officer considered the new evidence submitted by the applicant in support of his PRRA application:

- Documentation that shows that the applicant is HIV positive and that he is receiving treatment;
- Articles and reports that address country conditions in Burkina Faso;
- Letter from Gilles Barette, Director of Centre Afrika, dated October 29, 2013.

(PRRA decision, Certified Tribunal Record, at p 7)

[11] First, the officer familiarized himself with the RPD's conclusions and the risks raised by the applicant, such as political instability and the lack of access to health care to treat HIV in Burkina Faso.

[12] Among other things, the PRRA officer noted that the applicant had not established that the authorities in Burkina Faso had been looking for him since April 2009 and that he would be covered by sections 96 and 97 of the IRPA.

[13] The PRRA officer recognized that the applicant is HIV positive. The officer also read the applicant's argument regarding the lack of access to health care to treat HIV in his home village of Koualio, located 140 km from the capital of Burkina Faso.

[14] Furthermore, the officer found that the evidence relating to the lack of health care to treat HIV must be set aside in accordance with subparagraph 97(1)(*b*)(iv) of the IRPA, which provides that the threat or the risk raised in a PRRA application must not result from a state's inability to provide adequate health care.

[15] The officer then analyzed the documentary evidence filed by the applicant. The officer considered that the evidence relating to the general conditions of the country do not show that the applicant is exposed to a personalized risk in Burkina Faso. Furthermore, the officer noted that the evidence does not show that the applicant would still be sought by the authorities for the alleged events, which took place between 2008 and 2009.

[16] The officer then considered the letter from Gilles Barette, Director of Centre Afrika, and found that this letter had no probative value. The officer noted that the author of the letter lives in Canada and was not a witness to the threats against the applicant and that he did not indicate the sources of the information provided.

[17] Finally, the PRRA officer found that the applicant did not show that he is exposed to a personalized risk or that his personal situation differs from that of the other inhabitants of Burkina Faso.

IV. Statutory framework

[18] The relevant provisions of the IRPA relating to a PRRA application are the following:

Application for protection	**Demande de protection**
112. (1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).	**112**. (1) La personne se trouvant au Canada et qui n'est pas visée au paragraphe 115(1) peut, conformément aux règlements, demander la protection au ministre si elle est visée par une mesure de renvoi ayant pris effet ou nommée au certificat visé au paragraphe 77(1).
Consideration for application	**Examen de la demande**
113. Consideration of an application for protection shall be as follows:	**113**. Il est disposé de la demande comme il suit :
(*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	*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,

could not reasonably have been expected in the circumstances to have presented, at the time of the rejection;

(*b*) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;

(*c*) in the case of an applicant not described in subsection 112(3), consideration shall be on the basis of sections 96 to 98;

(*d*) in the case of an applicant described in subsection 112(3) — other than one described in subparagraph (e)(i) or (ii) — consideration shall be on the basis of the factors set out in section 97 and

(i) in the case of an applicant for protection who is inadmissible on grounds of serious criminality, whether they are a danger to the public in Canada, or

(ii) in the case of any other applicant, whether the application should be refused because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of Canada; and

(*e*) in the case of the following applicants, consideration shall be on the basis of sections 96 to 98 and subparagraph (d)(i) or (ii), as the case may be:

(i) an applicant who is

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;

b) une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;

c) s'agissant du demandeur non visé au paragraphe 112(3), sur la base des articles 96 à 98;

d) s'agissant du demandeur visé au paragraphe 112(3) — sauf celui visé au sous-alinéa e)(i) ou (ii) —, sur la base des éléments mentionnés à l'article 97 et, d'autre part :

(i) soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un danger pour le public au Canada,

(ii) soit, dans le cas de tout autre demandeur, du fait que la demande devrait être rejetée en raison de la nature et de la gravité de ses actes passés ou du danger qu'il constitue pour la sécurité du Canada;

e) s'agissant des demandeurs ci-après, sur la base des articles 96 à 98 et, selon le cas, du sous-alinéa d)(i) ou (ii) :

(i) celui qui est interdit de

determined to be inadmissible on grounds of serious criminality with respect to a conviction in Canada punishable by a maximum term of imprisonment of at least 10 years for which a term of imprisonment of less than two years — or no term of imprisonment — was imposed, and	territoire pour grande criminalité pour déclaration de culpabilité au Canada pour une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans et pour laquelle soit un emprisonnement de moins de deux ans a été infligé, soit aucune peine d'emprisonnement n'a été imposée,
(ii) an applicant who is determined to be inadmissible on grounds of serious criminality with respect to a conviction of an offence outside Canada 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, unless they are found to be a person referred to in section F of Article 1 of the Refugee Convention.	(ii) celui qui est interdit de territoire pour grande criminalité pour 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, sauf s'il a été conclu qu'il est visé à la section F de l'article premier de la Convention sur les réfugiés.

V. Issues

[19] The applicant raised three issues before the Court, reproduced below:

1. Did the officer err in law by not considering the applicant's medical condition in his PRRA, in particular regarding the presumed internal flight alternative?
2. Did the officer err in law in his analysis of the personal and documentary evidence?
3. Does the immigration officer's decision respect the fundamental rights protected by the Canadian Charter and by international law, particularly the Convention Against Torture?

[20] The Court considers that the following issue is determinative in this case: Is the PRRA officer's decision reasonable considering all of the evidence?

VI. Parties' arguments

A. *Applicant's arguments*

[21] The applicant raised three grounds in support of his application.

[22] First, the applicant alleged that the officer erred in neglecting to consider the applicant's medical evidence. The applicant states that his being HIV positive is determinative of his PRRA application and is closely related to there being no internal flight alternative in the location proposed by the RPD, which is in a rural area. The applicant alleged, first, that he risks being persecuted in the IFA location contemplated because he is HIV positive and that, second, access to health care for individuals with HIV in Burkina Faso, especially in rural areas, is minimal, even non-existent.

[23] Then, the applicant alleged that the officer neglected to consider all of the documentary evidence, including that of the existing conditions in Burkina Faso. The applicant alleged that the officer's analysis is incomplete and does not take into account the guidelines established by the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status*.

[24] Furthermore, the applicant argued that it was unreasonable for the officer to reject the letter from Gilles Barette on the ground that he lives in Canada. The applicant pointed out that

his experiences of detention, torture and escape from prison were recognized by the RPD and that Mr. Barette's opinion, including his personal experience in Burkina Faso is relevant to clear up the applicant's situation as to the possibility of his removal, merited being studied more closely.

[25] Moreover, the applicant alleged that the applicant's removal to Burkina Faso did not respect the fundamental rights protected by sections 7 and 12 of the *Canadian Charter of Rights and Freedoms*, and Canada's obligations under the standards of international law as codified in the *Geneva Convention*, the *International Covenant on Civil and Political Rights*, the *American Declaration of the Rights and Duties of Man* and the *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*.

[26] Alternatively, the applicant argued that the applicant falls under subsection 108(4) of the IRPA, which provides that refugee status is available to the applicant if he shows that he has "compelling reasons" to refuse to seek the protection of Burkina Faso. The applicant considers that the torture he experienced for four months of arbitrary detention and the fact that he was weakened by his medical condition, favour the recognition of compelling reasons in the circumstances.

B. *Respondent's arguments*

[27] The respondent argued that the PRRA officer's conclusion that the applicant falls within subparagraph 97(1)(*b*)(iv) of the IRPA, is consistent with the case law of the Federal Court and the Federal Court of Appeal (*Spooner v Canada (Minister of Citizenship and Immigration)*, 2014

FC 870 at paras 10 to 34 (*Spooner*)). The respondent pointed out that the applicant did not prove the lack of access to health care in Burkina Faso. It was to this very conclusion that Justice André F.J. Scott came on November 13, 2013, so as to dismiss the applicant's judicial stay request in a second deferral of removal request filed by the applicant (docket IMM-7113-13).

[28] As for the other evidence filed by the applicant in support of his PRRA application, it was open to the officer to consider it insufficient to show that the applicant would be personally exposed to a risk if he were to return to Burkina Faso. Among other things, the respondent pointed out that the applicant submitted no evidence in support of his claim that he would be discriminated against by his family if he were to return to his home village because he is HIV positive; therefore, the applicant cannot criticize the officer for omitting this argument. Furthermore, the applicant did not submit evidence regarding the alleged risk in Ouagadougou, the capital of Burkina Faso.

[29] Moreover, the respondent noted that it is not up to the Court to substitute its opinion for that of the officer with respect to the probative value given to the evidence considered admissible by the officer under paragraph 113(*a*) of the IRPA (*Mbaioremem v Canada (Minister of Citizenship and Immigration)*, 2013 FC 791 at paras 26 to 29 (*Mbaioremem*)).

[30] Subsequently, by relying on this Court's case law, the respondent alleged that the applicant's arguments relating to the Charter are not justified (*Spooner*, above; *Mbaioremem*, above).

[31] Moreover, the respondent pointed out that the applicant's argument regarding the compelling reasons under subsection 108(4) of the IRPA is a new argument, which cannot be raised in reply. Alternatively, the respondent argued that subsection 108(4) of the IRPA does not apply in this case since cessation of refugee protection is not at issue (*B.R. v Canada (Minister of Citizenship and Immigration)*, [2006] FCJ 337 at paras 30 and 31).

VII. Standard of review

[32] The standard of review applicable to conclusions of fact and mixed fact and law reviewed by the PRRA officer is the standard of reasonableness (*Kovacs v Canada (Minister of Citizenship and Immigration)*, [2010] FCJ 1241 at para 46; *Aleziri v Canada (Minister of Citizenship and Immigration)*, [2009] FCJ No 52 at para 11).

[33] The reasonableness of a decision is "concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at para 47 (*Dunsmuir*)).

VIII. Analysis

[34] An individual subject to a removal order can avail himself of a PRRA under subsection 112(1) of the IRPA, in compliance with Canada's domestic and international

obligations and the principle of non-refoulement (*Figurado v Canada (Solicitor General)*, [2005] FCJ 458 at para 40 (*Figurado*)).

[35] Paragraph 113(*a*) of the IRPA provides that in a PRRA, a failed refugee claimant can only present evidence that arose after his application was rejected or was not reasonably available or, if it was, that it could not reasonably have been expected in the circumstances to be presented, at the time of the rejection.

[36] The limits imposed by the admissible evidence at this stage relies on the logic that the PRRA is not an appeal of a decision of the Immigration and Refugee Board, or a *de novo* review of a refugee claim (*Mikhno v Canada (Minister of Citizenship and Immigration)*, 2010 FC 385 at para 23 (*Mikhno*); *Figurado*, above at para 52). This principle was set out by the Federal Court of Appeal in *Raza v Canada (Minister of Citizenship and Immigration)*, [2007] FCJ 1632 at paras 12 to 15):

> [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. …
>
> [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. …
>
> [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.
>
> [Emphasis added.]

[37] In this case, the reasons of the PRRA officer and the certified record reveal that the officer considered and weighed all the evidence, including the new evidence filed by the applicant.

[38] Specifically, the officer clearly sets out the reasons supporting his decision to give little or no probative value to some evidence.

[39] Among other things, it was open to the officer to find that the applicant did not show that the lack of health care in Burkina Faso stemmed from discriminatory treatment or was linked to persecution, which would have resulted in excluding the application of subparagraph 97(1)(*b*)(iv) of the IRPA. It was also open to the officer to conclude that the letter from Gilles Barette had no probative value with respect to the risks alleged by the applicant.

[40] Although the applicant disagreed with the weight given respectively to the evidence submitted, this does not render the officer's decision unreasonable. The assessment of the probative evidence in the new evidence submitted by the applicant is within the expertise of the

PRRA officer. In this view, the Court must show deference toward the officer's conclusions (*Mikhno*, above at para 27).

[41] Finally, the Court considers that the evidence in the record does not help determine Charter questions raised by the applicant (*Spooner*, above at para 29; *Covarrubias v Canada (Minister of Citizenship and Immigration)*, [2006] FCJ No 1682 at para 60).

IX. Conclusion

[42] Considering the above, the Court finds that the officer's decision is reasonable, in accordance with the principles set out by the Supreme Court of Canada in *Dunsmuir*, above.

[43] Therefore, the application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed. There is no question of general importance to certify.

OBITER

The arguments submitted to the Court by the applicant could be part of the possible submissions with respect to the humanitarian and compassionate considerations rather than the PRRA and also with respect to a future stay of removal in adjourning the stay for a determination on the applicant's current medical treatment and the need for essential medications to take, as a result of supporting objective and subjective evidence.

"Michel M.J. Shore"
Judge

Certified true translation
Catherine Jones, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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