Federal Court  Cour fédérale

Date: 20160722

Docket: IMM-127-16

Citation: 2016 FC 859

Ottawa, Ontario, July 22, 2016

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

SERHII VAKUROV

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Serhii Vakurov is a citizen of Ukraine. He has brought an application for judicial review of an adverse pre-removal risk assessment [PRRA] made by a senior immigration officer [the Officer].

[2] The Officer's initial decision was rendered on November 25, 2015, but not communicated to Mr. Vakurov until December 29, 2015. On December 24, 2015, Mr. Vakurov sent additional submissions and documents to the Officer. The Officer issued an addendum confirming her decision on January 12, 2016, which was communicated to Mr. Vakurov the following day. Mr. Vakurov says that the Officer breached his right to procedural fairness, because she provided supplementary reasons after he had commenced an application for leave and for judicial review of her initial decision.

[3] There is a difference between the issuance of supplementary reasons as a valid exercise of an officer's discretion to reconsider an initial decision, and as an illegitimate attempt to justify a poorly-crafted decision. In this case, I am satisfied that the Officer's issuance of supplemental reasons was appropriate, and did not result in a breach of procedural fairness.

[4] Mr. Vakurov has not challenged the Officer's decision on any other ground, and the application for judicial review is therefore dismissed.

II. Background

[5] Mr. Vakurov arrived in Canada on February 23, 2011 with a valid study permit. He maintained this status until April 20, 2013, and then chose to remain in Canada without authorization.

[6] On October 2, 2015, Citizenship and Immigration Canada issued an exclusion order against Mr. Vakurov pursuant to s 44(1) of the Immigration and Refugee Protection Act,

SC 2001, c 27 [IRPA]. On the same day, Mr. Vakurov was served with an Interpol arrest warrant at the Ottawa Police Station. He was subsequently brought to the Ottawa Carleton Detention Centre where he was held until October 16, 2015.

[7] On October 19, 2015, Mr. Vakurov requested a PRRA. His supporting documentation was due on November 2, 2015. In his written submissions, Mr. Vakurov alleged that he was a wealthy entrepreneur who was the victim of government corruption in Ukraine. He claimed that incriminating documents had been forged in an attempt to have him arrested and prosecuted. He said that corrupt officials were plotting against him, and had threatened his lawyer in Ukraine. He also alleged that these same officials had assaulted members of his family.

[8] Mr. Vakurov submitted the following documentation in support of his application: (1) a "Notification of Suspicion" [Notification], which stated that he was suspected of various crimes in Ukraine, including fraud, misappropriation, embezzlement, forgery, and abuse of authority in connection with his former position as the head of a credit union committee; (2) his Ukrainian passport; (3) a letter from his lawyer in Ukraine; and (4) country condition reports confirming state corruption in Ukraine.

[9] According to the Officer's affidavit, she rendered her initial adverse decision regarding Mr. Vakurov's PRRA on November 25, 2015, but it was not delivered to Mr. Vakurov until December 29, 2015. The Officer determined that Mr. Vakurov was neither a Convention refugee nor a person in need of protection pursuant to ss 96 and 97 of the IRPA. She accepted, based on the country condition reports, that there is government corruption in Ukraine. However, she

concluded that the Notification, together with the letter from Mr. Vakurov's lawyer in Ukraine, were insufficient to show that corrupt officials were targeting Mr. Vakurov in an attempt to seize his wealth. The Officer noted that Mr. Vakurov was acquitted of the allegedly false charges that were brought against him.

[10] On December 24, 2015, five days before he received the Officer's initial decision, Mr. Vakurov sent further submissions and additional documents to the Officer. These were: (1) a letter from his former common law spouse in Ukraine, stating that she and their three children had received threats from Mr. Vakurov's persecutors, and the children had been forced to change schools; (2) certificates from the children's schools; (3) a letter from a Canadian-born woman living in Ukraine, who claimed to have witnessed the threats against Mr. Vakurov and his family in Ukraine; and (4) the results of a 2013 bodybuilding competition in which Mr. Vakurov was a participant, and which identified his place of residence as Ontario, Canada.

[11] On December 29, 2015, the same day that he received the Officer's initial adverse decision regarding his PRRA, Mr. Vakurov was detained by the Canada Border Services Agency [CBSA]. While in detention, Mr. Vakurov complained that the Officer's initial decision did not address the additional submissions and documents he had provided. He was informed by his counsel that he should expect to receive an addendum to the initial decision, and was advised to await the Officer's supplementary reasons before filing an application for leave and for judicial review.

[12] On January 5, 2016, Mr. Vakurov once again provided his additional submissions and documents to the Officer. During a detention review hearing on January 7, 2016, the CBSA informed Mr. Vakurov that his removal from Canada had been scheduled for January 15, 2016. Given his pending removal, he decided not to wait for the Officer's addendum to the decision. Instead, on January 8, 2016, he filed an application for leave and for judicial review of the initial adverse PRRA decision. He argued that the Officer had breached procedural fairness by failing to consider his additional submissions and documents. He sought and obtained a stay of removal from this Court pending the determination of his application for leave and for judicial review.

[13] On January 13, 2016, the Officer provided Mr. Vakurov with the addendum to the initial adverse decision regarding his PRRA, in which she addressed the additional submissions and documents he had sent on December 24, 2015 and January 5, 2016.

[14] According to the Officer's affidavit, Mr. Vakurov's additional submissions and documents were not matched to his file until January 6, 2016, when the Officer was away for the holiday season. The Officer was made aware of Mr. Vakurov's additional submissions and documents when she returned to work on January 11, 2016. She issued the addendum to the initial decision the following day. The Officer was aware that Mr. Vakurov had filed an application for leave and for judicial review of her initial decision, but she did not know the grounds on which he relied.

[15] In her supplementary reasons, the Officer considered the letter from Mr. Vakurov's former common law spouse. She accepted that the former spouse and children had been

threatened in Ukraine, and that the children had changed schools as a result. However, the Officer found that this was not sufficient to prove that corrupt officials had brought false charges against Mr. Vakurov in an attempt to seize his wealth. The Officer acknowledged that Mr. Vakurov's former spouse had sought police protection, and had been told that the police could not arrest anyone based on the information she had provided, but would initiate an investigation if the threats ever materialized. Based on these facts, and Mr. Vakurov's acquittal of the allegedly false charges that had been brought against him, the Officer determined that the presumption of adequate state protection had not been rebutted.

III. Issue

[16] The sole issue raised by this application for judicial review is whether the Officer breached the duty of procedural fairness by issuing supplementary reasons after Mr. Vakurov had commenced an application for leave and for judicial review of her initial decision.

IV. Analysis

[17] The parties agree that questions of procedural fairness are subject to review by this Court against the standard of correctness (Canada (Minister of Citizenship and Immigration) v Khosa, 2009 SCC 12; Arango v Canada (Minister of Citizenship and Immigration), 2014 FC 370 at para 8 [Arango], aff'd 2015 FCA 10 [Arango FCA]).

[18] Mr. Vakurov does not argue that the Officer was functus officio when she issued her supplementary reasons. Nor does he allege that the Officer's supplementary reasons gave rise to a reasonable apprehension of bias. He says only that the Officer's addendum improperly

undermined the grounds of his application for leave and for judicial review of the initial decision, created inefficiency, and potentially brought the administration of justice into disrepute.

[19] Mr. Vakurov relies on an unreported decision of this Court, in which Justice Martineau held that a PRRA officer had breached an applicant's right to procedural fairness by unilaterally amending the original decision after an application for leave and for judicial review had been commenced (Théophile Mbonabuca et al v Canada (Minister of Citizenship and Immigration), January 14, 2016, Court File No IMM-1823-15 [Mbonabuca]). Justice Martineau found that the unilateral amendment of the initial decision caused prejudice to the applicant and was therefore procedurally unfair. He concluded that the officer's decision could not be saved on the grounds that it might be reasonable, or the same decision might be made again if the matter were reconsidered by a different officer.

[20] Mbonabuca may be distinguished from the present case. Mbonabuca involved a unilateral amendment of a decision by a PRRA officer. Here, the Officer issued supplementary reasons in response to the additional submissions and documents provided by Mr. Vakurov after the deadline had passed.

[21] In my view, this case is analogous to Arango. As in this case, in Arango, a PRRA officer issued supplemental reasons for an adverse PRRA decision after an application for leave and for judicial review of the initial decision had been commenced. The applicant claimed that the issuance of the officer's supplemental reasons usurped the jurisdiction of the Federal Court. Justice Barnes disagreed:

> [15] It seems incongruous to me that an applicant can submit materials late and then expect that the original decision be judicially reviewed as though the content of the new material was constructively known to the decision-maker but ignored. The logic of this argument escapes me. I also do not see how the process that was followed creates any unfairness for [the applicant] such that he can demand that everything be redone by someone new. His new materials were fully considered and the Officer reasonably found them to be unpersuasive. His fairness argument thus rests solely on the technical pillar of the doctrine of *functus officio*.

[22] On appeal, the Federal Court of Appeal confirmed that a PRRA officer may revisit a final decision in appropriate circumstances, because the doctrine of functus officio does not strictly apply in non-adjudicative administrative proceedings (Arango FCA at para 15).

[23] Moreover, as Justice Hughes held in Chudal v Canada (Minister of Citizenship and Immigration), 2005 FC 1073 at paragraph 19), a PRRA officer has an "obligation to receive all evidence which may affect the decision until the time the decision is made". The decision is made when it is delivered to the applicant (Ayikeze v Canada (Minister of Citizenship and Immigration), 2012 FC 1395 at para 16; Avouampo v Canada (Minister of Citizenship and Immigration), 2014 FC 1239 at para 21).

[24] The Officer considered Mr. Vakurov's late submissions at the first possible opportunity. According to the Officer's affidavit, she was not aware of the grounds upon which Mr. Vakurov had sought judicial review of her initial decision. There is nothing to suggest the Officer's decision was made in bad faith, or that the addendum was an ex post facto attempt "to remedy the evident breach of procedural fairness", as argued by Mr. Vakurov. Moreover, Mr. Vakurov

has not demonstrated that he suffered any prejudice as a result of the Officer's decision to consider his additional submissions and documents, as he had requested.

[25] Pursuant to Arango, an officer's decision to issue supplementary reasons to address additional submissions or documents does not, in itself, constitute a breach of procedural fairness, even if an application for leave and for judicial review of the initial decision has been commenced. The Court must consider whether this was a valid exercise of the officer's discretion to reconsider an initial decision, as opposed to an illegitimate attempt to justify a poorly-crafted decision (Arango at para 18; Sellathurai v Canada (Minister of Public Safety and Emergency Preparedness), 2008 FCA 255 at paras 46-47). In this case, it was the former.

[26] Mr. Vakurov has not challenged the Officer's decision on any other ground, and the application for judicial review is therefore dismissed.

V. Certified Question

[27] Mr. Vakurov says that the principle articulated in Justice Martineau's unreported decision in Mbonabuca is worthy of further development and broader application. He acknowledges that he is trying to "push the law" in this area, but he says this is warranted by the need for efficiency and the interests of justice.

[28] In my view, the applicable law is clearly stated in Justice Barnes' decision in Arango and the Federal Court of Appeal's confirmation of that decision. This is not an appropriate case in which to certify a question for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

No question is certified for appeal.

"Simon Fothergill"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-127-16
STYLE OF CAUSE:	SERHII VAKUROV v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JULY 5, 2016
JUDGMENT AND REASONS:	FOTHERGILL J.
DATED:	JULY 22, 2016

APPEARANCES:

Adolfo Morais	FOR THE APPLICANT
Orlagh O'Kelly	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Workable Immigration Solutions Barristers and Solicitors Ottawa, Ontario	FOR THE APPLICANT
William F. Pentney, Q.C. Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT