Date: 20090127

Docket: IMM-5039-08

Citation: 2009 FC 84

Ottawa, Ontario, January 27, 2009

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

AISSATOU DIALLO
RAMATOULAYE KABA
DJIBRIL KABA

Applicants

and

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

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] In the present matter, the evidence submitted in support of the Applicants' Pre-Removal Risk Assessment (PRRA) application had either already been considered by the Refugee Protection Division (RPD) or could reasonably have been expected in the circumstances to have been presented to the RPD in the context of the refugee claim.

[2] This Court has already held that such evidence is not "new" and must be rejected even if it would have contradicted a credibility finding made by the RPD:

> [17] The Officer rejected much of the evidence filed because it did not qualify as "new evidence". The Applicants assert that much of the rejected evidence contradicts the credibility finding – a finding of fact – of the RPD. This is one of the grounds, the Applicants submit, upon which evidence ought to be admitted as "new", as found in *Raza*, above, at paragraph 13(3)(*c*).
>
> [18] In my view, the Applicants have misapplied the Court of Appeal decision in *Raza*. I do not read the decision and, in particular paragraph 13, as a statement to the effect that, if any one of the questions posed can be answered in the positive, the evidence is "new". As noted in paragraph 15 of *Raza* decision, evidence must be considered "unless it is excluded on one of the grounds stated in paragraph [13] above". Thus, if the "new" evidence could have been presented at the RPD hearing, then s. 113(*a*) requires that such evidence be rejected, even if it contradicts a finding of fact by the RPD. This is reinforced by paragraph 13(5)(*a*) of the *Raza* decision.

(*Mooketsi v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1401).

[3] In *Raza v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385, 162 A.C.W.S. (3d) 1013, the Federal Court of Appeal clarifies the notion of "new evidence" that may be considered on a PRRA application and states that a negative RPD decision 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".

[4] In light of the above, the PRRA Officer committed no reviewable error in rejecting the Applicants' PRRA application for failure to submit new evidence, there was no requirement to hold an oral hearing and the PRRA Officer's reasons are sufficient in the circumstances of this case.

II. Facts

[5] The principal Applicant, Ms. Aissatou Diallo and her adult daughter, Ms. Ramatoulaye Kaba, are citizens of Guinea while the minor child, Djibril Kaba, is a citizen of the United States.

[6] On August 4, 2005, the Applicants came to Canada from the United States, where they had been living since 1991, and claimed refugee protection.

[7] The Applicants based their claim to refugee protection on the contention that the principal Applicant is a lesbian and that her adult daughter would be forced into an arranged marriage with a sixty-year-old man.

[8] On October 25, 2007, the RPD of the Immigration and Refugee Board (Board) determined that the Applicants were not Convention refugees or persons in need of protection due to the overall lack of credibility of their claim.

[9] On March 25, 2008, the Federal Court denied the Applicants' application for leave and for judicial review regarding the RPD's decision to deny their claim to refugee protection.

[10] On January 25, 2008, the Applicants made a PRRA application on the same grounds as those raised in their claim to refugee protection.

[11] The PRRA Officer rejected the Applicants' application for protection because no new evidence was submitted in support of their application. The documents annexed to the Applicants' PRRA submissions had already been considered by the RPD in the context of their claim to refugee protection and the subsequently submitted letters and affidavit, which post-dated the RPD decision,

did not meet the definition of new evidence because they did not reveal new facts and could reasonably be expected to have been submitted to the RPD in support of the refugee claim.

[12] The PRRA Officer also considered the documentary evidence on country conditions in Guinea, noted that improvements were made in the area of human rights, acknowledged that certain problems persisted in the area of human rights and concluded that the Applicants had failed to establish a well founded fear of persecution or a risk of torture, threat to life or cruel or unusual treatment or punishment in the event of their return to that country.

[13] On November 14, 2008, the Applicants filed an application for leave and for judicial review of the negative PRRA decision. The present motion for a stay of removal is made ancillary to that application.

III. Issue

[14] Have the Applicants failed to meet the tri-partite test for warranting a stay of their removal given the lack of a serious issue, the absence of demonstrable proof of irreparable harm, and the balance of convenience favouring the Minister?

IV. Analysis

The test for granting a stay

[15] The Supreme Court of Canada has established a tri-partite test for determining whether interlocutory injunctions should be granted pending a determination of a case on its merits, namely, (i) whether there is a serious question to be tried; (ii) whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm; and (iii) the balance of convenience, in terms of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction pending a decision on the merits. The Applicants must satisfy all three branches of the test before this Court can grant a stay of proceedings (*Toth v. Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302 11 A.C.W.S. (3d) 440 (F.C.A.); *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 46 A.C.W.S. (3d) 40).

(i) Serious Issue

[16] The Applicants allege that the PRRA Officer erred by failing to grant them an oral hearing, by arriving at unreasonable conclusions and by failing to provide sufficient reasons.

[17] The PRRA Officer reviewed the decision of the RPD, the Applicants' PRRA submissions and the "new" evidence provided by the Applicants in addition to relevant documentary evidence. The PRRA Officer found the existence of no new evidence as required by subsection 113(*a*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA).

[18] Subsection 113(*a*) of the IRPA stipulates that a PRRA application is to be conducted on the basis of **only new evidence** that arose after the rejection of the Applicants' refugee claim, was not

reasonably available or could not reasonable have been expected to be presented in the circumstances:

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

[19] In the event that the new evidence referred to in paragraph 113(*a*) of the IRPA raises a serious issue of the applicant's credibility, is central to the decision and would justify allowing the application for protection, a hearing is required to be held:

167. For the purpose of determining whether a hearing is required under paragraph 113(*b*) of the Act, the factors are the following:	**167.** Pour l'application de l'alinéa 113*b*) 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

[20] As the PRRA Officer found the existence of no evidence that met the definition of "new" evidence, the legislative criteria relating to the holding of a hearing in the context of a PRRA application were not met and there was consequently no duty to hold an oral hearing in the circumstances of this case.

[21] In *Raza*, above, the Federal Court of Appeal clarifies the notion of "new evidence" that may be considered on a PRRA application and states that a negative RPD decision 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".

[22] In the present matter, the evidence submitted in support of the Applicants' PRRA application had either already been considered by the RPD or could reasonably have been expected in the circumstances to have been presented to the RPD in the context of the refugee claim.

[23] This Court has already held that such evidence is not "new" and must be rejected even if it would have contradicted a credibility finding made by the RPD:

> [17] The Officer rejected much of the evidence filed because it did not qualify as "new evidence". The Applicants assert that much of the rejected evidence contradicts the credibility finding – a finding of fact – of the RPD. This is one of the grounds, the Applicants submit, upon which evidence ought to be admitted as "new", as found in *Raza*, above, at paragraph 13(3)(*c*).
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> [18] In my view, the Applicants have misapplied the Court of Appeal decision in *Raza*. I do not read the decision and, in particular paragraph 13, as a statement to the effect that, if any one of the questions posed can be answered in the positive, the evidence is "new". As noted in paragraph 15 of *Raza* decision, evidence must be considered "unless it is excluded on one of the grounds stated in paragraph [13] above". Thus, if the "new" evidence could have been presented at the RPD hearing, then s. 113(*a*) requires that such evidence be rejected, even if it contradicts a finding of fact by the RPD. This is reinforced by paragraph 13(5)(*a*) of the *Raza* decision.

(*Mooketsi*, above).

[24] In light of the above, the PRRA Officer committed no reviewable error in rejecting the Applicants' PRRA application for failure to submit new evidence, there was no requirement to hold an oral hearing and the PRRA Officer's reasons are sufficient in the circumstances of this case.

(ii) Irreparable Harm

[25] The Applicants have not met the second part of the tri-partite test, namely, demonstrable proof of irreparable harm.

[26] This Court has held that irreparable harm is a strict test in which **serious likelihood or jeopardy to the applicant's life or safety** must be demonstrated. The unsubstantiated risk identified by the Applicants does not meet this threshold (*Frankowski v. Canada (Minister of Citizenship and Immigration)* (2000), 98 A.C.W.S. (3d) 641, [2000] F.C.J. No. 935 (QL) at para. 7).

[27] Irreparable harm must not be speculative nor can it be based on a series of possibilities. The Court must be satisfied that the irreparable harm **will** occur if the relief sought is not granted (*Atakora v. Canada 9Minister of Employment and Immigration)* (1993), 68 F.T.R. 122, 42 A.C.W.S. (3d) 486 (F.C.T.D.) at para. 11).

[28] The only requirement at this time is that the Applicants return to the United States. There has been no risk identified by the Applicants in respect of the United States. Irreparable harm must be evaluated in relation to the country to which the Minister proposes to return an individual. There is no irreparable harm in the case at bar, given that the Applicants are being removed to the United States (*Radji v. Canada (Minister of Citizenship and Immigration),* 2007 FC 100, 308 F.T.R. 175 at paras. 41 and 42).

[29] The Federal Court of Appeal has found that the United States institutions have democratic systems of checks and balances, an independent judiciary and constitutional guarantees of due process. There is no irreparable harm arising should the Applicants engage the American immigration system. The Applicants will have access to that country's removal process, and any other relevant immigration processes (*Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 17, 157 A.C.W.S. (3d) 153 at para. 46; *Mughal v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 970, 160 A.C.W.S. (3d) 842 at para. 16; *Lakha v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1204, [2008] F.C.J. No. 1633 (QL); *Qureshi v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 97, 155 A.C.W.S (3d) 910 at paras. 1 and 22; *Hisseine v. Canada (Minister of Citizenship and Immigration),* 2005 FC

388, 138 A.C.W.S. (3d) 144 at para. 8; *Joao v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 880, 140 A.C.W.S. 93d) 533 at para. 10; *Mikhailov v. Canada (Minister of Citizenship and Immigration)* (2000) 191 F.T.R. 1, 97 A.C.W.S. (3d) 727 at paras. 11–12 (T.D.); *Akyol v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 931, 124 A.C.W.S. (3d) 1119 at para. 10).

[30] Moreover, the case law of this Court has on many occasions held that a removal to the United States, with potential removal from there to one's country of origin, does not constitute irreparable harm (*Haddad v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 405 124 A.C.W.S. (3d) 336 (T.D.) at para. 10; *Rahim v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 130, 103 A.C.W.S. (3d) 789 (T.D.), at para. 9; *Anand v. Canada (Minister of Citizenship and Immigration),* 2001 FCT 1283, 110 A.C.W.S. (3d) 340 (T.D.) at para. 8; *Nabut v. Canada (Minister of Citizenship and Immigration),* 2001 FCT 1392, 110 A.C.W.S. (3d) 1101 (T.D.); *Aquila v. Canada (Minister of Citizenship and Immigration)* (2000) 94 A.C.W.S. (3d) 960, [2000] F.C.J. No. 36 (T.D.) (QL) at para. 15; *Akyol*, above at para. 7; *Chen v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 464, 205 F.T.R. 285).

[31] In any event, even if the Applicants were to be returned to Guinea by the American authorities, the risk that the Applicants allege there has already been assessed by the RPD, (leave denied by this Court), and by the PRRA Officer. The allegations of risk are essentially the same as those considered previously.

[32] Neither the RPD nor the PRRA Officer who rendered the PRRA decision was satisfied that the Applicants were personally at risk. Leave to judicially review the RPD decision was dismissed. Accordingly, irreparable harm has not been established on the grounds of any alleged personal risk. The risks claimed by the Applicants, which have already been reasonably considered, cannot now serve as a basis for alleging irreparable harm (*Salman v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 507, 106 A.C.W.S. (3d) 121 at para. 6; *Daniel v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 392, 156 A.C.W.S. (3d) 1144 at para. 27).

[33] This Court has repeatedly held that a risk rejected by the RPD and a PRRA Officer cannot serve as a basis for supporting irreparable harm in a stay application (*Joao*, above at para. 11; *Akyol*, above).

[34] Furthermore, disruption of education does not constitute irreparable harm. As stated by Justice Marc Nadon: "leaving school before the completion of the school year will no doubt be highly inconvenient and will most likely necessitate the redoing of their school year. However, this does not constitute irreparable harm." (*Mahadeo v. Canada (Minister of Citizenship and Immigration)* (1999) 166 F.T.R. 315, 86 A.C.W.S. (3d) 773 (T.D.) at para. 6; *Strachan v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 267, 84 A.C.W.S. (3d) 545 (T.D.) at para. 24).

[35] Thus, the Applicants have failed to establish irreparable harm due to their removal to the United States.

(iii) Balance of Convenience

[36] The Applicants have not met the third aspect of the tri-partite test, insofar as the balance of convenience favours the Minister.

[37] In addition, with respect to the risk determination process, as Justice Donna McGillis stated, in *Sinnappu v. Canada (Minister of Citizenship and Immigration)*, [1997] 2 F.C. 791, 126 F.T.R. 29 (T.D.): “it must be recognized that, at some point in the system, there has to be finality.”

[38] Where the applicant has had the benefit of a refugee determination and a risk assessment in similar cases, this Court has held that the balance of convenience lies with the Minister (*Ayub v. Canada (Solicitor General)*, 2006 FC 147, 145 A.C.W.S. (3d) 1122 at para.6; *Chen v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1424, 134 A.C.W.S. (3d) 681; *Park Lee v. M.C.I.* (IMM-1122-05, IMM-1182-05), 28 February 2005 per Justice Judith Snider).

[39] The balance of any inconvenience which the Applicants may suffer as a result of their removal from Canada does not outweigh the public interest which the Minister seeks to maintain in the application of the IRPA, specifically the Minister’s interest in executing deportation orders as soon as reasonably practicable.

[40] There is no statutory provision for a stay pending the review of a PRRA decision. This indicates that Parliament intended that failed PRRA applicants could be removed prior to their judicial review application being determined. This is consistent with the Minister’s duty to execute

removal orders as soon as reasonably practicable (*Immigration and Refugee Protection Regulations*, SOR/2002-227, sections 231 and 232; *Golubyev v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 394, 156 A.C.W.S. (3d) 1147).

JUDGMENT

THIS COURT ORDERS that the Applicants' motion for a stay of their removal be dismissed.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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