Federal Court  Cour fédérale

Date: 20100202

Docket: IMM-1191-09

Citation: 2010 FC 113

Ottawa, Ontario, February 2, 2010

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

GHEORCHE CALIN LUPSA

Applicant

and

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

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction and background

[1] This application for judicial review filed by Mr. Lupsa, a citizen of Romania, pertains to the decision, dated February 5, 2009, denying his second pre-removal risk assessment (PRRA) application (the decision). My colleague, Justice Beaudry, on April 6, 2009, dismissed his motion for a stay of removal, being of the view that no serious issue against the decision had been

demonstrated. However, Mr. Lupsa remained in Canada following the granting of an administrative stay by the Minister based on medical evidence of his inability to travel.

[2] Hiding in a ship's container, Mr. Lupsa arrived in Canada in 1992. His efforts to remain here are numerous. I will summarize them briefly:

1) Refugee claim denied in 1993 but decision overturned on consent of the parties on February 18, 1994, by a judge of this Court before the judicial review could be heard (see Docket No. IMM-2006-93). A hearing *de novo* was not held before the Refugee Division (the Division) given the applicant's absence. In 1996, the Division deemed his claim for refugee protection to be abandoned.

2) Two applications for permanent residence were rejected; the first, in 2000, on grounds of medical inadmissibility and the second, in 2004, for inadmissibility on grounds of serious criminality.

3) In July 2005, he filed his first PRRA application, which was rejected in February 2006, as well as his application for judicial review of that decision. In her judgment dated March 14, 2007 (see: *Lupsa v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 311), my colleague Justice Tremblay-Lamer found that the evidence before her was insufficient to establish that he was wanted by the authorities in his country on charges of sedition under article 155 of the Romanian Penal Code. However, in her reasons, she indicated that the claimant could make another PRRA application in order to assess

evidence which had not been before the PRRA officer in February 2006, but which had been submitted to the Court when a stay motion was granted.

4) On May 18, 2006, he applied for an exemption on humanitarian and compassionate grounds under section 25 of the *Immigration and Refugee Protection Act* (IRPA) on the basis of his experiences in Romania from 1981 to 1982, his fragile health, his 1999 marriage to Sabina Aldea, the best interests of his two children, his rehabilitation and his establishment in Canada. On January 12, 2009, the Minister's Delegate refused the exemption after weighing the nature of his criminal activities, the risk of reoffending, his family in Canada and abroad, the best interests of the children, his establishment in Canada, the current conditions in Romania, including the fact that the ruling party in Romania has changed significantly since 1992, especially since 2004, and the medical services in that country. The Minister's Delegate was of the opinion that humanitarian considerations did not outweigh the finding of inadmissibility on grounds of serious criminality. According to the Delegate, ''[t]he positive factors in this case simply do not counterbalance these grim facts sufficiently…''. On October 16, 2009, my colleague Justice Shore dismissed the judicial review of that decision (see: *Lupsa v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1054).

5) In October 2007, the applicant filed a second PRRA application, essentially citing the same facts and risks as those submitted and assessed in his first PRRA application, with the addition of new pieces of evidence, in particular, the following exhibits:

- P-3 Notice to appear at the police station in the municipality of Alba Iulia dated January 26, 1990, requiring him to appear on January 28, 1990, for an offence under article 155 of the Penal Code (P.C.) of Romania.

- P-4 Copy of a handwritten notice to appear dated 26-06-1990 issued by the police requiring him to appear on July 1, 1990, to shed light on his situation in accordance with article 155 P.C.

- P-5 Handwritten letter dated 16.11.1994, written in Romanian, with a partial translation into French.

- P-6 ‘‘Partidul National Liberal’’ membership card, not translated.

- P-7 Invitation to a National Liberal Party meeting on September 3, 1990.

- P-16 Copy of two handwritten statements: one dated 03.08.2006 from his sister Luput Manuela, and the other, dated 26.07.06, from a certain ‘‘Habian Miela’’.

The panel’s decision

[3] After having listed the facts in support of the alleged risks (risk of arrest and of persecution by Romanian authorities for seditious acts, punishable by 15 to 25 years of imprisonment and risks of persecution based on his political opinion), PRRA Officer Dostie (the officer) wrote:

[TRANSLATION]

> The risks cited in this application as well as the facts presented are essentially the same as those submitted and assessed in the first PRRA application. At the time of the first application, some pieces of evidence were not available. This application has therefore been made in order to have an assessment of the various pieces of evidence that were unavailable at the time of the first application. [Emphasis added.]

[4] The officer indicated that among the many exhibits submitted by the applicant's counsel, [TRANSLATION] ''particular attention would be given to certain pieces of evidence, given their connection to the applicant's personal situation and the fact that this evidence was not available at the time of the previous application''.

[5] She began by assessing Exhibits P-3 and P-4, the notices to appear issued by the police; she dismissed them, being of the view that

> [TRANSLATION]
>
> [n]otwithstanding the foregoing, for the purposes of this application, I find the issue has less to do with determining whether the applicant was summoned by the municipal police of Alba Iulia regarding seditious acts, almost twenty years ago, and more to do with establishing whether these elements would still be a source of risk to the applicant should he return to Romania, if the applicant is still considered to be a person of interest to the authorities in his country. [Emphasis added.]

[6] On this point, she found that [TRANSLATION] ''[T]he assessment of the evidence, including the sequence of various events between the first notice in January 1990 and his leaving Romania in 1992, do not support such conclusions''.

[7] Notwithstanding Mr. Lupsa's claim that he had been arrested several times between January 1990 and when he left Romania in 1992, the officer found that he was no longer a person of interest to the authorities, for the following reasons: (1) he has never been charged with seditious acts; (2) while the authorities would be able to find him easily, they have not pursued him; (3) he has not submitted any evidence proving that he had been arrested and detained on several occasions; (4) in July 1992, over seven months after having obtained his passport from these same authorities and more that two years after the notices to appear, he left Romania legally; and, (5) the information in his docket fails to explain why the police would summon him repeatedly without pursuing the matter further.

[8] The officer was therefore not satisfied that the evidence submitted by Mr. Lupsa proved that the authorities were still after him.

[9] As for his mother's letter written in November 1994, the officer noted that: (1) the letter is only partially translated; (2) it is the only letter from his mother in the record; (3) it does not appear that the police were harassing her as retaliation against him; and, (4) the letter, written almost 15 years ago and two years after he left, does not objectively establish that the police are still after her son.

[10] The officer arrived at the same conclusion with regard to his sister's letter: (1) it is her only statement; (2) the letter was written more that 14 years after he left; (3) no threats by the authorities were issued against him; (4) she had not been bothered by the authorities; and, (5) the last event described in the letter occurred 8 months prior to her statement.

[11] The same reasoning was applied to Ms. Mirela's letter dated July 14, 2006. The officer was of the view that the letter fails to show any link between Ms. Mirela and the applicant other than the fact that she purchased the family home. According to the officer, it is not plausible that the Romanian police would repeatedly question this person about the applicant's whereabouts.

[12] Furthermore, the officer considered another factor in her analysis:

> [TRANSLATION]
> Other than these statements, two of which are from members of his family, there is a notable lack of any piece of evidence such as an arrest warrant, a notice to appear in court or other documents that would establish in any objective way that the applicant was being sought by the authorities. There is also a lack of evidence with regard to the multiple arrests and convictions the applicant alleges to have been a victim of between 1990 and when he left Romania in 1992.
>
> Given the foregoing, I give little weight to this evidence, which I consider to be self-serving. [Emphasis added.]

[13] The applicant also alleged that if he were to return to Romania he would face risks on account of his political opinion and, in support of this allegation, submitted as evidence his National Liberal Party (NLP) membership card and an invitation, dated September 30, 1990, to one of their meetings. According to the officer, other than these documents, P-6 and P-7, there is very little evidence in his file establishing his political involvement. She noted that, after the fall of Ceausescu in 1989, the NLP was reorganized and has been part of the government since 1991. In 2004, its leader was elected Prime Minister.

[14] Regarding the alleged risks linked to his political opinion the officer found the following:

> [TRANSLATION]

> As is shown in the documentary evidence, since Ceausescu's fall in 1989, there are several political parties in Romania and they are lawful participants in the government. Romania is a constitutional democracy and, despite reports of some irregularities, the last general election was considered to have been free and fair. Since the applicant left Romania in 1992, many significant changes have occurred, not the least of which was the country's entry into the European Union in January 2007. In spite of the continuing presence of several societal problems such as corruption, as illustrated by the documentary evidence submitted by the applicant's counsel, the country's entry into the European Union has helped promote the establishment of a democratic society founded on the rule of law and continues to do so today. After reviewing the evidence, I find that the applicant has failed to discharge his burden of establishing to my satisfaction the existence of personal risks based on his political opinion. [Emphasis added.]

Analysis

a) The applicant's claims

[15] Lupsa's counsel raised the following arguments against the decision:

1) That the officer disregarded or excluded relevant evidence. Specifically, she failed to take into account evidence prior to 1990 regarding the history of persecution of his father, of his mother and of himself. She therefore argued that the officer failed to assess his personal situation. She cited *Galan v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 749 and *Bengabo v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 186.

2) That the officer also disregarded some recent evidence, including the reopening of the investigation into the death of General Nuta.

3) That the officer failed to comply with section 167 of the *Immigration and Refugee Protection Regulations* (IRPR) when she determined that Mr. Lupsa lacked credibility without having called him to a hearing.

4) That the officer should have applied subsection 108(4) of the IRPA because of the events experienced by Mr. Lupsa between 1981 and 1992.

b) Standard of review

[16] In my view the submissions by the Minister's counsel regarding the standard of review are well founded in light of the Supreme Court of Canada decisions in *Dunsmuir v. New Brunswick*, 2008 SCC 9 (*Dunsmuir*) and in *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (*Khosa*). The officer's decision must be reasonable but the reasonableness of the risk assessment calls for great deference since it rests essentially on an assessment of the facts.

[17] In *Khosa*, Justice Binnie, writing for the majority, outlined Parliament's intent with regard to paragraph 18.1(4)(*d*) of the *Federal Courts Act*, which allows this Court to set aside a decision of a federal tribunal if such a decision is based ''on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it''. He is of the opinion that this paragraph does not represent a standard of review legislated by Parliament but rather a ground for review. He adds the following at paragraph 46 of his reasons:

> **46** More generally, it is clear from s. 18.1(4)(*d*) that Parliament intended administrative fact finding to command a high degree of deference. This is quite consistent with *Dunsmuir*. It provides legislative precision to the reasonableness standard of review of

> factual issues in cases falling under the *Federal Courts Act*.
> [Emphasis added.]

[18] However, issues relating to the application of subsection 108(4) of the IRPA and section 167 of the IRPR must be reviewed on a correctness standard because they raise questions of mixed law and fact.

c) Certain principles

[19] Justice Sharlow of the Federal Court of Appeal in *Raza et al v. The Minister of Citizenship and Immigration et al*, 2007 FCA 385 set out certain principles with regard to the statutory scheme regarding pre-removal risk assessments under the IRPA (the scheme). This scheme needs to be analyzed to find out whether section 96 (refugee claim) or section 97 (claim for protection) of the IRPA applies to this case.

[20] The purpose of the scheme is found in Canada's domestic and international commitments to the principle of non-refoulement, which holds that refugee claimants 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. [Emphasis added.]

[21] A PRRA application by a failed refugee claimant is not an appeal or reconsideration of the decision of the Refugee Division; however, according to the judge: ''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.''

[22] At paragraph 13 of her reasons in *Raza*, Justice Sharlow wrote:

> [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?
>
> b) proving a fact that was unknown to the refugee claimant at the time of the RPD hearing?
>
> 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). [Emphasis added.]

d) Applicability in this case

[23] In the present case, this is not a case of a claimant who was rejected by the Refugee Division. In fact, that negative decision was reversed by Justice Strayer in 1994 and his refugee protection claim was referred back to the Refugee Division for redetermination. However, the applicant failed to show up for the hearing, prompting the Division to deem his claim for refugee protection abandoned.

[24] The applicant, however, is now in a similar situation, considering that on February 10, 2006, Officer Lajoie rejected his first PRRA application. A reading of Officer Lajoie's decision shows that he was very familiar with the applicant's history, especially the facts relating to the period between 1981 and 1992. These facts are described in pages 2 and 3 of his decision. The decision was upheld by my colleague Justice Tremblay-Lamer, in *Lupsa*, dated March 22, 2007. She dismissed his application for judicial review, being of the opinion that Officer Lajoie ''made no reviewable error in concluding that he did not have sufficient evidence before him to find that the applicant would face personalized risks if he were to return to his country''. She nonetheless added the following:

> **29** With regard to the evidence that was not before the PRRA officer and that the applicant filed on his stay motion, I note that the applicant could always file a second application for protection under section 165 of the Immigration and Refugee Protection Regulations, SOR/2002-227, if he considers it advisable to have this new evidence assessed.

[25] Justice Beaudry had an opportunity to review the outcome of Mr. Lupsa's second PRRA application. He was of the view that the officer had asked herself the right question when she considered that the issue had [TRANSLATION] ''less to do with determining whether the applicant was summoned by the municipal police of Alba Iulia regarding seditious acts almost twenty years ago, and more to do with establishing whether these elements would still be a source of risk to the applicant should he return to Romania, if the applicant is still considered to be a person of interest to the authorities in his country''. In my view, the officer considered the existence of the notices to appear to be an established fact during her assessment.

[26] Moreover, on January 12, 2009, the Minister's Delegate refused Mr. Lupsa's application for an exemption under section 25 of the IRPA to allow him to remain in Canada, notwithstanding his inadmissibility. In particular, I note that the Minister's Delegate had before her the same Exhibits P-1 and P-2 which had been before the officer and myself. Justice Shore dismissed the application for judicial review. He found that Mr. Lupsa had not demonstrated the existence of an unreasonable error in the impugned decision before him, including the assessment of the risks if he were to return to Romania today.

Conclusions

[27] For the following reasons, I am of the view that this application for judicial review must be dismissed.

[28] The allegation that the officer violated section 167 of the IRPR is unfounded. On the face of it, the officer's decision is not based on the applicant's lack of credibility but on an analysis of the evidence in the record: the fact that he had never faced charges of sedition, the fact that he had not been sought for over two years, no evidence of any arrest and, finally, the low probative value assigned to the new evidence. Nothing in this decision impugns Mr. Lupsa's credibility. Counsel for the applicant focused on the Personal Information Form (PIF) filed before the Refugee Division in 1993. The events described therein were before Officer Lajoie; during the first PRRA application, he took them into consideration and deemed them to be inadequate. Mr. Lupsa's counsel argued before my colleague Justice Tremblay-Lamer that Officer Lavoie had violated section 167, an allegation that was dismissed by the judge.

[29] I reject the allegation that the officer committed an error by not analyzing the evidence pertaining to the events that transpired between 1981 and 1989. It was not her job to do so; the evidence had already been reviewed by Officer Lavoie and had been deemed to be inadequate; the decision was upheld by this Court. The officer's job was to assess the new allegations and facts in Mr. Lupsa's second PRRA application. The officer's view was endorsed by Justice Beaudry. I would add that the same evidence was reviewed by the Minister's Delegate and by Justice Shore. It is true that the officer did not specifically mention the possible reopening of the investigation into the death of General Nuta. On the whole, this omission does not warrant the Court's intervention

because, upon reading the document, it would not be Mr. Lupsa who would not be targeted, but rather members of the armed forces from 1989.

[30] Finally, I cannot agree with the argument with regard to subsection 108(4). Justice Shore was faced with the same argument in his decision. He determined that subsection 108(4) did not apply in that case. I agree with what Justice Shore wrote at paragraphs 112 to 122 of his reasons.

[31] Counsel for the applicant proposed five questions for certification. I will allow none for reasons raised by the Minister's counsel, citing the Federal Court of Appeal in *Canada (Minister of Citizenship and Immigration) v. Liyanagamage*, (1994) 176 N.R. 4. The questions proposed by the applicant do not transcend the parties' interests and do not raise any issues of general importance. Moreover, questions 1 to 4 are of a factual nature and are related and restricted to the facts of the case at bar. As for question 5, it has frequently been considered in this Court's jurisprudence.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed. No question is certified.

‘‘François Lemieux’’

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Judge

Certified true translation

Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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