Federal Court  Cour fédérale

Date: 20110826

Docket: IMM-6635-10

Citation: 2011 FC 1022

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, August 26, 2011

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

BOUBAKAR TRAORÉ

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Preliminary

[1] The Federal Court of Appeal, in an appeal concerning the interpretation of paragraph 113(*a*) of the I*mmigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), had the following to say about a Pre-Removal Risk Assessment (PRRA) officer's right to refuse to

reconsider allegations that had been before the Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada:

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

(*Raza v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385; see also, *Parshottam v Canada (Minister of Citizenship and Immigration)*, 2008 FC 51, 164 ACWS (3d) 840; *Ould v Canada (Minister of Citizenship and Immigration)*, 2007 FC 83, 161 ACWS (3d) 960, at paragraphs 16 to 19).

II. Introduction

[2] This is an application for judicial review of a PRRA decision, dated September 16, 2010, and given to the applicant on October 27, 2010.

[3] In that decision, the PRRA officer concluded that the applicant was not a person in need of protection under sections 96 and 97 of the IRPA.

[4] Essentially, the applicant argues that the decision is unreasonable because the officer did not consider the new information submitted by the applicant and because the officer breached the principles of natural justice by not holding an oral hearing.

[5] The Court agrees with the respondent's position, as argued by Michèle Joubert.

[6] In addition, the applicant also filed an application for judicial review of the decision of the Minister's delegate to reject the applicant's application for permanent residence for humanitarian and compassionate considerations.

III. Summary of the facts

[7] This PRRA application concerns a national of the Ivory Coast, Boubakar Traoré, born on June 24, 1961, in Abidjan, Ivory Coast. He is a widower and father to four children born between 1983 and 1995, who have remained in Ivory Coast. He has no family in Canada.

[8] The applicant is a businessman, who travelled a great deal between 2002 and 2005, staying in France, the United Kingdom, Switzerland and Dubai on business.

[9] On June 2, 2005, he obtained a temporary resident visa for Canada to allow him to come to Canada on business. This was the third Canadian visa issued to the applicant; the other two were never used.

[10] On June 20, 2005, he left Mali France and then Canada.

[11] On June 21, 2005, he was admitted to Canada as a temporary resident until July 20, 2005.

[12] On June 27, 2005, he reported to Citizenship and Immigration Canada (CIC) in Montréal to claim refugee status.

[13] On January 10, 2006, a hearing was held before the RPD. On January 23, 2006, the applicant’s counsel, Nino Karamaoun, asked the Board for an eight-week delay to clarify the

circumstances of the murder of the applicant's wife on January 15, 2006. On March 22, 2006, Mr. Karamaoun sent the documents to the panel.

[14] On May 12, 2006, the RPD rejected the claim for refugee protection, explaining that the panel was faced with a fabrication and that the applicant was in fact a backdoor immigrant.

[15] On June 14, 2006, an application for leave and for judicial review of the RPD's decision was filed with the Federal Court.

[16] The Federal Court dismissed the application for judicial review on January 29, 2007.

[17] On April 11, 2007, the applicant filed a PRRA application.

[18] On April 28, 2007, additional submissions together with substantial evidence were received for the PRRA.

[19] As reiterated by the officer, on May 12, 2006, the RPD rejected the applicant's refugee protection claim, judging his story to be devoid of all credibility.

[20] As indicated above, on January 29, 2007, the Honourable Madam Justice Danièle Tremblay-Lamer dismissed the applicant's application for judicial review of the RPD's decision.

[21] For his PRRA application, the applicant sent the PRRA officer written submissions, an affidavit and many documents, four of which were filed in the Applicant's Record.

[22] On May 11, 2007, the applicant also filed an application for permanent residence in Canada for humanitarian and compassionate considerations, which contained the written submissions and documents submitted in support of the PRRA application (Notes to File, Tribunal Record [TR] at page 4, and Applicant's Record [AR], at page 7).

[23] On December 4, 2007, the local authorities confirmed to the Canadian Embassy that they had not found any trace of two of the documents submitted by the applicant, namely the report (*procès-verbal*) No. 286 and the notification to proceed (*Soit Transmis*) No. 298 (Letter dated December 4, 2007, AR at page 39).

[24] On December 13, 2007, the PRRA officer wrote to the applicant to ask him to comment on the letter dated December 4, 2007, received from Abidjan (Letter dated December 13, 2007, and exhibits, TR at pages 88 to 92, and AR (incomplete copy) at pages 37 to 39).

[25] On April 1, 2008, the applicant again wrote to the PRRA officer in addition to faxing him some documents; these documents were added to the Applicant's Record (Letter dated April 1, 2008, TR at pages 34 to 37, and AR at pages 72 to 75; Reply dated April 2, 2008, AR at page 78).

[26] On March 24, 2010, the applicant sent a new letter and further documents (Letter dated March 24, 2010, TR at pages 23 to 33).

[27] On September 16, 2010, the PRRA application was denied (Letter dated September 16, 2010, AR at page 5; Notes to File, AR at pages 6 to 15).

[28] The PRRA officer concluded that the applicant was not a person in need of protection in accordance with section 96 and paragraphs 97(1)(*a*) and (*b*) of the IRPA (Notes to File, TR at pages 3 to 12, and AR at pages 6 to 15).

[29] First, the PRRA officer explained why she found that some of the documents that initially accompanied the PRRA application did not meet the criteria of paragraph 113(*a*) of the IRPA (Notes to File, TR at pages 4 and 5, and AR at pages 9 and 10).

[30] In her analysis of the facts, the officer specifically referred to several of the new documents submitted by the applicant and explained why she did not give any probative value to these documents.

[31] Lastly, the officer dealt with the portion of the PRRA application describing the [TRANSLATION] “risks related to HIV” (human immunodeficiency virus) (Notes to File, TR at pages 10 and 11, and AR at pages 13 and 14).

[32] The applicant is not challenging the merit of the PRRA officer's final conclusion regarding the [TRANSLATION] "risks related to HIV".

[33] The applicant essentially submits that

(a) the decision is unreasonable because the officer did not consider the new evidence submitted by the applicant; and

(b) the officer breached the principles of natural justice by not holding an oral hearing.

IV. Relevant statutory provisions

[34] Paragraphs 113(*a*) and (*b*) of the IRPA read as follows:

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;
(*b*) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;	*b*) une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;

[35] The factors for deciding whether a hearing is required are described at section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations):

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 113b) 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.

V. Analysis

[36] The factors listed at section 167 of the Regulations are conjunctive, and the applicant must meet all of them to be entitled to a hearing.

[37] The applicant alleges that the decision is unreasonable because the officer did not consider the new evidence submitted by the applicant.

[38] It is well established that, in a PRRA application, the applicant can usually include only new evidence that has arisen after the RPD decision.

[39] As demonstrated by the following passage cited, the Honourable Mr. Justice Simon Noël disposed of and dismissed an application for judicial review in which the applicant criticized the PRRA officer for failing to examine the evidence submitted in support of the PRRA application. Justice Noël explained and even answered as follows:

> [2] The following issues are raised by this application for judicial review:
>
> (1) Did the PRRA officer err in his assessment of the documents filed by the applicant?
>
> . . .
>
> [3] Given the multitude of questions that the applicant proposed for certification, I am including them under this heading:
>
> (1) For the application of paragraph 113(*a*) of the IRPA, does the "evidence that arose after the rejection" include only evidence that postdates the evidence before the RPD and that substantially differs from this evidence?
>
> (2) Does the standard governing the filing of new evidence pursuant to paragraph 113(*a*) of the IRPA require the PRRA officer to accept all evidence arising after the RPD decision, even the evidence normally accessible by the applicant or the evidence that she probably could have presented at the hearing on the refugee claim?
>
> . . .
>
> **III. <u>The decision under judicial review</u>**
>
> [15] The PRRA officer determined that there was insufficient evidence to establish that the applicant would be at risk of torture, cruel and unusual treatment or punishment or death if she were removed to Iran or if she was a member of a group that could be subject to this kind of abuse and/or treatment. Accordingly, the PRRA application was refused.

[16] In making this determination, the PRRA officer reviewed the 36 documents filed by the applicant, based on which he made several determinations:

> [1] Documents 12 to 36 do not amount to new evidence for the following reasons:
>
> > a. Documents 15 to 36 predate the RPD's decision refusing the claim and the applicant did not establish that these documents were not reasonably available or, if they were, that the applicant could not reasonably have been expected to have filed them at the time of the refusal;

. . .

[25] In a judgment (*Raza et al v. MCI et al*, 2006 FC 1385, at paragraph 22) where the facts are in part similar to this situation, Mr. Justice Mosley described the new information in the following manner:

> "It must be recalled that the role of the PRRA officer is not to revisit the Board's factual and credibility conclusions but to consider the present situation. In assessing "new information" it is not just the date of the document that is important, but whether the information is significant or significantly different than the information previously provided: *Selliah*, above at para. 38. Where "recent" information (i.e. information that post-dates the original decision) merely echoes information previously submitted, it is unlikely to result in a finding that country conditions have changed. The question is whether there is anything of "substance" that is new: *Yousef*, above at para.27."

[26] Very recently, the Court of Appeal rendered a judgment following the certification of two questions by Mosley J. in regard to section 113 of the IRPA (see *Raza et al. v. MCI*, 2007 FCA 385). Madam Justice Sharlow, on behalf of the Court, dismissed the appeal, adopted the reasoning of Mosley J. (see paragraph 16) and commented on the content of section 113 of the IRPA (see paragraph 13). She took the time to state once again that PRRA procedure is not an appeal or an application for review of the RPD decision given that Parliament clearly intended to limit the evidence presentable in the context of such a procedure (see paragraph 12).

[27] What Parliament does not want is to have the PRRA application become a disguised second refugee claim. By limiting the evidence to new information for a refused refugee claimant's PRRA application, it is clearly indicated that the intended objective is to analyze the application for protection taking into consideration the situation after the RPD decision, all subject to certain

> adaptations regarding some earlier evidence according to the wording of section 113 of the IRPA and the interpretation given by Sharlow J. and Mosley J.
>
> [28] Bearing in mind what is stated above regarding paragraph 113(*a*) of the IRPA and the *Raza* judgment (*supra*) of the Court of Appeal, PRRA application and that he explained in detail his findings in regard to its probative value (the credibility of the evidence, while considering the source and the circumstances surrounding the existence of the information, its trustworthiness, its element of novelty and its high degree of importance). He did so by taking into consideration not only the date of the information but also the aspect of novelty or lack thereof with reference to the evidence before the RPD, the RPD's findings and whether or not the information was available at the time of the RPD hearing as well as whether or not it was reasonable to expect that she present this information to the RPD. An analysis such as this satisfies the standards contained under paragraph 113(*a*) of the IRPA and the Court has no reason to intervene because the PRRA officer's decision was reasonable. Officer Perreault considered the relevant information and he made the appropriate determinations considering the circumstances of the matter.
>
> [29] I would add, as it had been mentioned in *Colindres*, *supra*, in circumstances similar to this case, that the fact that the applicant disagrees with the findings of the PRRA officer does not render the PRRA officer's decision unreasonable. In my opinion, the applicant in her submissions is in reality asking the Court to substitute its assessment of the evidence for the assessment made by the officer. This is not the Court's role at this stage of the applicant's file (*Gonzalez v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1592, 2006 FC 1274 at paragraph 17; *Maruthapillai v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 761 at paragraph 13). [Emphasis added]

(*Abdollahzadeh v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1310, 325 FTR 226).

[40] The applicant repeated the facts and risks that were alleged in his claim for refugee status and that were at issue in the RPD decision. Part of the documentary evidence submitted for the PRRA pre-dated the RPD decision, and the Federal Court had already dismissed the application for judicial review of that decision. The PRRA officer's decision is consistent with the principles developed by the case law of this Court, including those in *Raza*, as described above.

[41] The applicant did not submit any new evidence of probative value in support of his PRRA application that would have called into question the RPD decision. Consequently, the applicant's arguments and the case law cited are not relevant.

[42] The officer was entitled to weigh the evidence using her specialized expertise, and she provided reasons explaining the weight given to each item of the evidence. This approach is in keeping with the principles laid down by the Court in *Abdollahzadeh*, above:

> [29] I would add, as it had been mentioned in *Colindres*, *supra*, in circumstances similar to this case, that the fact that the applicant disagrees with the findings of the PRRA officer does not render the PRRA officer's decision unreasonable. In my opinion, the applicant in her submissions is in reality asking the Court to substitute its assessment of the evidence for the assessment made by the officer. This is not the Court's role at this stage of the applicant's file (*Gonzalez v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1592, 2006 FC 1274 at paragraph 17; *Maruthapillai v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 761 at paragraph 13). [Emphasis added].

[43] The officer considered all of the risks and documents related to the risks alleged by the applicant; the applicant's arguments were not accepted.

[44] The applicant alleges that the officer erred in making a [TRANSLATION] "fragmented" analysis of the evidence by failing to list certain documents and made an unreasonable decision.

[45] Contrary to what the applicant argues, the officer wrote more than one paragraph on the [TRANSLATION] "new" evidence the applicant provided.

[46] In fact, as one can see from reading pages 6 to 8 of the Notes to File, the officer devoted 11 paragraphs of her decision, in which she cited two excerpts of the [TRANSLATION] "new" evidence, to her analysis of the new evidence to support her finding that she did not give it much weight.

[47] The applicant suggested that the officer had omitted other evidence because she referred to some pieces but not others.

[48] The PRRA officer is presumed to have considered all of the evidence:

> [64] PRRA officers are presumed to have considered all of the evidence and need not mention all of the documentary evidence before them (*Florea v. Canada (Minister of Employment and Immigration)* (F.C.A.), [1993] F.C.J. No. 598; *Ramirez Chagoya v. Canada (Citizenship and Immigration)*, 2008 FC 721, [2008] F.C.J. No. 908).

(*Andrade v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1074)

[49] First, as appears from the letter dated December 4, 2007, regarding the results of the verifications made by Ivory Coast authorities, the department head stated that the submitted documents were forgeries, confirming the opinion issued by an embassy official in an e-mail dated November 8, 2007, to Anne-Marie Loungnarath (Results of verifications, TR at page 91; Email dated November 8, 2007, TR of docket IMM-6633-10 at page 336).

[50] Second, as appears from the letter from Ms. Loungnarath dated January 30, 2008, in reply to the letter by counsel for the applicant dated December 28, 2007, not only is the applicant's name extremely common in Ivory Coast, but also no other information to identify him or the

names of the other individuals involved was provided (Letter dated January 30, 2008, and documents, TR at pages 45 to 51, and AR at pages 40 to 55; Letter dated December 28, 2007, TR at pages 52 to 54 and 65 to 77, and AR at pages 40 to 55).

[51] On four occasions, the applicant took the opportunity to respond to the decision maker's concerns about the authenticity of the documents he had provided with his PRRA application dated April 26, 2007. Thus, the applicant was able to reply in December 2007, February 2008, March 2008 and April 2008, and to send other documents. (Letter dated December 28, 2007, and documents, TR at pages 52 to 54 and 65 to 77, and AR at pages 40 to 55; Letter dated February 14, 2008, TR at pages 42 to 44, and AR at pages 63 to 65; Letter dated March 10, 2008, TR at pages 38 and 39, and AR at pages 69 to 71; Letter dated April 1, 2008, TR at pages 34 to 37, and AR at pages 72 to 77.)

[52] The filing of these documents confirms the applicant's lack of credibility, noted by both the RPD and the Federal Court, and did not allow the PRRA officer to reach a different conclusion from the RPD (RPD reasons for decision, TR at pages 243 to 253; Order of the Court, docket IMM-3225-06).

[53] The PRRA officer's conclusion regarding these documents is reasonable, especially as the recent elections in Ivory Coast have led to a change in government.

Lack of an oral hearing

[54] The applicant alleges that the officer breached the principles of natural justice by not conducting an oral hearing.

[55] It should be noted that the applicant in this case had the opportunity to address the concerns raised, particularly following the December 2007 letter from Ivory Coast authorities, a letter that was forwarded to the applicant for comments.

[56] The Court recognizes that the applicant also benefited from several additional extensions to send his replies and additional documents.

[57] Consequently, the applicant failed to demonstrate that the officer breached the principles of natural justice by not granting an oral hearing, especially as the applicant does not explain how an oral hearing would have been of more benefit to him than the four opportunities he was given to provide written explanations.

[58] Moreover, this Court has decided that PRRA officers' not conducting an oral hearing does not necessarily breach the principles of natural justice (*Younis v Canada (Solicitor General)*, 2004 FC 266, 348 FTR 186; *Sylla v Canada (Minister of Citizenship and Immigration)*, 2004 CF 475, 135 ACWS (3d) 472; *Allel v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 533, 124 ACWS (3d) 754; *Matano v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1290, at paragraphs 13 to 20).

[59] For these reasons, the officer did not breach the principles of natural justice by not granting an oral hearing. She respected the spirit and the letter of paragraph 113(*b*) of the IRPA. An oral hearing was unnecessary in this case given the many opportunities given to the applicant to provide explanations and additional documents.

V. Conclusion

[60] For all of the above reasons, the applicant's application for judicial review is dismissed.

JUDGMENT

THE COURT ORDERS that the application for judicial review be dismissed. There is no question of general importance to certify.

"Michel M.J. Shore"
Judge

Certified true translation
Johanna Kratz, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6635-10
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