Federal Court  Cour fédérale

Date: 20130605

Docket: IMM-3209-12

Citation: 2013 FC 591

Ottawa, Ontario, June 5, 2013

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

BABATUNDE YUSUF

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of an Immigration Officer denying the Applicant's pre-removal risk assessment [PRRA] application.

I. Facts

[2] The Applicant is a citizen of Nigeria. He submitted a claim for refugee protection in 2008 because he feared persecution due to his involvement with the sister of Governor Ibori.

[3] The RPD determined that he had a history of criminal convictions in the United States and found that he was excluded for refugee protection due to his criminality. It also determined that he failed to establish his identity. In its inclusion finding, the RPD determined that the Applicant had not provided acceptable documentation to establish his identity, as required by section 106 of the IRPA and that he bore the onus of establishing it. As the Applicant had not provided reliable evidence to prove his identity, the RPD considered that he does not have an objective well-founded fear of persecution and that the credibility findings also extend to his assertion that he faces a risk to life or of being subjected to cruel and unusual treatment or punishment in Nigeria. This Court denied leave for judicial review on June 24, 2011.

[4] The Applicant submitted a PRRA application on July 26, 2011 in which he included the risks alleged in his refugee claim as well as his HIV positive diagnosis of July 2011.

II. Decision under review

[5] The Officer first noted that the RPD rendered a negative decision, in which it was determined that the Applicant is inadmissible on the basis of Article 1F(*b*) of the Convention and therefore, that he is not a Convention refugee or a person in need of protection.

[6] He determined that according to paragraph 112(3)(*c*) of the IRPA, the Applicant's claim will be assessed on the basis of the factors set out in section 97 of the IRPA.

[7] The Officer concluded that there is insufficient evidence to establish that if returned to Nigeria, the Applicant would be subjected to danger of torture pursuant to paragraph 97(1)(*a*) of the IRPA.

[8] The Officer then moved onto whether the Applicant should be granted protection under paragraph 97(1)(*b*) of the IRPA. The Officer reviewed the Applicant's counsel's submissions and determined that the allegations of risk put to the RPD are essentially the same as those identified in his PRRA submissions. The Officer concluded that although the information relating to the Applicant's experiences in Nigeria was provided as new evidence pursuant to subsection 113(*a*) of the IRPA, the content of the submissions does not consist of "new evidence."

[9] The Officer noted that the Applicant provided a new risk for consideration. On July 26, 2011, ten months after the refugee claim rejection, the Applicant was diagnosed with HIV Nephrology. The Officer noted the Applicant's position that he could not reasonably have been expected to have presented the new evidence regarding his medical condition at the time of the RPD hearing. The Officer considered the Applicant's submissions to the effect that he would be subjected to stigmatization and discrimination upon return to Nigeria, which amount to persecution and a risk to his life. The Officer also noted that the Applicant submitted reports on availability of treatment and the discrimination faced by people with HIV in Nigeria as well as a letter by a doctor confirming his diagnosis.

[10] The Officer reviewed *Singh v Canada (Minister of Citizenship and Immigration)*, 2004 FC 288, 39 Imm LR (3d) 261 at para 24 in which it was determined that a "risk to life under section 97

should not include having to assess whether there is appropriate health and medical care available in the country in question." The Officer also reviewed the evidence on discrimination against HIV positive people in Nigeria but noted that documentary evidence also established that the state recognizes that the matter of HIV/AIDS must be given priority attention. The Officer then concluded that "as per subsection 97(1)(*b*)(iv), assessing the adequacy of health and medical care is not within [his] mandate" and that the Applicant's allegations would be better served in the context of a claim based on Humanitarian and Compassionate grounds.

[11] Finally, the Officer determined that the country conditions in Nigeria are similar to those which existed prior to the RPD's rejection of the Applicant's claim and that there is no additional risk development.

III. Applicant's submissions

[12] The Applicant submits that where the RPD's decision was refused on exclusion under section 98 of the IRPA or identity under section 106 of the IRPA, it is submitted that the intention of subsection 113(*a*) of the IRPA is not to bar evidence from being considered. Indeed, since the evidence has not been assessed by any decision-maker then it remains "new" for the purposes of the PRRA application. The Applicant argues that just like the Officer did in *Chen v Canada (Minister of Citizenship and Immigration)*, 2009 FC 379, 176 ACWS (3d) 1120 [*Chen*] although in this decision, exclusion was not an issue, the Officer herein was required to assess the Applicant's risks as even if identity is uncertain in the context of a refugee claim, the PRRA Officer is still required to assess the risk posed by country conditions. The Applicant submits that what is meant by "new"

evidence needs to be expanded so as to account for individuals who have had no other forum assessing their risks.

[13] The Applicant submits that the PRRA Officer is not bound by the RPD's inclusion findings. Moreover, although the Applicant's evidence is not "new" pursuant to a strict reading of subsection 112(*a*) of the IRPA, given his unique situation - his risk not having been assessed by the RPD - the Applicant submits that the PRRA is the appropriate forum to assess the totality of his evidence. Although the evidence was in fact submitted to the RPD, since it was not considered, it was not actually presented to the RPD for evaluation, consideration and determination as the RPD did not turn its mind to inclusion. According to the Applicant, *Elezi v Canada (Minister of Citizenship and Immigration)*, 2007 FC 240, 62 Imm LR (3d) 66 stands for the proposition that the Officer "cannot disregard credible evidence that a person would be at risk if sent back to his or her country of origin on the sole basis that this evidence is technically inadmissible."

[14] The object of section 98 and subsection 112(3) of the IRPA bars the Applicant from becoming a permanent resident both within the refugee and the PRRA application system. However, the Applicant submits that the intention is not to bar the consideration of risk from ever taking place.

[15] Removal from Canada without a risk assessment is contrary to the principles of non-refoulement and Canada's commitment to humanitarian values and the objectives of the IRPA. Moreover, the provisions of an Act are to be interpreted as to ensure the attainment of the object of

the said Act and in considering the objectives of the IRPA in respect of refugees, decision makers are to ensure that asylum seekers receive fair consideration.

[16] Moreover, it was not reasonably open to the Officer here to find that the allegations made by the Applicant and included in his claim for refugee status had been determined by the RPD as there is no evidence that the RPD had in fact turned its mind to the Applicant's allegations.

[17] The Applicant further argues that as the Officer did not set forth any concern as to the Applicant's identity, a fulsome examination of the risks caused by the Applicant's past interactions with Christine Ibori was required under section 97 of the IRPA. Moreover, as it has been determined in the case law that evidence is "new" if it can contradict a finding of fact made by the RPD, which includes identity that is classified as a matter of credibility by section 106 of the IRPA, the Officer should have considered his risk if returned to Nigeria as the Officer was satisfied with his credibility.

[18] The Applicant disagrees with the Respondent's submission that the PRRA Officer was able to adopt the inclusion finding of the RPD as the only determination based on inclusion made by the RPD was in respect of identity. Moreover, there is no evidence that the Officer relied on this finding or even turned his mind to the issue of identity and therefore it should be considered that the PRRA Officer was satisfied as to the identity of the Applicant.

[19] The Applicant submits that the Officer's considerations under paragraph 97(1)(*a*) of the IRPA were unreasonable as the simple act of reviewing the law and then stating a conclusion is

inadequate, as it is contrary to the Officer's obligation to provide reasons that are sufficiently clear so as to allow an applicant to understand why his or her application has been refused. The Officer's conclusion ignores the fact that the Applicant was detained, assaulted and interrogated while in police custody in Nigeria which constitutes *prima facie* evidence that he would suffer such treatment upon return.

[20] Finally, the Applicant submits that the Officer fettered his discretion by determining that access to health or medical care could not satisfy the requirements of subparagraph 97(1)(*b*)(iv) of the IRPA. The Officer's conclusion is contrary to the scope of this subsection of IRPA which can lead to a positive PRRA decision where a government can be seen to deny care to a particular class of patients. The Applicant argues that there was ample evidence before the Officer as to the denial of health care treatment for those suffering with HIV/AIDS in Nigeria and the Officer does not seem to even have been aware that he could assess this factor under subparagraph 97(1)(*b*)(iv) of the IRPA.

IV. Respondent's submissions

[21] The Respondent submits that while the Officer was not required to adopt the RPD's inclusion findings, there was no prohibition on doing so and that the approach endorsed in *Chen*, above supports the approach taken by the Officer.

[22] The Respondent is of the view that it was reasonably open to the Officer to find that the allegations made by the Applicant included in his refugee claim have been determined by the RPD.

Although the Applicant's claim was disposed of on the grounds of identity, these findings did not constitute new evidence when resubmitted for consideration to the PRRA Officer.

[23] The Respondent submits that the fact that the Officer was not bound by the RPD's inclusion findings does not mean that he is prohibited from adopting them or required to re-determine them. The objective of the PRRA system is to avoid re-litigation of matters already determined. The Respondent argues that while the RPD's identity finding was not necessarily binding on the PRRA Officer, he was not required to consider the matter *de novo*. This is particularly applicable here since the Applicant has not pointed to any evidence which could rebut the RPD's finding.

[24] Where as here, the RPD has made an alternative finding on inclusion, which is an approach that has been endorsed repetitively, the Respondent submits that justice does not require a PRRA Officer to re-determine the same issues. Therefore, it was reasonable for the Officer to consider that the issue of identity was dealt with by the RPD's alternative finding and was not "new" evidence.

[25] Moreover, the Respondent submits that the Applicant has not pointed to any new evidence which could rebut the RPD's identity finding as there is no evidence presented to reliably establish his true identity. The Applicant did not submit any new material to prove it.

[26] The Respondent submits that the approach endorsed in *Chen*, above did not require the PRRA Officer to make his own identity analysis. Rather it directed the Officer to consider new evidence submitted - separate and apart from matters already determined by the RPD - against country condition documents. Such was the approach taken by the Officer in this case as he

considered the new evidence submitted to assess the risks involved for an HIV - positive person being removed to Nigeria.

[27] The Respondent argues that the reasons provided by the Officer to explain why it found that the reiteration of the claim of the Applicant had been made before the RPD did not meet the test for new evidence were adequate.

[28] The Respondent finally submits that the Officer's analysis under subparagraph 97(1)(*b*)(iv) of the IRPA was reasonable as it accepted that stigma and discrimination existed against HIV positive individuals in Nigeria but noted the continuing efforts by the state to address the problem.

V. Issues

1. Did the Officer err in its assessment of what constitutes "new evidence?"

2. Did the Officer provide adequate reasons for why the Applicant would not be subjected to torture?

3. Did the Officer err in his assessment of the Applicant's case pursuant to subparagraph 97(1)(*b*)(iv) of the IRPA?

[29] For the reasons that follow, it will not be necessary to deal with the second issue.

VI. Standard of review

[30] Assessment of the evidence is a question of fact and is reviewable under the standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47 [*Dunsmuir*]). The same standard applies to the adequacy of the reasons provided by the PRRA Officer (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 at para 22). A PRRA Officer's interpretation of subparagraph 97(1)(*b*)(iv) of the IRPA is to be reviewed under the standard of reasonableness as it is a question of mixed fact and law (*Dunsmuir*, above at para 53). However, in a situation where the Officer makes a determination as to his jurisdiction in considering subparagraph 97(1)(*b*)(iv) of the IRPA, then the standard of correctness must apply (*Dunsmuir*, above at para 50).

VII. Analysis

A. *Did the Officer err in his assessment of what constitutes "new evidence?"*

[31] A reading of the RPD's decision shows that the matters of risks and protection were not dealt with. In such circumstances, the PP 3 - Pre-Removal Risk Assessment (PRRA) manual [the PRRA manual] provides that the Applicant can present as "new evidence" the evidence that was submitted to the RPD. Therefore, the PRRA Officer must consider this evidence in order to make a proper determination on risk. Indeed, section 10.1 of the PRRA manual states the following:

> **10.1 Accepting new evidence only**
>
> A113(a) provides that persons whose claim for refugee protection has been rejected may only present ***new evidence*** that arose after the rejection, that was not reasonably available or that the applicant could not reasonably have been expected in the circumstances to have presented.

> Where the Refugee Protection Division panel did not have or take jurisdiction with respect to the protection issue raised, and did not consider the evidence available to the applicant, the "new evidence" rule does not prevent the applicant from submitting that evidence in support of their application. Examples of this situation would include "transitional" cases where the former Convention Refugee Determination Division did not have jurisdiction with respect to assertions of torture, or of cruel or unusual treatment or punishment, or where the RPD excluded the claimant without considering whether the claimant had a well-founded fear of persecution.
>
> [Emphasis added.]

[32] Therefore, in the present case, the Officer should have recognized the evidence presented to the RPD as "new evidence" and taken it into consideration in order to make a determination pursuant to section 97 of the IRPA. On that basis, it was incorrect not to consider the evidence as new. This determination is sufficient to conclude this judicial review but it is in the interests of the parties that issue #3 be dealt with.

B. *Did the Officer err in its assessment of the Applicant's case pursuant to subparagraph 97(1)(b)(iv) of the IRPA?*

[33] In his decision, the PRRA Officer briefly reviewed the documentary evidence related to the treatment of HIV positive people in Nigeria and the availability of treatment and then concluded that "as per subsection 97(1)(*b*)(iv) assessing the adequacy of health and medical care is not within [his] mandate." The PRRA Officer refused to assume jurisdiction without proper foundation.

[34] The Federal Court of Appeal interpreted subparagraph 97(1)(*b*)(iv) of the IRPA in *Covarrubias v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 365, 148 CRR (2d) 45

and determined that this exclusion is not to be interpreted as meaning that a medical condition may never form the basis of a valid claim:

> [39] This is not to say that the exclusion in subparagraph 97(1)(*b*)(iv) should be interpreted so broadly as to exclude any claim in respect of health care. The wording of the provision clearly leaves open the possibility for protection where an applicant can show that he faces a personalized risk to life on account of his country's unjustified unwillingness to provide him with adequate medical care, where the financial ability is present. For example, where a country makes a deliberate attempt to persecute or discriminate against a person by deliberately allocating insufficient resources for the treatment and care of that person's illness or disability, as has happened in some countries with patients suffering from HIV/AIDS, that person may qualify under the section, for this would be refusal to provide the care and not inability to do so. However, the applicant would bear the onus of proving this fact.

[35] Therefore, the Officer erred in excluding his jurisdiction over the question raised by the Applicant with regard to a risk based on a medical condition as the Federal Court of Appeal specified that such subsection should be considered as meaning that a person should be granted protection when his or her country chooses deliberately to allocate insufficient resources for the treatment and care of that person's illness or disability. The Officer was under a duty to verify whether the Applicant's situation falls under that category in light of the documentary evidence to the effect that there is limited access to medical care for HIV positive people in Nigeria and he failed to do so. It was therefore incorrect not to consider the personal health situation of the Applicant in light of the country's medical documentary evidence. The PRRA Officer therefore erred in his interpretation of his jurisdiction under subparagraph 97(1)(*b*)(iv) of the IRPA. It may well be that the evidence presented by the Applicant shows that there is no personalized risk to life because of the availability of medical services and that they are available to him; but by not having dealt with this issue as required, the Officer did not assume his jurisdiction.

VIII. Questions for certification

[36] The parties were invited to submit a question for certification. The Applicant submitted the following two questions:

1) If the RPD determines that a claimant is excluded from protection pursuant to section 98 of the IRPA, should the RPD Member also consider whether the claimant could have been determined a protected person under sections 96 and 97 of the IRPA if not for the finding under section 98?

2) If the answer to the first question is in the negative, is the evidence relating to the risk factors pursuant to sections 96 and 97 of the IRPA, which was not considered by the RPD, "new" evidence for the purpose of the Pre-Removal Risk Assessment application under subsection 113(*a*) of the IRPA as that evidence could not reasonably have been expected in the circumstances to have been presented to the RPD?

[37] The Applicant submits that the questions proposed are serious and of general importance and that they transcend the interests of the immediate parties to the litigation and contemplate issues of broad significance or general application that are determinative of the matters before the Court.

[38] The Applicant further submits that although the first question includes the Immigration and Refugee Board, which was not a party before the Court in this proceeding, the actions of the RPD and the actions of the PRRA Officer are inexorably bound, given the requirements of subsection 113(*a*) of the IRPA.

[39] The Applicant reiterates that an individual excluded from refugee protection under section 98 of the IRPA is still deserving of an opportunity to have his or her risks assessed prior to removal from Canada.

[40] The Applicant submits that in respect of Article 1E of the Convention, the RPD may not consider risk as it is not clear to which country the individual shall be removed. Once that has been determined by the Canada Border Services Agency, then a PRRA Officer may properly consider all evidence of risks the individual is likely to face on return to the selected country.

[41] The Applicant argues that in cases where an Applicant falls under Article 1F of the Convention and is therefore excluded under section 98 of the IRPA, he is caught by paragraph 112(3)(*c*) of the IRPA. Therefore, the PRRA Officer is not only to assess risk under section 97 of the IRPA but also the danger posed by that individual in Canada, as required by subsection 113(*d*) of the IRPA. This requirement to balance section 97 analysis against the risk posed by the Applicant to individuals in Canada is the consideration that removes inclusion from the realm of the RPD Board Member. This balancing is properly assigned to PRRA Officers and not the RPD. The decision *Xie v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 250, 37 Imm LR (3d) 163, remains the binding authority for the proposition that the RPD has no jurisdiction to consider inclusion after a refugee claimant has been excluded.

[42] The Applicant therefore submits that if inclusion ought not to be considered by the RPD once exclusion has been established, it is the PRRA Officer who must consider evidence not reasonably available or presented at the RPD hearing. The PRRA Officer was required to turn his

mind to those materials. However, it is the Applicant's submission that the Courts have not been consistent on this matter. The position has been taken that it is in the interest of efficiency for the RPD Member to conduct an assessment of inclusion in case it is determined that their assessment of exclusion was in error. The different interpretations in case law have left both PRRA Officers and RPD Members without any clarity as to the scope of their assignment and respective jurisdiction and having Members address this matter on a case by case basis will only lead to additional confusion for the PRRA Officer in determining what evidence they are to assess. The Applicant is of the view that providing a clear statement on jurisdiction would benefit all parties, provide clarity and likely reduce the need for additional litigation in this context.

[43] The Applicant finally submits that these questions are dispositive of the matter at bar, transcend the interests of the parties and are questions of general importance.

[44] The Respondent maintains that the decision of the PRRA Officer was reasonable in all respects. Should the Court consider that the assessment of the HIV evidence which is conceded to be "new," was unreasonable, it is submitted that the questions as proposed would not be dispositive.

[45] With regards to the first question, the Respondent argues that this question was decided by the Court of Appeal in *Moreno v Canada (Minister of Employment and Immigration)* (1993), 159 NR 210, 21 Imm LR (2d) 221 [*Moreno*]. The findings of a PRRA Officer were recently upheld in *Hedayati v Canada (Minister of Citizenship and Immigration)*, (7 March 2013), Ottawa, IMM-2687-12 (FC), a case where the RPD had made both inclusion and exclusion findings. It is to be recalled that the application for leave and judicial review of the RPD's decision was dismissed.

Moreover, the Applicant's challenge to the jurisdiction of the RPD would constitute a collateral attack of that decision and should not form the basis of a certified question.

[46] As for the second question, the Respondent argues that it does not require resolution as the PRRA manual provides for the possibility for claimants to submit evidence to a PRRA Officer in cases where the RPD did not have or take jurisdiction with respect to the protection issue raised. An example of this is a case where the RPD excluded the claimant without considering whether he or she had a well-founded fear of persecution. On that basis, the proposed question is not an "undecided point."

[47] No question should be certified in the present case as they do not raise questions of general importance and are not determinative for the following reasons.

[48] The first question goes at the jurisdiction of the RPD. The decision challenged before this Court is the PRRA determination and not the RPD's decision. As the RPD's decision is not the object of the present proceedings and therefore, its point of view is lacking in the present circumstances, it is not appropriate to certify this question. The very question raised by the Applicant relates to an issue that was argued when he sought judicial review of the RPD decision, which was denied. In any event, the issue raised by the first question has been addressed by the Federal Court of Appeal in *Moreno*, above where it was determined that there are practical considerations in favour of making inclusion findings when a claimant has been excluded but that it does not generally consist in an obligation on the part of the RPD. Therefore, such question is not determinative of the present judicial review which is concerned with the PRRA decision.

[49] With regards to the second question, as previously explained, the PRRA manual provides a clear answer. Therefore, there is no need to certify a question as it would not bring anything determinative to this judicial review. Indeed, it has already been determined that the PRRA Officer committed an error in not considering the allegations of risk submitted by the Applicant as "new evidence."

JUDGMENT

THIS COURT'S JUDGMENT IS THAT the present application for judicial review is granted. No question will be certified.

"Simon Noël"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Mr. Mario D. Bellissimo Ms. Erin Christine Roth	FOR THE APPLICANT
Mr. Christopher Ezrin	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Barristers and Solicitors Bellissimo Law Group Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT