Federal Court  Cour fédérale

Date: 20190115

Docket: IMM-2311-18

Citation: 2019 FC 50

[ENGLISH TRANSLATION]

Ottawa, Ontario, January 15, 2019

PRESENT: The Honourable Mr. Justice Bell

Docket: IMM-2311-18

BETWEEN:

DURANO DÉSIR, LOVENSON DÉSIR

Applicants

and

THE DEPARTMENT OF IMMIGRATION, REFUGEES AND CITIZENSHIP CANADA

Respondent

JUDGMENT AND REASONS

I. Nature of the case

[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 a decision dated January 25, 2018, by which a senior immigration officer [the Officer] refused the application for protection based on a pre-

removal risk assessment [PRRA], made by Durano Désir [the principal applicant] and his son, Lovenson Désir [collectively, "the applicants"]. For the reasons that follow, I dismiss the application.

II. Relevant facts

[2] The principal applicant is a 38-year-old man, originally from Haiti. His son, Lovenson Désir, the other applicant, is 14 years old. He too is originally from Haiti. The principal applicant states that he was a clothing and shoes merchant in Haiti before leaving that country in November 2008. He claims to have been physically assaulted by groups of bandits in the woods. These people allegedly beat and threatened to kill him unless he gave them money. Since he could not pay the money demanded, the principal applicant left Haiti, with his family, and fled to the Dominican Republic.

[3] The principal applicant states that he spent five (5) miserable years in the Dominican Republic. He says that many Haitians have been murdered there and that this has become a common occurrence. According to him, this is why he left the Dominican Republic in March 2013 and went to Brazil. He states that on July 22, 2016, as he was going home after his shift at work, a group of bandits attacked him and took his bicycle. He states that he was able to escape, saving his life. On August 20, 2016, he says that he saw one of these bandits in front of his home. He believes they were looking for him, and for this reason, he took his family into hiding.

[4] The principal applicant states that he, along with his family, left Brazil on August 22, 2016, and travelled to the United States. Once there, he says that he did not work, and he states that he did not have the money to claim refugee protection in the United States.

[5] On or about March 7, 2017, after a stay of more than six (6) months, the applicants left the United States and travelled to Canada to claim refugee protection. Their claim was found to be inadmissible under the *Canada–United States Safe Third Country Agreement*, December 5, 2002 (effective: December 29, 2004). An exclusion order was made against them. In light of that decision, the applicants left Canada and returned to the United States.

[6] On or about July 23, 2017, the principal applicant and his family crossed the Canadian border on foot to make another refugee protection claim. The claim was again found to be inadmissible, and a removal order was made against them on September 11, 2017. This time, the applicants were able to submit an application for protection to the Minister of Citizenship and Immigration Canada under the PRRA program. On October 4, 2017, they filed their PRRA application. The refusal of that application is now the subject of this application for judicial review.

III. PRRA Officer's decision

[7] The PRRA Officer pointed out that the applicants filed only five (5) paragraphs of evidence to substantiate their allegations of risk in Haiti. I note that the focus should not be on the quantity of evidence tendered by the applicants; it is, rather, the quality of the evidence that

counts. In particular, the evidence must show that there are inherent risks should they return to Haiti. The paragraphs in this case read as follows:

> [TRANSLATION]
>
> I was a merchant in Saint-Marc, Haiti. I sold clothes and shoes (basketball shoes). I started out in March 2008. Every time I went out to sell my merchandise, there was a group of bandits who came over to demand money from me. One day, they demanded money, and I didn't have enough to give them any. They physically assaulted me. I didn't go to the police, as that wasn't going to change anything. Obviously, a country where you can be assaulted in broad daylight by bandits who have no fear of getting arrested, that's a country where the police exist by name only. Haiti is such a country.
>
> On November 20, 2008, as I was on my way home, I saw a small car following me. After a few minutes, the occupants of that vehicle pulled a gun on me and kidnapped me. They drove me into the woods. They beat me and took all the money I had on me. They told me they were going to give me another chance. I was supposed to give them another $1,000 a week later; otherwise, they were going to kill me.
>
> Unfortunately, I couldn't come up with that amount, and I realized that I had no choice but to leave Haiti. On November 24, 2008, I fled to the Dominican Republic. I spent five (5) miserable years in the Dominican Republic, cutting sugar cane on a plantation. On the plantations, I regularly saw Haitians murdered right in front of me. That's why I decided to leave the Dominican Republic and go to Brazil.
>
> I arrived in Brazil on March 11, 2013. In Brazil, I worked from 4 p.m. to 2 a.m. On July 22, 2016, when I was coming home after work, a group of bandits attacked me. I was on a bicycle. They took my bicycle. I ran for my life. On August 20, 2016, I saw one of these bandits across the street from my house. I realized he was looking for me, so I went into hiding with my family. On August 22, I left Brazil with my family and travelled to the United States. Once in the United States, I didn't work, so I couldn't apply for refugee protection because I didn't have the money to do so. I therefore came to Canada to seek refuge.
>
> I do not want to go back to Haiti today because these bandits will kill me. The Haitian police don't protect the country's citizens, and they don't act on complaints made by victims of bandits.

[8] Given the lack of probative evidence supporting the PRRA application, the Officer concluded that the applicants had not demonstrated a well-founded fear of persecution in Haiti, as required by section 96 of the IRPA, or that, on a balance of probabilities, the applicants qualified as persons in need of protection under section 97 of the IRPA.

[9] The Officer therefore rejected the PRRA application for lack of evidence. The Officer was of the opinion that the applicants had not discharged their burden of proving the alleged risks.

[10] Here, I note that the officer made no reference to a medical report dated November 21, 2008 [medical report], prepared after the November 2008 incident in Haiti. The principal applicant claims that he provided this report to his former counsel before the PRRA Officer's decision was rendered. This report does not appear in the certified tribunal record before the Court.

IV. Relevant provisions

[11] For ease of reading, the relevant provisions of the IRPA and the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR] are reproduced in the Appendix attached to these reasons.

V. Applicants' arguments

[12] The applicants submit that the PRRA Officer should have considered the medical report and that he should have convened a hearing in accordance with paragraph 113(b) of the IRPA and section 167 of the IRPR.

[13] These two issues will be discussed below.

VI. Analysis

(1) *Have the applicants demonstrated that the PRRA Officer was in possession of a document that does not appear in the certified record, namely, the medical certificate dated November 21, 2008, when he rendered his decision on January 25, 2018?*

[14] The applicants ignore the fact that the medical report does not appear in the certified record. The onus is on the applicants to prove that the medical report was before the PRRA Officer if the report does not appear in the certified record (*Ogbuchi v Canada (Citizenship and Immigration)*, 2016 FC 764 at para 15). The principal applicant provided an affidavit in which he declares that he gave the medical report to his former counsel. Despite this statement, there is no affidavit from anyone demonstrating that the report was communicated to the PRRA Officer, on or prior to January 25, 2018, before the Officer rendered his decision.

[15] Section 17 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 [CIR Rules], regarding citizenship, immigration and refugee protection, provides as follows:

17 Upon receipt of an order under Rule 15, a tribunal shall, without delay, prepare a record	**17** Dès réception de l’ordonnance visée à la règle 15, le tribunal administratif

containing the following, on consecutively numbered pages and in the following order:	constitue un dossier composé des pièces suivantes, disposées dans l'ordre suivant sur des pages numérotées consécutivement :
(a) the decision or order in respect of which the application for judicial review is made and the written reasons given therefor,	**a)** la décision, l'ordonnance ou la mesure visée par la demande de contrôle judiciaire, ainsi que les motifs écrits y afférents;
(b) all papers relevant to the matter that are in the possession or control of the tribunal,	**b)** tous les documents pertinents qui sont en la possession ou sous la garde du tribunal administratif,
(c) any affidavits, or other documents filed during any such hearing, and	**c)** les affidavits et autres documents déposés lors de l'audition,
(d) a transcript, if any, of any oral testimony given during the hearing, giving rise to the decision or order or other matter that is the subject of the application for judicial review,	**d)** la transcription, s'il y a lieu, de tout témoignage donné de vive voix à l'audition qui a abouti à la décision, à l'ordonnance, à la mesure ou à la question visée par la demande de contrôle judiciaire,
and shall send a copy, duly certified by an appropriate officer to be correct, to each of the parties and two copies to the Registry.	dont il envoie à chacune des parties une copie certifiée conforme par un fonctionnaire compétent et au greffe deux copies de ces documents.
[Emphasis added.]	[Je souligne.]

[16] As appears above, section 17 of the CIR Rules provides that the evidentiary record submitted to the Court on judicial review is restricted to the evidentiary record that was before the administrative tribunal (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19, 428 NR 297).

[17] Moreover, the Procedural Protocol Re: Allegations Against Counsel or Other Authorized Representative in Citizenship, Immigration and Protected Person Cases before the Federal Court, issued by the Chief Justice on March 7, 2014, lists the steps to be followed prior to pleading incompetence by former legal counsel. More specifically, current counsel must satisfy himself or herself, by means of personal investigations or inquiries, that there is some factual foundation for this allegation. In addition, current counsel must notify former counsel in writing with sufficient details of the allegations and advise that the matter will be pleaded in an application described above. In this case, the applicants have not provided any evidence that they took the requisite steps under this protocol, or any other steps whatsoever.

[18] In a similar vein, it is trite law that a court on judicial review may only examine the evidence that was adduced before the initial decision-maker (*Ngankoy Isomi v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1394 at para 6, 157 ACWS (3d) 807; *Han v Canada (Minister of Citizenship and Immigration)*, 2006 FC 432 at para 11, 147 ACWS (3d) 1029; *Zolotareva v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1274 at para 36, 241 FTR 289).

[19] In summary, there is no evidence that the medical report was communicated to the PRRA Officer. Accordingly, without further explanation, I have no choice but to conclude that the certified record represents the entire record that was before the PRRA Officer. As Justice McDonald stated in *Jun Li v Minister of Citizenship and Immigration*, 2018 FC 639, at para 26, a decision-maker has “no positive obligation . . . to attempt to fill in gaps in the evidence

nor is there an obligation . . . to give [the applicant] the benefit of the doubt". I therefore agree with the Respondent that I should not consider the medical report in this application.

[20] In the alternative, even if the medical report had been before the PRRA Officer, this would have had no impact on the case that I must decide. Indeed, this medical report only confirms the principal applicant's statement to the effect that he was seriously assaulted in November 2008, more than ten (10) years ago. This does not change the fact that this report dates back to 2008 and that, as will be discussed below, the principal applicant's credibility is not at issue.

(2) *Did the PRRA officer err in not convening a hearing in accordance with paragraph 113(b) of the IRPA and section 167 of the IRPR?*

[21] I note that there are conflicting lines of authority regarding the standard of review to be applied to the issue of whether a hearing must be held or not. In *Zmari v Canada (Citizenship and Immigration)*, 2016 FC 132, 263 ACWS (3d) 177 [*Zmari*], the Court declared that this issue is reviewed on the correctness standard (see also: *Suntharalingam v Canada (Citizenship and Immigration)*, 2015 FC 1025, 257 ACWS (3d) 924; *Antoine v Canada (Citizenship and Immigration)*, 2015 FC 795, 258 ACWS (3d) 153; *Matinguo-Testie v Canada (Citizenship and Immigration)*, 2015 FC 651, ACWS (3d) 149; *Vargas Hernandez v Canada (Citizenship and Immigration)*, 2015 FC 578, 254 ACWS (3d) 912; *Negm v Canada (Citizenship and Immigration)*, 2015 FC 272, 250 ACWS (3d) 317). However, in *Mavhiko v Canada (Citizenship and Immigration)*, 2018 FC 1066, *Huang v Canada (Citizenship and Immigration)*, 2018 FC 940, *Thiruchelvam v Canada (Citizenship and Immigration)*, 2015 FC 913, 256 ACWS (3d) 394,

Seyoboka v Canada (Citizenship and Immigration), 2016 FC 514, and *Gjoka v Canada (Citizenship and Immigration)*, 2018 FC 292, the Court held that the reasonableness standard applies. I am of the opinion that the applicable standard of review is not material to this case. That is to say, the PRRA Officer's decision is not only reasonable, but correct.

[22] The applicants are of the opinion that the PRRA Officer [TRANSLATION] "had an obligation to give the principal applicant the opportunity to appear at a hearing". They argue that the PRRA Officer's refusal to do so [TRANSLATION] "is essentially based on the principal applicant's lack of credibility and not based on a lack of evidence". I do not share the applicants' opinion. As appears from the PRRA Officer's decision, the officer did not find the applicants to be lacking in credibility. To the contrary, the PRRA Officer simply found that there was a lack of supporting evidence in the PRRA application. It is important to bear in mind that the onus is on the applicants to show, on a balance of probabilities, that they would be personally subjected to a danger of torture or persecution, or to a risk to their lives or a risk of cruel and unusual treatment or punishment in the future should they return to Haiti. I acknowledge that evidence of past persecution can be an effective means of showing that a fear of future persecution is well founded (*Natynczyk v Canada (Minister of Citizenship and Immigration*, 2004 FC 914); however, in the present case, there is no evidence of a connection between the isolated incidents in November 2008 and the applicants' circumstances at the time of the PRRA Officer's decision.

[23] The PRRA Officer is not obligated to give the applicants an oral hearing in order that they may supplement their evidence (*Ferguson v Canada (Citizenship and Immigration)*, 2008 FC 1067 at para 27, 170 ACWS (3d) 397; *Adetunji v Canada (Citizenship and Immigration)*,

2012 FC 708 at para 31, 218 ACWS (3d) 616; *Nnabuike Ozomma v Canada (Citizenship and Immigration)*, 2012 FC 1167 at paras 52-56).

[24] In light of all of the above, the PRRA Officer correctly concluded that, regardless of the standard of review, a hearing was not required in accordance with paragraph 113(b) of the IRPA or section 167 of the IRPR.

VII. Conclusion

[25] I find that the PRRA Officer's decision is not only reasonable, but correct.

[26] The application for judicial review is therefore dismissed. No question is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed; and

2. No question is certified.

"B. Richard Bell"
Judge

ANNEX

***Immigration and Refugee Protection Act,* SC 2001, c 27**	***Loi sur l'immigration et la protection des réfugiés,* L.C. 2001, ch. 27**
Application for judicial review	**Demande d'autorisation**
72 (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is, subject to section 86.1, commenced by making an application for leave to the Court.	**72 (1)** Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est, sous réserve de l'article 86.1, subordonné au dépôt d'une demande d'autorisation.
Convention refugee	**Définition de réfugié**
96 A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	**96** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	**a)** soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	**b)** soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Person in need of protection

97 (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not

Personne à protéger

97 (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n’a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s’il y a des motifs sérieux de le croire, d’être soumise à la torture au sens de l’article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d’autres personnes originaires de ce pays ou qui s’y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne

caused by the inability of that country to provide adequate health or medical care.

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

Consideration of application

113 Consideration of an application for protection shall be as follows:

. . .

(b) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;

***Immigration and Refugee Protection Regulations*, SOR/2002-227**

Hearing — prescribed factors

167 For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors are the following:

(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;

résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

Examen de la demande

113 Il est disposé de la demande comme il suit :

[…]

b) une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;

***Règlement sur l'immigration et la protection des réfugiés*, DORS/2002-227**

Facteurs pour la tenue d'une audience

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) 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

(c) whether the evidence, if accepted, would justify allowing the application for protection.

b) l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;

c) la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2311-18
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