Federal Court  Cour fédérale

**Date: 20190710**

**Docket: IMM-6449-18**

**Citation: 2019 FC 911**

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

**Ottawa, Ontario, July 10, 2019**

**PRESENT: The Honourable Mr. Justice Shore**

**BETWEEN:**

**RONALD MICHAEL SHALLOW**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. Nature of the matter

[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 made by a senior immigration officer [officer] dated November 16, 2018, denying the applicant's pre-removal risk assessment [PRRA] application.

## II. Facts

[2] The applicant is a 46-year-old citizen of Saint Vincent and the Grenadines, who became a permanent resident of Canada on June 21, 1987, when he was 13 years old.

[3] The applicant admits that he has had drug problems for a long time, which have led to serious health problems.

[4] In 2009, the applicant was diagnosed with membranous nephropathy and chronic kidney disease. The kidney disease has gotten worse and, since 2015, he has had to undergo hemodialysis treatments three times a week. These treatments are necessary for his survival. In addition, the applicant has other health problems and takes long list of medications.

[5] Since the applicant has committed criminal offences related to drugs and firearm possession, he was the subject of an inadmissibility report and a removal order issued on June 6, 2014. He then applied for a PRRA, which was denied and is the subject of this judicial review.

## III. Positions of parties

### A. *Position of the applicant*

[6] According to the applicant, only a private company in Saint Vincent and the Grenadines provides the medical care necessary for his survival, but double discrimination would prevent him from benefiting from it.

[7] First, even if the health care he needs is available in his home country, the applicant claims that he would suffer discrimination there. Since he has lived in Canada for more than 30 years, health service providers would assume that he is wealthy and charge him more than what residents of Saint Vincent and the Grenadines pay for the same services.

[8] In addition, the applicant claims that employers will refuse to hire him because of his disability related to his illness. This would prevent him from working and therefore from paying for the treatments he needs.

[9] Finally, the applicant states that the officer should hold a hearing to give him the chance to respond to the officer's concerns; in short, this would be a case of veiled credibility.

B. *Position of the respondent*

[10] The respondent argues that it was up to the applicant to provide [TRANSLATION] "evidence to demonstrate that his country of citizenship provides or withholds hemodialysis on a selective or discriminatory basis, as required by paragraph 97(1)(a) of the IRPA". This would therefore not be a question of credibility as the applicant claims.

[11] The respondent's position is that, since the applicant has demonstrated that the state does not provide hemodialysis, his application for a PRRA falls within the exclusion under subparagraph 97(1)(b)(iv) of the IRPA. This provision specifies that for an applicant to be recognized as a person in need of protection, the risk he faces must not result from the country's inability to provide adequate medical or health care.

[12] The respondent points out that Ms. Wyllie Gould's affidavit, on which the applicant relies to demonstrate the discrimination he will face, only provides the affiant's personal perception. Again the respondent points out that the officer did not question Ms. Gould's credibility.

[13] Citing *Blidee v Canada (Citizenship and Immigration)*, 2019 FC 244 at para 16, the respondent further points out that the presumption of truth of a sworn statement should not be confused with a presumption of sufficiency. Thus, the applicant had to provide objective evidence in support of his claims, which he did not do.

## IV. The officer's decision

[14] The officer's conclusions are summarized below:

- The applicant has a medical condition that requires regular medical care, and he is concerned that he may not be able to afford such care in his country of birth;
- The applicant's situation is excluded by subparagraph 97(1)(b)(iv) of the IRPA, and to escape this exclusion the applicant had to demonstrate that his country of birth engages in practices that are persecutory or discriminatory to the point of persecution with respect to access to medical treatment;
- The applicant did not provide any evidence showing that the Government of SaintVincent and the Grenadines will provide or withhold hemodialysis in a selective, discriminatory or persecutory manner;
- The analysis of a PRRA application does not take into account humanitarian and compassionate considerations;

- On a balance of probabilities, the applicant will not face a danger of torture, a risk to his life, or a risk of cruel and unusual treatment or punishment.

## V. Issues

[15] The issues were reworded as follows:

1) Did the officer err in not holding a hearing?
2) Was the officer's decision reasonable?

[16] The applicant submits that the standard of review that should be applied when this Court assesses whether there was a breach of the principles of natural justice and procedural fairness is the standard of correctness. Indeed, there are decisions in the case law of this Court that, in the past, have determined that all questions of procedural fairness fall under the correctness standard. As noted by Justice William F. Pentney in *A.B. v Canada (Citizenship and Immigration)*, 2019 FC 165 at para 11, recent decisions of this Court have generally adopted the standard of reasonableness. In this case, since the officer's task was to determine whether to hold a hearing, by interpreting his own legislative and regulatory framework, this Court will apply the standard of reasonableness (*Nhengu v Canada (Citizenship and Immigration)*, 2018 FC 913 at para 5 [*Nhengu*]).

[17] As for the officer's conclusions regarding his assessment of the risks alleged by the applicant in support of his PRRA application, they are reviewable according to the standard reasonableness (*Alcantara Moradel v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 404 at para 16).

## VI. Relevant provisions

[18] The following provisions are relevant:

*Immigration and Refugee Protection Act*, SC 2001, c 27

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| **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** | **Personne à protéger** |
| **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 | **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) to a danger, believed on substantial grounds to exist, of | a) soit au risque, s'il y a des motifs sérieux de le croire, |

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| torture within the meaning of Article 1 of the Convention Against Torture; or | d’être soumise à la torture au sens de l’article premier de la Convention contre la torture; |
| (b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if | b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant : |
| (i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country, | (i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays, |
| (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, | (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) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and | (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) the risk is not caused by the inability of that country to provide adequate health or medical care. | (iv) la menace ou le risque ne résulte pas de l’incapacité du pays de fournir des soins médicaux ou de santé adéquats. |
| **Pre-removal Risk Assessment** | **Examen des risques avant renvoi** |
| **Protection** | **Protection** |
| . . . | […] |
| **Restriction** | **Restriction** |
| **112** (3) Refugee protection may not be conferred on an applicant who | **112** (3) L’asile ne peut être conféré au demandeur dans les cas suivants : |
| . . . | […] |
| (b) is determined to be inadmissible on grounds of | b) il est interdit de territoire pour grande criminalité pour |

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| serious criminality with respect to a conviction in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years or with respect to a conviction outside Canada for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; | déclaration de culpabilité au Canada pour une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou pour toute déclaration de culpabilité à l'extérieur du Canada pour une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans; |
| **Consideration of application** | **Examen de la demande** |
| **113** Consideration of an application for protection shall be as follows: | **113** Il est disposé de la demande comme il suit : |
| . . . | […] |
| (e) in the case of the following applicants, consideration shall be on the basis of sections 96 to 98 and subparagraph (d)(i) or (ii), as the case may be: | e) s'agissant des demandeurs ci-après, sur la base des articles 96 à 98 et, selon le cas, du sous-alinéa d)(i) ou (ii) : |
| (i) an applicant who is determined to be inadmissible on grounds of serious criminality with respect to a conviction in Canada punishable by a maximum term of imprisonment of at least 10 years for which a term of imprisonment of less than two years — or no term of imprisonment — was imposed, and | (i) celui qui est interdit de territoire pour grande criminalité pour déclaration de culpabilité au Canada pour une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans et pour laquelle soit un emprisonnement de moins de deux ans a été infligé, soit aucune peine d'emprisonnement n'a été imposée, |

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

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| **Hearing — prescribed** | **Facteurs pour la tenue d'une** |

| **factors** | **audience** |
| --- | --- |
| **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. |

## VII. Analysis

### A. *Did the officer err in not holding a hearing?*

[19] The applicant argues that the officer failed to observe the principles of natural justice and procedural fairness by not holding a hearing. According to the applicant, the affidavits he provided to demonstrate that there was discrimination in Saint Vincent and the Grenadines should have been sufficient, and he did not have to provide corroborating evidence. Thus, according to the applicant, the officer's conclusion, that he has not demonstrated the existence of discrimination based on the fact that he lived in Canada for more than 30 years, amounts to a

finding of lack of credibility. The applicant thus believes that the officer should have held a hearing to assess his credibility.

[20] Although it is sometimes difficult to distinguish between a veiled credibility finding and a lack of evidence (*Gao v Canada (Citizenship and Immigration)*, 2014 FC 59 at para 32), this case does not raise such a problem. The officer does not question the applicant's and Ms. Gould's testimonies, but needed more than Ms. Gould's personal beliefs to conclude that there was discrimination on the basis of wealth, as the applicant claims. Since the credibility of the applicant was not in doubt, the officer did not have to hold a hearing.

B. *Was the officer's decision reasonable?*

[21] The applicant seems to believe that it was up to the officer to remind him that he should make his best arguments by providing "all the evidence necessary for the officer to make a decision" (*Nhengu*, above, at para 6, citing *Lupsa v Canada (Citizenship and Immigration)*, 2007 FC 311 at paras 12-13). In this case, the applicant's main argument concerns the discrimination he will face upon his return to his country of birth, more specifically with regard to the costs of health services. It was therefore up to the applicant to provide objective evidence to prove this allegation.

[22] In connection with this same point, the applicant further asserts that the officer's decision was not adequately reasoned. In his view, the officer had to specify the evidence required. Rather, like the respondent, the Court is of the opinion that the decision was sufficiently substantiated. Upon reading it, it is clear that the officer expected to be shown that there was

discrimination in the provision of medical services and that this evidence had to be objective, which excluded Ms. Gould's personal beliefs. He also states the following on page 4 of the decision:

> The purpose of a Pre-Removal Risk Assessment (PRRA) is to evaluate if the applicant is at risk of persecution, torture, risk to life or risk of cruel and unusual treatment or punishment in the country of removal. The burden rests with the applicant to demonstrate that in his returning to St. Vincent and the Grenadines, there is a risk among those described in Sections 96 and 97 of the IRPA. All grounds for protection call for a demonstration that the risk be characterized as personal and objectively identifiable. [Emphasis added.]

[23] The evidence on file shows that the applicant's country of origin does not provide the medical care he needs; only a private clinic does. In a case such as this, where human factors are inevitably part of the story, it is essential to remember the role that Parliament has given to each of the decision makers, whether the PRRA officer or the judge, and the limits within which each must operate. For example, in this case, since the contested decision concerns a PRRA application, it is not open to the PRRA officer to consider the factors that are specific to a humanitarian and compassionate considerations application (*Canada (Citizenship and Immigration) v Varga*, 2006 FCA 394 at paras 6-9).

[24] In a decision on similar facts (C*ovarrubias v Canada (Citizenship and Immigration)*, 2005 FC 1193 (affirmed by the Federal Court of Appeal in 2006 FCA 365)), Justice Richard G. Mosley referred to the legislative objectives of subparagraph 97(1)b)(iv) of the IRPA as follows:

> [30] In *Singh*, Justice Russell dealt with a fact situation similar to this case. There was evidence that the applicant could have access to dialysis in India, but not at a price her family could afford. As Justice Russell summarized the arguments of paragraph 20 of his reasons, the applicant was asserting, in effect, that she

should not be removed to India because that country does not provide the free, universal health care that she required because of her particular ailment and her financial position. The respondent contended, as here, that these are humanitarian and compassionate factors to be considered in an application under section 25 of IRPA and not in a pre-removal risk assessment.

[31] Evidence of the legislative intent of paragraph 97(1)(b)(iv) was provided to the court in *Singh* through the clause explanatory notes submitted to Pariliament for the consideration of Bill C-11 [*An Act respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted or in danger, 1st Sess., 37th Parl., 2001*], subsequently enacted as IRPA. The notes, while not extensive on this question, have the following to say about section 97 and health facilities:

> Cases where a person faces a risk due to lack of adequate health or medical care can be more appropriately assessed through other means in the Act and are excluded from this definition. Lack of appropriate health or medical care are not grounds for granting refugee protection under the Act.

[32] While acknowledging that it was a very difficult case, Justice Russell concluded at para 24:

> This leads me to the conclusion that the respondent is correct on this issue. A risk to life under section 97 should not include having to assess whether there is appropriate health and medical case available in the country in question. There are various reasons why health and medical care might be "inadequate." <u>It might not be available at all or it might not be available to a particular applicant because he or she is not in a position to take advantage of it. If it is not within their reach, then it is not adequate to their needs.</u> [Emphasis added.]

[33] I think it is clear that the intent of the legislative scheme was to exclude claims for protection under section 97 based on risks arising from the inadequacy of health care and medical treatment in the claimant's country of origin, including those where treatment was available to those who could afford to pay for it. I agree with Justice Russell's interpretation of the statute. Thus I find that the PRRA officer did not err in applying the exclusion to Mr. Ramirez and the application cannot succeed on that ground.

[25] In light of the reasons above, the Court finds that the decision is reasonable, transparent and intelligible, and that it is within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

## VIII. Conclusion

[26] For the reasons specified above, the application for judicial review is dismissed.

**JUDGMENT in IMM-6449-18**

**THIS COURT'S JUDGMENT is that** the application for judicial review is dismissed.

There are no questions of general importance to certify.

"Michel M.J. Shore"
Judge

Certified true translation
This 23rd day of July, 2019.

Michael Palles, Translator

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-6449-18 |
| **STYLE OF CAUSE:** | RONALD MICHAEL SHALLOW v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | MONTRÉAL, QUEBEC |
| **DATE OF HEARING:** | JUNE 27, 2019 |
| **JUDGMENT AND REASONS:** | SHORE J. |
| **DATED:** | JULY 10, 2019 |

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