Federal Court  Cour fédérale

Date: 20240612

Docket: IMM-4054-23

Citation: 2024 FC 897

Ottawa, Ontario, June 12, 2024

PRESENT: The Honourable Madam Justice Ngo

BETWEEN:

HERVE KALONJI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is a judicial review of a decision by an officer at Immigration, Refugees and Citizenship Canada [Officer] dated September 25, 2019 and September 30, 2019 refusing a Pre-Removal Risk Assessment [PRRA] application [Decision]. The Officer refused the PRRA, because Mr. Herve Kalonji [Applicant] failed to demonstrate a forward-looking personalized risk of harm upon return to the Democratic Republic of Congo [Congo]. The PRRA application was

submitted after the Applicant had received a certification of conviction and was been deemed inadmissible for serious criminality under paragraph 36(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] On March 22, 2023, the Applicant received a copy of the PRRA Decision, by way of two (2) letters dated September 25, 2019 and September 30, 2019.

[3] The Applicant frames three issues:

a) The Applicant was prejudiced and denied procedural fairness, because the Decision was served upon him after an excessive delay, notably 42 months after the Decision was rendered;

b) The Decision is unreasonable, because the Officer found the Applicant would not benefit from the Temporary Suspension of Removal [TSR] without referring to an applicable provision under the IRPA; and

c) The Decision is unreasonable, because the Officer failed to consider paragraph 113(d)(i) of the IRPA to determine whether the Applicant is a danger to the public in Canada.

[4] The Applicant did not demonstrate that the Decision was unreasonable. For the reasons that follow, the application for judicial review is dismissed.

II. Relevant Legislation

[5] The Respondent provided a summary of the applicable legislative provisions, which are reproduced below:

a) The Applicant is described under paragraph 112(3)(b) of the IRPA, which provides that refugee protection may not be conferred on an applicant who is inadmissible on grounds of serious criminality;

b) Paragraph 36(1)(a) of the IRPA provides that a foreign national is inadmissible on grounds of serious criminality punishable by a term of imprisonment of at least ten (10) years under an Act of Parliament, and the person has been convicted for a term of more than six (6) months in Canada;

c) Subsection 113(d) of the IRPA provides that, an application by an applicant described in paragraph 112(3)(b) should consider the factors set out only in section 97 of the IRPA;

d) Section 172 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR] provides that, an application by a person described in subsection 112(3) of the IRPA shall include considerations of an assessment on risk and danger, as well as written responses provided by an applicant on the assessment. If the applicant is not found to face a risk set out in section 97 of the IRPA, an assessment on risk and danger is not required;

e) The Minister may impose a stay of removal orders with respect to a country, or a place, if the circumstances pose a generalized risk to the entire population as a result of the factors outlined under subsection 230(1) of the IRPR. Paragraph 230(3)(c) of the IRPR provides that a stay does not apply to a person who is inadmissible on grounds of serious criminality as defined under subsection 36(1) of the IRPA, or on grounds of criminality as defined under subsection 36(2) of the IRPA;

f) Paragraph 380(1)(a) of the *Criminal Code*, RSC, 1985, c C-46 [*Criminal Code*], provides that every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of the *Criminal Code*, defrauds the public or any person. As such, a person committing an offence under paragraph 380(1)(a) of the *Criminal Code* is guilty of an indictable offence and is liable to a term of imprisonment not exceeding fourteen (14) years.

III. Background

[6] On May 21, 2019, the Applicant was convicted of fraud under paragraph 380(1)(a) of the *Criminal Code*, an offence punishable by a term of imprisonment not exceeding fourteen (14) years. The Applicant was sentenced to a term of imprisonment of three and a half (3.5) years, and received a “suspended sentence,” with 845 days pre-sentence custody calculated at a rate of 1.5 for 42 months pre-trial custody. The Applicant was found inadmissible for serious

criminality under paragraph 36(1)(a) of the IRPA. The Applicant was described in paragraph 112(3)(b) of the IRPA and was entitled to a PRRA only under section 97 of the IRPA.

[7] On July 26, 2019, the Applicant submitted his PRRA application.

[8] The original deadline for the Applicant to provide his PRRA submissions was August 17, 2019.

[9] On August 9, 2019, the Applicant's counsel sent a letter to ask for a 30-day extension of time to September 17, 2019 to provide further submissions.

[10] On August 14, 2019, the Applicant's counsel sent a second letter to request a 30-day extension of time from the August 17, 2019 deadline to September 17, 2019.

[11] On September 25, 2019, the PRRA application was rejected on the basis that the Applicant would not be subject to risk of torture, risk to life or risk of cruel and unusual treatment or punishment if returned to his country of nationality. The Officer noted that at the time of their decision the Applicant did not make any submissions on this matter.

[12] In a letter dated September 30, 2019, the Officer who determined the PRRA application wrote to the Applicant. The letter indicated that the Officer received submissions from the Applicant's counsel dated September 16, 2019.

[13] Upon review of the Applicant's letter, the Officer indicated that they found no compelling change in circumstances, including those with respect to the country conditions, or with respect to those that would have changed, the decision issued initially on September 25, 2019. The Officer noted that the initial deadline for the PRRA submissions was August 17, 2019. The Applicant's counsel requested extensions of time to September 17, 2019 through two (2) letters. On September 16, 2019, the Applicant's counsel sent a third letter to ask for another extension to October 17, 2019. The third request for extension was refused.

[14] On March 22, 2023, the Applicant received a copy of the PRRA decisions of September 25, 2019 and September 30, 2019. The two letters together constitute the Decision at issue on judicial review.

IV. Issues and Standard of Review

[15] The issues before me are whether the Applicant has been denied procedural fairness and whether the Decision is unreasonable.

[16] The Respondent submits that allegations of a breach of procedural fairness are considered by the Court in a manner akin to applying the correctness standard of review (*Mohamed v Canada (Citizenship and Immigration)*, 2023 FC 1297 at para 19 [*Mohamed*].

[17] The reviewing court must conduct its own analysis to determine for itself whether the process followed by the decision maker was fair, with regard to all the relevant circumstances, including those outlined in *Baker v Canada (Minister of Citizenship and Immigration)*, 1999

CanLII 699 (SCC), [1999] 2 SCR 817 at paras 21-28, *Canadian Pacific Railway Co v Canada (Attorney General)*, 2018 FCA 69 at para 54). I agree.

[18] The parties agree the Decision is reviewable on the standard of reasonableness. I also agree that this is the applicable standard of review.

[19] The reasonableness standard requires that a reviewing court defer to a decision that is based on "an internally coherent and rational chain of analysis" and be "justified in relation to the facts and law that constrain the decision maker" (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 at paras 85, 99 [*Vavilov*]). In assessing whether a decision is reasonable, the Court will examine the reasons given by the administrative decision maker and will assess whether the decision is appropriately justified, transparent and intelligible. Both the outcome of the decision and its reasoning process must be considered in assessing whether these hallmarks are met (*Vavilov* at paras 15, 95, 136).

[20] A Court applying the reasonableness standard does not ask what decision it would have made in place of the administrative decision maker. It is "an approach meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. It finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers" (*Vavilov* at para 13).

[21] Such review must include a rigorous and robust evaluation of administrative decisions. As part of its analysis, the reviewing court must take a "reasons first" approach by examining the reasons provided with "respectful attention," in which the Court seeks to understand the reasoning process followed by the decision maker for drawing its conclusion (*Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21, 485 DLR (4th) 583 at paras 58, 60; *Vavilov* at para 84).

[22] The decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from reweighing and reassessing the evidence considered by the decision maker (*Vavilov* at para 125).

[23] The onus is on the party challenging the decision to prove that it is unreasonable. Flaws must be more than superficial for the reviewing court to overturn an administrative decision. The court must be satisfied that there are "sufficiently serious shortcomings" (*Vavilov* at para 100).

V. Analysis

A. *No Breach of Procedural Fairness*

[24] The Applicant submits that the 42-month delay in delivering the PRRA Decision was prejudicial, because he had not been provided with an opportunity to make submissions on the worsening country conditions in Congo during the intervening time. The Applicant states that returning would be dangerous, as there "remains ongoing violence in the Congo; particularly at

the Congo/Rwanda border. There are Ebola outbreaks; COVID problems and deaths due to Monkey pox." As a result, the Applicant argues that he was denied procedural fairness.

[25] The Respondent cites *Singh v Canada (Citizenship and Immigration*), 2014 FC 867 at paragraph 23 [*Singh*], to submit that a delay in itself does not amount to a breach of procedural fairness. As such, the evidence before the Officer must demonstrate that the delay is excessive, and that the delay caused prejudice or harm to the Applicant. Moreover *Singh*'s paragraph 23 was also referred to by the Applicant cited *Balepo v Canada (Citizenship and Immigration)* 2017 FC 1104 at paragraph 22 [*Balepo*].

[26] The Respondent submits that the Applicant failed to update the Officer between the time the PRRA application was submitted and the Decision was communicated to the Applicant.

[27] The determinative issue on the procedural fairness of the PRRA application is whether delayed delivery of the Decision caused a prejudice to the Applicant (*Singh* at para 23, *Mohamed* at para 19, *Balepo* at para 22).

[28] In *Singh,* the Court found no breach of procedural fairness from a 21-month period between the date the PRRA decision, and the date the decision was communicated. Justice de Montigny, as he was then, stated that PRRA applicants must bear some responsibility to ensure that applications submitted represent a description of the present conditions of the country. In *Singh*, the Court found that the period for which the Officer must consider submissions made on an application runs until the day a decision on the PRRA application is made. In Mr. Singh's

case, there was no attempt to update his submissions or inquire on his case during the 21-month period in question.

[29] In *Mohamed*, Justice Norris found that even if the information which the PRRA decision is based was outdated by the time the applicant was informed of the result, this was due to his inaction while he was waiting for the decision, as opposed to the delay in itself (*Mohamed* at para 42).

[30] In the Applicant's case, Applicant's counsel sought extensions of time to provide further submissions to support his PRRA application of 2019. One extension request was granted, which gave additional time for the Applicant to provide additional information with regards to his PRRA application. The onus was on the Applicant to provide any updates or inquiries about his PRRA application made in 2019 and before the Decision was communicated to him in 2023.

[31] Given the circumstances, the amount of time in communicating the Decision is not a sufficient ground alone to constitute a breach of procedural fairness. The Applicant must also demonstrate having suffered a prejudice because of the delay. In this case, I have not been persuaded that the Applicant has suffered prejudice or harm by the delay.

[32] In the absence of evidence that demonstrates prejudice to the Applicant by the amount of time in communicating the PRRA decision to him, I cannot conclude that he has been denied procedural fairness (*Singh* at para 28).

B. *The PRRA Decision was not Unreasonable*

[33] The Applicant argues that the Decision is unreasonable since the refusal letter dated September 30, 2019 does not stipulate which part of subsection 230(3) of the IRPR applied to the Applicant, and specifically on the issue of the TSR. The Applicant also argues that the Decision failed to consider paragraph 113(d)(i) of the IRPA to determine whether the Applicant is a danger to the public in Canada.

[34] I agree with the Respondent's submission that the reasons provided by the Officer clearly stated why the TSR does not apply to the Applicant. The PRRA decision of September 25, 2019 and the Officer's letter of September 30, 2019 addressed the issue of TSR with respect to Congo.

[35] The Officer stated that while the Congo currently has in place a TSR per subsection 230(3) of the IRPA, at this time, the Applicant would not benefit from this TSR because he had been deemed inadmissibility as provided by paragraph 112(3)(b) of the IRPA. Serious criminality under subsection 36(1) of the IRPA ought to be considered in conjunction with paragraph 230(3)(c) of the IRPR. I disagree with the Applicant's argument that there was a reviewable error.

[36] The Applicant further submits that the Officer failed to consider paragraph 113(d)(i) of the IRPA to determine if the Applicant was a danger to the public in Canada.

[37] The Respondent turns to subsection 172(4) of the IRPR to argue that the Officer was not required to consider whether the Applicant is a danger to the public in Canada. This provision provides that, “if the Minister decides on the basis of the factors set out in section 97 of the Act that the applicant is not described in that section, no written assessment on the basis of the factors set out in subparagraph 113(d)(i) or (ii) of the Act need be made.”

[38] In considering the Decision under review, I find that the Officer’s conclusion that the Applicant did not demonstrate a personalized risk of harm under section 97 of the IRPA was not unreasonable. The letter of September 30, 2019 explained that there had been insufficient objective and corroborative evidence provided by the Applicant to demonstrate that a personalized risk of serious harm pursuant to section 97 of the IRPA.

[39] The Officer reviewed counsel’s submissions, including an article, and found that, the link between the article and the Applicant’s circumstances had been insufficiently explained by the Applicant to demonstrate a personalized risk of serious harm upon return to his home country. The Officer engaged in a review of the submissions provided and the documentation on the country’s condition on Congo.

[40] As Justice McHaffie highlighted in *Fodor v Canada (Citizenship and Immigration*), 2020 FC 218, section 97 of the IRPA requires that the claimant be personally subject to a risk of life or cruel and unusual treatment or punishment. The risk is evaluated based on an independent assessment of the claimant’s circumstances, in the sense that the risk is not faced generally by others in the country. A claimant under section 97 is required to establish, on a balance of

probabilities, that removal would “more likely than not” subject them to the described risks (*Fodor* at para 20).

[41] This is the personalized risk that the Officer referred to in the Decision. Based on the record including the submissions and the article, I cannot find that the Officer was unreasonable in finding that the Applicant failed to meet his onus as provided under section 97 of the IRPA.

VI. Conclusion

[42] Given the above, I do not find that the Decision was unreasonable. The application for judicial review is dismissed.

A. *Other Procedural Issues and Certified Questions*

[43] Two days before the scheduled hearing, the Applicant’s counsel submitted a letter dated March 4, 2024 to advise that a new issue arose for the first time and that the Applicant proposed a question for certification. This new issue related to a new alleged error in the PRRA Decision and the interpretation of the IRPA. During the hearing, the Respondent confirmed receiving the letter dated March 4, 2024 one day before the hearing.

[44] It is well established that new issues should not generally be heard by a reviewing court (*Shoan v Canada (Attorney General)*, 2020 FCA 174 at para 13; *Alberta (Information and Privacy Commissioner) v Alberta Teachers’ Association*, 2011 SCC 61 at paras 22-26).

[45] Listing the grounds upon which relief is sought delineates the particulars of the application, as well as the scope of argument. Indeed, an argument not outlined in the application for judicial review will generally not be entertained by the courts, although this is a matter within the Court's discretion (*ATA v Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, 339 DLR (4th) 428 at para 22; *Oleynik v Canada (Attorney General)*, 2020 FCA 5, 441 DLR (4th) 744 at para 71; *Canada (Attorney General) v Valcom Consulting Group Inc*, 2019 FCA 1 at para 36).

[46] The Applicant wished to raise a new issue that was not raised in the Application for Leave and Judicial Review. After leave was granted, the Applicant did not make any legal submissions in the Applicant's Memorandum of Fact and Law or the Applicant's Further Memorandum of Fact and Law. It is important to note that the Applicant's counsel had represented the Applicant from the outset of the proceedings before this Court. The Applicant's counsel was also counsel of record during his PRRA application; and as an authorized representative, she received copies of the Decision.

[47] By raising a new issue for the first time at the hearing, the Respondent would be deprived of an opportunity to respond to the new argument raised in a meaningful way (*Diaz Castillo v Canada (Citizenship and Immigration)*, 2021 FC 1118 at para 17). While the Court has discretion to consider new arguments, I advised the parties that I decline to exercise my discretion.

[48] At the end of the Applicant's submissions, counsel also sought to introduce a second question for certification, which had not been addressed in the letter dated March 4, 2024.

[49] With respect to the two questions proposed for certification, I consider the Court's *Consolidated Practice Guidelines for Citizenship, Immigration, and Refugee Protection Proceedings*, June 24, 2022 (last amended October 31, 2023), specifically paragraph 36 [Guidelines]. The submissions do not respect the Guidelines requiring a party to notify opposing counsel at least five (5) days prior to a hearing of the questions it proposes to certify.

[50] Certified questions submitted at the last minute is not helpful to the Court nor fair for the opposing party. Moreover, a certified question is supposed to be a question of general importance. Arguably, these are not issues that should arise on the eve of judicial review or as an afterthought. Such a practice is strongly discouraged by the Court, and the Court may refuse to consider the merits of the proposed question as it prejudices the other party and the Court and does not serve the interests of justice (*Medina Rodriguez v Canada (Citizenship and Immigration)*, 2024 FC 401 at para 44).

[51] In any event, the questions as framed by the Applicant's counsel were highly fact-specific and do not meet the established test to certify a question (*Obazughanmwen v Canada (Public Safety and Emergency Preparedness*), 2023 FCA 151 at para 28; *Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168 at para 9).

[52] In considering the Guidelines, the fairness to the opposing party, and the interests of justice, I decline to certify the Applicant's questions.

[53] Finally, one day after the hearing, Applicant's counsel submitted a letter dated March 8, 2024 to the Court. The letter was not accepted pursuant to Rule 72(2)(a) of the Federal Courts Rules, SOR/2004-283.This correspondence was unsolicited, and it was not clear that the Respondent had been served.

JUDGMENT in docket IMM-4054-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question for certification.

"Phuong T.V. Ngo"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4054-23
STYLE OF CAUSE:	HERVE KALONJI V THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	BY VIDEOCONFERENCE
DATE OF HEARING:	MARCH 7, 2024
JUDGMENT AND RESONS:	NGO J.
DATED:	JUNE 12, 2024

APPEARANCES:

Mary Lam	FOR THE APPLICANT
Ian Hicks	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mary Lam Barrister and Solicitor Toronto (Ontario)	FOR THE APPLICANT
Attorney General of Canada Toronto (Ontario)	FOR THE RESPONDENT