Date: 20090320

Docket: IMM-3581-08

Citation: 2009 FC 287

Ottawa, Ontario, March 20, 2009

PRESENT: The Honourable Mr. Justice Orville Frenette

BETWEEN:

Boubacar Sadikh BA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. (2001), c. 27 (the Act), for judicial review of a decision dated July 23, 2008, by a pre-removal risk assessment officer (PRRA officer), dismissing the applicant's application for permanent residence made on humanitarian or compassionate grounds (H&C application).

Facts

[2] The applicant, Boubacar Sadikh Ba, is a citizen of Mauritania. He arrived in Canada on October 18, 2004, and claimed refugee protection on that date.

[3] The refugee claim was refused on August 11, 2005. The applicant then submitted an application for leave and judicial review to the Federal Court, and this application was dismissed on December 5, 2005.

[4] On May 3, 2006, he submitted to Citizenship and Immigration Canada an application for permanent residence made on humanitarian or compassionate grounds and, on March 21, 2008, an information update was submitted.

[5] On July 23, 2008, the PRRA officer refused the application on the grounds that [TRANSLATION] "the applicant had not demonstrated his life or safety would be in danger because he is a Black or because he would live in servitude in Mauritania. The evidence, analyzed in light of the findings made by the RPD, does not support that he would be personally subject to a risk for the grounds alleged. Consequently, I cannot confirm that the risks alleged constitute unusual or disproportionate hardship."

Issues

[6] The applicant is raising the following two issues:

1. Did the PRRA officer apply the wrong standard when she assessed the risk and the unusual, undeserved or disproportionate hardship?

2. Did the PRRA officer err in finding that she was not satisfied that a return to Mauritania would have disproportionate repercussions, given the applicant's personal circumstances?

Analysis

The applicable standards of judicial review

[7] It is settled law that where the issue turns on a question of fact or a question of mixed fact and law, the standard of review is reasonableness (*Dunsmuir v. New Brunswick,* [2008] 1 S.C.R. 190). According to *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, at paragraphs 59 to 64, deference is owed to the decisions of administrative tribunals.

[8] The standard of review for a question of law is correctness.

[9] In the specific case of the application of an incorrect factor in the assessment of risks included in an H&C application, the standard is correctness, since this is a question of law (*Mooker v. Minister of Citizenship and Immigration*, 2008 FC 518; *El Doukhi v. Minister of Citizenship and Immigration*, 2006 FC 1464, at paragraph 11).

The factor applied by the PRRA officer

[10] The applicant is arguing that even if the PRRA officer mentioned the factor of [TRANSLATION] "unusual or disproportionate hardship", she committed an error of law by not applying the correct factor. He argues that, in assessing this [TRANSLATION] "unusual or

disproportionate hardship", the PRRA officer first considered the question of social discrimination in terms of risk. According to him, this view of risk is erroneous.

[11] The PRRA officer took the following approach with respect to the risk assessment:

> [TRANSLATION]
> [The applicant] did not establish the presence of a risk likely to create unusual, undeserved or disproportionate hardship.

[12] Does this approach apply in the review of an H&C application? We know that there is a difference between the assessment of risk in an H&C application and in a PRRA application.

[13] In *Pinter v. Minister of Citizenship and Immigration*, 2005 FC 296, Chief Justice Lutfy wrote the following:

> [5] …There may well be risk considerations which are relevant to an application for permanent residence from within Canada which fall well below the higher threshold of risk to life or cruel and unusual punishment.

[14] The same reasoning can be found in *Dharamraj v. Minister of Citizenship and Immigration*, 2006 FC 674, at paragraph 24.

The difference between the assessment of risk in a PRRA application and in an H&C application

[15] There is a difference between the assessment of risk in a PRRA application and in an H&C application.

[16] Both applications take risk into account. In the context of a PRRA, the consideration of the "risk" referred to in section 97 of the Act involves assessing whether "the applicant would be personally subjected to a danger of torture or to a risk to life or to cruel and unusual treatment or punishment", while in the context of an H&C application, "risk should be addressed as but one of the factors relevant to determining whether the applicant would face unusual, and undeserved or disproportionate hardship". The focus is therefore on hardship, which has a risk component, not on risk as such (*Sahota v. Minister of Citizenship and Immigration*, 2007 FC 651, at paragraph 8).

[17] Thus, the concept of "hardship" in an H&C application and the concept of "risk" in a PRRA application must be assessed according to different standards (*Akinbowale v. Minister of Citizenship and Immigration*, 2007 FC 1221, at paragraph 20; *Ramirez v. Minister of Citizenship and Immigration*, 2006 FC 1404, at paragraph 42; *Markis et al. v. Minister of Citizenship and Immigration*, 2008 FC 428, at paragraphs 23 to 26). If the court does not analyze hardship as opposed to risk in its decision, it makes a reviewable error (*Ramirez*, above, at paragraphs 47 to 49).

[18] In *Doumbouya v. Minister of Citizenship and Immigration*, 2007 FC 1186, the PRRA officer used a line of analysis that is similar to the one used in this case. In *Doumbouya* – as in this case – the applicant argued that the PRRA officer did not apply the correct factor. The applicant criticized the inclusion of an element of personalized "risk" in the assessment of the H&C application. However, this argument was categorically rejected by Justice Michel M.J. Shore as follows:

> [35] Risk is a factor to be considered in assessing "unusual and undeserved or disproportionate hardship" within the context of a humanitarian and compassionate application (*Lin*, above, paragraph 7).

[36] Moreover, according to the Immigration Manual of the Department of Citizenship and Immigration, regarding applications under section 25 of the Act (paragraph 13 of chapter IP-5):

Positive (H&C) consideration may be warranted for persons 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 to a risk to their life or to a risk to security of the person.	On peut justifier une décision (CH) favorable pour un demandeur qui courrait un risque objectivement personnalisé s'il était renvoyé du Canada vers un pays dont il a la nationalité ou, s'il n'a pas la nationalité d'un pays, le pays où il avait sa résidence habituelle. Il peut s'agir d'un risque pour sa vie ou un risque pour sa sécurité.

[37] However, as Mr. Justice Sean Harrington wrote in *Sahota*, above:

> [7] While PRRA and H&C applications take risk into account, the manner in which they are assessed is quite different. In the context of a PRRA, "risk" as per section 97 of IRPA involves assessing whether the applicant would be personally subjected to a danger of torture or to a risk to life or to cruel and unusual treatment or punishment.
>
> [8] In an H&C application, however, risk should be addressed as but one of the factors relevant to determining whether the applicant would face unusual, and underserved or disproportionate hardship. Thus the focus is on hardship, which has a risk component, not on risk as such.
>
> [9] In general terms, it is more difficult for a PRRA applicant to establish risk than it is for an H&C applicant to establish hardship (see: *Melchor v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 1600, 2004 FC 1327; *Dharamraj v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 853, 2006 FC 674; and *Pinter v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 366, 2005 FC 296).

> …
>
> [12] In the current case, the officer considered the risk factors set out in the negative refugee claim decision, and updated them. Although he considered Mr. Singh Sahota's connections with Canada, as far as India is concerned, although he used the humanitarian and compassionate form, in reality all he did was assess risk, not hardship. For instance he said, "in assessing the risk invoked by the applicant I note that they have, in substance, been previously considered by the IRB." It may well be that a risk may not be so sufficient as to support a refugee claim under sections 96 or 97 of IRPA, but still be of sufficient severity to constitute a hardship.
>
> [13] The officer applied the wrong test. . . .

> [38] In this case, after considering Mr. Doumbouya's entire file, including his application for visa exemption, the officer determined, in the part of her reasons concerning [TRANSLATION] "Risks" that, considering Mr. Doumbouya's personal profile and the current situation in Guinea described in public information sources, Mr. Doumbouya failed to establish that the particular circumstances of his case were such that he would face unusual, undeserved or disproportionate hardship if required to apply for a visa abroad.

[19] In addition, despite the fact that the applicant is impugning the decision of the PRRA officer who, in this case, [TRANSLATION] "considered the question of discrimination in terms of risk", Justice Shore also stressed the following in *Maichibi v. Minister of Citizenship and Immigration*, 2008 FC 138 :

> [22] Section 13 of Chapter IP-5 of the Immigration Manual: Inland Processing (IP) "Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds" published by Citizenship and Immigration Canada, requires the risk to be personalized:
>
> | **Personalized risk** | **Risque personnalisé** |
> | --- | --- |
> | Positive consideration may be warranted for persons whose | On peut justifier une décision favorable pour un demandeur |

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 to a risk to their life or to a risk to security of the person.	qui courrait un risque objectivement personnalisé s'il était renvoyé du Canada vers un pays dont il a la nationalité ou, s'il n'a pas la nationalité d'un pays, le pays où il avait sa résidence habituelle. Il peut s'agir d'un risque pour sa vie ou un risque pour sa sécurité.

[20] Consequently, I believe that, in this case, the officer did not take an inappropriate view when assessing the applicant's H&C application.

Personalized risk and H&C applications

[21] The applicant is arguing that the PRRA officer erred when she found that she was not satisfied that a return to Mauritania would have disproportionate repercussions, given the applicant's personal circumstances.

[22] He repeated in his memorandum that he would be subject to [TRANSLATION] "unusual and undeserved or disproportionate hardship" as a result of the discrimination against Afro-Mauritanians should he return to Mauritania. This is a risk recognized as one of the factors to be taken into account in assessing the "unusual and undeserved or disproportionate hardship". This line of analysis is expressly set out in operational manual IP 5 of Citizenship and Immigration Canada with respect to H&C applications submitted by immigrants to Canada. The Supreme Court of Canada in *Baker v. Canada (M.C.I.),* [1999] 2 S.C.R. 817, stated that these operational manuals have proved

very useful in interpreting section 25 of the Act. The IP 5 manual was used by Justice Shore in the recent decision *Lalane v. Minister of Citizenship and Immigration*, 2009 FC 6.

Discrimination and personalized risk

[23] The jurisprudence of this Court has established that the discrimination to which a segment of the population of a country is subjected is not in itself a personalized risk for each applicant in that segment (*Dreta v. Minister of Citizenship and Immigration*, 2005 FC 1239; *Prophète v. Minister of Citizenship and Immigration*, 2008 FC 331; *Maichibi v. Minister of Citizenship and Immigration*, 2008 FC 138; *Rahman v. Minister of Citizenship and Immigration*, 2009 FC 138; *Lalane*, above, at paragraphs 42 to 46). In this case, the PRRA officer found that the risk that the applicant would be subjected to was not sufficiently personalized. She stressed that the applicant was part of a segment of the population of Mauritania who are Afro-Mauritanians, and that he was faced with the same risk as the other members of this segment. This reasoning is consistent with the jurisprudence of our courts.

[24] However, the respondent points out that the applicant is now raising new elements that he did not see fit to submit to the PRRA officer, namely, his claims that [TRANSLATION] "he will face discrimination in finding a job". He noted that at the pre-removal risk assessment – as before the Refugee Protection Division – what the applicant was truly claiming that he feared in Mauritania was slavery, and it appears that he is now trying to improve his case before this Court.

[25] Justice Sean Harrington found the following in *Kouka v. Minister of Citizenship and Immigration*, 2006 FC 1236:

> [26] First, it is important to emphasize the following. It is well settled that before making a decision, an immigration officer has a duty to review all the evidence in the record. Nevertheless, that does not in any way mean that the officer must reconsider evidence that was the subject of an earlier decision, as was discussed somewhat earlier in this judgment.
>
> [27] When dealing with a new H&C application, an immigration officer naturally takes into account comments made in an earlier decision. On this point, Mr. Justice Nadon wrote the following in *Hussain v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 751 (QL):
>
> > [12] I should note that before Mr. St. Vincent on their H&C application, the Applicants proceeded on the basis that Mr. Hussain was a member of the MQM, notwithstanding the clear findings made by the Refugee Board and by the PDRCC Officer to the contrary. The Applicants seem to be of the view that if they continue to add documents to the record, the credibility findings of the Refugee Board are somehow going to be "reversed" or "forgotten". In my view, that is a mistaken view because the officer who hears an H&C application does not sit in appeal or review of either the Refugee Board or the PDRCC Officer's decision. Thus, on the H&C application, Mr. St. Vincent could not proceed on the basis that Mr. Hussain was an MQM member, given the Refugee Board's findings in that respect. In short, the purpose of the H&C application is not to re-argue the facts which were originally before the Refugee Board, or to do indirectly what cannot be done directly – i.e., contest the findings of the Refugee Board.

[26] I also wish to point out that slavery in Mauritania was made a criminal offence in August 2006. [TRANSLATION] "Under the new legislation, slavery carries a maximum sentence of 10 years' imprisonment and a fine" (panel record, at page 21).

[27] For the reasons cited above, I am of the opinion that the PRRA officer did not err by taking into account the negative decision of the Immigration and Refugee Board in her analysis, thereby adopting the reasoning of Justice Harrington in *Kouka*, above.

Conclusion

[28] The PRRA officer obviously took into account all of the appropriate factors in her analysis and decision. She did not err in finding that she was not satisfied that a return to Mauritania would have [TRANSLATION] “disproportionate repercussions, given the applicant’s personal circumstances”.

JUDGMENT

The applicant's application for judicial review of the decision of the pre-removal risk assessment officer dated July 23, 2008, is dismissed.

No question is certified.

"Orville Frenette"
Deputy Judge

Certified true translation
Susan Deichert, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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