Federal Court  Cour fédérale

Date: 20090602

Docket: IMM-817-09

Citation: 2009 FC 563

Montréal, Quebec, June 2, 2009

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

DAVIDSON ALTENOR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Preliminary comments

[1] The applicant alleges that the Refugee Protection Division (RPD) concluded that he was a Convention refugee.

[2] He therefore argues that the pre-removal risk assessment (PRRA) officer was bound by that conclusion and had to follow it.

[3] This argument is unfounded for two reasons.

[4] The PRRA officer rightly found that the RPD had exceeded its jurisdiction by determining that the applicant was at risk. The Federal Court of Appeal has clearly and explicitly held as follows:

> [38] . . . In my view, the Board exceeded its mandate when it decided to deal with the appellant's risk of torture upon return with the result that the Minister is not bound by that finding. Once the Board found that the exclusion applied, it had done everything that it was required to do, and there was nothing more it could do, for the appellant. The appellant was now excluded from refugee protection, a matter within the Board's competence, and was limited to applying for protection, a matter within the Minister's jurisdiction. The Board's conclusions as to the appellant's risk of torture were gratuitous and were an infringement upon the Minister's responsibilities.

(*Xie v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 250, [2005] 1 F.C.R. 304)

[5] The applicant submits that there is some debate over this question. In support of his argument, he cites several trial decisions. This Court is bound by the decisions of the Federal Court of Appeal. Even excerpts from several trial decisions cannot change the fact that the Federal Court of Appeal precedent is the one this Court must follow.

[6] The applicant's argument must fail for another reason. PRRA officers are not bound by the RPD's conclusions and may reach different ones.

[7] Moreover, in this case, the RPD did not make detailed findings of fact. Instead, the panel engaged in a detailed analysis of the question of exclusion:

> [14] PRRA officers are not bound by the conclusions reached by the RPD. However, when the evidence before the PRRA officer is essentially the same as that

> before the RPD, it is reasonable for the PRRA officer to reach the same conclusions (see *Klais v. Minister of Citizenship and Immigration*), 2004 FC 783 at paragraph 11). In addition, PRRA officers do not sit on appeal or judicial review and therefore may rely on conclusions reached by the RPD when there is no new evidence (see *Jacques v. Canada (Solicitor General)*, [2004] F.C. 1481).

(*Isomi v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1394, 157 A.C.W.S. (3d) 807)

[8] As well, it should be noted that, at paragraph 38 of *Xie*, above, in which the claimant was excluded under Article 1F(*b*), the Federal Court of Appeal stated unequivocally that the Minister's representative (that is, the PRRA officer) was not bound by the RPD's findings of fact with regard to risk.

II. Introduction

[9] On May 29, 2009 at 2:00 p.m., the applicant, Davidson Altenor, filed a motion to stay the removal order made against him, which was to be executed on June 3, 2009. The decision to which the motion relates is a negative decision made on January 16, 2008 concerning his PRRA application.

III. Facts

[10] On February 20, 2009, Mr. Altenor, a citizen of Haiti, filed an application for leave and for judicial review of that decision and perfected his record.

[11] Mr. Altenor arrived in Canada on July 13, 2004 after staying in the United States for seven months between December 2003 and July 2004. He claimed refugee status on July 13, 2004.

[12] Mr. Altenor's claim was rejected on September 27, 2006. The RPD concluded that, because of his involvement in the Haitian police, he had to be excluded from the definition of Convention refugee and from being a person in need of protection under Article 1F(*a*) and (*c*) of the Convention.

[13] On February 5, 2007, Justice Pierre Blais dismissed the leave application filed against the RPD's decision.

[14] On December 12, 2007, Mr. Altenor sent Citizenship and Immigration Canada (CIC) his PRRA submissions. In paragraph 3 of those submissions, he stated that he did not have to present new evidence to establish his fear [TRANSLATION] "because the RPD has already ruled that this fear is well-founded".

[15] On January 16, 2008, the decision under review was made.

IV. Issue

[16] Has the applicant shown that a serious question and irreparable harm exist and that the balance of inconvenience is in his favour?

V. Analysis

[17] The applicant must meet the requirements of the tripartite test set out in *Toth v. Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302, 11 A.C.W.S. (3d) 440 (F.C.A.). All three requirements must be met. Failure to meet any of them is therefore fatal.

A. Serious question

[18] In support of his motion for a stay, Mr. Altenor raises three questions that he characterizes as serious.

[19] First, Mr. Altenor alleges that the officer made an error justifying the Court's intervention by concluding that he was inadmissible rather than excluded.

[20] Second, Mr. Altenor alleges that the officer could not disregard the RPD's conclusion that he fell within the definition of Convention refugee (page 2 of the RPD's reasons).

[21] Finally, he alleges that the PRRA officer refused his application mainly because of negative findings about his credibility. He therefore argues that the officer should have granted him an interview under section 167 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA).

1st question - Confusion between inadmissibility and exclusion

[22] The officer explained why the applicant was a person described in section 112(3). He began by noting that Mr. Altenor had been excluded because of his position in the Haitian police. However, in the middle of the page, the officer added the following:

> [TRANSLATION]
>
> Moreover, the *Immigration and Refugee Protection Regulations* provide as follows:
>
> > For the purpose of determining whether a foreign national or permanent resident is inadmissible under paragraph . . ., if either the following determination or decision has been rendered, the findings of fact set out in that determination or decision shall be considered as conclusive findings of fact:
>
> The RPD has excluded the applicant from the Convention. He is considered inadmissible under paragraph 35(1)(*a*) of the IRPA because there are reasonable grounds to believe that he committed an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*.

[23] This finding is incorrect, since Mr. Altenor was never found inadmissible; he was excluded by the RPD under section 98 of the IRPA; however, it is a mere finding of fact that did not affect the officer's decision. This error had no impact on the heading under which it was found.

[24] Contrary to what Mr. Altenor argues, the PRRA officer never found him inadmissible, since such a determination was not within the officer's jurisdiction. Moreover, such an important determination would not be made in the part of a decision where the decision maker is simply setting out facts.

[25] Thus, the officer made an error; the error concerns a fact that is neither relevant nor determinative in this case. The presence of an error of this kind does not raise a serious question.

2nd question - Was the officer bound by the RPD's decision?

[26] Mr. Altenor alleges that the RPD concluded that he was a Convention refugee.

[27] He therefore argues that the PRRA officer was bound by that conclusion and had to follow it.

[28] This argument is unfounded for two reasons.

[29] First, the PRRA officer rightly found that the RPD had exceeded its jurisdiction by determining that Mr. Altenor was at risk. The Federal Court of Appeal has clearly and explicitly held as follows:

> [38] . . . In my view, the Board exceeded its mandate when it decided to deal with the appellant's risk of torture upon return with the result that the Minister is not bound by that finding. Once the Board found that the exclusion applied, it had done everything that it was required to do, and there was nothing more it could do, for the appellant. The appellant was now excluded from refugee protection, a matter within the Board's competence, and was limited to applying for protection, a matter within the Minister's jurisdiction. The Board's conclusions as to the appellant's risk of torture were gratuitous and were an infringement upon the Minister's responsibilities.

(*Xie*, above)

[30] Mr. Altenor submits that there is some debate over this question. In support of his argument, he cites several trial decisions. This Court is bound by the decisions of the Federal Court of Appeal. The existence of several trial decisions cannot change the fact that the Federal Court of Appeal precedent is the one this Court must follow.

[31] Mr. Altenor's argument must fail for another reason. PRRA officers are not bound by the RPD's conclusions and may reach different ones.

[32] Moreover, in this case, the Court notes the following:

> [14] PRRA officers are not bound by the conclusions reached by the RPD. However, when the evidence before the PRRA officer is essentially the same as that before the RPD, it is reasonable for the PRRA officer to reach the same conclusions (see *Klais v. Minister of Citizenship and Immigration*), 2004 FC 783 at paragraph 11). In addition, PRRA officers do not sit on appeal or judicial review and therefore may rely on conclusions reached by the RPD when there is no new evidence (see *Jacques v. Canada (Solicitor General)*, [2004] F.C. 1481).

(*Isomi*, above)

[33] As well, it should be noted that, at paragraph 38 of *Xie*, above, in which the claimant was excluded under Article 1F(*b*), the Federal Court of Appeal stated unequivocally that the Minister's representative (that is, the PRRA officer) was not bound by the RPD's findings of fact with regard to risk.

[34] This argument does not raise a serious question either.

3rd question - Duty to hold a hearing

[35] Mr. Altenor argues that the PRRA officer refused his application for reasons of credibility. This allegation is incorrect.

[36] Rather, the officer concluded that Mr. Altenor had not filed sufficient evidence to satisfy him that the application was well-founded. In other words, the officer concluded that Mr. Altenor had not discharged his burden of proving that he would be at risk if he returned to Haiti.

[37] Although the dividing line between credibility and insufficiency of evidence is a thin one, it does exist. A PRRA officer has no duty to hold a hearing in cases where the applicant does not file enough evidence to discharge the burden of proving that returning poses a risk.

[38] This reasoning was recently applied by Justice Russell Zinn:

> [34] It is also my view that there is nothing in the officer's decision under review which would indicate that any part of it was based on the Applicant's credibility. The officer neither believes nor disbelieves that the Applicant is lesbian – he is unconvinced. He states that there is insufficient objective evidence to establish that she is lesbian. In short, he found that there was some evidence – the statement of counsel – but that it was insufficient to prove, on the balance of probabilities, that Ms. Ferguson was lesbian. In my view, that determination does not bring into question the Applicant's credibility.

(*Ferguson v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1067, 170 A.C.W.S. (3d) 397)

B. Irreparable harm

[39] Mr. Altenor identifies only one source of irreparable harm. He argues that he would be detained in the United States.

[40] This Court has found several times that detention in the United States does not constitute irreparable harm. For example, Justice Marc Nadon wrote the following in *Mikhailov v. Canada (Minister of Citizenship and Immigration)* (2000), 191 F.T.R. 1, 97 A.C.W.S. (3d) 727:

> [11] On the question of irreparable harm, the Applicants argue that they would face irreparable harm if they went to the United States because they would possibly be detained. In this regard, they cite a September 1998 report by Human Rights Watch entitled "United States--Locked Away: Immigration Detainees in Jails in the United States" and submit that "asylum seekers in the United States are generally detained (page 26 [of Report], first paragraph)" (paragraph 30 of Applicants' Written Representations of their Motion Record). Although the U.S. *Immigration and Naturalization Act* provides, as the Human Rights Watch Report points out, that all asylum seekers shall be detained pending a resolution of their claims, the Report also notes that people are detained "because they lack valid documents for entering or remaining in the United States; to protect public safety; to ensure their presence at ongoing immigration proceedings; or to prevent them from remaining in the United States after they have been ordered to return to their home countries" (p. 30 of Human Rights Watch Report, p. 39 of Applicants' Record). This seems to suggest that detention is limited to people seeking asylum in the United States, not in Canada. Further, I believe that none of the reasons for detention listed in the Report apply to the Applicants. Moreover, a subsequent study by Human Rights Watch suggests that detention is no longer routine and reports that case-by-case reviews have been implemented such that individuals would not be detained if they could show that they do not constitute a danger to society, that they have community ties, and would likely appear for future hearings.

[41] Justice Yves de Montigny applied the same reasoning in *Joao v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 880, 140 A.C.W.S. (3d) 533:

> [10] I should say that the Applicants are being removed to the United States, not Angola. This Court has held that removal to the United States does not constitute irreparable harm, even if the person concerned may be detained. The United States is

> presumed to treat detainees and refugee claimants fairly. It will be up to the American authorities to decide whether the Applicants should eventually be removed to Angola (*Mikhailov v. Minister of Citizenship and Immigration*), [2000] F.C.J. No. 642; *Akyol v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1182).

[42] As well, this Court has stated in two recent decisions that neither removal to the United States nor detention in that country can constitute irreparable harm:

> [29] The Federal Court of Appeal has found that the United States institutions have democratic systems of checks and balances, an independent judiciary and constitutional guarantees of due process. There is no irreparable harm arising should the Applicants engage the American immigration system. The Applicants will have access to that country's removal process, and any other relevant immigration processes (*Hinzman v. Canada (Minister of Citizenship and Immigration*), 2007 FCA 17, 157 A.C.W.S. (3d) 153 at para. 46. . . .

(*Diallo v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 84; also, *Qureshi v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 96, 156 A.C.W.S. (3d) 180, at paragraphs 25-26)

[43] The risks Mr. Altenor would face if he returned to Haiti were not established by him before the PRRA officer. He cannot rely on the same allegations to prove the existence of irreparable harm.

[44] Furthermore, the mere fact that there is a leave application against an administrative decision does not mean that the removal of the person concerned constitutes irreparable harm.

> [11] Sixth, the deportation of individuals while they have outstanding leave applications and/or other litigation before the Court, is not a serious issue nor does it constitute irreparable harm. . . .

(*Akyol v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 931, 124 A.C.W.S. (3d) 1119)

[45] With regard to Justin Mazzola's affidavit, Mr. Mazzola admits in paragraph 5 that detention in the United States lasts an average of 37 days. He does not specify the reasons why detention may last longer or the number of cases in which detention lasted much longer than the average. As well, the Court realizes that Mr. Mazzola is obviously not aware of the specific content of Mr. Altenor's case. The Court notes that Mr. Mazzola works for Amnesty International and that what he says is based solely on his knowledge of information from his work rather than on any specific knowledge of Mr. Altenor's case.

C. Balance of inconvenience

[46] The balance of inconvenience is in the Minister's favour. Section 48 of the IRPA provides that a removal order must be enforced as soon as is reasonably practicable. There is a public interest in having a system that operates in an efficient, expeditious and fair manner.

[47] Moreover, one of the objectives of the IRPA is to promote international justice and security by fostering respect for human rights (paragraph 3(1)(*i*) of the IRPA). Mr. Altenor was excluded from the definition of Convention refugee because the Immigration and Refugee Board (IRB) had serious reasons for considering that he had committed crimes against humanity and acts contrary to the purposes and principles of the United Nations. The balance of inconvenience is therefore clearly in the Minister's favour.

VI. Conclusion

[48] For all these reasons, the applicant's stay application must be dismissed.

JUDGMENT

THIS COURT ORDERS that the motion for a stay of the removal order made against the applicant be dismissed.

"Michel M.J. Shore"
Judge

Certified true translation
Brian McCordick, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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