

Federal Court



Cour fédérale

Date: 20120420

Docket: IMM-5228-11

Citation: 2012 FC 467

Ottawa, Ontario, April 20, 2012

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

ROGER AGWAME LEMIKA

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Roger Agwame Lemika seeks judicial review of a negative pre-removal risk assessment (PRRA). I agree with Mr. Lemika that the PRRA Officer erred in assessing the risk that he faces in the Democratic Republic of Congo (DRC) as a result of his major mental illness. As a result, the application for judicial review will be allowed.

Background

[2] Mr. Lemika suffers from schizophrenia. His illness is evidently well controlled with medication. However, when untreated, Mr. Lemika can become agitated, aggressive and psychotic. The record indicates a history of suicide attempts, and makes reference to Mr. Lemika's delusional belief that he is the son of God and has special powers.

[3] Although he was employed for some time after his arrival in Canada, it appears that Mr. Lemika's illness led to him being unemployed and homeless for a number of years. The illness has also brought Mr. Lemika into contact with the criminal justice system.

[4] Mr. Lemika asserted in his PRRA application that he would be at risk in the DRC as a result of his mental illness.

[5] He further submitted that he was not excluded from protection by paragraph 97(1)(b)(iv) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, which precludes a finding of risk to life or of cruel and unusual treatment "caused by the inability of [the country of origin] to provide adequate health or medical care".

[6] Mr. Lemika asserted that the harm he fears is not his inability to access medical care as such, but rather that his lack of access to medical care increased the risk of persecution that he faced from state security forces and his fellow citizens as a result of his untreated illness.

[7] Mr. Lemika submitted that his inability to access medical treatment, including medication, in the DRC would lead to a deterioration in his mental state and would allow the symptoms of his illness to emerge.

[8] His illness would render Mr. Lemika unable to access the necessities of life such as food and shelter. Moreover, the manifestation of his symptoms could include bizarre behaviour on his part that could lead to his arrest and detention by state security officers. If arrested, Mr. Lemika says that he would be held in prison conditions that are extreme and potentially life-threatening.

[9] Mr. Lemika also says that the general population in the DRC does not understand mental illness. The mentally ill are often viewed as victims of spells and are treated with prayer or sorcery. According to Mr. Lemika, these societal attitudes would also put him at risk if he began to exhibit bizarre behaviour in the DRC. In addition to social ostracism, Mr. Lemika says that he risks ill-treatment at the hands of his compatriots on account of his illness.

[10] Finally, Mr. Lemika asserts that he faces a risk of targeting at the port of entry as a returnee, and as a result of the internal armed conflict in the DRC.

The PRRA Decision

[11] The PRRA Officer reviewed the evidence regarding Mr. Lemika's psychiatric condition and medical treatment history. The Officer accepted that Mr. Lemika suffers from a chronic and long-term disability, but concluded that his mental illness can be controlled with prescription drug treatment, and that he has been willing to accept such treatment in the past.

[12] The Officer pointed to evidence that treatment for mental disorders is available through the DRC's primary health care system, finding that Mr. Lemika would not be denied medical treatment in the DRC "for any reason". As a result, the officer concluded that Mr. Lemika was not a person in need of protection for the purposes of section 97 of *IRPA*.

[13] The Officer further concluded that Mr. Lemika was not wanted for questioning, arrest or detention in the DRC. Nor was the Officer persuaded that Mr. Lemika would be targeted by any person within the context of the armed conflict in that country. Finally, the Officer was also satisfied that, in any event, adequate state protection would be available to Mr. Lemika in the DRC.

Standard of Review

[14] I agree with the parties that the Officer's decision is to be reviewed against the standard of reasonableness: see *Buchung v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 381, 79 Imm. L.R. (3d) 94 at para. 26; *Perea v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1173, [2009] F.C.J. No. 1472 (QL) at paras. 23-24.

[15] In reviewing a decision against the reasonableness standard, the Court must consider the justification, transparency and intelligibility of the decision-making process, and whether the decision falls within a range of possible acceptable outcomes which are defensible in light of the facts and the law: see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 47, and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 59.

Analysis

[16] The foundation of the PRRA Officer's decision is the determination that Mr. Lemika would not be denied the medical care that he requires for his schizophrenia in the DRC.

[17] In coming to this conclusion, the Officer noted that "mental health is part of the primary care system in the Democratic Republic of Congo, and that the treatment of severe mental disorders is available at the primary level". The Officer also observed that "[t]here is one mental health care centre and about twenty-two psychiatrists in the capital city [of Kinshasa]" and that "[c]ompetent doctors practice on the spot, with medicines which are normally available".

[18] All of these statements are borne out by the evidence. What the Officer does not consider is whether this treatment would actually be available to Mr. Lemika, were he to return to the DRC.

[19] The documentary evidence before the Officer indicates that the few mental health facilities that there are in Kinshasa lack the specialists to treat schizophrenia, and that medication to treat psychiatric patients is often too expensive for the patient. Indeed, the thrust of all the documentary evidence that was before the Officer is that the limited mental health care that is available in the DRC is generally only accessible to those who can pay for it.

[20] There was some evidence before the Officer to indicate that hospitals may, in some cases, provide an initial consultation, diagnosis and treatment free of charge. After that, however, it appears that the patient will be responsible for the ongoing cost of his or her own treatment.

[21] No disability benefits are available to persons with mental disorders in the DRC, and Mr. Lemika is estranged from his family. There was, moreover, no evidence before the Officer that the family would have either an interest in or the means to assist Mr. Lemika with his medical expenses.

[22] As a result, I am satisfied that the Officer's finding with respect to Mr. Lemika's ability to access mental health care was made without regard to the evidence in the record.

[23] The result of the Officer's finding regarding Mr. Lemika's ability to access mental health care was that the Officer did not assess whether the risks asserted by Mr. Lemika were in fact "caused by the inability of [the country of origin] to provide adequate health or medical care" for the purposes of paragraph 97(1)(b)(iv) of *IRPA*.

[24] Typically, cases under paragraph 97(1)(b)(iv) of *IRPA* involve situations where life-saving medical treatment such as kidney dialysis is unavailable or unaffordable in the PRRA applicant's country of origin: see, for example, *Covarrubias v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 365, [2007] 3 F.C.R. 169 (QL) (F.C.A.).

[25] That is, the risk asserted by the PRRA applicant in such cases is that his or her inability to access medical care will directly cause the apprehended harm.

[26] This case is somewhat different.

[27] The harm that Mr. Lemika apprehends in the DRC is not that his inability to access health care will itself cause a risk to his life or cruel and unusual treatment. Rather, Mr. Lemika says that if he cannot access treatment, his health will decline, and he will start to experience symptoms of his schizophrenia. These symptoms may include disordered thinking, delusions, psychosis, and aggressive or bizarre behaviour.

[28] It is the manifestation of the symptoms of his illness that Mr. Lemika says will likely attract the attention of state security officials and result in his arrest and detention, thus exposing him to life-threatening prison conditions. His unusual behaviour will also attract the attention of Mr. Lemika's fellow citizens, and will result in his inability to access the necessities of life, social ostracism and abuse.

[29] The nature of Mr. Lemika's claim requires an assessment of causation. That is, is the harm apprehended by Mr. Lemika "caused by the inability of [the DRC] to provide adequate health or medical care", or does the apprehended intervening actions of third parties mean that the harm is sufficiently removed from the initial inability to access medical care as to escape the purview of paragraph 97(1)(b)(iv) of the *Immigration and Refugee Protection Act*?

[30] This determination involves an assessment of the facts of this case, and is one that should properly be made in the first instance by a PRRA Officer.

[31] This then leads us to the Officer's alternative finding, which is that, in any event, adequate state protection would be available to Mr. Lemika in the DRC.

[32] In support of this finding, the Officer includes more than four pages of extracts from the 2010 United States Department of State Report. Although there are passing references made to efforts to combat impunity in the report, the extracts paint an almost uniformly grim picture of conditions within the DRC.

[33] The report notes that “state security forces continued to act with impunity throughout the year committing many serious abuses”. These abuses are reported to include arbitrary arrests and detention in “severe and life-threatening” conditions. Food is not provided to detainees, who are dependant on family members for nourishment, and prisoners regularly die of starvation.

[34] The DOS report also shows that medical care is often unavailable to prisoners, and infectious diseases are rampant. Cells may have no windows, running or potable water, lights, electricity or toilet facilities. Sexual violence is prevalent, as are sexually transmitted diseases, including HIV/AIDS.

[35] The report also indicates that soldiers face “‘no risk of punishment’ for abuses, partly due to their anonymity”.

[36] Nevertheless, without any real analysis of this evidence, the Officer concluded that Mr. Lemika had not provided clear and convincing evidence to rebut the presumption that the DRC will be able to protect its citizens. This aspect of the Officer’s decision thus lacks the justification, transparency and intelligibility required of a reasonable decision.

[37] Moreover, recourse to the record does not assist in supplementing the Officer's decision, as the other documentary evidence before the Officer regarding conditions in the DRC is itself almost uniformly grim.

[38] I am thus satisfied that the PRRA Officer's decision was unreasonable. Given my conclusion on this issue, it is not necessary to address the other sources of risk identified by Mr. Lemika.

Conclusion

[39] For these reasons, the application for judicial review is allowed.

[40] Mr. Lemika has proposed a question for certification relating to the interpretation of paragraph 97(1)(b)(iv) of the *Immigration and Refugee Protection Act*. I am not persuaded that the question proposed would be dispositive of an appeal, in light of my conclusion that the applicability of this provision requires a factual assessment of causation that should properly be made by a PRRA Officer in the first instance. As a result, no question will be certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed, and the matter is remitted to a different PRRA Officer for re-determination; and
2. No serious question of general importance is certified.

“Anne Mactavish”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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STYLE OF CAUSE: ROGER AGWAME LEMIKA v.
THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

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**REASONS FOR JUDGMENT
AND JUDGMENT:** MACTAVISH J.

DATED: April 20, 2012

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