Federal Court  Cour fédérale

Date: 20170315

Docket: IMM-1011-17

Citation: 2017 FC 280

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, March 15, 2017

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

BOUBACAR DIALLO

Applicant

and

**THE MINISTER OF IMMIGRATION,
REFUGEES AND CITIZENSHIP CANADA**

Respondent

ORDER AND REASONS

[1] Boubacar Diallo is applying to this Court seeking a stay of his removal from Canada to his country of origin, Guinea. An application for a stay is an exceptional measure that must be warranted. It is also well-governed in law. In this case, the application to be recognized as a refugee or person in need of protection was dismissed in February 2015. The application for leave for judicial review was also dismissed. Mr. Diallo subsequently submitted an application

for a pre-removal risk assessment [PRRA], which was also dismissed, this time on February 16, 2017. The removal from Canada is scheduled for March 16, and this is an application for a stay of that removal which, according to the record before the Court, was originally voluntary. In other words, the applicant apparently did not seek an administrative stay, based on which an application for leave and for judicial review could have been made. In any event, I have reviewed the application and found that it cannot succeed.

[2] The test used for stays is always the same. The applicant must satisfy the Court of each of the three factors of the tripartite test:

1. Is there a serious question to be tried in the underlying case?
2. Will the applicant suffer irreparable harm if he must return to his country of origin before his recourse is processed?
3. Does the balance of convenience favour the applicant?

(See *RJR-Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311 and *Toth v. Canada (Minister of Employment and Immigration)*, (1988), 86 NR 302 (FCA))

[3] In the case at hand, the underlying recourse on which basis the serious question must be examined is the decision on the pre-removal risk assessment. This is a first constraint. The serious question is tied to the file before the PRRA officer, as the judicial review is also limited to the file before the decision-maker. Section 113 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] sets out the circumstances in which such an application can succeed. We need only cite paragraph 113(a), which reads as follows:

Consideration of application	**Examen de la demande**
113 Consideration of an	**113** Il est disposé de la

application for protection shall be as follows:	demande comme il suit :
(a) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection;	**a)** le demandeur d'asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'il n'était pas raisonnable, dans les circonstances, de s'attendre à ce qu'il les ait présentés au moment du rejet;

[4] Thus, the PRRA application is not an opportunity to reassess what was decided by the Refugee Protection Division. This is another constraint. Only evidence that was not available to the Refugee Protection Division can be considered by the PRRA officer. In this case, this application under sections 96 and 97 of the Act was dismissed because, fundamentally, the applicant was unable to demonstrate that he was a refugee or a person in need of protection. On reading that brief decision, it is clear that the applicant was not deemed credible. Essentially, the applicant complained of persecution by an army captain in his country of origin because of a real estate transaction that had apparently taken place between the applicant and the captain's father. Despite that transaction, the army captain allegedly evicted the applicant and his family from the premises to take them over himself following his father's death. However, the applicant apparently changed his version at the hearing before the Refugee Protection Division to make a general allegation that the army captain had spread an accusation [TRANSLATION] "among people in the government that I was part of the coup d'état." (RPD Decision, at paragraph 11). He stated that he no longer had any fears regarding the property that had been forcibly expropriated.

[5] That version put forth at the hearing on February 4, 2015, before the Refugee Protection Division was not deemed credible, and the evidence in that regard was minimal and, in fact, contradicted the applicant's version. In fact, the application form for refugee protection in Canada completed by the applicant stated that he is not wanted by authorities in Guinea. In other words, the applicant raised the issue of being accused of participating in a coup d'état, which was never supported with any evidence and which contradicted his own statement submitted to obtain refugee status.

[6] While his application for a PRRA was pending, the applicant submitted no new evidence regarding the risks that he could face in Guinea. Thus, an initial decision was rendered on January 14, but it was clearly not communicated to the applicant since new elements were submitted on February 8, and the PRRA officer chose to examine that "new" evidence.

[7] It must be noted that the PRRA decision prepared when the applicant had not submitted any new evidence was certain to fail. That was the conclusion the PRRA officer very quickly reached. Despite that, he examined the conditions in Guinea in his decision. While acknowledging that things are not ideal, he concluded that the ethnic group to which the applicant belongs is not systematically targeted by the current government, which is in power following free and democratic elections in the eyes of international observers. Without minimizing the serious problems that persist, the PRRA officer concluded that conditions in the country had not changed since the decision by the Refugee Protection Division. There had been no developments since the decision by the Refugee Protection Division.

[8] That "evidence" was therefore received by authorities on or close to February 8, but it consisted of typed texts dated in November and December 2016. Those new elements were given very little weight. To be successful, the applicant thus would have to show on a balance of probabilities that those new elements establish that there is a risk.

[9] The PRRA officer examined the various texts presented *in extremis*. He reviewed each one individually. It was agreed at the hearing that the summary of each text in the PRRA decision is completely correct. Where there is disagreement is regarding the PRRA officer's conclusion. The texts were given little weight, while the applicant would obviously have preferred that they be given more. For there to be a serious question to be tried in a judicial review of the PRRA decision, the applicant had to establish a likelihood that the judicial review would be allowed ("likelihood of success").

[10] As was established in *Wang v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148; [2001] 3 FCR 682 [*Wang*], when an applicant seeks the same relief as is sought in the application for judicial review, it is not sufficient to satisfy the Court that the question raised is neither frivolous nor vexatious, but instead it is necessary to demonstrate the likelihood of success. That is what led Justice Pelletier, then of this Court, to state the following:

> [10] . . . It is this congruence of the relief sought in the interlocutory and the final application which leads me to conclude that if the same relief is sought, it ought to be obtained on the same basis in both applications. I am therefore of the view that where a motion for a stay is made from a Removal Officer's refusal to defer removal, the judge hearing the motion ought not simply apply the "serious issue" test, but should go further and closely examine the merits of the underlying application.

In my opinion, that was not demonstrated, and the likelihood of success in that regard is slim. It could even be nil. First, it is hard to understand in the case at hand why the additional evidence regarding an allegation that had been made was not presented before the Refugee Protection Division. The texts contain very little new information. Second, the texts are vague and imprecise. Moreover, when it comes from people far removed from the applicant, we do not even know what the source may have been for the evidence presented. These new elements, which come from the applicant's former spouse, his oldest son, an uncle, a human rights advocate, and the applicant's lawyer in Guinea, are all overly general and thus can be given little weight.

[11] The applicant is therefore required to establish the likelihood that he could demonstrate that the decision is unreasonable, meaning that it is not a possible, acceptable outcome and that it does not satisfy the criteria of justification, intelligibility, and transparency. Unfortunately for the applicant, that is far from being established. In my opinion, the PRRA officer's decision was not successfully challenged. In fact, it is hard to see how any other decision could have been reached. It is not sufficient to disagree with the conclusion. It must be shown that it is unreasonable.

[12] Consequently, the "new" evidence, on its face, largely does not satisfy the conditions for admissibility in paragraph 113(a) of the Act and, even if it were admitted, as the PRRA officer was prepared to do, it does not carry the necessary weight to conclude that there is a serious question that warrants a stay.

[13] It never goes beyond expressing a mere possibility or presenting general statements that do not further the argument.

[14] I add that it must be kept in mind that the PRRA officer nevertheless examined the objective documentary evidence on the conditions in Guinea. That evidence tends to further demonstrate that the fears of risk are not borne out, further weakening the new general assertions made to support the applicant's case. In my opinion, irreparable harm has not been demonstrated, either.

[15] I would add a comment. The applicant seems to be relying on a false premise. A question does not become serious because the litigant would consider the consequences to be undesirable. The serious question must be related to the underlying judicial review. The Act requires that the three parts of the tripartite test be satisfied. Moreover, a stay application is not an opportunity to try to argue that the Refugee Protection Division erred or that the PRRA officer erred because he did not review the Refugee Protection Division's decision. For a PRRA, the authority granted is limited (though not as much as that of an enforcement officer), and it excludes a review of the RPD's decision. That is why the starting point is the underlying PRRA decision, and the judge who is to rule on the stay, which is an exceptional measure, must not assume the authority to consider anything other than what is validly before the Court. A full review of the alleged risk is not repeated; one can only review the PRRA decision to determine whether, in the case before us, there is a likelihood of success in challenging the reasonableness of the decision, based on the admissible evidence presented. That was not demonstrated.

[16] The application for stay is therefore dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the stay application is dismissed.

"Yvan Roy"
Judge

Certified true translation
This 24th day of September 2019

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1011-17
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