Federal Court  Cour fédérale

Date: 20170508

Docket: IMM-4606-16

Citation: 2017 FC 464

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, May 8, 2017

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

MASHALA LUSE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant, a national of the Democratic Republic of the Congo (DRC), has schizophrenia. He arrived in Canada in 2004 at the age of 19, but he lost his permanent resident status in 2015 for serious criminality. He is subject to a deportation order and fears for his life or his safety were he to return to his native country where, he says, persons who suffer from mental health issues are seriously discriminated against by the State and persecuted by the population

because, in Africans' perception, mental pathology is attributed to supernatural causes. In the doctors' opinion, if he is removed to the DRC, without the appropriate medication, the applicant could have a decompensation episode, have a severe psychotic relapse, and become unpredictably agitated and aggressive. Also, without access to adequate care and treatment in the DRC, the applicant, who has a substance abuse problem—alcohol and drugs—, will relapse and his behaviour could lead him to prison where the detention conditions are in themselves extreme and inhumane for a person suffering from mental problems.

[2] The applicant is now seeking the judicial review of the decision dated September 30, 2016, by J. Martel, senior immigration officer [officer], dismissing his pre-removal risk assessment [PRRA] application. The officer found that the applicant had not demonstrated that there is more than a mere possibility of persecution within the meaning of section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], or that there are substantial grounds to believe that he would be subject to torture, to a risk to his life or to a risk of cruel and unusual treatment or punishment within the meaning of section 97 of the IRPA, if he were to return to his country of origin.

[3] The applicant argues that the officer disregarded the medical evidence in the record and minimized the consequences of his schizophrenia diagnosis, as well as the risks of returning to the DRC. Also, the officer erred in law by requiring the applicant to demonstrate, pursuant to section 96 of the IRPA, that persons who suffer from mental illness are systematically targeted for persecution. The respondent, on the other hand, defends the reasonableness of this decision in that the evidence submitted by the applicant is simply insufficient to establish the alleged risks,

and that the officer did not err in the application of section 96 of the IRPA, even if he used the expression [TRANSLATION] “systematically targeted.”

[4] It is the standard of reasonableness that applies to the officer’s findings of fact, while the standard of correctness applies to the determination of the burden of proof pursuant to section 96 of the IRPA.

[5] It has been consistently held that the applicant must provide evidence on all the elements of his application. Specifically, in regard to a PRRA application, the onus is on the applicant to provide the officer with all the evidence necessary for the officer to make a decision (*Lupsa v. Canada (Citizenship and Immigration)*, 2007 FC 311, 159 ACWS (3d) 419 at paragraph 12 [*Lupsa*] citing *Cirahan v. Canada (Solicitor General)*, 2004 FC 1603, [2004] FCJ No. 1943 (QL) at paragraph 13). If the evidence is insufficient, the applicant must bear the consequences (*Lupsa* at paragraph 13 citing *Selliah v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 872, [2004] FCJ No. 1134 (QL) at paragraph 22 and *Yousef v. Canada (Citizenship and Immigration)*, 2006 FC 864, [2006] FCJ No. 1101 at paragraph 33).

[6] In the case at bar, the issue of the applicant’s mental health is determinative. Both parties agree that it is now the Court’s responsibility to determine whether the officer’s dismissal of, or assignment of minimal weight to, the medical evidence in the record constitutes an acceptable outcome that is defensible in respect of the evidence in the record and the applicable law in this case. An individual’s mental condition is indeed a relevant risk factor that must be examined by the officer in the context of a PRRA application. Given that subparagraph 97(1)(b)(iv) excludes

protection only when the inability to provide adequate medical care is the direct cause of the feared prejudice, the officer had to question in particular whether the lack of adequate care or the prohibitive cost of medications used to manage the symptoms of schizophrenia, in this context, could expose the applicant to a risk to his life or to a risk of cruel and unusual treatment or punishment if he were forced to return to the DRC (*Lemika v. Canada (Citizenship and Immigration)*, 2012 FC 467 at paragraphs 27–30 [*Lemika*]; *Ferreira v. Canada (Citizenship and Immigration)*, 2014 FC 756 at paragraphs 10–14).

[7] There are grounds to intervene in this case, because the officer's decision was unreasonable as a whole, and the officer erred in assessing the burden of proof under section 96 of the IRPA.

[8] First, it is not disputed that the applicant suffers from auditory hallucinations that compel him to act in a way that could compromise his own safety or the safety of others, and that, indeed, the applicant had been hospitalized after drinking bleach following a psychotic episode. The applicant was still in treatment in December 2015 when he appeared before the Immigration Division [ID] following the inadmissibility report prepared by an immigration officer pursuant to section 44 of the IRPA, and the removal order issued in October 2014 by the Minister of Public Safety and Emergency Preparedness. This explains why the ID could not proceed earlier and had to appoint a designated representative for the applicant. On that point, a [TRANSLATION] "summary sheet" dated August 11, 2015, from the Jewish General Hospital in Montréal, issued by the applicant's attending physician, Dr. K. Geagea, and psychology intern, Anne Holding, confirms the applicant's schizophrenia diagnosis, his dependence on drugs and alcohol, his

depression, as well as the medications that he was taking at the time of his assessment, while a letter dated August 18, 2015 from the Centre NuHab Inc. certifies that the applicant was admitted there for a minimum six-month treatment.

[9] Second, in a letter dated August 3, 2016, filed in support of the pre-removal risk assessment [PRRA] application, two psychiatrists from the Jewish General Hospital in Montréal, Doctors Zoë Thomas and G. Eric Jarvis—the applicant having been assessed on July 13, 2016, by the Cultural Consultation Service [SCC] of the Jewish General Hospital in Montréal—confirm that the applicant apparently developed schizophrenia shortly after his arrival in Canada and that his illness was not treated for about ten years. The specialists suggest that the crimes that led to his inadmissibility could have been committed under the influence of auditory hallucinations, such that the applicant could have been found not criminally responsible, but for his former counsel's negligence. Both specialists insist on the fact that the applicant's situation could deteriorate if he does not take the appropriate medication, especially since there is a danger that he will end up on the street in the DRC and have new psychotic episodes and become aggressive toward himself and others. The specialists refer in particular to the recent suicide attempt where the applicant consumed bleach under the effect of these auditory hallucinations.

[10] The officer said that he had considered the medical evidence in the record. Although the officer does not dispute the schizophrenia diagnosis or the expertise of the two specialists, this did not preclude the officer from questioning the fact that the applicant had apparently suffered from schizophrenia since his arrival in Canada in 2004, and since the two specialists only assessed the applicant in July 2016, he dismissed the opinion that the applicant could have been

found not criminally responsible. As for the bleach incident, the officer considers that it was an isolated incident and suggests that the applicant could just as well have been under the influence of other substances proscribed by his condition. Also, the information in the record is not sufficient to conclude that if he were to return to the DRC, without medication, the applicant could relapse and run the risk of being arrested and detained by the authorities for criminal behaviour.

[11] I agree with the applicant's counsel that the medical evidence in the record could not be arbitrarily dismissed by the officer. According to this unrefuted evidence from the two mental health specialists, the applicant is a schizophrenic who has not been treated for many years. Whether the applicant developed this illness when he arrived in Canada or not, the serious symptoms and auditory hallucinations from which he suffered and continues to suffer are no less real. In the opinion of the two specialists, it is practically impossible for the applicant to refuse to obey the voices that order him to do things that are harmful, if not criminal. Objectively speaking, the associated risks in such circumstances are corroborated by the recent episode that led to the applicant's hospitalization because he received the order to kill himself by drinking bleach. Although it is hypothetical to question now whether the applicant could have been acquitted based on mental incapacity, the fact remains that, without medication, the applicant is likely to have new psychotic episodes in the very short term. Whether the applicant commits new criminal acts because he is in crisis or because he is under the influence of proscribed drugs, the fact remains that there is a risk that this problem will occur in the DRC if the applicant finds himself without assistance—he currently lives with his parents in Canada—and does not have

access to appropriate treatment or medication because of its exorbitant cost in the DRC, which is indeed well documented by the evidence in the record.

[12] The applicant also submits that the officer imposed a burden of proof more onerous than the one required under section 96 of the IRPA ([TRANSLATION] "more than a mere possibility of persecution"). Although the respondent relies on the fact that, at the end of the decision, the officer did indeed state the correct evidentiary standard that applies to section 96 of the IRPA, this does not change the fact that, when we read the decision as a whole, it indeed appears that the officer required a more onerous burden of proof than the one required by law or by the case law.

[13] With regard to the general conditions of the country, the officer recognized that persons who suffer from mental illness are often stigmatized, if not persecuted, and that they can constitute a particular social group. The officer did not dispute the fact that in Africa, any mental illness is suspect and that persons who suffer from it can be subject to irrational accusations of witchcraft. The documentation in the record also refers to many cases of discrimination, lynching, and assault toward individuals with physical or mental disabilities. However, according to the officer, this objective evidence was not sufficient to persuade him that the applicant discharged [TRANSLATION] "his burden of proving that he could be the victim of persecution in the DRC because of his mental health," because [TRANSLATION] "it is not clear that persons who suffer from mental illness in the DRC are now systematically targeted" [Emphasis added]. In fact, according to the officer, [TRANSLATION] "the applicant's profile [is not consistent] with the profile of someone who is persecuted, or otherwise targeted, in the DRC because of his mental

illness." According to the officer, the categorization of [TRANSLATION] "witch" most often affects children in urban areas, and older women in rural areas. Also, even though the incidents of witchcraft accusations are widespread in the DRC and that persons suffering from mental illness are no exception, adults are not part of a group that is particularly affected. In this regard, the officer made a reviewable error.

[14] At best, the officer's reasoning is not clearly articulated and suggests a certain laxity in the understanding of the distinguishing criteria for the analysis of evidence of persecution or perceived danger that is found in sections 96 and 97 (similar situation vs. personal danger) of the IRPA. In fact, the documentary evidence objectively demonstrates that the applicant's membership in a social group of persons suffering from a mental disorder puts him at risk of persecution on one of the grounds stated in section 96 of the IRPA. Indeed, the officer accepted that there is generally, within the Congolese population, an irrational belief against this particular social group. Yet, it is not because children born with a mental disability are considered to be witches that other persons suffering from the same mental problems are not. On this point, I agree with the applicant that he did not have to demonstrate to the officer on a balance of probabilities that persons who suffer from mental illness are [TRANSLATED] "systematically targeted," but rather that there is [TRANSLATED] "more than a mere possibility of persecution" by the civilian population, which required the officer to determine whether the Congolese State was able to offer the applicant protection, if necessary.

[15] When the officer makes a reviewable error regarding such a fundamental issue as the applicable standard of proof, the Court must generally return the matter for reconsideration,

unless it is obvious that the PRRA application could not possibly be allowed (*Alam v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 4, [2005] FCJ No. 15 at paragraphs 13–16; *Fi v. Canada (Citizenship and Immigration)*, 2006 FC 1125, [2006] FCJ No. 1401 at paragraphs 11–14; and *Paz Ospina v. Canada (Citizenship and Immigration)*, 2011 FC 681, [2011] FCJ No. 887 at paragraphs 31–34).

[16] For these reasons, this application for judicial review is allowed. The impugned decision is set aside, and the matter must be reconsidered by another officer. Counsel did not raise any questions of general importance.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed. The impugned decision is set aside, and the matter referred to another officer for redetermination. No question is certified.

"Luc Martineau"
Judge

Certified true translation
This 4th day of October 2019

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

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