Federal Court  Cour fédérale

Date: 20180810

Docket: IMM-5380-17

Citation: 2018 FC 831

Ottawa, Ontario, August 10, 2018

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

EMMANUEL KWAKU BOAKYE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision of an immigration officer [the Officer], dated November 27, 2017 [the Decision or the PRRA Decision], rejecting the Applicant's application for a Pre-Removal Risk Assessment [PRRA].

[2] As explained in greater detail below, this application is allowed, because I have found that the Officer made adverse credibility determinations sufficiently central to the outcome of the Decision that there was an obligation to conduct a transparent consideration of Mr. Boakye's request for an oral hearing,. While I have found that this application is moot, because the Applicant has been removed from Canada, I have also concluded that the particular circumstances of this case warrant the Court nevertheless exercising its discretion to decide the application. In these circumstances, my Judgment sets aside the Decision, with a direction that the Decision not be taken into account in any future Canadian immigration proceedings in which the Applicant is involved, but does not grant any further relief.

II. **Background**

[3] The Applicant, Emmanuel Kwaku Boakye, is a citizen of Ghana. He arrived in Canada in 1998 as a permanent resident after being sponsored by his mother.

[4] In 2009 and subsequently, Mr. Boakye was convicted of several criminal offences. In May 2010, he was found inadmissible to Canada and a removal order was issued against him. He appealed to the Immigration Appeal Division [IAD] in January 2011, on humanitarian and compassionate [H&C] grounds, but his appeal was dismissed. In March 2011, Mr. Boakye waived his right to a PRRA and returned to Ghana.

[5] Mr. Boakye returned to Canada without authorization in March 2017 and attempted to claim refugee protection under a false name. His real identity was discovered, and removal proceedings were once again initiated against him, with a deportation order being issued against

him in May 2017. He was placed in immigration detention in July 2017. This time Mr. Boakye sought a PRRA. He claimed that he would face a risk of persecution in Ghana due to alleged cognitive disability and mental health conditions and that his mental health would worsen due to the lack of medical treatment available to him in Ghana. The PRRA application was initially dismissed in October 2017, and then, after Mr. Boakye requested and was granted reconsideration of the October 2017 decision, was dismissed again in November 2017 in the Decision, summarized below, which is the subject of this application for judicial review.

[6] A Canada Border Services Agency [CBSA] officer delivered to Mr. Boakye on February 21, 2018, a Notification for Removal Arrangements scheduling his removal to Ghana for March 1, 2018. Mr. Boakye's counsel was not advised of the removal until March 2, 2018, after the removal had occurred. No stay of removal was sought. As a result of the removal, the Respondent, the Minister of Citizenship and Immigration [MCI], takes the position that this application for judicial review is moot. Mr. Boakye responds to this position by arguing that the removal was procedurally unfair and therefore unlawful, because his counsel was not advised in advance and he was therefore deprived of the opportunity to seek a stay.

III. **Pre-Removal Risk Assessment Decision**

[7] In the Decision, the Officer noted that Mr. Boakye's alleged cognitive disabilities and mental health issues were said to emanate from, or have been made worse by, his alleged abusive upbringing. However, the Officer observed that the testimony before the IAD did not refer to such abuse and that Mr. Boakye had provided no corroborative evidence for his allegations that his upbringing had been abusive.

[8] While the medical evidence adduced in support of the PRRA application referred to Mr. Boakye's psychiatrist developing a medication treatment plan to manage symptoms of Post-Traumatic Stress Disorder [PTSD], the Officer noted that there was no letter from the psychiatrist or indication of how, or by whom, the PTSD was diagnosed. The Officer acknowledged Mr. Boakye's statement that his mental health had deteriorated while in detention and that the jail psychiatrist had increased the dosage of his medication as a result of his difficulty sleeping and constant feelings of anxiousness and depression. However, the Officer concluded that imprisonment with the risk of being removed from his family would be cause for such symptoms and that he was receiving treatment and learning to cope through symptom management.

[9] Although referring to country condition documentation related to the treatment of individuals with mental disabilities in Ghana, the Officer noted that Mr. Boakye had lived in Ghana and travelled to other countries, including obtaining passports and making refugee claims, after leaving Canada in 2011. The Officer stated that Mr. Boakye did not have access to medication or mental health providers during that time period and concluded that, even if he had cognitive or intellectual disabilities, or other brain illnesses such as depression, anxiety or difficulty sleeping, he is able to care for himself and navigate his way through administrative and government processes and therefore would not be targeted for persecution upon return to Ghana.

[10] The Officer also observed that lack of medical treatment in Ghana cannot ground a claim for protection under s 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[11] As a result, the Officer rejected Mr. Boakye's PRRA application, determining that he would not be subject to risk of persecution, torture, risk to life or risk of cruel and unusual treatment or punishment if returned to Ghana.

IV. **Motion to Add Respondent and Amend Relief**

[12] On July 20, 2018, Mr. Boakye's counsel filed a motion, seeking to add the Minister of Public Safety and Emergency Preparedness [MPSEP] as a respondent and seeking to amend the relief sought in this proceeding to include: (a) that the MPSEP return Mr. Boakye to Canada and/or; (b) that the MCI provide Mr. Boakye with an Authorization to Return or a Temporary Residence Visa or Permit to allow him to return to Canada while his PRRA is being redetermined. On July 23, 2018, the MCI filed a Memorandum of Fact and Law in response to this motion, and on July 24, 2018, Mr. Boakye filed written submissions in reply. The Court directed that the parties make oral submissions on the motion at the hearing of the application for judicial review scheduled for July 26, 2018.

[13] At the hearing, the parties argued both the motion and the application for judicial review, and I reserved my decision on both. This Judgment and Reasons addresses both the motion and the application.

V. **Issues and Standard of Review**

[14] The parties' arguments raise the following issues for the Court's consideration:

A. Should the Court grant the Applicant's motion?

B. Should the Court decline to consider evidence adduced by the Applicant, in this application for judicial review, which was not before the Officer?

C. Is this application for judicial review moot?

D. If the application for judicial review is moot, should the Court nevertheless exercise its discretion to decide the application?

E. Did the Officer err by failing to consider or grant the Applicant's request for an oral hearing?

F. Did the Officer deprive the Applicant of procedural fairness, by failing to provide an opportunity for a psychiatric assessment before making the Decision?

G. Is the Decision reasonable?

[15] The Applicant raises various arguments challenging the Officer's substantive analysis in the Decision, related to the Officer's assessment of the evidence including the Applicant's credibility. As indicated by the articulation of the last issue listed above, the parties agree, and I concur, that these arguments are to be assessed on a standard of reasonableness. The parties also agree, and I again concur, that issues of procedural fairness are subject to a standard of correctness.

[16] The Applicant describes the issue surrounding his request for an oral hearing as a matter of procedural fairness, governed by the correctness standard. While the Minister did not take

issue with this position, I consider the weight of recent authority to support the conclusion that this issue involves a question of mixed fact and law and is governed by a standard of reasonableness, particularly where the question surrounds the extent to which a PRRA decision was influenced by a credibility determination (see, e.g. *Haji v. Canada (Citizenship and Immigration)*, 2018 FC 474, at paras 6-10). That having been said, my decision on this issue would be the same if I applied a standard of correctness.

VI. **Analysis**

A. *Should the Court grant the Applicant's motion?*

[17] Mr. Boakye's motion invokes Rules 101(1) and 104(1)(b) of the *Federal Courts Rules*, SOR/98-106, to add the MPSEP as a new party to this proceeding and Rule 75(1) to amend the relief sought. Rule 101(1) relates to joinder of claims, allowing a party to a proceeding to request relief against another party to the same proceeding in respect of more than one claim. As addressed in more detail below, Rule 101(1) expressly states that it is subject to Rule 302, which provides that, unless the Court orders otherwise, an application for judicial review shall be limited to a single order in respect of which relief is sought.

[18] Rule 104(1)(b) allows the Court at any time to order that a person who ought to have been joined as a party, or whose presence before the Court is necessary to ensure that all matters in dispute in the proceeding may be effectually and completely determined, be added as a party. Mr. Boakye refers the Court to the decision of the Federal Court of Canada, Appeal Division in *Stevens v Canada (Commission of Inquiry)*, [1998] 4 FC 125 at paragraph 20, which referenced

case law explaining that the reason which makes it necessary to join a person as a party to an action is so that it should be bound by the result of the action, involving a question which cannot be effectually and completely settled unless that person is a party.

[19] Rule 75(1) permits the Court at any time to allow a party to amend a document on such terms as will protect the rights of all parties. Rule 75 applies to all proceedings including applications (see *Astrazeneca AB v Apotex Inc.*, 2006 FC 7 at para 19) and therefore allows Mr. Boakye to seek to amend his Application for Leave and for Judicial Review to claim additional relief. The Federal Court of Appeal has explained in *Janssen Inc. v Abbvie Corp.*, 2014 FCA 242 at paragraph 3 that, on a motion to amend, the applicable test is whether it is more consonant with the interests of justice that the amendment be permitted or that it be denied. Factors to be considered include the timeliness of the motion to amend, the extent to which the proposed amendments would delay the expeditious hearing of the matter, the extent to which a position taken originally by one party has led another party to follow a course of action in the litigation which it would be difficult or impossible to alter, and whether the amendments sought will facilitate the Court's consideration of the true substance of the dispute on its merits.

[20] Mr. Boakye's effort to add the MPSEP as a party and to expand the relief sought in his application for judicial review both arise from his position that his removal from Canada to Ghana was conducted in a procedurally unfair and therefore unlawful manner, because the removal was performed without giving his counsel notice and therefore an opportunity to present a motion for stay of removal. He also relies upon his position that he suffers from mental health issues, which he submits compounds the unfairness of his removal without prior notice to his

counsel. Mr. Boakye brings his motion in response to the MCI's position that this application for judicial review is moot due to his removal. He argues that, because the removal was carried out by the MPSEP in what he submits was an unlawful manner, the MPSEP is a necessary party to this proceeding. Mr. Boakye submits that the lawfulness of the MPSEP's action should be scrutinized in considering whether this application is moot, or whether the Court should exercise its discretion to decide the matter nonetheless, and that he should be entitled to relief which permits him to return to Canada if the Court concludes that the MPSEP acted unlawfully, which relief would overcome the mootness concern.

[21] Mr. Boakye recognizes that the Federal Court of Appeal held in *Perez v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 171 [*Perez*] that an application for judicial review of a PRRA is moot where the individual who is the subject of the PRRA decision is no longer in Canada. However, he notes that the certified question considered by the Court of Appeal in that case was framed in terms of removal from or leaving Canada after an application for a stay of removal has been rejected. He therefore submits that, where the removal has not been subject to judicial scrutiny through a stay motion as it was in *Perez* and is argued to be unlawful, the conclusion in *Perez* does not apply. Mr. Boakye also notes the comments by Justice Roussel in *Mrda v Canada (Minister of Citizenship and Immigration)*, 2016 FC 49 [*Mrda*] at paragraph 31, that it would render rights under IRPA illusory if a judicial review application could be defeated simply by reason of the enforcement of a removal order.

[22] In support of the amended relief which he wishes to add to this application, Mr. Boakye relies on *San Vicente Freitas v Canada (Minister of Citizenship and Immigration)*, [1999] 2 FC

432 [*Freitas*], in which Justice Gibson explained at paragraph 36 that it was not in dispute before him that, if he were to determine the application for judicial review in favour of the applicant, he had the authority to order the respondent to return the applicant to Canada, at the respondent's expense, in order to render a new refugee determination meaningful. As Mr. Boakye notes, this Court has commented favourably upon *Freitas* in more recent decisions in *Magyar v Canada (Minister of Citizenship and Immigration)*, 2015 FC 750 at paragraph 23 and *Molnar v Canada (Minister of Citizenship and Immigration)*, 2015 FC 345 at paragraph 30.

[23] In opposing Mr. Boakye's motion, the MCI notes that *Freitas* and the cases that have favourably considered it all involved applications to judicially review decisions on claims for refugee protection, not PRRA decisions. The MCI submits that, to the extent there is any judicial commentary on the authority of the Court to order return of an applicant to Canada in judicially reviewing a PRRA, the Court has questioned whether such authority exists (see *Perez v Canada (Minister of Citizenship and Immigration)*, 2008 FC 663 at para 30; and *Sogi v Canada (Minister of Citizenship and Immigration)*, 2007 FC 108 [*Sogi*] at para 34).

[24] It is unnecessary for me to decide whether the Court may have authority to grant relief akin to that discussed in *Freitas*¸ in circumstances where an individual has been illegally removed from Canada following an unsuccessful PRRA. Mr. Boakye's efforts to distinguish the binding decision of the Federal Court of Appeal in *Perez*, and his submission that the Court should allow him to expand his requested relief and ultimately grant such relief to effect his return to Canada, depend on his argument that his removal was procedurally unfair and therefore unlawful. However, I agree with the MCI's position that this issue is not properly before the

Court in this application and that it is not appropriate to expand the scope of this application to encompass this issue. As the MCI notes, the decision challenged in Mr. Boakye's Application for Leave and for Judicial Review is the PRRA Decision of November 27, 2017. His removal on March 1, 2018, and the process followed by the MPSEP prior to that removal, are separate from the PRRA Decision and are not the subject of this application.

[25] As previously noted, Rule 101(1) permitting joinder of claims is subject to Rule 302, which provides that, unless the Court orders otherwise, an application for judicial review shall be limited to a single order in respect of which relief is sought. Rule 302 is obviously not a complete impediment to two related administrative decisions been challenged in the same application, or to two related applications being set down for simultaneous or consecutive hearing, as the Rule 302 restriction applies unless the Court otherwise orders. The impediment to the Court considering Mr. Boakye's arguments surrounding the legality of his removal in the present application turns on the fact that he has not brought an application challenging his removal. Rather, he seeks to challenge it indirectly through the effort to expand the requested relief in the present application, through a motion initiated less than one week prior to the hearing.

[26] I recognize the point raised by Mr. Boakye's counsel at the hearing, that he could not have been expected to include, in his original Application for Leave and Judicial Review, the expanded relief that he is now seeking, as he had not at that stage been removed and was not aware that removal would be effected in a manner with which he would subsequently take issue. However, Mr. Boakye's counsel was advised of the removal on March 2, 2018, the day

following the removal. There has therefore been ample time to initiate a judicial review of the removal.

[27] My conclusion, that the legality of Mr. Boakye's removal is not properly before the Court in this application and that it is not appropriate to expand the scope of this application, is neither a matter of form over substance nor solely a function of timeliness. As the Respondent submits, section 72(1) of IRPA provides that the entitlement to challenge a decision under IRPA requires leave of the Court. No leave has been sought by Mr. Boakye, or granted by the Court, in relation to any decision or decisions by the MPSEP surrounding his removal. As explained by the Federal Court of Appeal in *Zaghbib v Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FCA 182 at paragraphs 48 to 54, the leave requirement is an impediment to changing the subject matter of an application for judicial review by not only seeking different relief but also challenging a different decision.

[28] *Zaghbib* also notes at paragraph 53 the impediment to changing the subject matter of a judicial review that arises from the absence of a satisfactory record. In my view, this impediment is clearly present in this case. I appreciate that the record appears clear that Mr. Boakye's counsel was not given prior notice of his removal. What is less clear is the significance of this fact. The MCI argues, based on an affidavit of the CBSA officer who managed Mr. Boakye's removal, that Mr. Boakye understood that he was being removed and actively sought to advance his removal. Mr. Boakye's counsel strongly disagrees with this characterization of the circumstances surrounding the removal and again emphasizes the mental health conditions which he says should have been apparent to CBSA. The point is that the parties and the Court are without the

full record, such as would have been generated had the removal been the subject of an application for judicial review, which would be necessary to assess this issue and therefore Mr. Boakye's arguments surrounding the legality of his removal.

[29] Therefore, considering the principles described above as governing the application of the Rules invoked in Mr. Boakye's motion, my conclusion is that the interests of justice do not support adding the MPSEP as a party or expanding the relief requested in this application. The Applicant's motion will therefore be denied.

B. *Should the Court decline to consider evidence adduced by the Applicant, in this application for judicial review, which was not before the Officer?*

[30] The MCI takes the position that there are a number of pieces of evidence, filed by Mr. Boakye in this judicial review, which the Court should not consider, either in assessing whether the application is moot or in considering the merits of the application.

[31] The Applicant's Record includes an affidavit of Tyler Goettl, an associate of Mr. Boakye's counsel, which attaches a number of exhibits. The documents attached to Mr. Goettl's affidavit with which the MCI takes issue are a December 12, 2017 request for legal aid funding submitted by Mr. Boakye's counsel, a selection of the documents disclosed by Mr. Boakye to the IAD related to his alleged cognitive issues and the treatment of persons with mental health issues in Ghana, excerpts from the transcript of the IAD hearing, and Mr. Boakye's medical file from the Niagara Detention Centre. The MCI takes the position that, as none of this material was

before the Officer when considering the PRRA, it should not be considered by the Court in the adjudication of this application.

[32] Mr. Boakye has not responded with arguments supporting the relevance of any of this documentation. Nor do I understand his submissions, either on mootness or the merits of the judicial review application, to rely on this documentation in any material way. I confirm that the Court will not take it into account.

[33] The MCI raises a similar issue with respect to two affidavits of David Cote, another associate of Mr. Boakye's counsel, dated May 24, 2018 and July 20, 2018, the latter of which was filed in support of Mr. Boakye's motion to add the MPSEP and expand the requested relief. In connection with the May 24, 2018 affidavit, the MCI takes issue in particular with an attached report dated March 6, 2018 by a psychiatrist named Dr. Michaela Bader, resulting from an assessment of Mr. Boakye performed on February 4, 2018. Again, the MCI notes that both the assessment and the resulting report postdate the PRRA Decision.

[34] However, Mr. Boakye argues that this report is relevant to one of his procedural fairness arguments, to the effect that the Officer had an obligation to provide an opportunity for a psychiatric assessment of Mr. Boakye, who was in immigration detention, before making the Decision. He submits that Dr. Beder's report is relevant to this argument, because it supports his position that, if the Officer had afforded an opportunity for a psychiatric assessment, it would have identified mental health conditions as did Dr. Beder. In oral submissions, the MCI's counsel confirmed that she does not object to Mr. Boakye relying on Dr. Beder's report for this

purpose. I concur with the parties' position that that this report can be taken into account in assessing the procedural fairness argument described above, but I agree with the MCI's position that it is not relevant to the reasonableness of the Decision.

[35] The MCI also takes issue with the Court relying on two paragraphs of Mr. Cote's May 24, 2018 affidavit, in which he deposes to having learned from the CBSA officer, Nadeem Syed, that the Notification for Removal Arrangements was given to Mr. Boakye on February 21, 2018 and states that, because Mr. Boakye is functionally illiterate, it remains unclear whether he properly understood the ramifications of what was written in this document. The MCI again argues that this information was not before the Officer when making the PRRA Decision. The MCI further submits that, because Mr. Boakye's counsel has made no written submissions relying on this information to respond to the MCI's position on the mootness issue, the MCI had no notice of any such argument by Mr. Boakye and the Court should therefore not take this information into account in assessing the mootness of the application.

[36] I concur that the information in the two impugned paragraphs in Mr. Cote's affidavit are irrelevant to the reasonableness of the Decision, as that information was not before the Officer. I understand Mr. Boakye to be relying on this information to support his position that his removal was unlawful which, as explained below, he submits is relevant to whether this application is moot. The MCI is correct that, while Mr. Boakye filed Mr. Cote's affidavit pursuant to the Order granting leave in this matter, he did not file a Further Memorandum of Fact and Law, as he was entitled due to do under that Order, which would have given notice to the MCI of how he intended to rely on the affidavit to support his position on mootness. However, as noted by Mr.

Boakye's counsel, the affidavit of Mr. Syed filed by the MCI also deposes that the Notification for Removal Arrangements was delivered to Mr. Boakye on February 21, 2018 and that Mr. Boakye had advised Mr. Syed that "he does not read too well".

[37] I therefore question the extent to which the MCI was surprised by Mr. Boakye's reliance on the evidence in the two impugned paragraghs and do not consider that Mr. Boakye should be deprived of reliance on this evidence. That having been said, the outcome of my below analyses of mootness and the exercise of the Court's discretion would be no different if this evidence was not before me.

[38] Finally, in oral argument the MCI also referred to concern about the Court relying on the subsequent affidavit of Mr. Cote dated July 20, 2018, although no detailed submissions were made in support of this concern. That affidavit was filed in support of Mr. Boakye's motion, not the application for judicial review. I will therefore not take it into account in addressing the application. However, having considered this evidence for purposes of the motion, I can again confirm that, if I had taken this evidence into account in the below analyses of mootness and the exercise of the Court's discretion, the outcome of those analyses would be no different.

C. *Is this application for judicial review moot?*

[39] The parties' arguments in relation to the motion canvassed above are necessarily relevant to the question whether this application for judicial review is moot, as Mr. Boakye brought the motion in response to the MCI's argument that his application should be dismissed for mootness.

[40] Mr. Boakye referred the Court to *Rosa v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1234 [*Rosa*] and other decisions of this Court which concluded that applications for judicial review were not moot despite the fact that the applicant was no longer in Canada. However, I agree with the MCI's submission that these authorities involved applications to judicially review decisions by the Refugee Protection Division under section 96 of IRPA, which does not require that a claimant be present in Canada, and are therefore inapplicable to an application challenging a PRRA. Indeed, that distinction is expressly pointed out by Chief Justice Crampton at paragraphs 35 to 36 of *Rosa*.

[41] I also disagree with Mr. Boakye's position that *Perez* can be distinguished on the basis that the present case does not involve a removal that was conducted following the judicial scrutiny inherent in a stay motion. I appreciate that the certified question under consideration in *Perez* was framed in terms of the mootness of judicial review of a PRRA where removal was effected after rejection of a stay. However, while those were the circumstances that gave rise to the appeal in *Perez*, the analysis in that case does not turn on the fact that a stay motion was heard prior to the removal. The conclusion of the Federal Court of Appeal is set out as follows at paragraph 5 of the decision:

> 5 We agree that the application for judicial review is moot, and in particular with the statement made by Martineau J. at paragraph 25 of his reasons where he says:
>
> > […] Parliament intended that the PRRA should be determined before the PRRA applicant is removed from Canada, to avoid putting her or him at risk in her or his country of origin. To this extent, if a PRRA applicant is removed from Canada before a determination is made on the risks to which that person would be subject to in her or his country of origin, the intended objective of the PRRA system

> can no longer be met. Indeed, this explains why section 112 of the Act specifies that a person applying for protection is a "person in Canada".
>
> By the same logic, a review of a negative decision of a PRRA officer after the subject person has been removed from Canada, is without object.

[42] I read the analysis of the Federal Court of Appeal as endorsing the interpretation by Justice Martineau of section 112 of IRPA, which expressly restricts the entitlement to apply for a PRRA to a person in Canada. If a person is a longer in Canada then, regardless of whether he or she had the benefit of a stay motion before being removed from Canada, the person can no longer benefit from a PRRA, and it would therefore be of no practical effect for the Court to decide an application for judicial review of a prior PRRA decision as, regardless of the merits of the application, the Court cannot order that the PRRA be redetermined.

[43] I have also considered Mr. Boakye's reliance on the recent decision in *Murugamoorthy v Canada (Minister of Citizenship and Immigration)*, 2018 FC 650 [*Murugamoorthy*], in which Justice Walker stated as follows at paragraph 21:

> [21] The Applicant argues that the Court should exercise its discretion to hear and determine the merits of this application. In considering whether to exercise my discretion, I have reviewed the PRRA and paragraph 115(2)(a) cases noted in this judgment in which the courts have determined the cases to be moot notwithstanding the particular applicant may question the risk assessment conducted in their case. I have read the decision of the Minister's Delegate carefully and find nothing exceptional in the decision that would warrant the exercise of discretion. <u>There is no suggestion in the record and none has been made by the Applicant that the steps taken by the Respondent through the removal process were taken other than in the proper discharge of the Minister's obligations under the IRPA.</u>
>
> [Applicant's emphasis]

[44] Mr. Boakye submits that it is implicit in Justice Walker's analysis that an application for judicial review of a PRRA a decision is not moot, notwithstanding that the applicant has been removed, where there is a challenge to the legality of the removal process. I disagree with this interpretation of *Murugamoorthy*. Rather, as argued by the MCI, it is clear from the above passage that the comments about the removal process related not to whether the application was moot, which Justice Walker had so concluded at paragraph 20, but were made in considering whether to exercise the Court's discretion to decide the application notwithstanding that it was moot. I will return to *Murugamoorthy* in considering whether to exercise my own discretion in the next section of this Analysis.

[45] I am bound by *Perez*. Moreover, even if I were to have accepted that *Perez* does not apply where a removal has not been subjected to judicial scrutiny and was conducted unlawfully, this would not assist Mr. Boakye in resisting the conclusion that his application is moot, as I have found, as explained above in the analysis of his motion, that the procedural fairness of his removal is not an issue before the Court in the present application. It is therefore my conclusion that this application is moot.

D. *If the application for judicial review is moot, should the Court nevertheless exercise its discretion to decide the application?*

[46] Notwithstanding my finding that this application is moot, the parties accept, and in my view the law is clear, that the Court nevertheless has the discretion to decide the application. That principle is implicit in *Perez*, where the Federal Court of Appeal held that, in the exercise of

its discretion to hear an application for judicial review that is moot, the Court need not consider factors beyond those identified in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 [*Borowski*]. Indeed, this conclusion is explicit in the subsequent decision in *Canada (Minister of Public Safety and Emergency Preparedness) v Shpati*, 2011 FCA 286, where the Federal Court of Appeal explained at paragragh 30 that, notwithstanding that an application for judicial review of a PRRA decision is moot, the Court may exercise its discretion based on the *Borowski* factors to decide the application and set the decision aside.

[47] *Murugamoorthy* summarized as follows at paragraph 12 the three factors that the Court should consider in assessing whether to exercise this discretion:

> [12] The Supreme Court identified three factors a court should consider in assessing whether to exercise its discretion to hear a case on its merits even though it is moot: the adversarial system, the concern for judicial economy and the court's proper law-making role (*Borowski*, paras 31 to 42). The review of the factors is not to be mechanical and the Supreme Court acknowledged that the factors may weigh differently in any particular case.

[48] As noted by the MCI, in addition to these factors, it is possible that other criteria may also be considered (see *Sogi* at para 40).

[49] Applying the *Borowski* factors to the present case, in my view it is clear that an adversarial context still exists between the parties, as demonstrated by the substantial efforts undertaken by both parties to advance their respective positions both on the merits of the application for judicial review and the interlocutory matters that the Court has been called upon to consider. In considering authorities identified by the MCI, I note that other members of this

Court have similarly found an adversarial context to still exist, notwithstanding that the judicial review of a PRRA had been rendered moot by the applicant's removal (see, e.g., *Lai v Canada (Citizenship and Immigration)*, 2015 FC 646 at para 22 [*Lai*], quoting *Mekuria v Canada (Citizenship and Immigration)*, 2010 FC 304 at para 13; and *Rana v Canada (Citizenship and Immigration)*, 2010 FC 36 [*Rana*] at para 70). However, I also note the MCI's reference to paragraph 47 of *Sogi*, in which the Court held that the adversarial context should be supplemented by at least one of the other two criteria to support an exercise of the Court's discretion.

[50] Turning to the second of the *Borowski* factors, the concern for economy in the deployment of judicial resources, I note that this factor has militated against the exercise of discretion, even in cases such as *Lai* and *Rana* where the requisite adversarial context was found still to exist. The present matter is unlike some other cases, where the Court exercised its discretion to decide the issues raised in a moot judicial review of a PRRA because those issues were being considered anyway in the context of another decision, such as a decision on an application for permanent residence on H&C grounds (see, e.g., *Lovera v Canada (Citizenship and Immigration)*, 2016 FC 786 at para 49). However, in *Sogi* at paragraph 43, the Court noted in considering the second *Borowski* factor that the question which must be asked is whether a judicial solution could have concrete consequences for the rights of the parties even if in practice the problem which gave rise to the issue would not be settled.

[51] As previously noted, Justice Walker implicitly recognized in *Murugamoorthy* that an allegation by an applicant that the steps taken through the removal process were in some manner

improper can be relevant to the exercise of the Court's discretion. Similarly, counsel for the MCI acknowledged in oral argument that, while Mr. Boakye's allegations of a breach of procedural fairness surrounding his removal are not relevant to whether his application for judicial review of the PRRA Decision is moot, they may be relevant to the exercise of the Court's discretion to decide the application nevertheless. The position of the MCI is that, if Mr. Boakye wished to advance these allegations, he should have filed an application for judicial review challenging his removal in a timely manner following the removal. The MCI submits that, had he done so, and were he to be successful in obtaining leave, challenging the lawfulness of his removal, and securing a remedy effecting his return to Canada, the provisions of IRPA would afford him another PRRA, in which case it could be useful to the parties to have the benefit of a decision from the Court in the present application.

[52] However, the MCI submits that, because Mr. Boakye has not taken the steps described above, there would be no benefit to the parties in receiving a decision on the present application, and Mr. Boakye's allegations surrounding his removal therefore do not warrant an exercise of the Court's discretion. I disagree with this position. While my decision to deny Mr. Boakye's motion turned on my agreement with the MCI's argument that it is not available to Mr. Boakye to challenge his removal through an amendment to the present application, he has clearly raised allegations that his removal was unlawful which, if pursued through appropriate procedures, are such that a decision in the present judicial review of the PRRA Decision could have consequences for the rights of the parties. I make no comment on the likelihood that Mr. Boakye's pursuit of such allegations would be successful. However, in my view, the level of

judicial resources to be devoted to rendering a decision in this application are warranted given the potential for this decision to be of benefit to the parties.

[53] I have also taken into account the third *Borowski* factor, the need for the Court to demonstrate awareness of its proper lawmaking function. I do not consider the present case to represent a circumstance where a decision in the application for judicial review will fulfil a lawmaking function. However, neither do I consider that such a decision will raise concern of the sort identified at paragraph 22 of *Lai*, that an order that a PRRA be redetermined could establish a new category of persons in need of protection, that the enforcement of a removal order could become illegal after the fact by judicial dicta, or that a decision in this application could amount to an indirect review of a previous stay decision by the Court. There has been no stay decision in this case, I do not intend to express a conclusion on the legality of the removal, and as explained below a decision allowing the application, if warranted, can be made without ordering redetermination of the PRRA.

[54] I note that, in *Pusuma v Canada (Minister of Citizenship and Immigration)*, 2015 FC 658 [*Pusuma*], Justice Mactavish exercised her discretion to decide an application for judicial review of a PRRA, notwithstanding that it was moot, because it could have collateral consequences for the applicants in other proceedings. Justice Mactavish set aside an H&C decision, which was also under review, and remitted it for redetermination. However, with respect to the PRRA decision, the Court's relief was limited to setting aside the decision and directing that, in the redetermination of H&C decision, no weight be given to the reasons that the PRRA had been refused.

[55] In summary, taking into account the *Borowski* factors and the particular circumstances presented by Mr. Boakye, my conclusion is that this is an appropriate case for the Court to exercise its discretion to decide this application notwithstanding that it is moot.

E. *Did the Officer err by failing to consider or grant the Applicant's request for an oral hearing?*

[56] Turning to the merits of this application, my decision to allow the application turns on Mr. Boakye's argument that the Officer erred by failing to consider his request for an oral hearing. In his PRRA submissions, Mr. Boakye's made such a request as follows:

> If the adjudicating officer has any doubts about the credibility of the Applicant's claim it is submitted that an oral hearing should be convoked so that his credibility can be tested. If credibility is at issue, it is submitted that it is contrary to the rules of natural justice and fairness to deny the Applicant the opportunity to be heard and respond. This is especially true in the within case, where Mr. Boakye never had an RPD hearing and his fear of persecution has never been assessed.

[57] Notwithstanding this submission, the Officer did not afford Mr. Boakye an oral hearing, and the Decision demonstrates no consideration of his request.

[58] The MCI submits, correctly, that an oral hearing is required in the PRRA context only in particular circumstances. As explained by Justice Scott in *Ahmad v Canada (Minister of Citizenship and Immigration)*, 2012 FC 89 at paragraph 38:

> 38 It has been clearly established that, in the context of a PRRA application, an oral hearing is the exception. Moreover, serious credibility issues must be central to the PRRA application in order

> to trigger the holding of an oral hearing. In reading the officer's decision it is clear that no such issue of credibility was found to exist.

[59] This explanation of the law is derived from the particular statutory provisions that govern the availability of an oral hearing in a PRRA application. Section 113(b) of IRPA provides that a hearing of a PRRA application may be held if the MCI, on the basis of prescribed factors, is of the opinion that a hearing is required. Such factors are prescribed by section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 as follows:

167 Hearing - prescribed factors - For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors are the following:	**167** Pour l'application de l'alinéa 113b) de la Loi, les facteurs ci-après servent à décider si la tenue d'une audience est requise :
(a) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;	a) l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur;
(b) whether the evidence is central to the decision with respect to the application for protection; and	b) l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;
(c) whether the evidence, if accepted, would justify allowing the application for protection.	c) la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection

[60] Mr. Boakye argues not only that the Officer erred by failing to convoke an oral hearing but that there is a reviewable error in that the Decision fails to demonstrate any consideration of his request. As noted by the MCI, in *Ghavidel v Canada (Minister of Citizenship and Immigration)*, 2007 FC 939 [*Ghavidel*] at paragraphs 23 to 25, Justice de Montigny held as follows with respect to the need for an explanation as to why an oral hearing was not provided:

> [23] Was the applicant entitled to an explanation as to why she was not granted an oral interview, despite her repeated requests to obtain one? The applicant believed she was, and relied heavily on the decision of my colleague Justice Kelen in *Zokai v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1103 [*Zokai*], where he stated:
>
> > [11] I agree with the applicant that a breach of procedural fairness arises on the facts of this case. The applicant made a detailed request in his PRRA application for an oral hearing, with specific reference to the factors set out in section 167 of the Regulations. However, the PRRA Officer makes no reference to these factors, or to any other factors that led to the decision not to hold an oral hearing, despite the written request for one. In fact, there is no evidence that the Officer turned his mind to the appropriateness of holding an oral hearing.
>
> [24] I believe this case is distinguishable from *Zokai*, as Justice Kelen's finding was predicated not only on the fact that a request for an oral hearing had been made, but also on the fact that credibility was central to the outcome of the decision. Such is not the case here. The applicant herself appears to have requested an oral hearing out of concern that the Officer would take issue with her credibility. In her PRRA submissions, she wrote: "If the officer finds that there are concerns with Ms. Ebadi Ghavidel's credibility, the applicant is requesting that an oral interview be scheduled to permit her to be able to respond to any concerns directly". Her concerns, contingent as they were on credibility concerns, were therefore not triggered.
>
> [25] It would undoubtedly have been preferable to explain why an oral hearing was not provided, for the numerous reasons outlined in the decision of the Federal Court of Appeal in *Via Rail Canada Inc. v. Lemonde*, [2000] F.C.J. No. 1685 (QL), at paras.

> 16-22. However, I hesitate making it compulsory and therefore adding to the already heavy burden of PRRA Officers, especially when a careful reading of the reasons makes it clear that credibility was not an issue. In any event, I do not think the failure to provide reasons in this specific case warrants the quashing of the decision and its remittance to another PRRA Officer, as the end result would not be affected by the fulfillment of such a requirement.

[61] The MCI submits that, in the present case, there was no duty to hold an oral hearing and no obligation to provide an explanation why no oral hearing was afforded, because credibility was not central to the outcome of the Decision. In the MCI's submission, Mr. Boakye's assertions about his diagnosis, his symptoms, his medication and his experiences were not disbelieved by the Officer. Rather, says the MCI, the Officer's finding was that the evidence adduced was insufficient to support Mr. Boakye's claim. In contrast, Mr. Boakye's position is that it is clear that credibility was at issue in the Decision, in relation to his account of childhood abuse, cognitive disabilities, and mental health conditions.

[62] The determination of this issue therefore depends on whether, applying the reasonableness standard of review, the Decision can be interpreted as turning on insufficiency of evidence, as MCI submits, as opposed to credibility concerns central to the Officer's analysis.

[63] In the Decision, the Officer noted that Mr. Boakye stated in his affidavit that he suffers from cognitive disabilities, as well as severe mental health issues, emanating from and/or exacerbated by his abusive upbringing. The Officer referred to Mr. Boakye's statement that he was raised by an abusive woman named Afrakuma and that his abuse continued in Canada after his mother sponsored him. However, the Officer quoted from Mr. Boakye's testimony before the IAD about being raised by his grandparents after his father died when he was an infant and his

mother left Ghana. The Officer observed that Mr. Boakye's testimony before the IAD did not mention anything about a woman named Afrakuma or suffering abuse at her hands. As there was no other evidence to corroborate the allegations of abuse by Afrakuma, the Officer gave little weight to this risk and, because Mr. Boakye had not established his account of abuse by Afrakuma, the Officer gave little weight to the assertion that he suffered from cognitive disabilities and serious mental health issues as a result.

[64] I have difficulty interpreting this analysis in any way other than as an adverse credibility determination. While the Officer used the language of insufficiency, stating that little weight was given to Mr. Boakye's assertions, it is clear that the Officer reached this conclusion because he disbelieved Mr. Boakye's evidence that he had been abused as a child by Afrakuma, due to the omission of any such allegation in his IAD testimony and the inconsistency with his IAD testimony as to who had raised him. These are credibility determinations.

[65] The same analysis applies to the Officer's consideration of Mr. Boakye's evidence surrounding abuse by his mother. Based on the fact that his mother testified at his IAD hearing that Mr. Boakye lived with her and that he could continue to live with her, the Officer concluded that she was attempting to help him with his immigration matters. The Officer further observed that nothing was stated during the IAD hearing about any abuse suffered by Mr. Boakye at the hands of his mother. Again, this demonstrates the Officer disbelieving Mr. Boakye's statements of abuse.

[66] I also note that the MCI appears to acknowledge that the Officer negatively assessed Mr. Boakye's credibility, as the MCI's written submissions argue that the Officer reasonably relied on the absence of any mention of Afrakuma before the IAD to assess his credibility. However, I recognize that, taking into account the guidance in *Ghavidel*, the fact that the Decision demonstrates adverse credibility determinations is not by itself sufficient to conclude that the Officer made a reviewable error in failing to consider affording Mr. Boakye an oral hearing. The remaining question is whether these credibility determinations were sufficiently central to the outcome of the Decision to impose such an obligation upon the Officer.

[67] In my view, the Decision does demonstrate that the credibility determinations played a central role in the Officer's rejection of the PRRA application. In addition to the analyses described above, the Officer also gave little weight to the September 20, 2017 letter from the Canadian Mental Health Association, which Mr. Boakye submitted as evidence of his mental health conditions. The Officer's discount of the probative value of this letter was based in part on the fact that the letter did not indicate how, or by whom, Mr. Boakye had been diagnosed with PTSD, but it was also based on the earlier analyses affording little weight to Mr. Boakye's accounts of childhood abuse.

[68] Also, at the beginning of the portion of the decision in which the Officer concludes that Mr. Boakye was able to function well following his previous deportation from Canada, the Officer appears to attribute the symptoms that Mr. Boakye states he was then experiencing to his detention and potential removal. This is consistent with the Officer having rejected the accounts

of childhood abuse as causative of those symptoms. Again, the adverse credibility determinations surrounding those accounts appear to have significantly influenced the outcome of the Decision.

[69] I do not conclude that the Officer was necessarily obliged to give Mr. Boakye an oral hearing. However, I do find that the Officer made adverse credibility determination sufficiently central to the outcome of the Decision that, particularly given Mr. Boakye's express request for an oral hearing, there was an obligation to conduct a transparent consideration of that request in accordance with the section 167 factors.

[70] Based on this finding, the Decision must be set aside, and it is unnecessary for the Court to consider the other arguments raised by Mr. Boakye in challenging the procedural fairness or reasonableness of the Decision. As previously explained, guided by *Pusuma*¸ the relief granted by my judgment will be limited to setting aside the Decision and directing that, in any subsequent Canadian immigration proceedings in which Mr. Boakye is involved, no weight is to be given to the reasons given by the Officer for refusing Mr. Boakye's PRRA application.

VII. **Certified Questions**

[71] Mr. Boakye proposes two questions for certification for appeal. Edited slightly to reflect my understanding of the issues raised, those questions are as follows:

A. Is a PRRA moot as a result of an applicant's removal from Canada, where there is *prima facie* evidence that the removal was unlawful?

B. In considering a PRRA application, is there an obligation to order a psychiatric assessment where there is *prima facie* evidence of mental health issues and the applicant is precluded from obtaining his own assessment due to being incarcerated in a maximum security prison?

[72] The MCI opposes certification of both questions. The MCI submits that the first question has been clearly answered by existing jurisprudence, which is not dependent upon the circumstances surrounding removal, and that the second question does not arise in the present case because, even if such an obligation existed, the evidence before the Officer was not sufficient to invoke the obligation.

[73] I agree that it is not appropriate for the Court to certify either of the proposed questions, although I reach that conclusion for reasons somewhat different than those argued by the MCI. I agree with the MCI that *Perez* is dispositive of the first question. However, in addition, neither question would be determinative of an appeal in this matter. The first question would not be determinative, because I have made the decision to exercise my discretion to decide the application for judicial review notwithstanding that it is moot. The second question would not be determinative, because my decision does not turn on the issue raised by that question.

[74] As such, no question will be certified for appeal.

JUDGMENT IN IMM-5380-17

THIS COURT'S JUDGMENT is that this application for judicial review is allowed and the Decision is set aside, with the direction that, in any subsequent Canadian immigration proceedings in which Mr. Boakye is involved, no weight is to be given to the reasons given by the Officer for refusing Mr. Boakye's PRRA application. No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5380-17
STYLE OF CAUSE:	EMMANUEL KWAKU BOAKYE V THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JULY 26, 2018
JUDGMENT AND REASONS:	SOUTHCOTT J.
DATED:	AUGUST 10, 2018

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