Federal Court Cour fédérale

Date: 20180913

Docket: IMM-796-18

Citation: 2018 FC 913

[ENGLISH TRANSLATION]

Ottawa, Ontario, September 13, 2018

Present: The Honourable Mr. Justice LeBlanc

BETWEEN:

BATANAI NHENGU
SHUMIRAI JUBILEE NHENGU
SHEKINAH MUNYASHA NHENGU

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant, Batanai Nhengu [Batanai], his wife, Shumira [Shumira], and their minor child, Shekinah Munyasha, are citizens of Zimbabwe. In January and May 2017, they reported at the Canadian border arriving from the United States for the purpose of claiming refugee protection. On both occasions, they were denied entry on grounds of the combined effect of the

Agreement between the Government of Canada and the Government of the United States of America for cooperation in the examination of refugee status claims from nationals of third countries, signed by the two countries on December 5, 2012 (commonly known as the *Third Country Agreement*), and section 159.3 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations].

[2] On the first occasion, the applicants were sent back to the United States. On the second, a removal order was issued against them, under the terms of which the applicants were given the option to apply for a pre-removal risk assessment [PRRA] under section 112 of the *Immigration and Refugee Protection Act*, SC 2001 c 27 [the Act], which they proceeded to do. The principal applicants, Batanai and Shumira, essentially claim on their PRRA application that they fear persecution from the authorities in Zimbabwe if they are returned to that country because they were members of a political movement there called the Movement for Democratic Change. They argue that the Zimbabwe authorities suspect them of being among the leaders of that movement, which apparently led to their arrest and detention for three days in August 2016 and subsequent charges for public mischief following a demonstration organized in the country's capital. They further claim that after being released, they were visited by police officers who threatened to make them disappear. Finally, the principal applicants maintain that the Zimbabwe authorities continue even today to track their comings and goings and that if they are sent back to that country, they will be arrested immediately.

[3] On January 8, 2018, an officer of the Minister of Immigration, Refugees and Citizenship [Officer] rejected the applicants' PRRA application, essentially finding that the applicants had

not submitted any evidence to corroborate the claims in their application and that it could not be concluded from the documentary evidence concerning the state of the situation in Zimbabwe that removing the applicants to their country of origin would subject them personally to a risk to their lives or to a risk of cruel and unusual treatment or punishment, as required under sections 96 and 97 of the Act.

[4] The applicants submit that this decision should be invalidated. They criticize the Officer for requiring corroborative evidence when the applicants' statements supporting their PRRA application were, in and of themselves, evidence of which there was no reason to doubt the credibility. The applicants further submit that had the Officer had doubts regardless, it was his duty to hold a hearing as permitted under paragraph 113(b) of the Act, which the Officer failed to do.

[5] I cannot accept the applicants' submissions. When subject to judicial review by the Court, decisions rejecting PRRA applications, including decisions not to hold a hearing, are typically subject to the standard of reasonableness (*Kioko v Canada (Citizenship and Immigration)*, 2014 FC 717 at paragraphs 18, 19, 65 and 66 [*Kioko*]). In accordance with this standard, the Court will intervene to set aside the decision of an administrative decision-maker only where it is satisfied that the process leading to the impugned decision fails to exhibit the necessary qualities of intelligibility, transparency and justification or that the conclusion drawn by the decision-maker falls outside the range of "possible, acceptable outcomes which are defensible in respect of the facts and the law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47, [2008] 1 SCR 190). This is a deferential standard.

[6] Now, it is important to note at the outset that PRRA applicants are responsible for establishing, on a balance of probabilities, that they are persons in need of protection (*Adetunji v Canada (Citizenship and Immigration)*, 2012 FC 708 at paragraph 19 [*Adetunji*]; *Ferguson v Canada (Citizenship and Immigration)*, 2008 FC 1067 at paragraph 22 [*Ferguson*]). In this regard, it is up to them to "put [their] best foot forward" (*Ikeji v Canada (Citizenship and Immigration)*, 2016 FC 1422 at paragraph 47). In other words, a PRRA applicant is expected to provide to the Minister's officer "all the evidence necessary for the officer to make a decision", while the PRRA officer does not play a role in the submission of evidence and, in particular, has no obligation to inform the applicant if his or her evidence is insufficient (*Lupsa v Canada (Citizenship and Immigration)*, 2007 FC 311, at paragraphs 12-13).

[7] I note in this regard that, in contrast to a refugee claim as such, a PRRA application is, without exception, considered without a hearing, hence the importance of presenting the strongest case possible.

[8] Moreover, for a PRRA application to be admissible, the risk must be both prospective and personalized, that is, in the latter case, a risk that is more significant than the one faced generally by the population of the country of origin (*Prophète v Canada (Citizenship and Immigration)*, 2009 FCA 31 at paragraph 3; *Matute Andrade v Canada (Citizenship and Immigration)*, 2010 FC 1074 at paragraph 48). This risk may not be purely subjective; it must also be supported by objective evidence (*Haji v Canada (Citizenship and Immigration)*, 2009 FC 889 at paragraph 10).

[9] In this context, the Minister's officer called upon to rule on a PRRA application has the right to expect, at least with respect to the crucial aspects of the application, that evidence other than solely the PRRA applicant's claims be provided with a view to determining whether the burden of proof borne by the latter has been met (*Ferguson* at paragraph 32; *Kioko* at paragraph 49). In other words, where such evidence exists or where it is not unreasonable to expect the applicant to have obtained it, the Minister's officer may consider the absence of this evidence in assessing the weight and probative value of the claims of risk cited in support of the PRRA application, unless the applicant has provided a satisfactory explanation of the reasons for the absence of this evidence in the application.

[10] The applicants in the present case, who, moreover, have legal counsel, have done neither. The statement provided in support of the applicants' PRRA application nevertheless contains reference to a "court document" setting out the charges allegedly brought against them following the demonstration in August 2016 (Certified Tribunal Record, at page 27). However, no trace of this document is found in the record, nor could an explanation for its absence be provided to me at hearing.

[11] As a result, the claim that the applicants remain subjects of interest to the Zimbabwe authorities, which is crucial to determining the prospective nature of the alleged risk, is based solely on the statement they submitted in support of their application. In this regard, I find that it was not unreasonable for the Officer to expect to see some form of corroboration of this claim. This could have been demonstrated, for example, through friends or relatives of the applicants still living in Zimbabwe. This corroboration was all the more desirable, if not crucial, insofar as,

according to the Officer, the applicants had been unable to establish, based on the objective documentary evidence concerning the situation in Zimbabwe, that they had the profile of people sought by the Zimbabwe authorities. I note in this regard that the applicants did not submit in support of their application any excerpts of this evidence to back up their claims. Instead, they limited themselves to simply referring to reports dated 2008, 2014 and 2015 and a report on matters including the demonstration in August 2016.

[12] What the applicants would ultimately have the Court accept is the idea that a PRRA application may establish claims concerning prospective risk in the form of a single statement without any need to provide further reasons explaining the absence of corroborative evidence, the Minister's officer's only means of verifying the weight of this statement being to hold a hearing. To me, this is contrary to the letter and spirit of the provisions of the Act and Regulations applicable to the PRRA in that this claim tends to minimize the burden of proof borne by PRRA applicants and, for all intents and purposes, to recognize their right of systematic recourse to a hearing when holding a hearing in this situation is, in fact, the exception (*Ahmad v Canada (Citizenship and Immigration)*, 2012 FC 89 at paragraph 38; *Adetunji* at paragraph 25).

[13] I note that section 11 of the *Refugee Protection Division Rules*, SOR/2012-256 [the Rules], requires that refugee claimants submit in support of their claim "acceptable documents establishing their identity and other elements of the claim" and, if they cannot do so, that they "explain why they did not provide the documents and what steps they took to obtain them" [emphasis added].

[14] Like refugee claimants, PRRA applicants avail themselves of the protection of Canada on the same basis, or that set out in sections 96 and 97 of the Act. If a refugee claimant must bear the burden described in this provision of the Rules, I do not see how it would be unreasonable to place the same burden on a PRRA applicant with respect to the crucial elements of the PRRA application. I believe that this is what is reflected in the judge-made rule to which I referred previously to the effect that PRRA applicants must "put [their] best foot forward", particularly in a situation where, unlike a refugee claim, the decision concerning the application is, without exception, made based on the information submitted.

[15] A PRRA application must consequently, in principle, contain all elements likely to give it weight and assist the applicant in meeting the burden of proof which, in cases where the applicant has provided only a statement, includes an explanation of the steps taken, unsuccessfully, to obtain the documents that would have further substantiated the application. As I have indicated previously, an officer of the Minister may legitimately expect at least to find such explanations in this situation. In the absence thereof, the officer may, in my view, draw negative conclusions as to the probative value of the evidence submitted by the applicant to establish the alleged prospective risk, each case being necessarily assessed on its merits. In short, a sole statement may not be sufficient to establish, on a balance of probabilities, the existence of a risk justifying the protection of Canada.

[16] Although the difference between the two concepts may appear tenuous, the situation in this case is not one of credibility but of insufficient evidence affecting the probative value of the applicants' claims. It was, at least, not unreasonable for the Officer to take this view. Once again,

the risk leading to availment of the protection of Canada, in the context of a PRRA, requires looking into the future. It cannot be based strictly on subjective considerations. In other words, it is not enough to state that one is at risk; it is necessary to provide evidence or explain why evidence potentially substantiating this conviction was not submitted with the application and why it is necessary, in this context, to rely solely on a statement from the applicant.

[17] The applicants did none of this, which could have cast reasonable doubt as to the sufficiency of the evidence with regard to meeting their burden of proof. This is consequently not a case where the applicants could reasonably expect the Officer to hold a hearing or even to consider doing so, since this situation is not, strictly speaking, one that might give rise to the holding of a hearing in accordance with the criteria set out in section 167 of the Regulations, which, furthermore, were not addressed whatsoever in the factum submitted by the applicants before the Court.

[18] I will therefore dismiss this application for judicial review. The applicants have also asked me to certify the following two questions for appeal:

a. Does the sole fact that a statement from PRRA applicants cannot be corroborated have the effect of rendering this statement insufficient as evidence, or does it relate instead to a question of credibility?

b. In a case where a decision-maker is preparing to reject an application owing to doubts concerning the applicants' credibility which might be clarified, should this decision-maker, in accordance with the principles of fundamental justice set out in the Constitution, provide them an opportunity to be heard to clarify their account?

[19] The Minister opposes this request.

[20] There is openness to certification when it is a serious question of general importance and transcends the interests of the parties to the litigation while allowing the appeal to be resolved (*Zazai v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89 at paragraph 11; *Canada (Minister of Citizenship and Immigration) v Liyanagamage* (1994), 176 NR 4 at paragraph 4, [1994] FCJ no. 1637 (QL) (FCA)).

[21] Beyond the fact that the applicants have not explained how the two proposed questions meet this test, I am not convinced that these are serious questions of general importance or that they transcend the interests of the parties to this dispute.

[22] First, the question as to whether the absence of corroboration points toward insufficiency of the evidence or concerns relating to an applicant's credibility depends largely on the specific circumstances of each case. Additionally, as I have indicated in the body of my decision, the absence of corroboration may be explained without consequently engaging either of these concerns.

[23] With regard to the second question, it is ultimately a matter of asking the Court of Appeal to determine whether, in the case at hand, the Officer should have exercised his discretion by summoning the applicants to a hearing as permitted under the Act. This question is neither serious nor of general importance and does not transcend the interests of the applicants. I note that in *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, the Supreme Court of Canada ruled that with respect to PRRA applications, the procedure provided in section 113 of the Act, which grants the Minister's officers discretion as to whether to hold a

hearing, complied with the principles of fundamental justice set out in the *Canadian Charter of Rights and Freedoms* (Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c 11).

JUDGMENT in IMM-796-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. No question is certified.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	BATANAI NHENGU, SHUMIRAI JUBILEE NHENGU, SHEKINAH MUNYASHA NHENGU v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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