Date: 20070322

Docket: IMM-2515-06

Citation: 2007 FC 311

Montréal, Quebec, March 22, 2007

Present: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

GHEORCHE CALIN LUPSA

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by a Canada Border Services Agency (CBSA) officer rejecting the applicant's application for pre-removal risk assessment (PRRA) on the ground that the applicant was not considered to be a person who would be subjected to a personal risk, a risk to his life, a risk of torture or cruel and unusual punishment under sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) if he were returned to Romania.

The facts

[2] The applicant, Gheorche Calin Lupsa, is a citizen of Romania.

[3] The applicant arrived in Canada in 1992 and filed a refugee claim, which was refused in April 1993. The applicant filed an application for judicial review of this decision; the Federal Court quashed the decision, and the matter was sent back for reconsideration of the claim.

[4] The applicant was summoned for the reconsideration of his claim on June 14 and August 21, 1996, but he did not attend the scheduled hearings. On September 20, 1996, the Immigration and Refugee Board (IRB) concluded that he had abandoned his claim. His refugee claim was therefore not considered.

[5] On March 7, 2000, his application for permanent residency was refused at the final stage on the ground that the applicant was medically inadmissible. This decision was quashed by the Federal Court in accordance with an agreement between the parties, and the matter was referred for reconsideration.

[6] On October 10, 2003, the applicant was sentenced to a term of two years less a day for offences under the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. Consequently, in November 2003, an exclusion order was issued against him. In January 2004, the applicant's application for permanent residency was denied on the ground, *inter alia*, that he was inadmissible by reason of criminality under paragraph 36(1)(*a*) of the Act.

[7] On February 10, 2006, a CBSA officer (the PRRA officer) made a negative decision on the applicant's PRRA application. On March 22, 2006, a report under subsection 44(2) of the Act and an expulsion order were issued against the applicant.

[8] On May 18, 2006, the applicant submitted an application for permanent residence, sponsored by his Canadian wife. On the same day, he filed a motion in this Court to stay his removal scheduled for May 23, 2006.

[9] On May 23, 2006, the stay motion was heard by this Court. Because of the potential significance of evidence filed before the hearing, and the possibility that this evidence had not been considered by the PRRA officer in making his decision, the Court granted the stay pending the outcome of the judicial review.

Issues

1. The appropriate standard of review.
2. Did the PRRA officer fail to consider an important piece of evidence?
3. Was the PRRA officer obliged to summon the applicant to a hearing, given that he had abandoned his refugee claim?

Analysis

1. The appropriate standard of review

[10] There appears to be some debate in the case law as to whether the findings of a PRRA officer are reviewable on a standard of reasonableness *simpliciter* or patent unreasonableness (*Selliah v. Canada (Minister of Citizenship and Immigration)***,** 2004 FC 872, [2004] F.C.J. No. 1134 (QL) at paragraph 16; *Hailu v. Canada (Minister of Citizenship and Immigration),* 2005 FC 229, [2005] F.C.J. No. 268 (QL) at paragraph 12; *Prasad v. Canada (Minister of Citizenship and Immigration),* 2003 FCT 614, [2003] F.C.J. No. 805 (QL)).

[11] However, given the circumstances of this case, my findings would be the same regardless of the standard applied.

2. Did the PRRA officer fail to consider an important piece of evidence?

[12] Generally, the Federal Court of Appeal and this Court have stated on many occasions that the onus is on the applicant to submit evidence on all the elements of his or her application. Specifically, on a PRRA application, it is settled law that the applicant bears the burden of providing the PRRA officer with all the evidence necessary for the officer to make a decision (*Cirahan v. Canada (Solicitor General),* 2004 FC 1603, [2004] F.C.J. No. 1943 (QL) at paragraph 13).

[13] The PRRA officer does not play a role in the submission of evidence. If the evidence is insufficient, the applicant must bear the consequences, and the officer has no obligation to inform

the applicant of this (*Selliah*, above, at paragraph 22; see also *Youssef v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 864, [2006] F.C.J. No. 1101 (QL) at paragraph 33).

[14] It is not incumbent on the PRRA officer to alert the applicant to insufficiencies in the evidence (*Tuhin v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 22, [2006] F.C.J. No. 36 (QL) at paragraph 4).

[15] In this case, the PRRA officer noticed that because the applicant had abandoned his refugee claim in 1996, the alleged risks had not been evaluated under section 96 of the Act. Therefore, the officer noted that he would assess all the information and evidence in the applicant's file in accordance with this section from the date the applicant arrived in Canada.

[16] In addition, because Parliament expanded the scope of protection by enacting section 97 of the Act in June 2002, the alleged risks were also evaluated under this provision. Accordingly, the PRRA officer reviewed the evidence submitted to him by the applicant as well as the objective documentary sources. The officer also considered the applicant's entire Citizenship and Immigration Canada (CIC) file from the date of his arrival.

[17] After considering all this information, the officer found that the applicant had not submitted any trustworthy and objective evidence to prove that he would be personally at risk should he return to Romania.

[18] The applicant had stated in his PRRA application that he was wanted by the authorities in his country and feared being arrested if he returned to Romania because he had been accused of sedition under article 155 of the Romanian Penal Code. An arrest warrant had allegedly been issued against him shortly after his arrival in Canada, and he could face 15 to 25 years' imprisonment.

[19] In his application, the applicant alleges that given his poor health as a result of a kidney transplant in December 2004 as well as the difficult prison conditions in Romania, a return to his country would constitute a personalized risk.

[20] In his decision, the PRRA officer acknowledged that the detention conditions in Romanian prisons are poor. On that point, he found that despite some improvements, the living conditions in the prisons remain difficult, especially at the medical and sanitary level.

[21] The PRRA officer also confirmed that a crime under article 155 of the Romanian Penal Code is very serious and punishable by imprisonment, as the applicant claimed. However, the officer was not convinced that the applicant would face such a charge because he had not provided trustworthy and objective evidence to support his argument on this issue in his PRRA application. On this point, the officer stated:

> [TRANSLATION]
>
> The applicant has not filed any document suggesting that a charge was brought against him under the Romanian criminal code for sedition. I do not have an indictment, police report or arrest warrant. I note that the applicant has been in Canada for more than 13 years and that in that time he has not managed to get the documents confirming the charges pending against him. . . . I note that the facts raised in the

> refugee claim, dating from 1992, do not mention any such charge. The only one that he mentions in the PIF is the one for driving while intoxicated . . . the applicant has not established, through trustworthy and objective evidence, that a charge under the Romanian criminal code is pending against him. Since the fears of the judicial process as well as the risk of detention are based on the existence of this charge and considering that this fact was not proven, I am not persuaded that the applicant met his burden of establishing that there would be a personalized risk if he were to return to Romania.
>
> [Emphasis added.]

[22] The charge under article 155 of the Romanian Penal Code and a translation of this charge had been produced and filed before the IRB, Convention Refugee Determination Division (CRDD) on February 3, 1993, as "Exhibit 7." These documents were also before the CRDD on the redetermination of the claim following the order of this Court to that effect on February 24, 1994, and were identified as "Exhibit 1."

[23] This evidence does not appear on the list of documents submitted by the applicant on his PRRA application or in the CIC immigration file.

[24] As the above-noted case law indicates, the PRRA officer had to review the file and make a decision based on the evidence before him. He was not obliged to seek additional evidence. The documentary evidence regarding the charge against the applicant in Romania was not before the officer.

[25] Counsel for the applicant argues that the officer did not consult the documents from the Refugee Protection Division (RPD). The regional program advisor at the Programs Branch of the

CIC Quebec Regional Office stated in her supplementary affidavit that PRRA officers may consult CIC files. Generally, the documents from the RPD that might contain the CIC file are limited to the Personal Information Form (PIF) and the Notice of Decision and Reasons of the RPD.

[26] It should be noted that no rule, practice or procedure exists requiring a PRRA officer to consult applicants' files that the RPD might have, since it is an independent administrative tribunal. The PRRA officer was not obliged to seek additional evidence. The applicant could have obtained this evidence in various ways, including applying to the RPD. He failed to do so and must bear the consequences. He cannot now cast blame for this on the PRRA officer.

[27] In addition, as I indicated above, the case law is clear that the applicant bears the onus of providing evidence in support of his submissions in his PRRA application and that any deficiencies in this regard are at the applicant's risk.

[28] In my view, the PRRA officer made no reviewable error in concluding that he did not have sufficient evidence before him to find that the applicant would face personalized risks if he were to return to his country.

[29] With regard to the evidence that was not before the PRRA officer and that the applicant filed on his stay motion, I note that the applicant could always file a second application for protection under section 165 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, if he considers it advisable to have this new evidence assessed.

3. *Was the PRRA officer obliged to summon the applicant to a hearing, given that he had abandoned his refugee claim*?

[30] The applicant contends that he was entitled to a hearing before the PRRA officer because his refugee claim had never been heard.

[31] As provided in subsection 113(*b*) of the Act, a hearing may be held on a PRRA application if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required. Under section 167 of the Regulations, above, a PRRA officer is obliged to hold an oral hearing when there is a serious issue of credibility at stake (*Kim v. Canada (Minister of Citizenship and Immigration),* 2003 FCT 321, [2003] F.C.J. No. 452 (QL) at paragraph 6). Mr. Justice Michael Phelan stated this clearly in *Tekie v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 27, [2005] F.C.J. No. 39 (QL) at paragraph 16:

> . . . section 167 becomes operative where credibility is an issue which could result in a negative PRRA decision. The intent of the provision is to allow an Applicant to face any credibility concern which may be put in issue.

[32] In this case, the officer had determined that the applicant's credibility was not an issue. He therefore considered that a hearing was not necessary. After reviewing the factors set out in section 167 of the Regulations, I am of the view that there were no circumstances justifying a hearing.

[33] The applicant submits that the absence of a hearing before the PRRA breached his fundamental rights with respect to both procedural fairness and the principles of fundamental justice.

[34] The Supreme Court recognized in *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, that in such a context, a hearing is not required in every case and that the procedure set out in section 113 is consistent with the principles of fundamental justice in the *Canadian Charter of Rights and Freedoms*, since the applicant has an opportunity to present his case in writing.

[35] The Federal Court also noted that a PRRA process that does not include a meeting with the officer nonetheless complies with the principles of natural justice, if it allows the applicant to present all of his or her arguments (see: *Younis v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 266, [2004] F.C.J. No. 339 (QL); *Iboude v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1316, [2005] F.C.J. No. 1595 (QL)).

[36] Despite the fact that he did not have a hearing, the applicant herein has failed to demonstrate that he did not have the opportunity to present all his arguments and evidence to the PRRA officer as part of his PRRA application.

Conclusion

[37] This Court is satisfied that the PRRA officer did not disregard important evidence that was before him or make a patently unreasonable decision, having regard to the evidence. In my view, there is no reason for this Court to intervene, regardless of the standard of review applied.

[38] For these reasons, his decision is upheld, and the application for judicial review is dismissed.

[39] The parties had the opportunity to raise a serious question of general importance as provided in paragraph 74(*d*) of the Act, and the applicant proposed the following question for certification:

> [TRANSLATION]
>
> Considering *Charkaoui v. Canada (M.C.I)*, 2007 SCC 9, *Suresh v. Canada (M.C.I.)*, 2002 SCC 1, *Chan v. Canada (M.C.I.)*, [1995] 3 S.C.R. 593, *Ward v. Canada (M.C.I.)*, [1993] 2 S.C.R. 689, *Baker v. Canada (M.C.I.)*, [1999] 2 S.C.R. 817, with respect to procedural fairness and the principles of fundamental justice in section 7 of the *Canadian Charter of Rights and Freedoms*, and the exceptional circumstances in this case, was the PRRA officer required to weigh all the evidence from all the immigration proceedings when he clearly decided, having regard to sections 96, 97 and 113 IRPA, to consider the applicant's entire file from the date of his arrival in Canada and considering that the officer did not give the applicant the opportunity to file supplementary representations given the officer's negative decision and despite Mr. Lupsa's request in his PRRA form dated July 19, 2005, that he wanted to submit other explanations and documents?

[40] In the Court's view, this question does not transcend the interests of the parties to the litigation or contemplate issues of general application since the PRRA officer's analysis is based essentially on a question of fact; there is no question to be certified.

JUDGMENT

The application for judicial review is dismissed.

"Danièle Tremblay-Lamer"
Judge

Certified true translation
Mary Jo Egan, LLB

Appendix A: Statutory Provisions

Immigration and Refugee Protection Act, S.C. 2001, c. 27	***Loi sur l'immigration et la protection des réfugiés***, L.C. 2001, ch. 27
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion, (*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or (*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	**96.** A qualité de réfugié au sens de la Convention -- le réfugié -- la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques: *a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays; *b*) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
. . .	**[…]**
97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally (*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or (*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if (i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country, (ii) the risk would be faced by the person in every part of that country and is not faced generally by other	**97.** (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée: *a*) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture; *b*) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant: (i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays, (ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes

individuals in or from that country,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

. . .

113. Consideration of an application for protection shall be as follows:
(*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;
(*b*) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;
(*c*) in the case of an applicant not described in subsection 112(3), consideration shall be on the basis of sections 96 to 98;
(*d*) in the case of an applicant described in subsection 112(3), consideration shall be on the basis of the factors set out in section 97 and
(i) in the case of an applicant for protection who is inadmissible on grounds of serious criminality, whether they are a danger to the public in Canada, or
(ii) in the case of any other applicant, whether the application should be refused because of the nature and severity of acts

originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) la menace ou le risque ne résulte pas de sanctions légitimes – sauf celles infligées au mépris des normes internationales – et inhérents à celles-ci ou occasionnés par elles,
(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

[…]

113. Il est disposé de la demande comme il suit:
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;
b) une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;
c) s'agissant du demandeur non visé au paragraphe 112(3), sur la base des articles 96 à 98;
d) s'agissant du demandeur visé au paragraphe 112(3), sur la base des éléments mentionnés à l'article 97 et, d'autre part:
(i) soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un danger pour le public au Canada,
(ii) soit, dans le cas de tout autre demandeur, du fait que la demande devrait être rejetée en raison de la nature et de la gravité de ses actes passés ou du danger qu'il constitue pour la sécurité du Canada.

committed by the applicant or because of the danger that the applicant constitutes to the security of Canada.

Immigration and Refugee Protection Regulations **(SOR/2002-227)**	***Règlement sur l'immigration et la protection des réfugiés*** **(DORS/2002-227)**
165. A person whose application for protection was rejected and who has remained in Canada since being given notification under section 160 may make another application. Written submissions, if any, must accompany the application. For greater certainty, the application does not result in a stay of the removal order.	**165.** La personne dont la demande de protection a été rejetée et qui est demeurée au Canada après la délivrance de l'avis visé à l'article 160 peut présenter une autre demande de protection. Les observations écrites, le cas échéant, doivent accompagner la demande. Il est entendu que la demande n'opère pas sursis de la mesure de renvoi.
. . .	**[…]**
167. For the purpose of determining whether a hearing is required under paragraph 113(*b*) of the Act, the factors are the following: (*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; (*b*) whether the evidence is central to the decision with respect to the application for protection; and (*c*) whether the evidence, if accepted, would justify allowing the application for protection.	**167.** Pour l'application de l'alinéa 113(*b*) de la Loi, les facteurs ci-après servent à décider si la tenue d'une audience est requise: *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*) l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection; *c*) la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

FEDERAL COURT

SOLICITORS OF RECORD

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