Date: 20090223

Docket: IMM-2750-08

Citation: 2009 FC 186

Ottawa, Ontario, February 23, 2009

Present: The Honourable Mr. Justice Shore

BETWEEN:

SERGE CEDRICK BENGABO

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

1. Introduction

[1] Once an applicant's testimony has been found not to be credible by previous decision-makers, it is not permitted, absent valid evidence, be it at the leave stage, after or on application for judicial review, to submit new evidence. This fundamental principle of administrative law has been reiterated on many occasions by this Court and applies in this case (*Asofov v. M.C.I.*, IMM-7425-93, (May 18,1994) (F.C.); *Walker v. Randall* (1999), 173 F.T.R. 161 (F.C.); *Franz v. Canada (Minister of Employment and Immigration)* (1994), 80 F.T.R. 79, 90 A.C.W.S. (3d) 821 (F.C.); *César v. M.E.I.,* A-42-93, (October 8, 1993) (F.C.); *F.M.R.F. v. Canada (Minister of Employment and*

Immigration), (1992), 56 F.T.R. 270, 35 A.C.W.S. (3d) 594 (F.C.); *Quintero v. Canada (Minister of Citizenship and Immigration)* (1995), 90 F.T.R. 251, 53 A.C.W.S. (3d) 379 (F.C.); *Quito v. Canada (Minister of Citizenship and Immigration)* (1990), 32 F.T.R. 222, 19 A.C.W.S. (3d) 908 (F.C.)).

II. Judicial proceedings

[2] This is an application for judicial review of a decision of a Pre-Removal Risk Assessment (PRRA) officer, dated April 30, 2008, rejecting the application made by the applicant Serge Cedrick Bengabo.

III. Facts

[3] Mr. Bengabo, a citizen of the Central African Republic (CAR), was born on September 28, 1983.

[4] He alleges that in 2001, his father, a diplomat and politician, was assassinated, and he did not know where his mother was. In November 2002, he left the CAR for France, where he claimed refugee protection. His claim was rejected in May 2005, and he voluntarily returned to his country of origin. He claims that, after arriving in the CAR in June 2005, he learned that his mother was in the northern part of the country, in the city of Paoua, and that he went there to look for her. While travelling to the village where he thought his mother was living, he was stopped by rebels. He explains that he was detained by the rebels for two days before he finally escaped into the bush during an attack on the rebel base. According to him, when he returned to Paoua, he was detained for one day by government security forces, who mistook him for a rebel. He states that he escaped and came to Canada to claim refugee protection. He alleges that in his country he was sentenced to a

2-year prison term for the offence of escaping and 10 years of hard labour for associating with conspirators.

[5] Mr. Bengabo arrived in Canada on August 28, 2005, after a journey of several days, transiting through Chad and France. He claimed refugee protection on September 7, 2005. Mr. Bengabo alleges fearing imprisonment by government security forces if he were to return to the CAR. On April 6, 2006, the Immigration and Refugee Board (IRB) rejected his claim for refugee protection. The IRB found that Mr. Bengabo's story was not credible and that he invented his story to justify a claim for refugee protection. On August 17, 2006, this Court dismissed his application for leave and for judicial review at the leave stage.

IV. Impugned decision

[6] On March 14, 2008, Mr. Bengabo submitted his PRRA application and two documents concerning his arrest and escape. In a decision dated April 30, 2008, the PRRA officer dismissed the PRRA application on three grounds.

[7] The officer concluded that Mr. Bengabo had not submitted new evidence [TRANSLATION] "having probative value that would lead me to make findings of fact different from those made by the RPD" (Decision at page 6). In his decision, the officer studied the notice of escape and wanted notice issued by the Department of Justice, dated January 30, 2006, and a certificate of judgment for the Public Treasury, dated September 28, 2006. The officer concluded that the copies submitted were in poor condition and that the legal signatures and seal were illegible. The officer commented that Mr. Bengabo did not specify how he had obtained these documents, who had sent them to him,

or whether the originals were in fact in his possession. Moreover, Mr. Bengabo did not explain why he had not submitted the notice of escape to the IRB, even though the notice had been issued before the IRB rendered its decision. The officer also noted that the notice of escape had been issued seven months after Mr. Bengabo's escape.

[8] In this regard, the officer concluded that Mr. Bengabo had not submitted any probative documents showing that he could be at risk at present or if he were to return to his country of origin.

[9] Mr. Bengabo did not prove to the officer that he had been detained by rebels or government security forces or even that he might be imprisoned if he were to return. In his reasons, the officer quoted the IRB's findings concerning Mr. Bengabo's credibility:

> [TRANSLATION]
> The claimant lacked credibility and his testimony was not trustworthy in respect of the central elements of his claim for refugee protection, because his testimony was inconsistent and implausible
> . . .
>
> The panel rejects the claimant's testimony as lacking in credibility, because he changed his version of the facts to suit the questions asked of him, without explaining the reasons, despite the opportunities given by the panel.
> . . .
>
> The panel rejects the claimant's testimony as totally lacking in credibility, because his oral testimony contradicted his written testimony and he was incapable of providing an explanation, other than by changing his oral testimony to be consistent with his narrative. The inconsistencies in the claimant's testimony seriously undermine his credibility and lead the panel to conclude that the claimant has never been to the Paoua area.
> . . .
>
> In light of the documentary evidence, the panel is of the opinion that it is unreasonable to believe that the claimant would have been afforded such preferential treatment in a detention centre, which the claimant was unable to identify, when he was supposedly accused of being

> a rebel. That inconsistency became implausibility when the claimant alleged that the soldier pointed to the tall grass and told him to relieve himself there and that, thus freed of all restraints, he was able to flee. The panel does not believe that the claimant was detained by soldiers of his government. The panel believes that the claimant's story was invented to justify a claim for refugee protection.

(Decision at page 5).

[10] Finally, the officer rejected the claim that the political and military crisis presently raging in the CAR is sufficient to show the risk Mr. Bengabo would face if he were to return. The documentary evidence showed that the CAR is a country where there are significant human rights problems, that the authorities have made considerable use of arbitrary arrests and detentions, that the government restricts freedom of movement and that conditions in detention are harsh. Nevertheless, the officer concluded that the situation caused by the insecurity and conflicts affects the general population of the CAR and that Mr. Bengabo did not establish any connection between the authorities' violence and his particular situation.

[11] Finally, on July 10, 2008, Justice Michel Beaudry of this Court allowed the motion for a stay of the removal order made against Mr. Bengabo. The Court's judgment was essentially based on the new evidence submitted by Mr. Bengabo regarding his alleged conviction.

V. Issue

[12] Was the officer's decision not to give the two documents submitted by Mr. Bengabo any probative value reasonable?

VI. Analysis

Standard of review

[13] Before *Dunsmuir v. New-Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, pure questions of fact decided by a PRRA officer in rendering an impugned decision were assessed according to the patent unreasonableness standard (*Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100 at paragraph 38).

[14] However, where a PRRA officer is asked to verify whether documents meet the requirements under paragraph 113(*a*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), he or she is considering a question of mixed fact and law subject to reasonableness *simpliciter* standard of review. This standard also applies to the final decision concerning the PRRA as a whole (*Elezi v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 240, 62 Imm. L.R. (3d) 66 at paragraphs 21-22).

[15] In this case, we have a question of mixed fact and law. In light of the judgment of the Supreme Court of Canada in *Dunsmuir*, above, the question that this Court must now ask is whether or not the decision is reasonable. If it is, this Court must refuse to intervene and must dismiss the application. According to the Supreme Court of Canada, the qualities to be considered are a decision's justification, transparency and intelligibility. The accepted solutions must be defensible in respect of the facts and the law (*Dunsmuir* at paragraph 47).

Documents submitted

[16] The officer studied copies of the notice of escape and the certificate of judgment. The copies submitted to the officer were [TRANSLATION] "of poor quality":

> [TRANSLATION]
> In one of them, the seals are illegible, and the other does not have a seal, or at least none is visible.

(Decision at page 4).

[17] Moreover, the notice of escape could have been submitted to the IRB. The officer noted that Mr. Bengabo did not explain this omission in his submissions:

> [TRANSLATION]
> I note that the applicant does not specify how he obtained these documents, who sent them to him, if he has the originals in his possession or why he did not submit one of them to the IRB.
>
> I note that the notice of escape and wanted notice was issued some seven months following the applicant's escape.

(Decision at page 4).

[18] Mr. Bengabo argues that the illegible seals and the poor-quality photocopies of the documents are not, on their own, sufficient grounds for excluding the documents, which are new evidence within the meaning of paragraph 113(*a*) of the IRPA. According to Mr. Bengabo, the certificate of judgment would have qualified as new evidence because it was issued after the IRB decision.

[19] Mr. Bengabo submitted two judgments for consideration. He cited *Aung v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 82, 145 A.C.W.S. (3d) 896, where it was held effect that an officer does not have jurisdiction to determine whether or not a document apparently issued by a court is authentic. The other judgment he cited was *Masongo v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 39, [2008] F.C.J. No. 44 (QL), in which the Court declared

that a document purportedly issued by a foreign authority is presumed to be valid unless there is evidence to the contrary (at paragraph 12). The Court placed the onus of investigating the authenticity of documents on the PRRA officer: "It would have been appropriate to investigate the authenticity of the police letter. . . . PRRA officers have means at their disposal and there are times when they should be used . . ." (*Masongo* at paragraph 15).

[20] Contrary to what Mr. Bengabo alleges, the real issue here is not whether or not the documents are authentic. The issue is whether the documents are new evidence within the meaning of paragraph 113(*a*) of the IRPA, so that they may be submitted for consideration by the officer.

[21] Paragraph 113(*a*) reads as follows:

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;	**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;

[22] As regards the notice of escape, it was reasonable for the officer to give it no probative value. In *Elezi*, above, Justice Yves de Montigny stated that evidence that existed before the IRB's negative decision requires an explanation before it can be admitted with a PRRA application:

> [26] I am prepared to accept that paragraph 113(*a*) refers to three distinct possibilities and that its three parts must be read disjunctively. If the use of the word "or" is to be given meaning, the three parts of paragraph 113(*a*) must clearly be seen as three separate alternatives. While the first part refers to evidence that postdates the Board's decision, the second and third parts obviously relate to evidence that predates its decision. Only evidence that existed before the Board's negative decision requires an explanation before it can be admitted with a PRRA application. As for evidence that arises after the Board's decision, there is no need for an explanation. The mere fact that it did not exist at the time the decision was reached is sufficient to establish that it could not have been presented earlier to the Board

[23] The officer identified [TRANSLATION] "one of them [the two documents submitted]" as predating the IRB decision (Decision at page 4). If Mr. Bengabo believes that the notice of escape meets the requirements of the second or third categories of evidence described at paragraph 113(*a*) of the IRPA, it is up to him to provide explanations. It is up to the officer to assess the explanations in light of the circumstances in the case. In this case, Mr. Bengabo did not give any explanations. It was therefore open to the officer to conclude that Mr. Bengabo did not discharge his burden of explaining why the notice of escape was not submitted to the IRB.

[24] As regards the certificate of judgment, the mere fact that a document is dated after an IRB decision does not make it new evidence within the meaning of paragraph 113(*a*) of the IRPA:

> [27] That being said, a piece of evidence will not fall within the first category and be characterized as "new" just because it is dated after the Board's decision. If that were the case, a PRRA application could easily be turned into an appeal of the Board's decision. A failed refugee applicant could easily muster "new" affidavits and documentary evidence to counter the Board's findings and bolster his story. This is precisely why the case law has insisted that new evidence relate to new

> developments, either in country conditions or in the applicant's personal situation, instead of focusing on the date the evidence was produced . . .

(*Elezi*, above).

[25] In *Raza v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1385, 304 F.T.R. 46 (aff'd *Raza v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385, 162 A.C.W.S. (3d) 1013), Justice Richard Mosley dismissed an application for judicial review because the new evidence submitted to the officer was not any different from the information that had been submitted to the IRB:

> [22] It must be recalled that the role of the PRRA officer is not to revisit the Board's factual and credibility conclusions but to consider the present situation. In assessing "new information" it is not just the date of the document that is important, but whether the information is significant or significantly different than the information previously provided: *Selliah*, above at para. 38. Where "recent" information (i.e. information that post-dates the original decision) merely echoes information previously submitted, it is unlikely to result in a finding that country conditions have changed. The question is whether there is anything of "substance" that is new . . .
>
> [23] In the present case, though the evidence of the applicant post-dates the refugee determination in time with respect to the date it was written, nothing in the letter, affidavits or articles is substantially different than the information that was before the Board. As noted by the Officer with respect to the letter and affidavits: they "refer only to the applicants' circumstances which were considered by the Board", "no new risk developments are contained", and they contain "essentially a repetition of the same information". . .

[26] In this case, it is not enough for the new evidence to merely confirm the facts relied on by Mr. Bengabo before the IRB. The certificate of judgment supports Mr. Bengabo's allegations that he was convicted and sentenced to a term of imprisonment and hard labour. However, the IRB completely rejected his story as not credible, including the reasons given for his alleged conviction. The officer was not required to consider facts that did not involve new developments. A PRRA

application is not and must not become an appeal from the IRB decision. Mr. Bengabo has already contested the IRB decision before the Federal Court, and his application was dismissed at the leave stage.

[27] In the alternative, it was open to the officer to give no probative value to the two documents without investigating their authenticity. Other factors that an officer may consider when he or she decides whether evidence has probative value are the nature of the information, its significance for the case and the credibility of its source (*Elezi*, above, at paragraph 41). To elaborate on this last point, the case law indicates that a decision-maker may disregard documents without investigating them if there is sufficient evidence to doubt their authenticity or if the applicant is not trustworthy (*Allouche v. Canada (Minister of Citizenship and Immigration)* (2000), 99 A.C.W.S. (3d) 648, [2000] F.C.J. No. 339 (QL) (T.D.) at paragraph 4; *Riveros v. Canada (Minister of Citizenship and Immigration*), 2001 FCT 1009, 113 A.C.W.S. (3d) 323 at paragraphs 53-54; *Sheikh v. Canada (Minister of Employment and Immigration)*, [1990] 3 F.C. 238, 21 A.C.W.S. (3d) 1350 (C.A.)).

[28] In this case, the IRB decided that Mr. Bengabo was not credible with regard to the events to which the documents related. On the basis of the judgments in *Allouche*, *Riveros* and *Sheikh*, above, it was open to the officer to give no probative value to the two documents without investigating them.

New evidence on record

[29] After the officer rendered his decision, Mr. Bengabo produced new documents concerning the authenticity of the documents submitted for the PRRA, namely the affidavit of his uncle,

Vincent Biande Baguiwe. In the context of a judicial review of a decision, only evidence that was before the decision-maker is admissible (*Elezi*, above at paragraph 20). An applicant cannot remedy the shortcomings of his or her submissions to a PRRA officer.

[30] Mr. Biande Baguiwe faxed the same two documents that Mr. Bengabo had submitted to the officer. The only difference was that the documents sent by Mr. Biande Baguiwe were apparently certified by a lawyer in the CRA. The affidavit of Mr. Biande Baguiwe must be excluded, as it was not part of the record when the officer rendered his decision.

VII. Conclusion

[31] For these reasons, the application for judicial review is dismissed.

JUDGMENT

THE COURT ORDERS that

1. The application for judicial review be dismissed;

2. No serious question of general importance be certified.

"Michel M.J. Shore"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

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