Federal Court  Cour fédérale

Date: 20100112

Docket: IMM-1639-09

Citation: 2010 FC 35

Ottawa, Ontario, January 12, 2010

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

KOFI AMPONG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT

[1] This is an application pursuant to subsection 72 (1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of the negative decision of the Applicant's Pre-Removal Risk Assessment, dated February 17, 2009 (Decision), which refused the Applicant's application to be deemed a Convention refugee or person in need of protection under sections 96 and 97 of the Act.

BACKGROUND

[2] The Applicant is a 27-year-old citizen of Ghana who obtained a visa to visit Canada. Once in Canada, he was issued a Student Authorization which was valid until August of 2005. The Applicant did not leave Canada at the end of this period. Rather, he worked without authorization until September, 2007, when he came to the attention of the immigration authorities. A removal order was issued in October, 2007.

[3] The Applicant was assaulted in September of 2007. As a result of this assault, he has suffered a serious spinal cord injury. The Applicant is paralyzed in his lower extremities and has only limited use of his upper extremities. He cannot stand or walk and is also incontinent.

[4] The Applicant applied twice for permanent residence status and was rejected both times. His first rejection occurred in January, 2005, when he applied under the Skilled Worker program. His second rejection occurred in July, 2008, when he applied on humanitarian and compassionate grounds.

DECISION UNDER REVIEW

[5] The Applicant's PRRA claim was based on a high risk of death if he does not receive the medical care he requires. He contends that he would not receive such care in Ghana.

[6] The PRRA Officer (Officer) in this case considered all of the documents adduced by the Applicant, including an RCMP report regarding the 2007 aggravated assault, a letter from a doctor describing the extent of the Applicant's injuries and his resulting needs, as well as the Applicant's personal documents.

[7] In his evidence, the doctor had noted that "the management of spinal cord injured patients is a sub-specialized field which usually would not be present or available in the healthcare system of a third world country." The doctor suggested that Ghana is likely considered a third world country with regard to its health care system.

[8] Furthermore, the doctor determined that the Applicant would suffer a high level of risk if returned to Ghana, and advised that "it is likely that he will develop medical complications with a high likelihood of serious illness and possible death." However, the Officer found this evidence to be of limited probative value since it was "somewhat speculative in nature."

[9] The Officer found that the Applicant did not provide "objectively identifiable evidence to substantiate a finding Ghana is unable to provide adequate medical care to its nationals." Moreover, the Applicant had not proven that Ghana "engages in practices that are persecutory or discriminatory to the point of persecution – with respect to the provision of access to medical treatment."

[10] While the Officer accepted that the Applicant had a permanent and debilitating spinal cord injury, he remained unconvinced that the Applicant was a person in need of protection on the basis of his medical problems. Consequently, he found that the Applicant would face the same risks as any other similarly-situated person in Ghana, and concluded that the Applicant did not face a risk to his life caused by the inability of Ghana to provide the medical care he requires.

[11] The Officer determined that the Applicant's risks were not among those described in sections 96 and 97 of the Act. Furthermore, he concluded that the Applicant had based his claim on "personal circumstances which are excluded from consideration under subparagraph 97(1)(b)."

ISSUES

[12] The issues arising on this application can be summarized as follows:

1. Whether the Officer erred in determining that the Applicant would not be at risk upon his return to Ghana pursuant to sections 96 and 97 of the Act;
2. Whether the Officer erred in his assessment of the evidence;

STATUTORY PROVISIONS

[13] The following provisions of the Act are applicable in these proceedings:

Convention refugee

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.

Person in need of protection

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

Définition de « réfugié »

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.

Personne à protéger

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

Article 1 of the Convention Against Torture; or

sens de l’article premier de la Convention contre la torture;

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d’autres personnes originaires de ce pays ou qui s’y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(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) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l’incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Person in need of protection

Personne à protéger

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d’une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

STANDARD OF REVIEW

[14] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review" (*Dunsmuir* at paragraph 44). Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of "reasonableness" review.

[15] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[16] The application of a legal test to the facts of a case is an issue of mixed fact and law. In such instances, the appropriate standard of review is one of reasonableness. See *Dunsmuir*, *supra*, at paragraph 164. Thus, the Court will use a deferential standard when determining whether the Board erred when it found that the Applicant would not be at risk upon his return to Ghana, pursuant to sections 96 and 97 of the Act.

[17] The Officer's assessment of evidence is also reviewable on a standard of reasonableness. See *Dunsmuir*, *supra* at paragraph 51. Thus, deference should be shown to the Officer in his assessment of the evidence and the weight he accorded it.

[18] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir* at paragraph 47. Put another way, the Court should only intervene if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

ARGUMENTS

The Applicant

Overlooking expert evidence

[19] The Applicant submits that the Officer erred in finding the doctor's evidence to be "somewhat speculative." The Applicant submits that the doctor is an expert who determined that the Applicant was "likely to develop medical complications," and decided that there was a "high likelihood of serious illness and possible death." The Officer erred in assigning a lower probative value to this expert evidence and in using his personal opinion to determine whether or not the

Applicant would face a risk to his life because of Ghana's inability to provide the medical care he requires.

Section 97(1)(*b*)(iv)

[20] The Act requires that "the risk is not caused by the inability of that country to provide adequate health or medical care." However, the Applicant contends that his situation is distinguishable since his requirement for healthcare is directly related to the assault he experienced in Canada by a Canadian. The Applicant further contends that it is Canada's responsibility to take care of its victims.

[21] Moreover, the Applicant says that the issue in this case is not just whether the Applicant will receive the right treatment if deported; the issue is whether he will get the appropriate treatment if he is removed from the country where he suffered his injury, which is now unwilling to protect him in his vulnerable position.

Sections 96 and 97

[22] The Applicant also contends that the Officer erred in determining that the risks faced by the Applicant are not encompassed in sections 96 and 97 of the Act. The Applicant faces a well-founded fear of persecution because of his disability. In Ghana, the disabled face discrimination, poverty and death.

[23] In the alternative, the Applicant submits that, according to *Ozdemir v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1008, 256 F.T.R. 154, a negative finding (in *Ozdemir*, one of credibility) in respect of section 96 is not necessarily dispositive of the section 97(1) claim.

[24] Because he is disabled, the Applicant says he is at risk of discrimination and poverty. As a disabled person in Ghana, he will be unable to provide for himself and obtain proper treatments. The Applicant maintains that he will be faced with life-threatening situations as a result of being unable to provide for himself. First of all, being unable to provide for himself will lead to material deprivation and physical weakness. The Applicant submits that this will lead to increased vulnerability, which will then lead to increased poverty.

[25] Finally, the Applicant submits that the Court should allow the judicial review of the Decision in order to respect the objectives of the Act, which includes at section 3(2)(*e*) the following:

> To establish fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system, while upholding Canada's respect for the human rights and fundamental freedoms of all human beings.

The Respondent

Section 97 (1)(*b*)(iv)

[26] The Respondent submits that the Applicant's claim is excluded by virtue of subparagraph 97(1)(*b*)(iv) of the Act, since it is premised on his medical condition and his alleged inability to

obtain proper medical treatment in Ghana. The Federal Court of Appeal examined this subparagraph in *Covarrubias v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 365, [2007] 3 F.C.R. 169 at paragraph 41 and determined that 97(1)(*b*)(iv):

> Excludes from protection persons whose claims are based on evidence that their native country is unable to provide adequate medical care, because it chooses in good faith, for legitimate political and financial priority reasons, not to provide such care to its nationals. If it can be proved that there is an illegitimate reason for denying the care, however, such as prosecutorial reasons, that may suffice to avoid the operation of the exclusion.

[27] The Applicant has alleged a risk that clearly falls under the ambit of this subparagraph. As such, it cannot be the basis for a claim for protection in his PRRA application. The Respondent contends further that a PRRA officer does not have the authority to declare this subparagraph inoperable. See *Covarrubias*, *supra* at paragraph 56.

[28] The Officer was bound by this subparagraph and was reasonable in his acknowledgement of the limitations it imposed upon him. Further, the factors raised by the Applicant for consideration are issues to be considered on an H&C application. Such factors are not intended for consideration on a PRRA. See *Sherzady v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 516, 273 F.T.R. 11, at paragraphs 15-16. The Applicant's application cannot succeed on the basis of factors that are excluded as grounds of protection, or are more appropriately suited to an H&C application.

Evidence properly assessed

[29] The Respondent submits that the decision with regard to the Applicant's evidence was based on the Officer's consideration and weighing of the evidence. These tasks fall squarely within the mandate and the discretion of the Officer.

[30] The Officer considered both the Applicant's evidence and his medical condition, and determined that he was not a person in need of protection. In so doing, the Officer assessed the probative value, the weight, the relevancy and the sufficiency of the evidence.

[31] Although the Applicant alleges that the Officer erred in his assessment of the medical evidence, the Respondent submits that the Officer was correct in his examination. Furthermore, the Officer's finding that the evidence had a low probative value because it was speculative in nature was open to the Officer to make. It is not the Court's role to reweigh the evidence and substitute its own decision for that of the Officer.

[32] The Officer's Decision was "within a range of possible, acceptable outcomes which are defensible in respects of fact and law."

ANALYSIS

[33] It is clear from the Officer's Decision that he felt the Applicant had not provided "objectively identifiable evidence to substantiate a finding Ghana is unable to provide adequate medical care to its nationals."

[34] The Officer finds the medical opinion provided by Dr. Milczarek on the issue of medical care in Ghana to be "somewhat speculative in nature," but Dr. Milczarek points to the World Health Organization website and the problems mentioned there for third world countries and concludes as follows on this issue:

> Therefore, if Mr. Ampong is deported Ghana (sic), it is likely that he will develop medical complications with a high likelihood of serious illness and possible death.

[35] In one sense, of course, this is "somewhat speculative," in that no one knows for certain that the Applicant will die. However, bearing in mind the burdens of proof that the Applicant must satisfy under sections 96 and 97 I think it is unreasonable for the Officer to reject this evidence as it is not speculative for a qualified medical practitioner to conclude that, if the Applicant does not receive treatment that meets his needs, the likely result will be serious illness and death.

[36] However, the Applicant's problems do not end here because the Officer also found, as an alternative, that the risks faced by the Applicant are not encompassed by sections 96 and 97 of the Act.

[37] As regards section 97, the Officer found that the Applicant is excluded because the risks he says he faces are, at bottom, founded upon the inability of Ghana to provide him with the medical services he needs. This is excluded by subsection 97(1)(*b*)(iv). See *Covarrubias, supra*, at paragraph 41.

[38] In addition, the Officer obviously felt that section 96 persecution was not available to the Applicant because "the information submitted does not support a finding that Ghana engages in practices that are persecutory – or discriminatory to the point of persecution – with respect to the provision of access to medical treatment."

[39] It is clear that the Officer's conclusions regarding section 96 persecution and section 97 risk were based upon the evidence placed before him by the Applicant. If that were sufficient, then I believe the Applicant's evidence does not support a claim for section 96 persecution or section 97 risk.

[40] However, the Officer cannot confine himself in a PRRA application to the evidence submitted by the Applicant but is required to conduct his/her own research. See *Citizenship and Immigration Canada*, PP3 Pre-Removal Risk Assessment (PRRA) Operation Manual at section 10.3 (PRRA Manual) and *Hassaballa v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 489, [2007] F.C.J. No. 658 at paragraph 33. In fact, the Decision shows that the Officer consulted no further sources before reaching his Decision.

[41] Had the Officer conducted his own research as required by the PRRA Manual and *Hassaballa*, he might have found, for example, the 2007 *Survey on Health in Ghana* which states that "people with disability in Ghana, and in most parts of Africa face multiple discrimination, from the home, the community and society at large and in terms of allocation of resources and opportunities."

[42] Multiple discrimination may give rise to persecution under section 96 of the Act. Indeed, in *Ramirez v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 466, [2008] F.C.J. No. 1028 it was determined that the consideration of cumulative effects is important in a decision on persecution. In *Ramirez*, the RPD erred by only considering the availability of medical care, rather than considering the cumulative effects of the discrimination in the delivery of health care and the discrimination that existed in seeking employment.

[43] The *2007 Survey on Health in Ghana* says that persons with a disability are estimated to make up approximately 10% of the population of Ghana. As a result, it is certainly possible that the Applicant may belong to a particular social group in Ghana which is discriminated against to the point of persecution, either based on discrimination in the delivery of health care, or the cumulative effects of other sorts of discrimination, including "multiple discrimination, from the home, the community and society at large and in terms of allocation of resources and opportunities." See the *2007 Survey on Health in Ghana.*

[44] The Respondent has argued that the Applicant's PRRA application was based on Ghana's inability to provide him with proper medical care, and that it would be unreasonable to impose a duty on the Officer to research and consult additional sources of information on risks that are not raised by the Applicant. The Respondent contends that this would have the unacceptable effect of removing the onus from the Applicant to state the risks alleged in the claim.

[45] I remain unconvinced by the Respondent's argument for one simple reason: the Officer clearly contemplated the existence of such discrimination in Ghana within his reasons. As written by the Officer, "the information submitted does not support a finding that Ghana engages in practices that are persecutory - or discriminatory to the point of persecution – with respect to the provision of access to medical treatment." Within this statement, the Officer clearly recognized the possibility of discrimination in the delivery of health care amounting to persecution. However, the Officer dismissed this in finding that the information submitted did not support such a finding. The Officer erred by neglecting to conduct research on what he acknowledged was a potentially determinative issue.

[46] As noted by the Officer, discrimination in the delivery of health care may constitute persecution. See, for example, *Diaz v. Canada (Minister of Public Safety)*, 2008 FC 1243, 336 F.T.R. 259. As stated in paragraph 35 of *Diaz*, "inadequate health care in itself is not a foundation for a claim (if it is delivered in a non-discriminatory manner)." The corollary of this finding is that healthcare delivered in a discriminatory manner can be a foundation for a PRRA claim. Indeed, the

Immigration and Refugee Board's *Consolidated Grounds in the Immigration and Refugee Protection Act* provides in section 3.1.9. as follows:

> The inability of a country to provide adequate health or medical care generally can be distinguished from those situations where adequate health or medical care is provided to some individuals but not others. The individuals who are denied treatment may be able to establish a claim under section 97(1)(b) because in their case, their risk arises from the country's unwillingness to provide them with adequate care. These types of situations may also succeed under the refugee ground if the risk is associated with on of the Convention reasons.

Thus, the Officer erred by dismissing this facet of the claim without performing the adequate research to satisfy himself that the claim should not be allowed on this basis.

[47] According to *Covarrubias*, *supra*, at paragraph 41, section 97(1)(b)(iv):

> excludes those whose claims are based on evidence that their native country is unable to provide adequate medical care, because it chooses in good faith, for legitimate political and financial priority reasons, not to provide such care.

[48] However, if an illegitimate reason can be found for denying such care, for example, persecutorial reasons, then the exclusion may not apply. See *Covarrubias* at paragraph 41. The result of this is that, according to *Covarrubias* at paragraph 39:

> The wording of section 97(1)(b)(iv) clearly leaves open the possibility for protection where an applicant can show that he faces a personalized risk to life on account of his country's unjustified unwillingness to provide him with adequate medical care, where the financial ability is present.

[49] The Officer's Decision cannot be considered reasonable when he neglected to consider whether the Applicant's PRRA application is exempted from the exclusion found in 97(1)(*b*)(iv). Moreover, the Officer erred in failing to conduct his own research to determine the possible cumulative effects of discrimination the Applicant may face upon his return to Ghana.

[50] I think the Decision is unreasonable and must be returned for reconsideration.

[51] Counsel are requested to serve and file any submissions with respect to certification of a question of general importance within seven days of receipt of these Reasons for Judgment. Each party will have a further period of three days to serve and file any reply to the submission of the opposite party Following that, a Judgment will be issued.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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