Federal Court  Cour fédérale

Date: 20101215

Docket: IMM-1331-10

2010 FC 1290

Ottawa, Ontario, December 15, 2010

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

FAROUK MATANO

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] In the present matter, the Court must address the applicant's application for judicial review of the Pre-Removal Risk Assessment Officer's decision to maintain the Removal order enforceable against the applicant. This decision was rendered on January 28, 2010 by V. Spence, Pre-Removal Risk Assessment ("PRRA") Officer. The removal order was stayed by Order of Justice Campbell on June 3, 2010, pending determination of the present judicial review. At issue is the applicant's

contention that the PRRA Officer erred by not granting him an oral hearing. The applicant seeks to have this decision quashed and the matter sent to another PRRA Officer for determination.

[2] The applicant, Farouk Matano, fled from his native Kenya and arrived in Canada on July 18, 1989. He subsequently filed a claim for refugee protection, as he feared persecution based on his religious beliefs and political activities in Kenya. This claim was heard by the Convention Refugee Determination Division ("CRDD") on October 22, 1991. The Applicant's refugee claim was refused on February 24, 1992, on the basis that he was not a Convention refugee. The CRDD ruled that the applicant was not credible in his assertion that he supported Mwakenya, a political movement in Kenya. The CRDD found that he demonstrated a lack of knowledge in Mwakenya and that his credibility was such that he could not be believed in his claim of fearing persecution. Other facts, such as the ease with which he obtained a Kenyan passport and the fact that an expert witness provided evidence conflicting with the applicant's submissions further convinced the CRDD that his refugee claim was not based on a well-founded fear of persecution. His application for leave with the Federal Court for his refugee claim was denied.

[3] The applicant then proceeded to file two ultimately unsuccessful permanent residence claims in 1997 and 2001. While he was accepted on principle for permanent residence on humanitarian grounds, a condition sentence for fraud over $5,000.00 derailed his claim. He has stayed in Canada on temporary resident permits and work permits with his wife, a landed Canadian citizen, and three Canadian born children until December 2009, when he was given a PRRA application in order for him to be removed to his native Kenya.

The PRRA Officer's Decision

[4] The PRRA Officer rejected the application on the basis that the applicant would not be subject to risk of persecution, danger of torture, risk to life or risk of cruel and unusual treatment or punishment if returned to Kenya. The PRRA Officer's decision highlights the past proceedings in the applicant's case and considered evidence adduced with his PRRA application.

[5] The adduced evidence is at the heart of the present Reasons for Judgment and Judgment. It is important to report this evidence as the PRRA Officer analyzed it. The applicant's affidavit and claims were analyzed, insomuch as they diverged from what is related in the 1991 CRDD decision in his case:

a. The CRDD decision relates that the Applicant fled Kenya with the help of his uncle. In his PRRA application, the applicant states that his father was the one who helped him.
b. The CRDD decision is to the effect that the applicant was detained for three days in 1987 by the police in relation to his activities with Ansarr Muslim Youth, a community organisation. In his PRRA application, the applicant claims to have been detained and beaten in 1989 for a period of one month.
c. The applicant submitted photos of marks on his leg, allegedly the result of beatings received while detained. The PRRA Officer assigned no weight to this evidence.
d. The PRRA Officer did not find that the applicant's documents relating that he was still wanted by the Kenyan authorities to be believable.

[6] The PRRA Officer also considered the documentary evidence submitted by the applicant in regards to the state of human rights in Kenya, the treatment of Muslims and reports relating to political violence in Kenya. The PRRA Officer decided that, while not ideal, the conditions in Kenya are such that the Officer was not convinced that "the applicant would face a systemic and sustained denial of his fundamental human rights if he is required to return to Kenya". The applicant did not demonstrate a mere possibility of persecution and that he would be in danger of torture and the like.

Position of the Parties

[7] The applicant contends that the PRRA Officer's decision failed to observe a principle of natural justice and procedural fairness. This principle is such that the applicant should have been allowed an oral hearing. It is his contention that the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("IRPA") and the *Immigration and Refugee Protection Rules*, SOR/2002-227 ("the Rules") are such that an oral hearing should have been granted, as credibility was a core element of the PRRA Officer's decision. The applicant contends that credibility was central, even if the PRRA Officer did not state openly that credibility was at issue.

[8] The Minister contends that a valid and enforceable removal order is in effect and that the applicant has no right to stay in Canada. Further, the Minister submits that the PRRA Officer did not rule on credibility, but on the basis of the totality of the evidence submitted. It is argued that the applicant is attempting a revaluation of the evidence presented to the CRDD. However, this is not something case law has recognized as being the role of the PRRA Officer. Generally, the Minister claims that the PRRA Officer's decision was reasonable.

The applicable law and standard of review

[9] The core issue here is the following: did the PRRA Officer err in not giving the Applicant an oral hearing? It is important to cite the relevant passages of the IRPA and of the Rules as they were when the PRRA Officer made his decision.

Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 112 113. Consideration of an application for protection shall be as follows:	*Loi sur l'Immigration et la protection des réfugiés*, L.C. 2001, ch. 27, art. 112 113. Il est disposé de la demande comme il suit :
(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;	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) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;	b) une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;
(c) in the case of an applicant not described in subsection 112(3), consideration shall be on the basis of sections 96 to 98;	c) s'agissant du demandeur non visé au paragraphe 112(3), sur la base des articles 96 à 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

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) 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

(i) soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un danger pour le public au Canada,

(ii) in the case of any other applicant, whether the application should be refused because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of 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.

Immigration and Refugee Protection Rules, SOR/2002-227, s. 167
167. For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors are the following:

Règlement sur l' immigration et la protection des réfugiés, DORS/2002-227, art. 167
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

c) la question de savoir si ces

accepted, would justify allowing the application for protection.	éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

[10] The applicable standard of review when evaluating the PRRA Officer's decision to allow an oral hearing based on the facts in a case is that of reasonableness, as it is a core element of the Officer's competence and legislative mandate. It is related to the exercise of the Officer's discretion and should be awarded deference (*Matute Andrade c. Canada (Citoyenneté et Immigration)*, 2010 CF 1074; *Lopez Puerta v. Canada (Citizenship and Immigration)*, 2010 FC 464). In light of the language of subsection 113(b), the availability of the oral hearing is a matter of the Officer's discretion, not a matter of right (*Perez Arias v. Canada (Citizenship and Immigration)*, 2009 FC 1207; *Begashaw v. Canada (Citizenship and Immigration)*, 2009 FC 1167). As such, the Court may not substitute its own judgment to that of the PRRA Officer. So long as the decision falls within the realm of reasonable and justifiable outcomes, the Court may not intervene (*Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9).

[11] However, the fairness of the procedure must be reviewed on the standard of correctness (*Latifi v. Canada (Citizenship and Immigration)*, 2006 FC 1388, at para. 31; *Hurtado Prieto v. Canada (Citizenship and Immigration)*, 2010 FC 253, at para. 24; *Ventura v. Canada (Citizenship and Immigration)*, 2010 FC 871, at para. 15).

[12] Further, as noted by s.167 of the Rules, the PRRA Officer must consider three relevant criteria while assessing if a hearing is required: (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. These criteria have been interpreted by this Court as requiring 1) a question of the applicant's credibility and 2) that this credibility finding is determinative to the case (*Matute Andrade c. Canada (Citoyenneté et Immigration)*, 2010 CF 1074). The criteria set out by s. 167 of the Rules are seen to be cumulative (*Tran v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 175; *Ventura v. Canada (Citizenship and Immigratio*n), 2010 FC 871).

The PRRA Officer's decision in regards to holding a hearing

[13] The PRRA Officer generally stated that the factors of s. 167 of the Rules were assessed, and that a hearing was not found to be necessary. It is however important to highlight that the reviewing Court must address the nature of the decision and its reasoning, rather than analyze at face value solely the language used. In other words, credibility findings may be disguised in language and the Court must go beyond the sole language used by the PRRA Officer (*Hurtado Prieto c. Canada (Citoyenneté et Immigration)*, 2010 CF 253; *Ferguson v. Canada (Citizenship and Immigration)*, 2008 FC 1067). The reviewing Court must not re-weigh the evidence before the PRRA Officer, it must address if this evidence was evaluated reasonably, as per the principles of judicial review.

[14] Granting a hearing in PRRA proceedings is the exception, not the rule, as can be seen from the PRRA Officer's manual. Furthermore, this manual states in all clarity at section 14.2 the following:

> Where the applicant has had a claim for refugee protection that was considered by the IRB and the IRB has made a determination on the credibility of the applicant, the officer will not, in normal circumstances, need to conduct a separate hearing with respect to

> credibility. However, a hearing may be contemplated where the IRB has either determined that the applicant was credible, or did not make any conclusion on the credibility of the applicant, but the officer is confronted with evidence that leads the officer to believe the applicant is not credible; equally, the officer may require an oral hearing if new evidence would appear to contradict the IRB's finding that the applicant was not credible.

[15] In the case at bar, one must analyze what was adduced as evidence before the PRRA Officer. There was documentary evidence, as well as an affidavit from the applicant. Pictures of the applicant's scars on his leg were submitted, under the pretense that these were caused by the applicant's mistreatment in Kenya. The evidence that was presented was linked to the reasons of the applicant's departure from Kenya as well as the current country conditions in Kenya and how they relate to the applicant. However, the PRRA Officer's mandate is not to reevaluate a refugee claim, but to assess new evidence that was not reasonably available at the time of the refugee hearing (*Kaybaki v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 32 ; *Rodriguez Quiroga v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1306). A new version of the underlying facts of the refugee claim cannot reasonably be considered "new evidence" for the purpose of the PRRA Officer's findings. The pictures of the applicant's leg were analyzed, but given no weight by the PRRA Officer, as no objective evidence was adduced to support the applicant's claims that it resulted from his alleged detention and mistreatment in Kenya. Furthermore, no objective evidence attesting that the applicant was still sought by the authorities. The PRRA Officer considered the evidence and gave it no weight. It was reasonable for the PRRA Officer to do so.

[16] In any event, even if the Court was to consider the Officer's findings in regards to the applicant's version of the events as credibility findings, these would not be considered central and

determinative to the application for protection, in keeping with s. 167 of the Rules' language and cumulative conditions. The applicant's allegations that credibility findings were couched in plausibility findings does not hold true when the PRRA Officer's decision is analyzed. The evidence relates the underlying facts to his failed refugee claim. The PRRA Officer must assess the present risks relating to sections 96 and 97 of IPRA: who helped the applicant escape, how long he was detained and if his scar results from detention are matters that were or should have been dealt with by the CRDD. The Applicant had the burden to present to the CRDD all relevant facts to justify his claim for refugee protection.

[17] As stated above, the PRRA Officer's mandate is to evaluate new evidence in regards to the risks the applicant would face if he was to be deported to Kenya. The Officer's reasons clearly show that he evaluated this evidence. He considered that the applicant's statements regarding the fact that he was still actively sought by the authorities in Kenya and found they lacked specificity and were not supported by evidence. The Officer decided that the applicant did not present any objective evidence to rebut the CRDD's findings.

[18] More importantly, the Officer assessed the current country conditions in Kenya. In this respect, he concluded that while not ideal, that the conditions were not such that the applicant, as a Muslim, would face more than a mere possibility of persecution. The Officer's conclusions are drawn from several reports and the documentary evidence and cannot be considered arbitrary. The Officer concluded that the applicant did not demonstrate more than a mere possibility that he will be at risk of persecution, and he has not demonstrated, on a balance of probabilities, that he would be

in danger of torture, or at risk of cruel and unusual treatment or punishment or at risk to life should he return to Kenya.

[19] As noted above, the procedural fairness of the procedure is to be reviewed on the standard of correctness. In analyzing the decision and the evidence before the PRRA Officer, no finding of a breach of procedural fairness can be made. The decision in this respect is correct.

[20] The PRRA Officer's decision is reasonable and falls within the justifiable outcomes within the applicable facts and law. It was in the PRRA Officer's discretion to conduct an oral hearing, should the conditions by s. 167 of the Rules be found. The PRRA Officer did not have to conduct an oral hearing: the adduced evidence cannot be considered as "new evidence" and the decision did not depend on credibility findings. In any event, the evidence does not fall within the scope of s. 167 of the Rules and the extraordinary nature of oral hearings at the PRRA stage. The PRRA Officer's decision carefully considered the documentary evidence in regards to the country conditions and fear of persecution. This Court cannot find any reviewable error in the PRRA Officer's decision.

[21] No question of general importance for certification was proposed by the Parties.

JUDGMENT

THIS COURT'S JUDGMENT is:

- this application for judicial review is dismissed and no question is certified.

"Simon Noël"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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