Federal Court Cour fédérale

Date: 20131206

Docket: IMM-11726-12

Citation: 2013 FC 1226

Ottawa, Ontario, December 6, 2013

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

CRAIGTHUS ANTHONY LEVEL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, Mr Level, seeks judicial review of a decision rendered on October 2, 2013 by the Minister's Delegate (the "Delegate") which rejected his application for refugee protection pursuant to subsection 112(3) of the *Immigration and Refugee Protection Act* [the "Act"]. The Delegate disagreed with the Pre-Removal Risk Assessment [the "PRRA"] Officer's positive assessment which found that the applicant was in need of protection because he was a mentally ill deportee with a criminal record, and no family support or place to live and that it would be more likely than not that he would become homeless and would be at risk of cruel and unusual treatment

or punishment. The Delegate rejected the application for protection and found that the applicant would not face a risk of torture, risk to life or risk of cruel and unusual treatment or punishment under section 97 of the Act if he were returned to Jamaica.

[2] For the reasons that follow the application is allowed.

Background

[3] Mr Level is a citizen of Jamaica who arrived in Canada in 2004 and became a permanent resident. In 2004, he was convicted of two counts of sexual assault and sentenced to two years less a day in prison. While in prison he was diagnosed with paranoid schizophrenia.

[4] The Immigration and Refugee Board [the "Board"] determined that he was inadmissible to Canada on grounds of serious criminality pursuant to paragraph 112(3)(b) of the Act. A deportation order was issued in June 2005.

[5] Mr Level's PRRA was refused in October 2006. His application on humanitarian and compassionate [H&C] grounds was also denied because he failed to file an application record.

[6] A second PRRA application submitted in May 2008 was also refused. Judicial review was granted and the PRRA was reconsidered (*Level v Canada (Minister of Citizenship and Immigration)*, 2010 FC 251, [2011] 3 FCR 60 (*Level*)).

[7] On July 15, 2010 the PRRA Officer approved the application, determining that the applicant would be at risk if he were deported to Jamaica and stayed the applicant's removal order. The Officer noted, among other findings, that the applicant's mother and brother had since moved to Canada and his last remaining relative in Jamaica, his grandmother, had died.

[8] Because the applicant is inadmissible to Canada pursuant to subsection 112(3) of the Act, the positive PRRA decision was considered by the Minister's Delegate. The Delegate is tasked with considering both the risk to the applicant pursuant to section 97 and the risk the applicant would pose to Canada.

The Delegate's Decision

[9] The Delegate conducted a review of the documents and the evidence and provided extensive reasons with regard to the risk to the applicant pursuant to section 97. The Delegate's decision primarily focused on the availability of medical services for the mentally ill in Jamaica and the ability of the applicant to access these services if he were given appropriate time to prepare for his removal. The Delegate, however, did not provide an analysis of the possible risk posed by the applicant to Canada, although the Delegate referred to the objectives of the Act as set out in section 3 which include the protection of the health and safety of Canadians.

[10] In the analysis of the risk to the applicant, the Delegate gave little weight to the applicant's evidence of Dr Abel regarding a similarly situated person, "AG". Although the Delegate recognized Dr Abel's expertise as a mental health specialist in Jamaica, the Delegate noted that Dr Abel did not personally assess AG, and that his conclusions could not be applied to the applicant because their

situations were not identical. The Delegate also noted that Dr Abel was not the applicant's treating psychiatrist and gave little weight to Dr Abel's claim that the applicant would be unable to switch from the medication he had been taking, Risperidone, to other medications.

[11] The Delegate also referred to the extensive material submitted by the applicant which described the health and mental health services available in Jamaica and the challenges faced by the mentally ill in Jamaica.

[12] The Delegate found that Jamaica had mental health services that Mr Level could access and that he could take steps to obtain the necessary documents he would need in order to access these services before his removal from Canada.

[13] The Delegate found that the applicant's claim that he would likely become homeless and face cruel and unusual treatment by members of the public, and that without access to medication he would act out and come to the attention of the police who would treat him with brutality was "speculative at best". The Delegate acknowledged that although police brutality exists in Jamaica, the police do not specifically target people with mental illness or the homeless.

[14] The Delegate also concluded that the applicant is able to care for himself in Canada, lives away from his family in a rooming house and is responsible for his medication and counselling and therefore there was no reason to think that he would not be able to learn to access the services he needs in Jamaica.

[15] In addition, the Delegate found that if the medication he currently takes is not available in Jamaica, he could have his medication changed.

Issues

[16] The applicant raised several issues:

- Whether the Delegate reasonably dealt with the PRRA Officer's positive risk assessment;
- Whether the Delegate's conclusion on risk was unreasonable;
- Whether the Delegate breached the applicant's right to procedural fairness by not giving him an opportunity to address the Delegate's finding that he could switch his medication;
- Whether the Delegate erred in law by applying the wrong test to assess risk; and,
- In response to the respondent's claim, whether section 97(1)(b)(iv) of the Act excludes the applicant.

[17] The determinative issue is whether the Delegate's determination of the applicant's risk under section 97 is reasonable.

[18] The other issues will be dealt with briefly first.

Standard of review

[19] It is well-settled that the standard of review of a delegate's decision is reasonableness and that matters of procedural fairness attract the standard of correctness (*Khosa v Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12 at para 43, [2009] 1 SCR 339 (*Khosa*); *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 (*Dunsmuir*)).

[20] Where the standard of reasonableness applies, the role of the Court on judicial review is to determine whether the Board's decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir* at para 47. There may be several reasonable outcomes and "as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome": *Khosa* at para 59. The Court will not re-weigh the evidence or substitute any decision it would have made.

Paragraph 97(1)(b)(iv)

[21] The respondent raised the issue that the inability of Jamaica to provide health care to the applicant, if indeed this was the case, would not be grounds to find the applicant in need of protection due to the application of paragraph 97(1)(b)(iv) of the Act. However, the Delegate's decision does not make any findings on this issue.

[22] The relevant section provides:

97(1) A person in need of protection is a person in Canada whose removal to their country or countries of	97(1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi

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 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.

(Emphasis added)

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 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.

(La Cour souligne)

[23] Both the PRRA Officer and the Delegate recognized that "the risk identified did not arise out of the inability of Jamaica to provide medical treatment but rather that the applicant will be at risk from members of the public and authorities due to his mental illness."

[24] The applicant's submissions to the Court also focus on the risk the applicant will face regardless of the adequacy of health care in Jamaica.

[25] I also note that in the 2010 *Level* decision, Justice Russell, in allowing judicial review of the applicant's negative PRRA, stated, at para 62,:

> [62] The Officer's identification of the risks stated by the Applicant – "The applicant fears that if he is not provided the requisite health care in Jamaica he is likely to develop erratic or violent behavior" – is not an accurate statement of the risk outlined in the Applicant's submissions. The Applicant made it very clear in his submissions that:
>
> > While we are concerned about the state of health care in Jamaica and its impact upon Mr. Level should he be removed there, we are not maintaining that the inadequacy of mental health care resources itself creates the risk. Rather, we are arguing that it renders him unable to protect himself from the agents of the state and the citizens who may seek to persecute, abuse or torture Mr. Level because of his mental illness.

[26] And noted at para 66:

> [66] Counsel for the Respondent attempted to persuade me at the hearing that, even though the Applicant fears what the state and citizens of Jamaica will do to someone with his illness, the risk still comes within subsection 97(1)(*b*)(iv) because it arises out of the failings of the health care system in Jamaica. In my view, this is not the case. The Applicant does not allege that the inadequate health care system in Jamaica will bring him within section 97. He says that

> he fears the state authorities and Jamaicans generally because they kill and torture vulnerable people with his kind of illness.

[27] Similar submissions were made by the respondent before me. However, the applicant's position is clear that he will be at risk due to his serious mental illness but not from the potential inadequacy of the health system. Although an attentive health and social services system could play a preventive role, the risk he faces is from the public, the police and the corrections system if he fails to take his medication and if his illness causes him to act inappropriately or commit a crime and be detained and potentially abused.

[28] Justice Mactavish described a similar risk in *Lemika v Canada (Minister of Citizenship and Immigration*) 2012 FC 467, [2012] FCJ No 769 (*Lemika*) and found that the issue of causation should be assessed by the PRRA officer on the particular facts of the case:

> [27] The harm that Mr. Lemika apprehends in the DRC is not that his inability to access health care will itself cause a risk to his life or cruel and unusual treatment. Rather, Mr. Lemika says that if he cannot access treatment, his health will decline, and he will start to experience symptoms of his schizophrenia. These symptoms may include disordered thinking, delusions, psychosis, and aggressive or bizarre behaviour.
>
> [28] It is the manifestation of the symptoms of his illness that Mr. Lemika says will likely attract the attention of state security officials and result in his arrest and detention, thus exposing him to life-threatening prison conditions. His unusual behaviour will also attract the attention of Mr. Lemika's fellow citizens, and will result in his inability to access the necessities of life, social ostracism and abuse.
>
> [29] The nature of Mr. Lemika's claim requires an assessment of causation. That is, is the harm apprehended by Mr. Lemika "caused by the inability of [the DRC] to provide adequate health or medical care", or does the apprehended intervening actions of third parties mean that the harm is sufficiently removed from the initial inability to access medical care as to escape the purview of paragraph 97(1)(b)(iv) of the *Immigration and Refugee Protection Act*?

> [30] This determination involves an assessment of the facts of this case, and is one that should properly be made in the first instance by a PRRA Officer.

[29] In the present case, the Delegate understood that the alleged harm or risk was not due to the health system, which the Delegate found to be adequate, but from the public and the police which the Delegate found to be speculative.

Section 97 test was properly understood and applied

[30] The applicant submits that the Delegate erred in rejecting the evidence of Dr Abel which commented on a similarly situated person, “AG” because AG was not identical to the applicant.

[31] The Delegate appropriately gave low weight to Dr Abel’s evidence because Dr Abel had no personal knowledge of AG prior to giving his assessment. Dr Abel could only speak to the general situation of mental health care in Jamaica.

[32] The Delegate’s comments about AG’s situation not being identical to that of the applicant do not lead to the conclusion that the Delegate did not properly assess whether the applicant would face an individualised risk in Jamaica. The Delegate did consider the risk the applicant would face as a mentally ill person and concluded it was speculative.

[33] While I do not agree with that finding, the proper test was applied.

The Delegate considered the PRRA Officer's positive risk assessment

[34] The applicant submits that although the decision of a PRRA Officer is not binding on the Delegate, the Delegate must carefully consider the evidence, give full reasons for departing from the Officer's conclusions and that the PRRA decision is owed deference. The applicant submits that if the Delegate may conduct an independent assessment without regard to the PRRA, the PRRA is pointless and the expertise of the PRRA officer is ignored.

[35] I agree with the respondent that the Delegate is not bound by the PRRA Officer's assessment but must come to his or her own independent decision. The Delegate was not required to defer to the PRRA Officer's assessment and decision.

[36] The jurisprudence establishes that the Delegate is not bound by the PRRA Officer's decision. As Justice Shore stated in *Placide v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1056, 359 FTR 217 (*Placide*):

> [63] […] In accordance with section 6 of the IRPA, the Minister did not delegate to the PRRA officer but to National Headquarters only the power to dispose of an application for protection described in subsection 112(3) of the IRPA […]
>
> [64] In fact, case law requires that the delegate make the decision himself and give reasons for it: "the reasons must also emanate from the person making the decision, in this case the Minister, rather than take the form of advice or suggestion" (*Suresh*, above, at para. 126). The process is similar to that of *Thomson v. Canada (Deputy Minister of Agriculture)*, [1992] 1 S.C.R. 385, at pages 399 to 401, in which the Court ruled that the holder of a power who receives a recommendation is not required to follow it [refers to case law]
>
> [65] Otherwise, the Minister's delegate would not really be exercising the power conferred on him. The Minister's delegate would merely be approving assessments administratively and giving them force of law. This would essentially give PRRA officers a

> decision-making power which the Minister decided to delegate to another officer in the public service.

[37] In *Delgado v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1131, [2011] FCJ No 1390, Justice Hughes relied on *Placide* and also rejected the argument that under the Act and the *Immigration and Refugee Protection Regulations*, the PRRA decision should be made by the Officer, and not the Delegate (at para 7). Although the facts of those cases differ, the general proposition applies that the Delegate may disagree with the PRRA Officer and come to his own reasonable assessment.

[38] This does not render the role of the PRRA officer pointless as the Delegate does consider the PRRA decision. While the applicant's position is that the PRRA officer is the expert on risk assessment and the Officer's decision on risk should be final, such an interpretation is inconsistent with the role of the Minister's delegate in making a determination under subsection 112(3) of the Act.

[39] As Justice Shore noted in *Placide*, the Delegate must take into consideration the written assessments of the grounds for protection described in section 97 before making a decision (at para 61). In the present case, the Delegate's reasons indicate that the PRRA Officer's opinion on risk was considered along with the "entirety of the submission from Level and the Pre-Removal Risk Assessment, the information prepared by CIC officials and all attendant documentation".

The failure of the Delegate to give the applicant an opportunity to address the finding that the applicant could switch medication is not a breach of procedural fairness

[40] The applicant submits that the Delegate's finding that the applicant could switch from Risperidone, which he has taken for the past eight years, to another anti-psychotic medication that may be available in Jamaica, should have been raised with the applicant and he should have been given the opportunity to provide additional evidence to establish that he could not switch to another medication.

[41] I do not regard this as a breach of procedural fairness. The onus was on the applicant to establish the risk he would face.

[42] Although the Delegate reasonably gave little weight to the evidence of Dr Abel, other evidence was provided about the applicant's medication which indicates that the applicant has been taking Respiradone for over eight years. His own doctor's evidence is that the treatment should not be varied without a full assessment and that Respiradone has resulted in significant improvements to his condition. In addition, the medication is administered by injection due to the dosage and to ensure he takes it as required. The Delegate's own decision that the medication could be changed appears to be based on his own view which is not supported by any other medical advice and which contradicts the applicant's evidence.

[43] The Delegate was of the view that the applicant could prepare for a change in medication while in Canada, however, the Delegate did not have any evidence that this would be possible or effective.

[44] Therefore, the Delegate's finding is not reasonable as it is not supported by the evidence on the record.

Was the Delegate's decision on the risk faced by the applicant unreasonable?

[45] The applicant submits that the Delegate ignored and mischaracterised evidence, and made unreasonable findings in light of the evidence.

[46] The applicant submits that the Delegate failed to consider the totality of evidence and ignored the evidence which contradicted the Delegate's conclusions on the availability of care in Jamaica, the treatment of the mentally ill, the likelihood the applicant will become homeless in Jamaica, and the likelihood that the applicant would be incarcerated and mistreated in prison.

[47] The applicant submits that in particular, the Delegate failed to consider issues made in previous submissions including those from the 2008 PRRA regarding the applicant's medication and need for monitoring. The Delegate also failed to mention submissions from 2010 on the applicant's increased reliance on family support and the deficiencies in the community-based treatment system in Jamaica and its impact on homelessness.

[48] The Delegate also failed to refer to the evidence regarding the severity of the applicant's mental illness, his treatment regime and the need of support from his family set out in the evidence of Dr Eccles and Dr Morgan.

[49] The applicant also submits that the Delegate mischaracterized the evidence that he relied on including the peer-reviewed article “Mad, Sick, Head, Nuh Good” (Arthur et al, (2010) 47:2 Transcultural Psychiatry 252) and other documentary evidence submitted by the applicant such as the Georgetown report “Sent Home with Nothing” ((2011) HRI Papers & Reports, paper 6) and the news article, “Bellevue a Human Warehouse. Psychiatrist Wants Hospital Closed” (October 12, 2008, Jamaica Gleaner)

[50] The applicant argues that the Delegate unreasonably concluded that the applicant is self-sufficient which is contradicted by the evidence.

Delegate’s decision does not meet the standard of reasonableness

[51] The applicant carefully scrutinised the Delegate’s references to the extensive material that was submitted. The applicant pointed to several articles and segments of other material which cast a very bleak picture of the situation in Jamaica. The respondent on the other hand pointed to the more optimistic aspects of the same articles and documents. In my view the evidence on the adequacy of mental health services and the treatment of mentally ill persons, including the stigma they face, the risk of homelessness, and the risk of violence from the public and the police is mixed at best.

[52] Although the Delegate need not refer to all the evidence, and it is clear that the Delegate considered the evidence and extensively referred to it, the Delegate did not address some key evidence about the applicant from which his findings were based.

[53] As noted in *Lemika*, the causation of risk must be assessed on the facts. The Delegate found it speculative that the applicant would face homelessness and would come to the attention of the police leading to possible mistreatment and incarceration with the general population rather than treatment, as well as other violence. The Delegate's conclusion that this was speculative is based on his finding that the applicant could take care of himself in Jamaica, manage his own treatment regime and access the services he needs.

[54] The Delegate observed that the applicant lives in a rooming house alone, takes his medication and attends counselling. Beyond these observations, which overstate the applicant's abilities, the Delegate did not offer reasons for his conclusion that the applicant is able "to properly administer his own medication, with minimal support from his family". This is contradicted by the evidence provided by the applicant.

[55] It appears that the Delegate misunderstood the severity of the applicant's mental illness and the extent of support he requires. Although the applicant lives on his own, he requires the Ontario Disability Support Program to pay for his treatment and depends on family support, community programs, therapy and medication to maintain the limited independence he enjoys. The Delegate did not consider that the applicant must take his medication through injection because he cannot remember to take a pill every day, and that he relies on his family to remind him of his routine and help him with his day-to-day living.

[56] The evidence portrays the applicant as needing a great deal of structure and assistance from family, service agencies and health providers to maintain that structure and to ensure he continues to

take his medication. Without this support, it may be more likely than not that the circumstances the Delegate regards as speculative will come to pass.

[57] The role of the Court is not to re-weigh the evidence. I accept that the Delegate reasonably concluded that Jamaica could provide mental health services, but as noted above, this is not the real issue. Regardless of whether the circumstances of mentally ill persons in Jamaica are mediocre, poor or dismal, and noting that similar circumstances and challenges exist in many countries, including Canada, for the mentally ill, the error of the Delegate is the finding that the applicant would have the ability to access the services available in Jamaica.

[58] The applicant's evidence described his reliance on his mother, father and sister to attend appointments, help him with his legal affairs and monitor his psychological state, along with a long list of regular support services on a weekly and monthly basis, including appointments at the William Osler Health Center, Reconnect Mental Health Services, his psychiatrist Dr Gojer and his family doctor, Dr Forbes.

[59] In conclusion, the applicant's assessment by the Delegate pursuant to subsection 112(3) of the Act must be reconsidered. The finding that the applicant had the ability to learn to access the type of care he requires in Jamaica is not reasonable in accordance with the *Dunsmuir* standard as it is contradicted by the evidence that indicates the severity of the applicant's condition and the supports he requires to manage on a day-to-day basis. The Delegate's finding that the risk faced by the applicant was speculative was based on the unreasonable finding that the applicant could access necessary services on his own. In addition, the finding that the applicant could switch to different

medication was not supported by the evidence and could be considered to be speculation on the part of the Delegate.

Proposed certified question

[60] The applicant proposed the following question for certification,:

> What role does a positive PRRA play in a delegate's decision on a restricted PRRA (i.e. a decision made pursuant to subsection 112(3) and subsection 172(4) of the Regulations)?

[61] The respondent opposed the question noting that the jurisprudence, at least by the Federal Court had addressed this.

[62] There is no need to certify the question. The application for judicial review is allowed due to my finding that the Delegate's determination of risk is not reasonable. This finding is not based on the fact that the Delegate disagreed with the PRRA officer, but due to the unreasonableness of the Delegate's own findings.

[63] The application for judicial review is allowed and no question is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. No question is certified.

"Catherine M. Kane"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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