Federal Court Cour fédérale

Date: 20151218

Docket: IMM-2361-15

Citation: 2015 FC 1394

Ottawa, Ontario, December 18, 2015

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

KOFI BOAKYE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of an immigration officer ("Officer" or "PRRA Officer") of Citizenship and Immigration Canada, dated March 23, 2015, in which the Officer denied the Applicant's Pre-Removal Risk Assessment (PRRA) pursuant to ss 112 and 113 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

[2] The Applicant is a 31 year old citizen of Ghana. He came to Canada in 1998 as a permanent resident having been sponsored by his mother. In 2005, the Applicant was convicted of three criminal offences. In 2008, he was diagnosed with Psychotic Disorder Not Otherwise Specified and suspected schizophrenia (Certified Tribunal Record, p 130). This diagnosis was confirmed in 2013. Also in 2008, the Immigration Division of the Immigration and Refugee Board of Canada ("IRB") found that the Applicant was criminally inadmissible to Canada and, on January 31, 2008, a deportation order was issued against him. The Applicant appealed the deportation order and on May 9, 2009, his removal was stayed by the Immigration Appeal Division of the IRB for three years. However, the Applicant reoffended and was convicted on May 30, 2014. On July 30, 2014, the stay of his removal was cancelled and the appeal of his January 2008 deportation order was terminated by operation of law pursuant to s 68(4) of the IRPA. On October 21, 2014, the Applicant applied for a PRRA based on his belief that his life would be at risk in Ghana because he suffers from schizophrenia. On March 23, 2015, the PRRA Officer rendered a negative decision which is the subject of this application for judicial review.

[3] In his decision, the PRRA Officer stated that the Applicant's submissions were based on his belief that his life would be at risk in Ghana because he suffers from schizophrenia. Further, the Officer noted the Applicant's submission that he has no immediate family in Ghana to assist him and that inadequate treatment would place him at risk of being stigmatized and/or discriminated against. He also noted counsel's submission that Ghana's inability to provide adequate health care would result in his illness being untreated, likely rendering the Applicant homeless.

[4] The PRRA Officer found that he had been provided with insufficient objective evidence that the Applicant had seen or received medication from a doctor since June 2012. And, while his independent research of country conditions clearly indicated that discrimination against persons with disabilities continues to be a problem in Ghana, it was also clear that the government was making serious efforts to change this. Because Ghana is a democracy with a functioning police force and a judicial system capable of assisting the Applicant should the need arise, the PRRA Officer found that the Applicant did not meet the requirements of s 96 of the IRPA. Based on the same evidence, the PRRA Officer found that the Applicant would not be at risk of torture pursuant to s 97(1)(a) of the IRPA because the risk arose from his medical condition, it was not pain or suffering inflicted or consented to by government or its agents and therefore did not fall under the definition of torture. The PRRA Officer accepted the 2008 diagnosis of a psychotic disorder not otherwise specified and the possibility that the Applicant's symptoms represented the evolution of schizophrenia, but found the risk caused by Ghana's inability to provide adequate health or medical care was excluded by s 97(1)(b)(iv) of the IRPA. Further, the absence of a social support network in Ghana was a humanitarian and compassionate factor which he was not able to consider in the context of a PRRA.

[5] The PRRA Officer found that there was insufficient evidence before him to conclude that the Applicant faces more than a mere possibility of persecution on any Convention ground. And, on a balance of probabilities, he found that it is not likely that the Applicant will face a risk of torture, or a risk to life or cruel and unusual treatment or punishment upon return to Ghana.

[6] In light of the PRRA Officer's finding that there was insufficient evidence that the Applicant was taking medication, his counsel submitted a request for reconsideration on May 15, 2015, including a doctor's note confirming the Applicant's recent treatment and ongoing medication. The Applicant claims that he did not receive a response to his request. However, since this letter was sent after the PRRA Officer's decision was rendered, it was therefore not a part of the record before the PRRA Officer when he rendered his decision and, for that reason, it is also not to be considered by this Court when reviewing the Officer's decision (*Assn of Universities and Colleges of Canada v Canadian Copyright Licensing* Agency, 2012 FCA 22 at paras 19-20).

[7] The Applicant submits that the PRRA Officer erred by applying a "serious efforts" rather than operational adequacy test when assessing whether state protection was available to him (*Balogh v Canada (Citizenship and Immigration)*, 2015 FC 76 at paras 27-28; *Kanto v Canada (Citizenship and Immigration)*, 2014 FC 628 at para 21; *Fazekas v Canada (Citizenship and Immigration)*, 2013 FC 694 at paras 9-11; *Molnar v Canada (Citizenship and Immigration)*, 2013 FC 296 at para 26; *Gulyas v Canada (Citizenship and Immigration)*, 2013 FC 254 at para 79).

[8] The Applicant submits that in his PRRA application he had relied largely on a recent Human Rights Watch ("HRW") report on the treatment of persons with mental health issues by psychiatric hospitals and in prayer camps in Ghana. The Applicant quotes extensively from his counsel's submissions in his application for a PRRA, which includes quotes from the HRW report. Those submissions by counsel state that the report discusses prayer camps run by private

religious organizations where mental health patients are subjected to various abuses, including denial of food and medicine, overcrowding, prolonged detention and physical and verbal abuse. And, at Ghanaian psychiatric hospitals, patients are beaten if they refuse treatment which often consists of local, traditional remedies or electroconvulsive therapy. The Applicant also quotes from a recent study on mental health and discrimination in Southern Ghana in support of his submission that he would be negatively affected by societal stigmatization, discrimination and the loss of familial supports.

[9] According to the Applicant, the documentary evidence confirms that stigma continues to affect persons living with mental health issues and that services in psychiatric hospitals constitute cruel and unusual treatment or punishment. However, the Applicant submits that this evidence was ignored and, in reliance solely on the United States Department of State Ghana 2013 Human Rights Report ("US DOS Report"), the PRRA Officer concluded that the government of Ghana was making serious efforts to change the treatment of those who suffer from mental illness. However, the PRRA Officer pointed to no evidence that such efforts have amounted to protection for persons with mental illness in Ghana; rather, the evidence supports the opposite conclusion.

[10] The Respondent submits that the PRRA Officer's single reference to serious efforts is taken out of context and is insufficient to ground an argument that the Officer applied the wrong test. In *Barragan Gonzalez v Canada (Citizenship and Immigration)*, 2015 FC 502 [*Barragan*], Justice Boswell found that the use of the words "serious efforts" was not an error since it was

drawn from the Federal Court of Appeal case, *Canada (Minister of Employment and Immigration) v Villafranca*, [1992] FCJ No 1189 (FCA).

[11] As I have previously stated in *Beri v Canada (Citizenship and Immigration)*, 2013 FC 854 at para 35, adequate state protection involves more than making "serious efforts" to address problems and protect citizens (*De Araujo Garcia v Canada (Citizenship and Immigration)*, 2007 FC 79). Instead, the focus must be on what is actually happening in a country, that is, evidence of actual or operational level protection, and not on efforts that a state is endeavouring to put in place (*Hercegi v Canada (Citizenship and Immigration)*, 2012 FC 250 at para 5).

[12] There are also many decisions of this Court which speak to the relevance of legislation in assessing the adequacy of state protection. As stated by Justice Gagné in *Molnar v Canada (Citizenship and Immigration)*, 2013 FC 296 at para 26:

> [26] Needless to say that the operational adequacy of state protection is best determined in light of the most recent evidence put before the panel, rather than through generalities based on evidence emanating from state authorities about legislative and procedural measures that the government has, or has attempted to, put in place.

[13] Similarly in *Bautista v Canada (Citizenship and Immigration)*, 2009 FC 1187 at para 32, Justice Kelen stated that if serious efforts of the state are considered, they should be viewed at the operational capacity level and not only at the legislative stage (citing *Elcock v Canada (Minister of Citizenship and Immigration)*, (1999) 175 FTR 116 at para 15).

[14] In this case the PRRA Officer did not explicitly state what test for state protection was being applied. And while it is true, as the Respondent submits, that mere reference to the term "serious efforts" does not establish that the wrong test was used (*Majlat v Canada (Citizenship and Immigration)*, 2014 FC 965 at paras 35-36; *Medina v Canada (Citizenship and Immigration)*, 2008 FC 728 at para 11), the Respondent's reliance on *Barragan* is misplaced. There Justice Boswell stated:

> Although it can be an error if the RPD fails to understand that the seriousness of the state's efforts must be evaluated at the operational level (*Toriz Gilvaja v Canada (Citizenship and Immigration)*, 2009 FC 598 at paragraph 39, 81 Imm LR (3d) 165), the RPD cannot be faulted for couching its analysis in the words used by the Federal Court of Appeal

[15] In this case, there is nothing in the PRRA Officer's decision to suggest that he understood that operational adequacy of state protection is the correct test for establishing state protection under ss 96 and 97 of the IRPA. Nor is there any suggestion that he applied the operational adequacy test to the evidence before him. Read as a whole, the decision suggests that the Officer incorrectly adopted a "serious efforts" test.

[16] The PRRA Officer quoted extensively from the US DOS Report. From it, he concluded that it was clear that "discrimination against persons with disabilities continues to be a problem in Ghana", but that "it is also clear that the government of Ghana is making serious efforts to change this". The Officer further states, "I note that the law explicitly prohibits discrimination against persons with physical, sensory, intellectual and mental disabilities". The Officer also references the creation of "several government agencies" and the involvement of National Government Organizations to address discrimination against people with disabilities.

[17] However, as the Applicant points out, the same US DOS Report, in fact the same section quoted in the PRRA Officer's decision, acknowledges criticisms of Ghana's implementation of its legislative schemes. For example,

> The constitution prohibits discrimination on the basis of race, gender, disability, language or social status; however, enforcement was generally inadequate.
>
> […]
>
> Activists supporting the rights of persons with disabilities, including Voice Ghana (a disability advocacy organization) complained of slow implementation of the law, especially the lack of legislative instruments to implement it. Despite legal protection provided in the law, discrimination against persons with disabilities in employment and inaccessibility of public buildings continued to be problems.

[18] The internet articles submitted by the Applicant to the PRRA Officer also contain evidence pertaining to the operational ineffectiveness of Ghanian legislation on mental health issues. In the 2014 article from Journalists for Human Rights, "Unavailable and underfunded: mental healthcare in Ghana", the author discusses the Mental Health Bill, stating "The massive investment required for the full implementation of what is in the Bill seems unlikely in the near future". And, in the 2011 article titled "GHANA: Mental health bill to address stigma", the chief psychiatrist in Ghana's national health service recognized the importance of implementation, stating "if we pass the bill and we take steps to implement it, within five years we will see a new face of mental health in Ghana".

[19] Whether the Officer identified and adopted the proper test for state protection is reviewed on the correctness standard (*Ruano v Canada (Citizenship and Immigration),* 2015 FC 1023 at para 35; *Koky v Canada (Citizenship and Immigration),* 2011 FC 1407, at para 19). The jurisprudence has

established a clear test for state protection and it is not open to the Officer to apply a different test (*Ruszo v Canada (Citizenship and Immigration)*, 2013 FC 1004 at para 22 [*Ruszo*]). In my view, the PRRA Officer failed to identify and adopt the operational adequacy test in his state protection analysis. On this ground alone I would grant the application.

[20] However, even if the Officer had intended to adopt the correct test, he erred in applying it by accepting evidence that demonstrated the abuses suffered in Ghana by persons with mental illness and disability, and failing to address evidence that suggested a lack of operational adequacy in the protection of the mentally ill in Ghana. Where the question is whether the officer properly applied the correct test to the evidence on state protection before him, the standard is reasonableness (*Burai v Canada (Citizenship and Immigration)*, 2013 FC 565 at para 34; *Ruszo* at para 22). The Officer's focus on Ghana's serious legislative efforts led to the unreasonable decision that the Applicant would have access to state protection.

[21] Given my finding above, I need not address the Applicant's further submission that the PRRA Officer erred in failing to consider s 97(1)(b) of the IRPA. However, before concluding that the Applicant's risk flowed from the unavailability of medical treatment, particularly given the documentary evidence quoted by the PRRA Officer concerning the treatment of those with mental illness in Ghana, in my view the Officer was required to assess the nature or cause of the risk based on the facts of the case (*Lemika v Canada (Citizenship and Immigration)*, 2012 FC 467 at paras 27-30; *Ferreira v Canada (Citizenship and Immigration)*, 2014 FC 756 at paras 11-13).

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted. The decision of CIC is set aside and the matter is remitted for redetermination by a different officer;
2. No question of general importance is proposed by the parties and none arises; and
3. There will be no order as to costs.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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