Federal Court Cour fédérale

Date: 20181107

Docket: IMM-664-18

Citation: 2018 FC 1123

Ottawa, Ontario, November 7, 2018

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

ORRETT KRIS FRANCIS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This application seeks review of a Pre-Removal Risk Assessment [PRRA] decision and suggests that the Court must address the question of when a person in Canada subject to a removal order may be given notice that they can apply for a PRRA. As is discussed below, I find that the question of timing is not properly before the Court, that the only issue to be addressed is the reasonableness of the decision, and that it is reasonable.

Legislative Framework

[2] The PRRA provides an avenue of protection to a defined group of persons awaiting removal from Canada who may face risk in returning to their country of origin. The PRRA program is consistent with Canada's international obligations under *The 1951 Refugee Convention* and *1967 Protocol*. Specifically, it complies with Canada's obligation to respect the principal of *non-refoulement*, which prohibits the forced return of someone to a territory where his or her life or freedom is threatened.

[3] The relevant sections of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], and the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*] as they relate to this applicant are outlined as follows.

[4] A person who is "subject to a removal order that is in force" may apply to the Minister for protection "after they are given notice to that effect by the Department:" *IRPA* ss 112(1) and *IRPR* ss 160(1). The notice that a PRRA application may be made "shall be given … before removal from Canada:" *IRPR* para 160(3)(a).

[5] Subsection 49(1) of *IRPA* provides that a removal order "comes into force" on the latest of these dates: "(a) the day the removal order is made, if there is no right to appeal; (b) the day the appeal period expires, if there is a right to appeal and no appeal is made; and (c) the day of the final determination of the appeal, if an appeal is made."

[6] Removal orders may be stayed. Section 50 of *IRPA* provides that a removal order is stayed "(a) if a decision that was made in a judicial proceeding — at which the Minister shall be given the opportunity to make submissions — would be directly contravened by the enforcement of the removal order; (b) in the case of a foreign national sentenced to a term of imprisonment in Canada, until the sentence is completed; (c) for the duration of a stay imposed by the Immigration Appeal Division or any other court of competent jurisdiction; (d) for the duration of a stay under paragraph 114(1)(b); and (e) for the duration of a stay imposed by the Minister."

[7] It is to be noted that the stay of a removal order does not affect its validity.

Factual Background

[8] The applicant is a citizen of Jamaica. He entered Canada on June 22, 1990, as a permanent resident. On July 1, 2013, he was convicted for the offences of trafficking controlled substances for a criminal organization, conspiracy to traffic cocaine, and conspiracy to traffic marijuana. He was sentenced to 9 years in prison and was committed to the Bath Institution to serve his sentence. He filed an appeal with the Ontario Court of Appeal and by its Order dated May 12, 2017, he was released on bail, subject to conditions, pending the hearing of the appeal. On release from prison, the applicant was arrested and detained by the Canada Border Services Agency, but was ordered released by the Immigration Division on May 17, 2017.

[9] Subsequent to the conviction, but prior to his release on bail, the applicant was determined on June 18, 2015, by the Immigration and Refugee Board, to be inadmissible to Canada and he was issued a removal order in the form of a deportation order.

[10] On June 22, 2017, the applicant was served with a PRRA. He filed his PRRA application on June 29, 2017, and submissions from counsel were sent on July 20, 2017. In the application, the applicant wrote: "Please be advised the convictions are currently being appealed" but the written submissions did not mention the appeal nor was it suggested that it was inappropriate to make the PRRA determination at that time.

[11] The PRRA submissions focused on persecution in Jamaica. Evidence was submitted to show that deportees to Jamaica are discriminated against and have difficulty finding work. Evidence was also submitted to show that kidnapping for ransom is common in Jamaica and the applicant suggests that he will been seen as a wealthy person because he is returning from Canada.

[12] The officer did not find that the applicant would be in danger of torture under paragraph 97(1)(a) of *IRPA* or punishment under paragraph 97(1)(b) of *IRPA*. When considering the PRRA, the officer agreed with the applicant that the evidence showed that deportees to Jamaica may experience discrimination, but said that the evidence did not indicate how anyone in Jamaica would become aware that he was a deportee.

[13] In the alternative, the officer said there was insufficient evidence to show that the discrimination deportees may experience rises to the level of torture, risk to life, or cruel or unusual treatment and punishment. The officer also said there was insufficient evidence the applicant would be targeted personally by gangs because of perceived financial resources. While

the evidence showed that criminality is a problem in Jamaica, the applicant was found not to have shown that he would be singled out.

[14] The PRRA decision makes no mention of the criminal appeal pending at the Ontario Court of Appeal. The PRRA decision was made on November 17, 2017, but was not communicated to the applicant until February 7, 2018. In February of 2018, the CBSA began preparations for the removal of the applicant on March 15, 2018. On February 27, 2018, counsel for the applicant informed the CBSA that the applicant was still serving a sentence and was only out on bail. The CBSA cancelled the removal.

Issues

[15] The applicant submits that the respondent erred in law and acted without jurisdiction in serving him with a PRRA notification pursuant to section 160 of *IRPR*, prior to the removal order against him being enforceable. Alternatively, the applicant submits that the respondent erred in failing to consider whether the cumulative discrimination he would face in Jamaica would amount to persecution.

Analysis

[16] The respondent submits that the applicant cannot now take issue with it having issued him the PRRA notification:

> Though the Applicant now claims that the PRRA process should not have been initiated, given that he could possibly be returned to jail if his appeal is negative, this argument is without merit. The Applicant was provided with his PRRA on June 22, 2017. He made PRRA submissions on June 29, 2017 and July 20, 2017. He did not challenge the decision to execute his PRRA when it was

> initiated. It was not until his PRRA was determined negative, while challenging the actual PRRA decision, that the Applicant now claims the PRRA process should not have begun.

[17] The decision under review, as described in the Notice for Leave and Judicial Review is "the decision of Senior Immigration Officer R. KLAGSBRUN (Dated November 17th, 2017, and communicated to the Applicants [*sic*] on February 7th, 2018), refusing the application for permanent residence pursuant to Section 112 of the *Immigration and Refugee Protection Act* ("Pre-Removal Risk Assessment")".

[18] It is true that the applicant in outlining the relief sought states that it is based, in part, on the ground that the respondent "erred in law and acted without jurisdiction in serving the client PRRA pursuant to R. 160 of the IRPR, prior to the removal order being enforceable." It is my view that in so asserting, the applicant is really asking this Court to review the decision made June 22, 2017, to provide the applicant with notice that he was entitled to submit a PRRA application. That decision is not under review. Moreover, no timely application is made by the applicant seeking leave and judicial review of that decision, nor is an extension of time sought.

[19] I agree with the respondent that the applicant is attempting in this application reviewing the PPRA decision to challenge the decision to notify the applicant that he could file a PRRA application. If that was his concern, he ought to have challenged the PRRA notification in the thirty days period after it was given to him. I also agree with the respondent's observation that if the PRRA decision had been favourable, then it is unlikely the applicant would now be saying that the decision was made without jurisdiction and is a nullity.

[20] In light of this finding, the extensive submissions made by counsel as to the timing of the PRRA notification need not be addressed. However, I will make some *obiter* observations.

[21] First, this Court has observed that PRRA decisions are to be made close to the actual removal from Canada of an applicant: see *Revich v Canada (Minister of Citizenship and Immigration)*, 2005 FC 852 and *Asfaw v Canada (Minister of Citizenship and Immigration)*, 2016 FC 366.

[22] Second, the only legislative pre-condition to the issuing of notification to an applicant that he or she may submit a PRRA application is that the person be subject to a "removal order that is in force." Provided that condition is met, the timing of the notice is in the hands of the immigration authorities. A removal order that is in force may be stayed by operation of law, as was this applicant's removal order as a result of his criminal conviction and appeal. A stayed removal order does not mean that it is no longer in force; rather it means that it cannot be enforced.

[23] If the PRRA is determined well prior to the actual date of removal, an applicant may ask the removal officer to reconsider the application when served later with a Direction to Report or alternatively file a new PRRA as is provided for in section 165 of IRPR:

> A person whose application for protection was rejected and who has remained in Canada since being given notification under section 160 may make another application. Written submissions, if any, must accompany the application. For greater certainty, the application does not result in a stay of the removal order.

[24] While no stay is automatic in such circumstances, the applicant may apply to this Court for a stay of removal on the basis of an application for leave and review of the decision to effect removal prior to the new PRRA being determined. The Court routinely hears such motions on the basis of what counsel often describe as a “deemed refusal to defer removal.” As I observed in *Toth v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1051 at para 24:

> If there is clear and convincing evidence presented in a deferral request that an applicant’s circumstances have materially changed or the conditions in the country of removal have altered for the worse such that a failed claimant faces a real risk of harm and inadequate protection, then that applicant may persuade a judge of this Court that he is likely to succeed on judicial review of the rejected deferral request. Alternatively, he may convince a judge that he has a prima facie case that his removal will deprive him of his right to liberty, security and perhaps life as protected by section 7 of the *Charter*.

[25] Accordingly, where, as here, the PRRA notification was issued well prior to a removal being effected, the individual is not without a remedy and has safeguards to ensure that he or she is not being removed to a risk of harm.

[26] The only issue properly before the Court in this application is whether the officer’s decision is reasonable.

[27] The applicant submits that the officer did not consider how cumulative acts of discrimination reach the level of persecution. He relies on *Iossifov v Canada (Minister of citizenship and Immigration)* [1993] FCJ No 1318, 45 ACWS (3d) 728 [*Iossifov*].

[28] *Iossifov* was a case dealing with a refugee claim under section 96 of *IRPA*. Because in the present case, the applicant was served with a deportation order based on his criminal inadmissibility, he was eligible under subsection 112(3) of *IRPA* to a PRRA limited to section 97 considerations; namely, whether he faces a risk of torture or cruel and unusual treatment. As such the principle in *Iossifov* has no application to his circumstances. He made no submissions as to the reasonableness of the PRRA decision's examination of section 97 considerations.

[29] For these reasons the application is dismissed.

[30] The applicant proposed the following two questions for certification:

1. When is the timing of the initiation of the PRRA process not in accordance with section 7 of the *Charter* and with Canada's commitment to the principle of *non-refoulement*?

2. When is paragraph 160(3)(a) of the IRPR triggered, i.e. when is a person "subject to a removal order that is in force, before removal from Canada" and specifically what is meant by "before removal from Canada"?

[31] As the decision under review is related only to the reasonableness of it, neither proposed question would be dispositive of an appeal. No question is certified.

JUDGMENT IN IMM-664-18

THIS COURT'S JUDGMENT is that the application is dismissed and no question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-664-18
STYLE OF CAUSE:	ORRETT KRIS FRANCIS v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 3, 2018
JUDGMENT AND REASONS:	ZINN J.
DATED:	NOVEMBER 7, 2018

APPEARANCES:

Wennie Lee	FOR THE APPLICANT
Veronica Cham	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lee & Company *Immigration Advocacy, Counsel & Litigation* Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Department of Justice Canada Ontario Regional Office Toronto, Ontario	FOR THE RESPONDENT