Federal Court  Cour fédérale

Date: 20240829

Docket: IMM-11069-23

Citation: 2024 FC 1352

Toronto, Ontario, August 29, 2024

PRESENT: The Honourable Justice Battista

BETWEEN:

ERIC NSHIMYUMUREMYI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant is a gay man from Rwanda who challenges the refusal of his application for a pre-removal risk assessment (PRRA). The Applicant was removed from Canada on April 30, 2024, despite the issuance of a production order from the Court prior to the removal indicating that leave to apply for judicial review would likely be granted. The Respondent claims that the matter is now moot.

[2] For the reasons that follow, I exercise my discretion to hear the application despite its mootness. I grant the application for judicial review based on the unreasonableness of the PRRA officer's (Officer) decision.

II. Background

[3] The Applicant arrived in Canada in January 2020, and made a claim for refugee protection. He became aware that his refugee claim had been deemed abandoned when he was detained by the Canada Border Services Agency (CBSA) in April 2023. The following month he submitted a PRRA application. Throughout the PRRA process, until the Applicant's removal, he remained in detention in Laval, Quebec.

[4] In the 11-page written statement accompanying the PRRA application, the Applicant described the process of accepting his sexual orientation along with details of his relationships with men. He described his fears of returning to Rwanda based on his experience, the climate of homophobia in the country, and the lack of protection for the LGBTQI community.

[5] The Applicant's experiences in Rwanda included mistreatment by his uncle. Upon discovering the Applicant's sexual orientation, the Applicant's uncle arranged a forced heterosexual marriage for him. When the Applicant resisted, his uncle arranged for a member of the military to beat the Applicant, breaking his arm and leg.

[6] The Officer refused the Applicant's PRRA application on August 17, 2023. As described below, the basis of the Officer's decision was that the Applicant did not corroborate his written evidence.

[7] The Applicant commenced an application for leave and judicial review in this Court on September 1, 2023. On February 12, 2024, Justice John Norris issued a production order on the file pursuant to the Federal Court's Consolidated Practice Guidelines for Citizenship, Immigration, and Refugee Protection Proceedings (Guidelines). Production orders are issued when the Court is inclined to grant leave to commence an application for judicial review and are meant to facilitate settlement discussions (Guidelines at para 40).

[8] On April 22, 2024, a Direction to Report for removal to Rwanda was issued indicating that the Applicant would be deported one week later, on April 29, 2024. It is not known when the Direction was actually provided to the Applicant. He was deported from Canada to Rwanda on April 30, 2024.

III. Decision

[9] The Officer concluded that the Applicant is neither a Convention refugee nor a person in need of protection pursuant to sections 96 or 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The Officer did not express any doubts about the Applicant's evidence in his handwritten 11-page narrative describing his experiences and fears. Rather, the Officer found that the evidence was "insufficient" to establish the Applicant's sexual orientation, stating that the Applicant's written statement in his PRRA application was unsworn and uncorroborated by other evidence.

IV. Issues

[10] The preliminary issue in this application is whether it is moot based on the Applicant's removal from Canada and the governing jurisprudence.

[11] The parties have different perspectives on the issue involved in the substantive review of the decision. The Applicant alleges a breach of procedural fairness, arguing that the Officer disbelieved the Applicant but could not fairly make a final conclusion on the evidence without convoking an oral hearing pursuant to subsection 113(b) of the *IRPA*.

[12] The Respondent states that the substantive issue in this case is whether the Officer reasonably determined that there was insufficient evidence to support the Applicant's written evidence of allegations and fears. The standard of review for this issue is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[13] I agree with the Respondent that the Officer's decision was, in essence, based upon concerns related to a lack of evidence rather than doubts about the evidence that was presented.

[14] The Officer's reasons give no indication that the Applicant was disbelieved. The Applicant provided an 11-page narrative describing his experiences, but the Officer engaged with none of it. The Officer expressed no concerns about the plausibility or veracity of that evidence or the honesty of the Applicant. The Officer simply found that the written evidence of the Applicant was insufficient because it was not corroborated.

[15] For this reason, the substantive issue is whether the Officer reasonably found that there was insufficient evidence to establish the Applicant's fears.

V. Analysis

A. *Preliminary issue: mootness*

(1) Is the judicial review application moot?

[16] The Respondent argues that the application for judicial review is moot because the Applicant has been removed from Canada.

[17] The concept of mootness was explained by the Supreme Court of Canada (SCC) in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*]. The SCC explained that mootness is a common law principle in which a court declines to hear and determine a matter because there is no genuine controversy between the parties that has practical effects on the rights of the parties (*Borowski* at 353).

[18] The Federal Court of Appeal (FCA) approved the application of mootness in the judicial review of PRRA decisions when the person has been removed from Canada after an application for a stay has been rejected (*Solis Perez v Canada (Citizenship and Immigration)*, 2009 FCA 171 [*Solis Perez*]. The FCA stated that "a review of a negative decision of a PRRA officer after the subject person has been removed from Canada, is without object" (at para 5). This was based on the reasoning of the Federal Court (Martineau J.) that PRRA applications could be processed only for persons "in Canada" pursuant to section 112 of the *IRPA*.

[19] In my view, the concept of mootness does not neatly apply to the review of negative PRRA decisions made after a person is removed from Canada. The object of a judicial review application of a negative PRRA decision is the negative PRRA decision; the object is not the person who filed the PRRA application, nor the PRRA application on its merits. Unless the parties before the Court

on judicial review are in agreement about the validity or invalidity of the decision that is under review, a live controversy or *lis* exists.

[20] There is nothing in the *IRPA*, the *Federal Courts Act*, RSC 1985, c F-7, or the *Federal Courts Rules*, SOR/98-106 which requires a person to be in Canada in order to seek judicial review of a negative PRRA decision. While it is true that PRRA applications can only be advanced by persons in Canada pursuant to section 112 of the *IRPA*, whether someone is in Canada at the time of their PRRA application is a factual determination to be made by the PRRA officer deciding the PRRA application, not by the Court on judicial review.

[21] The *IRPA* does not preclude PRRA applications from persons removed; it only restricts PRRA applications to persons in Canada. The fact that a person was removed from Canada does not conclusively preclude the presence of that person in Canada at the time of redetermination of the PRRA application, if the judicial review application is successful. The Court could, for example, issue *mandamus* and order the return of the person in the context of litigation challenging the legality or constitutionality of the removal; Canadian immigration authorities could authorize an individual's return under subsection 52(1) of the *IRPA*; or the person may find a way to return to Canada before the redetermination on their own initiative.

[22] Moreover, as described below, a broad application of mootness in these circumstances could lead to injustice because it would allow a party to the litigation to remove an issue from court scrutiny despite a continuing dispute. Most of the examples leading to mootness described by the SCC in *Borowski* involve changed circumstances out of the control of the immediate parties to the litigation: determinations of invalidity or unconstitutionality of legislation, revocation of bylaws, or the death of one of the parties (at 354-355). By contrast, in the judicial review of PRRA

decisions of removed persons, it is one of the parties to the litigation (or their agents) that generates the circumstances raising the issue of mootness. There almost always remains a dispute about the decision precipitating the removal.

[23] In any case, I am bound by the FCA's categorical determination in *Solis Perez* that the judicial review of negative PRRA applications by persons removed from Canada are moot. For this reason, I find the judicial review application in this case to be moot.

(2) Should discretion be exercised in this case to hear and determine the application notwithstanding its mootness?

[24] If a court finds a matter to be moot, the next stage is to consider whether the court should exercise its discretion to hear and determine the matter with reference to the following factors (*Borowski* at 358-362):

- The continued existence of an adversarial context,
- The concern for judicial economy,
- The court's law-making role.

[25] The SCC made it clear that in the interest of not fettering a Court's discretion, the list should not be considered exhaustive (*Borowski* at 358). This Court has recognized that other criteria may be considered (*Sogi v Canada (Citizenship and Immigration)*, 2007 FC 108 [*Sogi*] at para 40). As such, to the list of criteria for the exercise of my discretion I add the following criteria which is relevant in circumstances concerning the removal of an Applicant with a pending judicial review application:

- The role of one of the parties (or their agents) in manufacturing the conditions of mootness.

(a) *The continued existence of the adversarial context*

[26] The Respondent submits that an adversarial context no longer exists between the parties because the Applicant did not file a further memorandum and took no steps to seek a stay of removal.

[27] I disagree. Both parties have filed memoranda and are represented by counsel, and the Court record is complete. Counsel for both parties appeared at the judicial review hearing. Most importantly, both parties have opposing views about the legal validity of the decision under review. An adversarial context clearly exists.

[28] Counsel for the Respondent submitted that a continuing adversarial context should not in itself justify the exercise of discretion to determine a matter that is moot. In support of this position, counsel suggested that Justice Richard Southcott in *Boakye v Canada (Citizenship and Immigration)*, 2018 FC 831 [*Boakye*] at paragraph 49 endorsed the statement of Justice Simon Noël in *Sogi* at paragraph 47 that this criterion should be supplemented by at least one other criterion.

[29] In *Boakye*, Justice Southcott referred to but did not endorse the suggestion that an adversarial context could not in itself support the exercise of discretion to determine a matter that is moot (at para 48).

[30] Further, the statement of Justice Noël on this point in *Sogi* was clearly *obiter*. Imposing restrictions on the various criteria for exercising discretion in moot cases would contradict the very process of exercising discretion as well as the caution of the SCC in *Borowski* not to fetter a court in exercising such discretion. There is nothing in *Borowski* that indicated that any one factor for

the exercise of discretion should have greater or lesser weight than the other factors; in fact, the SCC indicated the opposite. It stressed unfettered discretion, the fact that the process is not a mechanical one, and that "the presence of one or two of the factors may be overborne by the absence of the third, and vice versa" (*Borowski* at 363).

[31] In any case, all other criteria support the exercise of discretion in this matter.

(b) *The concern for judicial economy*

[32] The Respondent submits that the concern for judicial economy militates against hearing this application, as a decision to quash and re-determine the PRRA application will not lead to concrete consequences and because there will be no benefit to the parties in receiving a decision in the present application.

[33] Again, I disagree. The pleadings have already been filed and the record is complete, the judicial review hearing was allocated 90 minutes for argument, and the application will be disposed of in a summary manner. Judicial review hearings are not criminal or civil trials, which typically consume more judicial resources.

[34] The Respondent states that re-determining a PRRA application from a removed applicant will not lead to concrete consequences or benefits to the parties. This is speculative. As explained above, the presence or absence of the Applicant in Canada is a fact to be determined at the time of the redetermination; it is not a matter for this Court. Even if the chances of the Applicant's return to Canada prior to the redetermination of the PRRA application are small, he should have the benefit of those chances given the precipitous removal of the Applicant after the Court indicated

that leave was likely, and the possibility that Canada's obligation of *non-refoulement* was breached.

(c) *The Court's law-making role*

[35] The Respondent submits that in the absence of a dispute affecting the parties' rights, the judgment could be seen as intruding into the Parliament's role, and that ordering a re-determination of a PRRA application for an individual outside of Canada may amount to establishing a new category of refugee claimant under the *IRPA*. The Respondent points to jurisprudence agreeing with this point: *Mekuria v Canada (Citizenship and Immigration)*, 2010 FC 304 at paras 12-15.

[36] I am puzzled by this submission. Upon redetermination, a PRRA officer will be examining and applying all of the criteria in section 112 of the *IRPA* in order to determine the Applicant's eligibility for a PRRA, including whether or not he is in Canada at the time of the redetermination. The establishment of that fact is to be made at the time of redetermination by the PRRA officer charged with applying section 112. Should the officer confirm that the Applicant is not in Canada at that time, the appropriate decision will follow. Given the circumstances of this case, it is hoped that the PRRA officer on redetermination will exhaust all efforts to confirm the Applicant's presence or absence from Canada, but that is not the Court's role or responsibility.

[37] Far from creating a new category of refugee claimant, the responsibility of making factual determinations required at the time of redetermination pursuant to section 112 is placed where it belongs: with the PRRA officer. The Court is therefore not usurping Parliament's authority, but showing respect for it.

[38] Further, the criterion relevant to the Court's law making role should encompass the role of the Court in ensuring the proper application of the law, which is particularly important in the domain of public law. In this case, as will be explained below, the Officer unreasonably imposed a requirement of corroboration on the Applicant, contrary to well-established jurisprudence. In my view, a determination of this application will assist in supporting the proper application of the law for future PRRA determinations.

(d) *The role of the Respondent in manufacturing mootness*

[39] The value of this criterion lies in its potential to deter a party from removing an otherwise justiciable issue from the Court based solely on that party's ability to do so. It is similar to the "clean hands" doctrine, which denies equitable remedies based on improper conduct. Mootness is not an equitable remedy, but a judicial doctrine or practice based on practical concerns (*Borowski* at 353). Nevertheless, the formulation of discretionary decisions can incorporate criteria related to the requesting party's conduct.

[40] The application of this criterion is concerned with the extent to which an applicant has been able to exercise a right of review in court, the degree of the Court's expressed interest in assuming jurisdiction over the matter, and the timing of a party's actions in undermining the justiciability of the dispute.

[41] Immigration law is part of public law, and the exercise of public power must be transparent and justified (*Vavilov* at para 95). A reflexive or broad application of mootness in the public law context has the potential to shield public decision making from transparency and accountability. This would be contrary to the protection of judicial review in section 96 of the *Constitution Act, 1867* and the culture of justification, which the SCC identified as a goal of judicial review (*Vavilov*

at paras 2, 13–15, 24). The exercise of discretion to determine matters when public authorities have played a role in manufacturing mootness reduces the risk that unlawful public decisions will be insulated from public scrutiny.

[42] Here, as explained below, the Respondent's conduct was not only improper, but may have led to a breach of Canada's *non-refoulement* obligation in the *IRPA* and international law. The SCC recently described *non-refoulement* as "the cornerstone of the international refugee protection regime" and a "critical legal constraint" in interpreting and applying the *IRPA* (*Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 117).

[43] As stated above, the Applicant was in detention in Laval, Québec throughout the PRRA application process until the time of removal. His removal order was enforceable 15 days after the deemed abandonment of his refugee claim in April 2023, yet no steps were taken to remove him for one year, until shortly after a production order was issued by this Court.

[44] Justice Norris issued the production order in this matter on February 12, 2024. To reiterate, according to the Guidelines a production order is issued when the Court is inclined to grant leave.

[45] Despite this production order, a Direction to Report was issued on April 22, 2024, for deportation on April 29, 2024. It is not known when the Direction to Report was provided to the Applicant. He was deported on April 30, 2024.

[46] Less than one week's notice of deportation was provided to the Applicant, who had been detained in an immigration holding facility for one year, shortly after this Court expressed its inclination to conduct the only review of the Applicant's only risk assessment. Based on the evidence provided by the Applicant in support of his application, the Officer's lack of credibility

concerns with the Applicant's experiences or fears, and the documentary evidence within the application demonstrating the risks faced by the LGBTQI community in Rwanda, it is possible, perhaps even probable, that the actions of the Respondent or its agents resulted in a breach of Canada's *non-refoulement* obligation under the *IRPA* and international law.

[47] Production orders are the preliminary step to the issuance of granted leave orders, and as indicated above, they are an indication of the Court's inclination to assume jurisdiction over the review of a decision. They are meant to facilitate settlement by expressing the Court's preliminary view that the application is meritorious. Unless there is to be regular interference with the judicial function of the Court, production orders should be a signal to the Respondent to scale down enforcement strategies, not to escalate them, which is what appears to have happened in this case.

[48] Given the role of the Respondent in manufacturing the conditions of mootness after the Court expressed an inclination to hear the Applicant's judicial review application, it would be contrary to the interests of justice to decline to hear the application for judicial review.

[49] Based on the factors described above, the Court will therefore exercise its discretion to hear this application.

B. *The Officer's decision is unreasonable*

[50] Having exercised my discretion to hear this matter, I find the Officer's decision is unreasonable.

[51] As stated above, the Officer connected the refusal to the lack of sufficient evidence supporting the application, and in particular the lack of sufficient evidence of the Applicant's sexual orientation. The Officer stated:

> I note that the applicant's written narrative, which is not a sworn document, is the only personalized submission made for his application. I note that the applicant's narrative and his claim as a gay person is not corroborated with any evidence such as letters of support from his friends or past partners from the U.S.… I find that the applicant's unsworn narrative alone is insufficient to establish his sexuality and the risk alleged within, particularly considering the availability of supporting documents that can be reasonable [*sic*] expected. I find that the applicant submitted insufficient evidence to establish that he is gay...

[52] The Officer unreasonably dismissed the Applicant's 11-page narrative as evidence of his sexual orientation supporting his PRRA application. The Officer also unreasonably imposed a requirement of corroboration of the Applicant's sexual orientation.

(1) Unreasonable dismissal of the Applicant's evidence in his PRRA narrative

[53] As noted above, the Applicant provided an 11-page handwritten narrative describing his sexual orientation, same-sex relationships, experiences in Rwanda, and basis for fearing persecution upon his return. The Officer expressed no doubts about this evidence. However, the Officer gave no weight or value to the Applicant's narrative because it was unsworn.

[54] The Officer was unreasonable in dismissing the Applicant's narrative as evidence. The Applicant declared in his PRRA application form that it was "truthful, complete and correct;" the Officer cited no requirement for the narrative to be sworn. The Officer's failure to take this evidentiary record into account renders the Officer's decision unreasonable (*Vavilov* at para 126).

(2) Unreasonable requirement for corroboration

[55] The Officer erred by unreasonably requiring corroboration of the Applicant's sexual orientation. This Court has found that lack of corroboration of a person's sexual orientation, absent reasonable adverse credibility findings, does not rebut the presumption of truthfulness of sworn

testimony (*Sadeghi-Pari v Canada (Minister of Citizenship and Immigration)*, 2004 FC 282 at para 38).

[56] I find that this principle applies to the requirement to corroborate unsworn, uncontested testimony of sexual orientation. This Court in *Osikoya v Canada (Citizenship and Immigration)*, 2018 FC 720 at paragraph 60 has recognized the inherent difficulty in corroborating sexual orientation:

> … sexual orientation can be difficult to establish when it is the basis of a claim for protection. At the risk of stating the obvious, one cannot expect sexual orientation to be as readily established with corroborating evidence as, say, someone's employment or education history might be.

[57] Furthermore, Justice Roger Lafrenière has held that a declaration of truthfulness in a PRRA application attracts a presumption of truthfulness (*Qosaj v Canada (Citizenship and Immigration)*, 2021 FC 565 at para 45). As such, it was an error for the Officer to require corroboration of the Applicant's evidence in his PRRA application.

[58] In addition, the United Nations High Commissioner for Refugees' (UNHCR) *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugee* states that self-identification as an LGBTQI person should be taken as an indication of sexual orientation:

> Self-identification: Self-identification as a LGBTI person should be taken as an indication of the applicant's sexual orientation and/or gender identity…. The applicant's own testimony is the primary and often the only source of evidence, especially where persecution is at the hands of family members or the community.
>
> [Paras 63, 64]

[59] While UNHCR guidelines are not formally binding on Canadian decision makers, they are among the international human rights instruments with which the *IRPA* must comply when being applied (*De Guzman v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436 at paras 83-89). The Officer's requirement of corroboration of the Applicant's sexual orientation was also unreasonable for its inconsistency with this international instrument.

VI. Conclusion

[60] This application is moot based on the ruling of the FCA in *Solis Perez*. However, it is in the interests of justice for this Court to exercise its discretion to hear and determine this application for judicial review.

[61] The Officer's decision is unreasonable and is set aside.

VII. Remedy

[62] At the hearing of this matter, counsel for the Applicant requested for the first time that an order be issued for the return of the Applicant to Canada.

[63] It is doubtful that the Court in a judicial review application of a negative PRRA application has the authority to issue such an order (*Boakye* at paras 22–24). In any case, no request was made by the Applicant to expand the scope of this review to encompass the legality of the removal, nor to enjoin the public authority responsible for removal, the Minister of Public Safety and Emergency Preparedness. The current matter involves the review of a negative PRRA decision and not the process of removal. The requested order will therefore be dismissed.

[64] However, the dismissal of this order does not prevent the Applicant from initiating other litigation seeking the requested relief.

JUDGMENT in IMM-11069-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The decision of the Officer dated August 17, 2023, is quashed and sent back for redetermination by a different officer.

3. There is no question for certification.

"Michael Battista"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-11069-24
STYLE OF CAUSE:	ERIC NSHIMYUMUREMYI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	AUGUST 20, 2024
JUDGMENT AND REASONS:	BATTISTA J.
DATED:	AUGUST 29, 2024

APPEARANCES:

Matthew Tubie	FOR THE APPLICANT
Mariam Shanouda	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Matthew Nicholas LLP Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT