Date: 20090513

Docket: IMM-3802-08

Citation: 2009 FC 491

Ottawa, Ontario, May 13, 2009

PRESENT: The Honourable Mr. Justice Orville Frenette

BETWEEN:

Maboso MONONGO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act), of a decision dated August 21, 2008, by Julie Bernier, the pre-removal risk assessment officer (PRRA officer) who denied the applicant's refugee protection claim.

Facts

[2] The applicant, who is a citizen of the Democratic Republic of Congo (DRC), arrived in Canada in May 1997, at fifteen years of age. He became a permanent resident as an immigrant in the "member of the family" class.

[3] The evidence shows that since he reached the age of majority in 2000, the applicant has been convicted in Canada of more than 30 criminal offences, including: assault, assaulting a peace officer, possession of prohibited weapons, assault with a weapon, uttering death threats, and assault causing bodily harm. Furthermore, the applicant did not respect conditions during seven probation periods between 2000 and 2007.

[4] On September 24, 2004, the Immigration Division issued a deportation order against the applicant rendering him inadmissible to Canada on grounds of serious criminality under paragraph 36(1)(*a*) of the Act:

36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	**36.** (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :
(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;	*a)* être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;

[5] An appeal filed against this measure was rejected by decision dated December 27, 2006.

[6] On September 23, 2004, the day preceding the date of the inquiry, the applicant presented a refugee claim to the Refugee Protection Division (RPD). Because he failed to appear at the RPD hearings, the RPD then pronounced that it was abandoning his refugee claim by decision dated February 14, 2007.

[7] On July 23, 2008, the applicant completed a PRRA application form but did not submit it. The officer André Pelletier, from the Canada Border Services Agency, explained to him at that time that he had to complete the form and submit it at the latest 15 days afterwards, i.e. August 7, 2008. It was not until August 14, 2008, seven days too late, that he allegedly submitted his application via a facsimile sent by Robert Naylor.

[8] The failure to submit the PRRA application in a timely manner had two consequences. First, the applicant lost the statutory stay until the PRRA decision was delivered pursuant to subsection 232(*b*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations). Second, after the 15 days had expired according to section 162 of the Regulations, the PRRA officer could deliver her decision as early as August 8, 2008.

[9] Having not received the form, the officer delivered her reasoned decision rejecting the PRRA application and, on August 21, 2008, Nadine Grégoire from the Canada Border Services Agency went to the applicant's detention facility to inform him of the negative decision.

[10] The following day, on August 22, 2008, the applicant's counsel submitted her written memorandum to the Registry. Subsequently, the PRRA officer submitted an addendum to her decision, taking into account the above submissions, but rejecting the PRRA application.

The impugned decision

[11] The PRRA officer found that there was not any sufficient or new evidence allowing her to find that if the applicant was returned to the DRC, he would be subject to a general and specific risk.

[12] In the addendum of August 29, 2008, the PRRA officer further explained her decision, taking into account the applicant's submissions. She found that despite his ethnic origin of Tutsi or half Hutu, he would not automatically be subject to risks of persecution, death threats or torture in the DRC.

[13] The PRRA officer attributed very little probative value to the "pseudo" psychological report of David L. B. Woodbury that the applicant suffered from psychological problems (Mr. Woodbury not being a psychologist or a member of the Ordre des psychologues du Québec). She also considered that despite the poor quality of medical care or institutions for people with psychological problems, they were present in the DRC; an argument she did not comment on in the decision of August 21, 2008.

The appropriate standard of review

[14] The standard of review for decisions relating to questions of fact or questions of mixed fact and law is that of reasonableness (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190). In *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, we recall that decisions by administrative tribunals, because they are specialized tribunals, command deference. For questions of pure law, the standard is that of correctness (*Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, and *Dunsmuir*, above). Finally, when it is a case of natural justice or procedural fairness, the standard is also that of correctness (*Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3; *Cartier v. Canada (Attorney General)*, [2003] 2 F.C. 317 (C.A.), at paragraphs 30 to 36; *Thaneswaran v. Minister of Citizenship and Immigration*, 2007 FC 189).

Legislation

[15] The relevant sections of the IRPA are the following:

112. (3) Refugee protection may not result from an application for protection if the person	**112.** (3) L'asile ne peut être conféré au demandeur dans les cas suivants :
(*a*) is determined to be inadmissible on grounds of security, violating human or international rights or organized criminality;	*a*) il est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée;
(*b*) is determined to be inadmissible on grounds of serious criminality with respect to a conviction in Canada punished by a term of imprisonment of at least two years or with respect to a conviction outside Canada for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years;	*b*) il est interdit de territoire pour grande criminalité pour déclaration de culpabilité au Canada punie par un emprisonnement d'au moins deux ans ou pour toute déclaration de culpabilité à l'extérieur du Canada pour une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;
(*c*) made a claim to refugee protection that	*c*) il a été débouté de sa demande d'asile au

was rejected on the basis of section F of Article 1 of the Refugee Convention; or

(*d*) is named in a certificate referred to in subsection 77(1).

113. Consideration of an application for protection shall be as follows:

(*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;

(*b*) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;

(*c*) in the case of an applicant not described in subsection 112(3), consideration shall be on the basis of sections 96 to 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

(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

(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.

titre de la section F de l'article premier de la Convention sur les réfugiés;

d) il est nommé au certificat visé au paragraphe 77(1).

113. Il est disposé de la demande comme il suit :

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) une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;

c) s'agissant du demandeur non visé au paragraphe 112(3), sur la base des articles 96 à 98;

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) soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un danger pour le public au 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.

114. (1) A decision to allow the application for protection has
(*a*) in the case of an applicant not described in subsection 112(3), the effect of conferring refugee protection; and
(*b*) in the case of an applicant described in subsection 112(3), the effect of staying the removal order with respect to a country or place in respect of which the applicant was determined to be in need of protection.

114. (1) La décision accordant la demande de protection a pour effet de conférer l'asile au demandeur; toutefois, elle a pour effet, s'agissant de celui visé au paragraphe 112(3), de surseoir, pour le pays ou le lieu en cause, à la mesure de renvoi le visant.

(2) If the Minister is of the opinion that the circumstances surrounding a stay of the enforcement of a removal order have changed, the Minister may re-examine, in accordance with paragraph 113(*d*) and the regulations, the grounds on which the application was allowed and may cancel the stay.

(2) Le ministre peut révoquer le sursis s'il estime, après examen, sur la base de l'alinéa 113*d*) et conformément aux règlements, des motifs qui l'ont justifié, que les circonstances l'ayant amené ont changé.

(3) If the Minister is of the opinion that a decision to allow an application for protection was obtained as a result of directly or indirectly misrepresenting or withholding material facts on a relevant matter, the Minister may vacate the decision.

(3) Le ministre peut annuler la décision ayant accordé la demande de protection s'il estime qu'elle découle de présentations erronées sur un fait important quant à un objet pertinent, ou de réticence sur ce fait.

(4) If a decision is vacated under subsection (3), it is nullified and the application for protection is deemed to have been rejected.

(4) La décision portant annulation emporte nullité de la décision initiale et la demande de protection est réputée avoir été rejetée.

115. (1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.

115. (1) Ne peut être renvoyée dans un pays où elle risque la persécution du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques, la torture ou des traitements ou peines cruels et inusités, la personne protégée ou la personne dont il est statué que la qualité de réfugié lui a été reconnue par un autre pays vers lequel elle peut être renvoyée.

(2) Subsection (1) does not apply in the case of a person

(2) Le paragraphe (1) ne s'applique pas à l'interdit de territoire :

(*a*) who is inadmissible on grounds of serious

a) pour grande criminalité qui, selon le ministre,

criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada; or	constitue un danger pour le public au Canada;
(*b*) who is inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada.	*b*) pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée si, selon le ministre, il ne devrait pas être présent au Canada en raison soit de la nature et de la gravité de ses actes passés, soit du danger qu'il constitue pour la sécurité du Canada.
(3) A person, after a determination under paragraph 101(1)(*e*) that the person's claim is ineligible, is to be sent to the country from which the person came to Canada, but may be sent to another country if that country is designated under subsection 102(1) or if the country from which the person came to Canada has rejected their claim for refugee protection.	(3) Une personne ne peut, après prononcé d'irrecevabilité au titre de l'alinéa 101(1)*e*), être renvoyée que vers le pays d'où elle est arrivée au Canada sauf si le pays vers lequel elle sera renvoyée a été désigné au titre du paragraphe 102(1) ou que sa demande d'asile a été rejetée dans le pays d'où elle est arrivée au Canada.

Functus officio

[16] The respondent raises a procedural argument of *functus officio* on the addendum of the PRRA officer dated August 29, 2008, even if it did not alter the substance of the decision dated August 21, 2008.

[17] Counsel for the applicant argues that the PRRA officer had the administrative power to act as she did. She also maintains that despite the expiry of the 15-day deadline, she had the right to file her memorandum because the authorities knew that the applicant would be applying or would want to apply for a PRRA.

[18] According to the *functus officio* principle, a decision-maker no longer has jurisdiction over a matter once he or she has delivered the decision. Consequently, the PRRA officer became *functus*

officio on August 21, 2008, after having delivered and signed her decision and having disclosed it to the applicant. This point is made in *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848. This Court's decisions have applied this classic rule of *functus officio* to administrative decisions, i.e. that the decision is final after it is signed and has been disclosed to the parties: *Chudal v. Minister of Citizenship and Immigration*, 2005 FC 1073; *Pur v. Minister of Citizenship and Immigration*, 2008 FC 1109; *Dumbrava v. Minister of Citizenship and Immigration* (1995), 101 F.T.R. 230.

[19] Moreover, Justice Barbara Reed in *Nouranidoust v. Canada (Minister of Citizenship and Immigration)*, [2000] 1 F.C. 123, is less categorical or formalistic; she wrote, referring to remarks by Justice Sopinka in *Chandler*, above:

> [13] . . . However, he noted that the doctrine should be applied flexibly to administrative tribunals:
> . . . I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law.

Justice Reed found that an immigration officer could reopen a file "when the officer considers it in the interests of justice to do so".

[20] This judgment appears significantly marginal when analyzing the weight of authority. I must conclude that in the circumstances of this record, the principle of *functus officio* must apply; therefore, the decision of August 21, 2008, must be the only decision for consideration.

[21] The applicant raises the following arguments: fear for his life and safety, his psychological condition and his removal to a high risk country.

Fear for his life and safety

[22] The applicant submits that his ethnic origin of Tutsi or half Hutu means that he will be persecuted in the Congo and that at the airport of entry, he will be interrogated and incarcerated. He argues that Tutsis are perceived to be responsible for the wars of 1990-1997 and 1998-2002. He relies on the *Country Reports on Human Rights Practices – 2007*, which refer to the dangerous situation in the DRC.

[23] The respondent replies that this problem was considered by the PRRA officer and that, according to the document of the British Home Office, Border & Immigration Agency, *Country of Origin Information Report, Democratic Republic of the Congo*, February 8, 2008, [TRANSLATION] "the situation for Tutsis appears to have improved".

[24] An analysis of the documentary evidence shows that persecution of Tutsis would apply particularly to those who carry out political activities that are contrary to those of the government (see also *Kandolo v. Minister of Citizenship and Immigration*, 2008 FC 1176; *Maskini v. Minister of Citizenship and Immigration*, 2008 FC 826).

[25] The applicant did not prove that he was a part of this category so there is no personal risk that differentiates his situation from that of other Tutsis. If there is no evidence of personalized risk, this

ground is not sufficient to prevent removal (*Kaba v. Minister of Citizenship and Immigration*, 2007 FC 647). In *Nkitabungi v. Minister of Citizenship and Immigration*, 2007 FC 331, Justice Luc Martineau had to decide the situation of a citizen of the DRC of Tutsi origin, and dismissed the application against the decision by the officer on this matter (see also *Lalane v. Minister of Citizenship and Immigration*, 2009 FC 6). The PRRA officer in this case also considered the extensive criminal record of the applicant.

The psychological condition of the applicant

[26] The applicant argues that the PRRA officer erred by not taking into account [TRANSLATION] "his mental disability" and the consequences if he was imprisoned. He raises the issue of quality of psychiatric care in the DRC. The applicant alleges that he has suffered from a mental disability since he was born and draws some support in a report by David L.B. Woodbury with regard to his psychological condition. In three judgments, it was determined that Mr. Woodbury is a psychoeducator and not a psychologist, so he does not have the authority to issue psychological diagnoses (*Singh v. Minister of Citizenship and Immigration*, 2001 FCT 1376, at paragraph 6; *Kakonyi v. Minister of Public Safety and Emergency Preparedness*, 2008 FC 1410, at paragraphs 49 and 50; *Sokhi v. Minister of Citizenship and Immigration*, 2009 FC 140, at paragraph 10).

[27] The evidence shows that intellectually, the applicant is well below average and, according to psychological reports, there is [TRANSLATION] "a diagnostic possibility of an unspecified psychological dysfunction" or [TRANSLATION] "an individual with a borderline psychotic organization of the personality".

[28] Moreover, the psychological and psychiatric reports by the Institut Pinel found that the applicant was in a state to be held criminally responsible for the offences he committed.

[29] At the Institut Pinel, the applicant was subject to numerous tests and evaluations; according to the reports by psychiatrists Durivage, Wolwartz and Talbot, he was to be held criminally responsible for the offences with which he was charged under section 16 of the *Criminal Code*. The psychiatrist Talbot, in his note of April 1, 2008, indicated that the applicant's schizophrenic episodes follow his refusal to take medication to control his condition.

[30] It is apparent in the evidence that the applicant suffers from certain mental problems that are controlled with medication. The evidence shows that the DRC has psychiatric institutions that can take care of persons with mental illness (document of the British Home Office, February 2008, at paragraphs 28.55 and 28.56). Even if the quality of these services is not at the same level as it is in Canada, this reason does not justify a non-removal.

[31] The applicant's medical condition cannot constitute a risk according to sections 96 and 97 of the Act. This part of the applicant's argument would be further linked to an application for relief filed in accordance with section 25 of the Act (*Covarrubias v. Minister of Citizenship and Immigration*, [2007] 3 F.C. 169 (C.A.); *Mekarbèche v. Minister of Citizenship and Immigration*, 2007 FC 566).

[32] It is apparent from the evidence as a whole that the PRRA officer did not commit an error in her analysis of the evidence. She found that the recent documentary evidence shows that the conditions in the DRC have recently improved; however, she noted that there is a risk of serious danger for all citizens. The applicant did not establish that he would be subject to a particular and personal risk in the DRC. In *Nkitabungi*, above, Justice Martineau dismissed the application for judicial review of a national of the DRC because, *inter alia*, the applicant, of Tutsi ethnicity, did not prove that he would be "personally at risk", if he returned to the Congo.

[33] In my opinion, the applicant in this case did not discharge the burden of demonstrating that he would be at risk in the DRC for this reason.

Removal to a high risk country

[34] In 2002, the Supreme Court of Canada in *Suresh,* above, recalled that exercising the discretionary power of the Minister, under paragraph 53(1)(*h*) of the Act, is subject to the principles of fundamental justice under section 7 of the *Canadian Charter of Rights and Freedoms*. It reiterated that according to these principles and Canada's adherence to the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (GA 39/46, annex, 39 U.N. GAOR supp. (No. 51), U.N. Doc. A/39/51 (1984)), a person must not be removed to a country where there are serious grounds that a danger of torture exists. The Federal Court of Appeal held in *Li v. Canada (Minister of Citizenship and Immigration),* [2005] 3 F.C.R. 239, that the risk should be established according to the standards of a certain probability. However, the Supreme Court held that this principle did not entirely exclude the possibility of deportation to such a country with

serious danger in exceptional cases when the security of Canada has been put at risk. The Supreme Court in *Suresh*, above, also commented as follows, at paragraphs 90 and 91:

> . . . The threat must be "serious", in the sense that it must be grounded on objectively reasonable suspicion based on evidence and in the sense that the threatened harm must be substantial rather than negligible.
>
> [91] This definition of "danger to the security of Canada" does not mean that Canada is unable to deport those who pose a risk to individual Canadians, but not the country. . . .

[35] The British House of Lords recently rendered a decision in *RB (Algeria) v. Secretary of State for the Home Department*, [2009] U.K.H.L. 10, that authorized the deportation of an Algerian national, categorized as a terrorist, even when Algeria was suspected of practising torture. The House of Lords relied on the Government of Algeria's commitment not to allow torture.

Conclusion

[36] It follows that in a case such as this, it is not inappropriate to remove the applicant to the DRC, a country where certain dangers exist; the decision by the PRRA officer was not unreasonable according to the criteria established in *Dunsmuir*, above.

[37] The application for judicial review is therefore dismissed.

JUDGMENT

The application for judicial review of the decision by Julie Bernier, the pre-removal risk assessment officer, dated August 21, 2008, is dismissed.

No question is certified.

"Orville Frenette"
Deputy Judge

Certified true translation

Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3802-08
STYLE OF CAUSE:	Maboso MONONGO v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	April 15, 2009
REASONS FOR JUDGMENT AND JUDGMENT BY:	ORVILLE FRENETTE, D.J.
DATED:	May 13, 2009

APPEARANCES:

Denise Fernet	FOR THE APPLICANT
Daniel Latulippe	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Denise Fernet Montréal, Quebec	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT