Federal Court Cour fédérale

Date: 20100504

Docket: IMM-159-09

Citation: 2010 FC 491

Montréal, Quebec, May 4, 2010

PRESENT: The Honourable Mr. Justice Mainville

BETWEEN:

WORKINESH BULLA MANDIDA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] In this case, an application was submitted by Workinesh Bulla Mandida (the "Applicant"), seeking judicial review of a decision dated December 12, 2008 by an Immigration Officer (the "Officer") who carried out a pre-removal risk assessment; he concluded that the Applicant would not be subjected to a risk of persecution, danger of torture, risk to life or risk of cruel or unusual punishment if she returned to Ethiopia.

[2] For the reasons set out below, this application for judicial review is dismissed, mainly on the ground that the Applicant did not submit any evidence to the Officer supporting any finding of risk should she be returned to Ethiopia. The Applicant has, rather unwisely, chosen to treat her pre-removal risk assessment application as a form of request for relief on humanitarian and compassionate grounds.

Background

[3] The Applicant is an elderly national from Ethiopia who is now over 70 years old and who has had a long and convoluted history of claims with the Canadian immigration authorities.

[4] The Applicant originally arrived in Canada with her elderly husband on September 20, 2000, as a visitor. It is useful to note that the Applicant's son and daughter were residing in Canada at that time. A few months later, on May 29, 2001, the Applicant and her husband claimed refugee status.

[5] On March 1, 2002, the Convention Refugee Determination Division ("CRDD") ruled that the Applicant and her husband were not Convention refugees. The CRDD came to this determination mainly on the ground that the Applicant's husband, who was the principal applicant in their joint refugee claim, was simply not credible and that his entire story was implausible. The CRDD also noted that the Applicant had herself returned to Ethiopia in March 1992; that was viewed by the CRDD as incompatible with her claim of persecution in that country. The CRDD also

took into account the fact that the Applicant and her husband had waited over 7 months after their arrival in Canada to apply for refugee status.

[6] That decision of the CRDD was not challenged by way of judicial review and is therefore final.

[7] Following the rejection of this refugee claim, the Applicant's husband returned to Ethiopia, but the Applicant has remained in Canada.

[8] The notes provided by the Respondent show that, in June 2002, the Applicant submitted an application for permanent residence based on her son's sponsorship, with a request that this application be processed from within Canada on humanitarian and compassionate grounds. However that request was denied in 2005.

[9] On March 13, 2005, the Applicant's son-in-law died. Some time thereafter, the Applicant moved in with her widowed daughter in Oakville, Ontario, to assist her with her three children. The Applicant's daughter filed a new family class sponsorship for the Applicant; and the Applicant herself filed a new concurrent permanent residence application which is currently being processed as an overseas application under the family class by the Canadian immigration authorities in Nairobi, and a decision on this matter is still pending.

[10] The Applicant has nevertheless remained in Canada on the basis of a temporary work permit issued to her as a live-in caregiver for her daughter. The Applicant's current work permit expires on December 21, 2010.

[11] For unknown reasons, on May 12, 2008, the Applicant filed an application for a pre-removal risk assessment. As already noted, that assessment resulted in findings unfavourable to the Applicant on December 12, 2008. Following this decision, the Applicant's removal from Canada was scheduled for February 6, 2009. That removal was subsequently stayed by Justice O'Keefe on February 4, 2009 pending the results of this judicial review proceeding.

[12] In her pre-removal risk assessment application, the Applicant raised the following as significant incidents that caused her to seek protection outside of her country of nationality:

> 1. My daughter, Hirut Dano of Oakville, ON submitted family class sponsorship on my behalf and met the requirement for eligibility.
> 2. I also submitted permanent residence applications which is currently pending decision
> 3. Meanwhile, my daughter offered me employment as a foreign worker which was approved by respective Canadian government and authorities
> 4. I also applied for work permit and have obtained social insurance number (SIN)
> 5. Now, I believe my status has changed and I am in Canada under a work permit
> 6. I have submitted medical report and police certificate to the Canadian High Commission in Nairobi
>
> (sic throughout)

[13] The Applicant also explained as follows why she did not seek any form of protection from the authorities in Ethiopia:

> The authorities of my country are not in a position to grant me protection. The authorities of my country of origin are engaged in violation of human rights. To seek protection from such authorities is tantamount to exposing myself to danger and risk.

However, the Applicant did not explain what specific "danger and risk" she was referring to.

[14] In a letter accompanying the pre-removal risk assessment application, the Applicant's legal counsel essentially reiterated and expanded upon these humanitarian and compassionate considerations, but raised no specific issue related to any risk the Applicant would face if returned to Ethiopia.

The impugned decision

[15] The Officer notes that the facts raised by the Applicant in support of her pre-removal risk assessment are rather arguments based, for the most part, on humanitarian and compassionate considerations.

[16] After noting that the Applicant's refugee claim had been rejected by the CRDD under the provisions of the immigration legislation as it stood prior to the coming into force of the current *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act"), the Officer recognized the expanded ambit of the pre-removal risk assessment that was to be carried out in the Applicant's case:

> In considering this PRAA (sic) application, I was required under the Immigration and Refugee Protection Act (IRPA) to accept all evidence tendered to establish a ground for protection under section 97 because at the time of the applicant's claim for refugee status was decided, section 97 did not exist. I was also required to accept new evidence on convention ground under section 96 that arose after the

> rejection as per section (sic) 113(a) of the same Act. The burden of proof is on the applicant.

[17] The Officer then went on to state that the Applicant and her counsel had simply put forward arguments for the Applicant to remain in Canada without any reference to risk factors. The Officer thus concluded that these arguments did not fall under the purview of a pre-removal risk application, but rather pertained to a humanitarian and companionate needs application.

[18] The Officer further noted that the Applicant had failed to offer any evidence corroborating that she would be personally at risk if she returned to Ethiopia.

[19] The Officer thus concluded, on the basis of the record, that there was no more than a mere possibility that the Applicant will be subjected to persecution if she returned to Ethiopia, and that there were no substantial grounds to believe she will face a risk of torture, or a risk to life or cruel and unusual treatment or punishment.

Position of the Applicant

[20] The Applicant's written submissions commence with a challenge of the 2002 decision of the CRDD, even though she is long time-barred from challenging this decision.

[21] The Applicant then adds that, since the 2002 CRDD decision, she is now at risk in that "she will be subjected to gender discrimination and ridicule by her community in Ethiopia for her separation from her husband for eight years" (para. 18 of Applicant's written submissions), and "has

nowhere to go as her relationship with her relatives has been severed" (para. 19 of the Applicant's written submissions). These issues were, however, never raised before the Officer.

[22] The Applicant also raises a whole series of other humanitarian and compassionate issues, some of which were not brought to the attention of the Officer, such as the "best interest of the applicant's Canadian-born grandchildren" (para. 23 of the Applicant's written submissions), "fatal consequences as a result of long hours of flight between Canada and Ethiopia" (para. 24 of the Applicant's written submissions), "being torn apart from her grandchildren" (para. 25 of the Applicant's written submissions), etc.

[23] In his oral submissions, the Applicant's counsel referred to a number of cases, almost all of which concerned applications for consideration on humanitarian and compassionate grounds.

Position of the Respondent

[24] The Respondent notes that the submissions made in support of the pre-removal risk assessment amount to a recitation of humanitarian and compassionate factors which are beyond the purview of a pre-removal risk assessment. Since the Applicant did not identify in her pre-removal risk assessment application any risk she would be exposed to were she to return to Ethiopia, the Respondent submits that this application for judicial review should be dismissed.

[25] The Respondent further notes that the Applicant now raises new risk factors which were never brought to the attention to the Officer. Therefore, they can have no bearing on this judicial review application.

[26] In a nutshell, the Respondent argues that the Applicant has confused a pre-removal risk assessment application with an application based on humanitarian and compassionate considerations.

Relevant legislative provisions

[27] The following provisions of the Act are relevant in this case:

25. (1) The Minister shall, upon request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative or on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.	**25.** (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative ou sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,
(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or
(*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of 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,

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi 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) 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.

(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.

112. (1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).

112. (1) La personne se trouvant au Canada et qui n'est pas visée au paragraphe 115(1) peut, conformément aux règlements, demander la protection au ministre si elle est visée par une mesure de renvoi ayant pris effet ou nommée au certificat visé au paragraphe 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;
[…]

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;
[…]

(*c*) in the case of an applicant not described in subsection 112(3), consideration shall be on the basis of sections 96 to 98;

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

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.

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.

Analysis

[28] The pre-removal risk assessment procedure is the logical consequence of Canada's domestic and international commitments to the principle of non-refoulement. Under that principle, a person should not be removed to a country where he or she would be at risk of persecution, torture, risk to life or risk of cruel and unusual treatment or punishment. Canada's commitment to the principle of non-refoulement requires that there be a review of risk prior to removal.

[29] Under Canada's current immigration and refugee protection legislation, risk may be assessed by way of a determination by the Refugee Protection Division of the Immigration and Refugee Board pursuant to sections 96 or 97 of the Act or by way of a pre-removal risk assessment pursuant to section 112 thereof. There is a close connection between these various legislative provisions. As noted by the Federal Court of Appeal in *Raza v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385, 289 D.L.R (4th) 675, [2007] F.C.J. No. 1632 (QL) at para. 11:

> Assuming there are no issues of criminality or national security, an application under subsection 112(1) is allowed if, at the time of the application, the applicant meets the definition of "Convention refugee" in section 96 of the IRPA or the definition of "person in need of protection" in section 97 of the IRPA (paragraph 113(*c*) of the IRPA). The result of a successful PRRA application is to confer refugee protection on the applicant (subsection 114(1) of the IRPA).

[30] In a pre-removal risk assessment, it is the applicant who bears the burden of proof. The standard of proof is the balance of probabilities. Thus, the Applicant in this case had the burden of proving, on a balance of probabilities, that she would be at risk of persecution, torture, to life or of cruel and unusual treatment or punishment if she returned to Ethiopia: *Bayavuge v. Canada*

(Minister of Citizenship and Immigration), 2007 FC 65, 308 F.T.R. 126, [2007] F.C.J. No. 111 (QL) at para. 3; *Ferguson v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1067, [2008] F.C.J. No. 1308 (QL) at paras. 20-21; *Guergour v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1147, [2009] F.C.J. No. 1417 (QL) at para. 6.

[31] In this case, the Applicant has led no evidence whatsoever concerning the risk she would be exposed to if she returned to Ethiopia, limiting her representations before the Officer to issues related to humanitarian and compassionate considerations should she be removed from Canada.

[32] The case law is clear: humanitarian or compassionate considerations need not to be considered in a pre-removal risk assessment. In *Kim v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 437, [2005] F.C.J. No. 540 (QL) at para. 70, Justice Mosley noted the following:

> By the same logic, I find that PRRA officers need not consider humanitarian and compassionate factors in making their decisions. There is no discretion afforded to a PRRA officer in making a risk assessment. Either the officer is satisfied that the risk factors alleged exist and are sufficiently serious to grant protection, or the officer is not satisfied. The PRRA inquiry and decision-making process does not take into account factors other than risk. In any case, there is a better forum for the consideration of humanitarian and compassionate factors: the H&C determination mechanism. I do not find that the officer erred in law by refusing to consider humanitarian and compassionate factors in the context of the PRRA decision.

See also *Sherzady v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 516, 273 F.T.R. 11, [2005] F.C.J. No. 638 (QL) at para. 15; *Covarrubias v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1193, 279 F.T.R. 24, [2005] F.C.J. No. 1470 (QL) at paras. 34 to 38;

Kakonyi v. Canada (Minister of Public Safety and Emergency Preparedness), 2008 FC 1410, [2008] F.C.J. No. 1807 (QL) at para. 37.

[33] The Federal Court of Appeal in *Varga v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 394, [2007] 4 F.C.R. 3, 277 D.L.R. (4th) 762, [2006] F.C.J. No. 1828 (QL), at paras. 6 and 12, expressly indicated that an application for a pre-removal risk assessment under section 112 of the Act should not be confused with an application for consideration of humanitarian and compassionate factors under section 25 of the Act, and then added that the best interest of a child need not be considered in the context of a pre-removal risk assessment:

> PRRA officers' mandate is carefully defined by *IRPA* and should not be judicially expanded to include the interests of any Canadian-born children who may be adversely affected by a parent's removal. It is not necessary to read words into the relevant provisions of *IRPA* in order for it to comply with the *Canadian Charter of Fundamental Rights and Freedoms*, and Canada's obligations in international law.
> […]
> Although the same officer may sometimes make a PRRA and determine an H&C application, the two decision-making processes should be neither confused, nor duplicated: *Ranganathan v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 164 (C.A.) at paras. 16-17; *Rasiah v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 711, 2005 FC 583 at para. 16.

[34] Consequently, I find that no reviewable error has been made by the Officer in refusing to consider the evidence based on humanitarian and compassionate factors offered by the Applicant.

[35] The fundamental problem in this case is that the Applicant has confused a pre-removal risk assessment under section 112 of the Act and a request for exemption on humanitarian and

compassionate grounds under section 25 of the Act. This confusion has resulted in the Applicant submitting an odd pre-removal risk assessment application. The Officer in this case carried out a risk assessment on the basis of the information which the Applicant provided. Any alleged failure to assess risk is of the Applicant's own making.

[36] At the hearing, counsel for both parties indicated that they had no question to certify pursuant to paragraph 74(d) of the Act, and no such question is raised by these proceedings.

JUDGMENT

THE COURT JUDGES AND DECIDES that the application for judicial review is dismissed.

"Robert M. Mainville"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-159-09
STYLE OF CAUSE:	WORKINESH BULLA MANDIDA v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 25, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	Mainville J.
DATED:	May 4, 2010

APPEARANCES:

Daniel Dagago	FOR THE APPLICANT
Eleanor Elstub	FOR THE RESPONDENT

SOLICITORS OF RECORD:

DH Dagago Law Office Barrister & Solicitor Toronto, Ontario	FOR THE APPLICANT
Myles J. Kiran Deputy Attorney General of Canada	FOR THE RESPONDENT