Federal Court of Appeal | Cour d'appel fédérale

Date: 20170310

Docket: A-104-16

Citation: 2017 FCA 48

[ENGLISH TRANSLATION]

CORAM: **SCOTT J.A.**
BOIVIN J.A.
DE MONTIGNY J.A.

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

and

LAMINE YANSANE

Respondent

Heard at Montréal, Quebec, on January 11, 2017.

Judgment delivered at Ottawa, Ontario, on March 10, 2017.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: SCOTT J.A.
BOIVIN J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] This appeal comes before the Court from a decision rendered by Madam Justice Gagné of the Federal Court (the judge), whereby which she allowed the respondent's application for judicial review of the decision dismissing his application for a pre-removal risk assessment (PRRA). The judge made this ruling, indexed as 2016 FC 277, not because the contested

decision was unreasonable, but because the PRRA officer did not comply with the findings of fact made by the Federal Court in previous decisions. The judge certified the following question:

> [TRANSLATION] In the absence of a specific verdict, what impact do the Federal Court's findings of fact and directions have on an administrative decision-maker assigned to re-determine the case?

[2] For the following reasons, I am of the opinion that the appeal should be allowed, because the judge erred in concluding that she was bound by the findings of fact made previously by her colleagues in the applications for judicial review of previous PRRAs.

I. Background

[3] The respondent, Mr. Lamine Yansane, is a citizen of Guinea, and he arrived in Canada in October 2005. On the personal information form with his claim for refugee protection, he noted his fear of his father, the imam of his state, who is very well known in his native city. He stated his family was very conservative, and that he was accused of apostasy for marrying a Catholic woman in 1994. The respondent's father reportedly initially consented to the marriage on the condition that his spouse convert to Islam afterwards. However, not only did she not convert, but the respondent grew closer to her religion. After being pressured by his family to leave his wife and marry his cousin, the respondent and his family left their native city in October 2004 to live in Conakry, the capital, approximately 300 kilometers away.

[4] Hearing rumours that the respondent was attending a Catholic church, his father and uncle reportedly came to his home in September 2005. The respondent said his father hit him and threatened to kill him when he admitted that he was thinking of converting to Christianity.

Fearing for his life, the respondent reportedly first sought shelter with his wife's brother; when his wife's brother warned him that his father and other members of the Muslim community were looking for him, he left the country, and his wife and two children went to live in a remote village.

[5] In August 2006, the Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada denied the respondent's application for refugee protection on the ground of general lack of credibility. The Federal Court denied the application for leave for judicial review of this decision. The respondent then filed an initial PRRA application and an application for permanent residency on humanitarian and compassionate (H&C) grounds. These applications were both denied in November 2007. His application for a stay was also denied, but the respondent was not deported because the required travel documents could not be obtained.

[6] In November 2008, the respondent filed a second PRRA application supported by new evidence, including proof of his conversion to Christianity since his arrival in Canada and of his father's fatwa against him. This application was also denied, but a stay of removal was granted in January 2009 until the Court ruled on the application for leave and for judicial review filed against the second PRRA decision (see *Yansane v. Canada (Citizenship and Immigration)*, 2009 FC 75, [2009] F.C.J. No. 78 (Justice Lemieux) [*Yansane 1*]). As Mr. Justice Lemieux saw it, the fact that the immigration officer may have ignored the teachings of this Court in *Raza v. Canada (Citizenship and Immigration)*, 2007 FCA 385, 370 N.R. 344 [*Raza*] or that she may have erred by giving too little weight to the new evidence was a serious enough question for the stay. The application for judicial review was then allowed by Mr. Justice Shore, on the grounds that the

officer did not take into account the new documentary evidence and considering the high risk of persecution and death due to the respondent's change of religion, as confirmed by his baptism in April 2007 (see *Yansane v. Canada (Citizenship and Immigration)*, 2009 FC 1242 [*Yansane 2*]).

[7] The second PRRA application was therefore referred back to another officer, who also denied it on March 20, 2012. However, with the parties' consent, that decision was quashed.

[8] On March 11, 2013, the PRRA application was denied for a third time by a new immigration officer. She also refused to consider the new evidence on the ground that the documents filed by the respondent were self-serving and did not meet the criteria of "new evidence" under subsection 113(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA). In a judicial review of this decision, Shore J. once again quashed it in an unreported decision on November 20, 2013 (*Yansane 3*). Since this decision is central to this appeal, I am reproducing the most relevant excerpts:

> …
>
> [TRANSLATION]
> **KNOWING** that the four previous decisions concerning the applicant discussed before this Court were raised again in relation to the applicant's current situation, this Court still fully agrees with all paragraphs and citations from these previous decisions. These decisions should be read in depth, knowing that there were orders to implement them. In addition, the most recent evidence in the form of letters before this Court is accepted as valid evidence.
>
> …
>
> **KNOWING** that, without clear and convincing information from the Embassy of Canada in the applicant's country of origin (or other evidence provided on request by an authority in the executive branch of the Canadian government) contradicting the evidence on record, this Court can only rule what it has decided since the beginning of this case with the evidence before it; that is, to have before this Court clear and convincing assurance from a government authority in the applicant's country of origin about the state of the security or protection available

> to the applicant given the most recent evidence. This type of evidence is required to contradict the new evidence on file, as in certain other cases before this Court where the Court accepted the assurances of the country of origin in question to change its point of view on the current evidence of record.
>
> **THIS COURT'S JUDGMENT** is that this application for judicial review be allowed; therefore, this Court overturns the most recent PRRA decision and orders a new determination before another officer. No questions of general importance are certified.
>
> ***Obiter***
>
> It is not the Federal Court's power to decide the applicant's fate; the PRRA officer is responsible for that decision and has the power to make that decision. To contradict the new evidence submitted each time to demonstrate that each time the case is revisited, the previous danger remains or is renewed for the future without interruption, the Embassy of Canada or another entity of the executive branch of the Canadian government is responsible for clarifying the situation, if in fact the new evidence may be contradicted. Information from a Canadian government source could make the PRRA officer's and this Court's task easier if this matter were to return before this Court.
>
> *Yansane 3*, Appeal book, vol. 2, at pages 378–379

[9] After that decision, the immigration officer responsible for the fourth PRRA application decided to hold a hearing and assess the respondent's credibility. After an interview that lasted nearly three hours, the officer found (in a decision approximately 20 pages long) that the respondent was not credible. The officer noted significant inconsistencies and contradictions in the respondent's testimony and significant irregularities in the documents he offered in evidence, and therefore was of the opinion that the evidence did not demonstrate that there was more than a simple possibility of persecution within the meaning of section 96 of the IRPA, or that there were substantial grounds to believe he would be exposed to a risk of torture, a risk to his life, or cruel and unusual treatment or punishment within the meaning of section 97 of the IRPA if he returned to Guinea.

[10] The officer also examined the documentary evidence about religious practice and freedom of religion in Guinea and noted that the only difficulties that can occur when a person converts to Catholicism are with their family or neighbours. She then found that Christians are free to practise their religion and that it was unlikely that an imam would find support with political leaders, other imams, or even the general population if he tried to apply Sharia and declare a fatwa against his son for having converted to Catholicism. Finally, the officer noted the Federal Court's previous decisions involving the respondent and explained her process in the following terms:

> [TRANSLATION] In the most recent decisions, the Federal Court found, based on the new evidence presented, that the applicant would be at risk if he returned to Guinea, and it asked for clear and convincing assurances from the Embassy of Canada in the applicant's country of origin or other evidence provided on request by an authority in the executive branch of the Canadian government about the state of the security or protection available to the applicant. That being said, before following the Court's recommendations in this area, it was important to ensure that the risks alleged by the applicant were real. …Given the circumstances, I deemed it appropriate to meet with the applicant to assess the credibility of his allegations before following the most recent Court orders. [Citations omitted.]
>
> PRRA officer's decision, Appeal Book, vol. 2 at page 238

[11] In the application for judicial review of this fourth assessment of the second PRRA, the judge found that the officer's decision was "inherently reasonable" but must still be set aside because it did not take into account the previous decisions rendered by Shore J. in 2009 and in 2013 (*Yansane 2* and *Yansane 3*).

[12] In terms of the reasonableness of the decision, the judge concluded that the officer could find that the respondent was generally not credible given the many implausibilities and contradictions in his testimony. The judge also agreed that it was plausible that the respondent

changed his testimony in response to the concerns and negative findings of the RPD, and that the officer's finding was reasonable on that point. The judge also noted that most of the originals were missing from the record, and that the officer noted certain discrepancies in the documents filed by the respondent as new evidence. Overall, she considered that the officer assessed all the evidence before her and that her findings were within the range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[13] Notwithstanding that conclusion, the judge nevertheless allowed the application for judicial review because she was of the opinion that it was unreasonable for the officer to ignore what she called the findings of fact made by the Court in its previous decisions about the documentary evidence. Although she expressed reservations about the merit of such findings (see paragraph 38 of her Reasons, where she states that [TRANSLATION] "it is clear that it is not this Court's duty to administer the evidence in support of a PRRA application"), she still stated that these findings could not be ignored by a subsequent decision-maker. The gist of her reasoning on this matter is found in the following paragraph:

> [TRANSLATION] [41] The PRRA officer was not required to follow the findings of the other PRRA officers who ruled on the applicant's application, but the findings of fact and directions (in *Yansane 2* and *Yansane 3* but not the June 3, 2015, direction) did need to be followed. I so conclude this despite the fact that Mr. Justice Shore did not add to his order in *Yansane 3* that he was returning the file to the respondent for a redetermination in accordance with his reasons or any other similar formulation. The absence of such a statement in the decision of Shore J. does not allow an administrative decision-maker assigned to redetermine the matter to ignore the reasons, findings of fact, or directions of this Court. (emphasis added)

[14] As mentioned above, the judge certified the question reproduced above, providing the grounds for the appeal filed by the Minister of Citizenship and Immigration under subsection 74(d) of the IRPA.

II. Analysis

[15] In general, the role of a superior court in a judicial review of an administrative decision is not to replace the administrative decision-maker's decision with its own decision; rather, its role is limited to verifying the legality and reasonableness of the decision rendered, and to returning the file to the same decision-maker or another decision-maker in the same organization if it finds that an error was made and that the decision was illegal or not within the range of possible, acceptable outcomes in respect of the facts and the law (*Dunsmuir v. New Brunswick*, 2008 SCC 9, at para. 47, [2008] 1 S.C.R. 190).

[16] However, under paragraph 18.1(3)(b), the Federal Court can exceptionally set aside a decision and refer it back for judgment in compliance with the instructions it deems appropriate. The type of instructions the Court may give depend on the circumstances, and the case law provides several illustrations of directions or instructions issued as part of a judgment allowing an application for judicial review. The Court may therefore set a deadline to re-examine the file (see for example *Lu v. Canada (Citizenship and Immigration)*, 2016 FC 175); limit reconsideration to a specific question and require the decision-maker to take certain documents into account (see *Bledy v. Canada (Citizenship and Immigration)*, 2012 FC 679; *Camargo v. Canada (Citizenship and Immigration)*, 2015 FC 1044); exclude a piece of evidence (see *M.A.O.*

v. Canada (Minister of Citizenship and Immigration), 2003 FC 1406, [2003] F.C.J. No. 1799); or forbid a specific result (*Carroll v. Canada (Attorney General)*, 2015 FC 287).

[17] Indeed, the Court often simply directs that reconsideration take place in accordance with its reasons; I will discuss the impact of such a direction later on. Conversely, the Court may require a specific verdict of the administrative organization to which the file is being returned; however, this is a power that the Court will use only in the most clear-cut cases, for example when there can only be one possible outcome when the law is interpreted correctly (see *Wihksne v. Canada (Attorney General)*, 2002 FCA 356, 299 N.R. 211). On the other hand, if the assessment of the evidence may affect the outcome, even if the applicable law has been clarified, it is better to let the administrative decision-maker make a decision, though the decision may need to be reviewed again for reasonableness if one of the parties is not satisfied with the decision:

> [13] On an application for judicial review, the role of the Court with respect to a tribunal's findings of fact is strictly circumscribed. In the absence of an error of law in a tribunal's fact-finding process, or a breach of the duty of fairness, the Court may only quash a decision of a federal tribunal for factual error if the finding was perverse or capricious or made without regard to the material before the tribunal: *Federal Court Act*, paragraph 18.1(4)(d). Hence, if, as a result of an error of law, a tribunal has omitted to make a relevant finding of fact, including a factual inference, the matter should normally be returned to the tribunal to enable it to complete its work. Accordingly, in our opinion, the judge would have erred in law if, having set aside the decision of the Board, she had remitted the matter with a direction that the Board grant Mr. Rafuse leave to appeal.
>
> *Canada (Minister of Human Resources Development) v. Rafuse*, 2002 FCA 31, 286 N.R. 385

[18] In my view, the same caution is warranted for the directions and instructions that this Court may issue when it allows an application for judicial review. We must never lose sight of

the fact that such directions or instructions depart from the logic of a judicial review, and that their abusive or unjustified use would go against Parliament's desire to give specialized administrative organizations the responsibility for ruling on questions that often require expertise that common law panels are lacking. This is especially the case for eligibility and weighing of evidence, which are central to the mandate of administrative decision-makers.

[19] According to that logic, I believe it is essential to interpret the possibility of issuing directions or instructions restrictively, such that only those explicitly stated in the judgment may bind the administrative decision-maker responsible for re-examining a case. This must be the case not only so that Parliament's decision not to allow appeals is respected, but also so that the law is predictable and appropriately guides those who must re-examine a question when the first decision was set aside. Consequently, I am of the opinion that only instructions explicitly stated in the judgment bind the subsequent decision-maker; otherwise, the comments and recommendations made by the Court in its reasons would have to be considered mere *obiters*, and the decision-maker would be advised to consider them but not required to follow them.

[20] For this reason, I believe that the judge erred in concluding that it was unreasonable for the PRRA officer to ignore the findings of Shore J. concerning the documentary evidence before her. In his two previous decisions, Shore J. seemed to find that the new evidence about the respondent's personal risk if he returned to Guinea, due to his change of religion and the threats uttered against him by his father, was credible and had not been reasonably assessed. In addition, he indicated that only clear and convincing evidence from the Canadian Embassy in Guinea or

another Canadian authority would allow the respondent's evidence to be quashed and convince the Court that he could safely return to his country.

[21] These arguments of Shore J. seem, at the very least, questionable. On the one hand, the precise meaning of those warnings is not entirely clear. By pointing out that the respondent's new evidence was not only eligible based on the criteria listed by our Court in *Raza*, but also undisputed, did Shore J. mean to imply that the respondent's credibility had been confirmed? In holding a new hearing, could the officer not find that the respondent was not credible, despite the documentary evidence? By indicating that the Court could not change its opinion on the protection the respondent could have in his country except with evidence from the Canadian Embassy, did Shore J. merely state his personal point of view or did he intend to restrict the latitude of future decision-makers and even other Federal Court judges?

[22] On the other hand, the Federal Court is not responsible for administering the evidence supporting a PRRA application, as the judge noted more than once in her judgment. The officer in charge of reviewing such an application is the one responsible for determining the admissibility and weight of the evidence; there may be more than one way to determine that a country has the resources and will to protect its citizens in general and an individual in particular. The immigration officer, who faces such questions on a regular basis, has more expertise than the Court and is entitled to more deference in that field (*Raza v. Canada (Citizenship and Immigration)*, 2006 FC 1385, 58 Admin L.R. (4th) 283).

[23] Be that as it may, Shore J. did not review these comments in his formal order. He merely set aside the PPRA decision and ordered a new determination by another officer. Moreover, he explicitly labelled as an *obiter* his recommendation that the Canadian Embassy or another Canadian government entity clarify the situation if the respondent's new evidence was to be contradicted. Under these circumstances, it seems clear to me that the immigration officer responsible for re-examining the PRRA application was not required to comply with the wish expressed by Shore J. It was clearly an *obiter dictum* and not binding.

[24] The situation faced by the officer assigned to re-examine the PRRA application in this case was entirely different from that referred to by Madam Justice Gleason, then of the Federal Court, in *Burton v. Canada (Citizenship and Immigration)*, 2014 FC 910, 30 Imm L.R. (4th) 294 [*Burton*], which the judge cites to support her reasons. In that case, a PRRA officer had held that the applicant would be at risk if he returned to his country, but denied his application because he had failed to demonstrate the inability or lack of will of his country to protect him. A first judge set aside that decision because the applicant's personal situation was not taken into account in the analysis of whether his country was able to protect him. The PRRA officer to whom the case was referred then found that the applicant would not be at risk if he returned to his country, despite the fact that the first judge cast doubt on that finding. Discussing the reasonableness of this finding in a second application for judicial review, Gleason J. stated the following:

> [45] Because she remitted the matter for redetermination in accordance with her Reasons, and because those Reasons at least implicitly endorsed the risk determination of the first PRRA officer and contemplated that the issue of risk would not be reassessed if circumstances remained unchanged, the second PRRA officer in my view could not depart from the previous risk assessment unless there were new facts or circumstances that could reasonably give rise to a different risk conclusion.

> [46] In this regard, it is clear that the second PRRA officer was bound by Justice Mactavish's direction as the principle of *stare decisis* requires administrative tribunals to follow directions given by the reviewing court (see e.g. *Régie des rentes du Québec v Canada Bread Company Ltd*, 2013 SCC 46 (CanLII), [2013] 3 SCR 125 at paragraph 46 and *Canada (Commissioner of Competition) v Superior Propane Inc*, 2003 FCA 53 (CanLII), 223 DLR (4th) 55 at paragraph 54). Thus, unless there were new facts which could have reasonably given rise to a different risk conclusion, the second PRRA officer was required to adopt the same risk conclusion that the first PRRA officer did.

[25] Strictly speaking, the first judge's judgment did not, in my opinion, contain any directions or instructions. By referring the case to another immigration officer for reconsideration "in accordance with these reasons," the first judge was not giving instructions within the meaning of paragraph 18.1(3)(b), but merely reiterating the well-known principle that an administrative decision-maker must comply with the decision of a superior court in applying the principle of *stare decisis*. In fact, it matters little whether the judgment allowing an application for judicial review contains such a statement; it goes without saying that an administrative tribunal to which a case is referred back must always take into account the decision and findings of the reviewing court, unless new facts call for a different analysis. In the *Burton* case the Court determined that there was a risk, and the immigration officer had to take this finding into account; this scenario is quite different from the situation in the current case, where Shore J. did not determine the risk to which the respondent was exposed if he returned to Guinea but specified the type of evidence the PRRA officer needed to obtain to exclude the new evidence submitted by the respondent in his second PRRA application. Such an instruction, which departs from the very nature of a judicial review proceeding and infringes upon the expertise of the officers in charge of assessing PRRA applications, cannot bind the administrative decision-maker unless it is explicitly part of the formal judgment. Such was not the case here.

[26] For the above-mentioned reasons, I would allow the appeal and would set aside the decision of the Federal Court. Rendering the judgment that should have been handed down by the Federal Court, I would dismiss the application for judicial review.

[27] I would reword the question certified by the judge to remove the reference to findings of fact, and I would answer as follows:

Question: In the absence of a specific verdict, what impact do the Federal Court's directions have on an administrative decision-maker assigned to re-determine the case?

Answer: The administrative decision-maker to whom the case is returned must always comply with the reasons and findings of the judgment allowing the judicial review, as well as with the directions and instructions explicitly stated by the Federal Court in its judgment.

"Yves de Montigny"

J.A.

"I agree.
A.F. Scott J.A."

"I agree.
Richard Boivin, J.A."

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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