Federal Court  Cour fédérale

Date: 20150520

Docket: IMM-7199-14

Citation: 2015 FC 651

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, May 20, 2015

Present: The Honourable Mr. Justice Martineau

BETWEEN:

FABRICE MATINGOU-TESTIE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant challenges the legality of the decision of a senior immigration officer (officer) dated August 20, 2014, rejecting his pre-removal risk assessment (PRRA).

[2] The applicant is a citizen of the Democratic Republic of Congo. He arrived in Canada in December 2010 and applied for refugee protection on the ground that his life would be in danger

because he witnessed an incident where the Congolese police arrested, beat and forcibly took a human rights activist, Armand Tungulu, who later died in detention. The applicant entered into Canada using a genuine passport bearing the name Fabrice Milambwe Kabwe, but a search of luggage revealed that he was also in possession of an altered French passport, which bore the name Charles Reynes. The applicant then presented a certificate of lost identity documents and a driver's licence issued to Fabrice Matingou-Testie, with which he applied for refugee status and filed a PRRA application.

[3] On June 30, 2011, the Refugee Protection Division (RPD) dismissed the applicant's application for refugee protection because he did not discharge his burden of proving his identity, as required by section 106 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (Act). Therefore, the RPD did not rule on the credibility of the allegations made by the applicant under sections 96 and 97 of the Act. The applicant submitted this application for judicial review, and on April 3, 2012, the Court confirmed its legality: *Matingou-Testie v Canada (Citizenship and Immigration)*, 2012 FC 389. However, we note that the question of the applicant's identity has since been resolved in his favour from a practical viewpoint.

[4] On July 18, 2013, the applicant filed an application for permanent residence in the spousal category. However, on January 30, 2013, the applicant pleaded guilty to two charges of theft under $5,000 which gives rise to inadmissibility for criminality under subsection 36(2) of the Act. On November 20, 2013, a removal order was issued against the applicant. On February 26, 2014, the applicant filed a PRRA application. On August 20, 2014, the officer

dismissed it on the grounds that he would not be at risk if he was returned to the DRC, hence this application for judicial review.

[5] In this case, the officer accepted a great deal of new evidence and noted that she was satisfied with the applicant's identity. However, the officer did not give any weight to the applicant's allegations that he was in danger because of the Tungulu case. The officer noted that the allegations of risk were contradictory to some information provided by the applicant in the past and that the only evidence provided in support of the applicant's story was his affidavit and the two letters from his ex-wife. Moreover, the applicant had, in the past, already used his contacts to defend fabricated stories. In addition, the officer noted that the objective evidence did not show that the mere fact of witnessing this incident was sufficient for the applicant to be at risk and that although the authorities were looking for him in 2010, the applicant did not show that he would still be a person of interest today.

[6] Today, the applicant first challenges the fact that the officer did not hold a hearing, although the regulatory factors were met in this case, which was disputed by the respondent. Certain decisions of the Court indicate that the standard of review in such cases is reasonableness, and "on the basis that the appropriateness of holding a hearing in light of a particular context of a file calls for discretion and commands deference " (*Adetunji v Canada (Citizenship and Immigration)*, 2012 FC 708 at para 24; see also *Kanto v Canada (Citizenship and Immigration)*, 2014 FC 628 at paras 11-12; *Bicuku v Canada (Citizenship and Immigration)*, 2014 FC 339 at paras 16-20). However, other decisions indicate that it is an issue of procedural fairness to which the standard of correctness applies (*Fawaz v Canada (Citizenship and*

Immigration), 2012 FC 1394 at para 56; *Ahmad v Canada (Citizenship and Immigration)*, 2012 FC 89 at para 18; *Negm v Canada (Citizenship and Immigration)*, 2015 FC 272 at para 33). Personally, I agree with this second interpretation. Although paragraph 113(*b*) of the Act gives departmental officers the discretion to grant a hearing in light of the prescribed factors set out in section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (*Regulations*)), the impact of such a refusal on the life and safety of the person in question raises an issue of procedural fairness to which the standard of correctness applies, inasmuch as in this case, it is the first time that there is a final decision dealing with the merit of the allegations of persecution or risk made by the applicant under sections 96 and 97 of the Act.

[7] It is appropriate to intervene in this case. I am satisfied that the prescribed factors were met and that the officer violated procedural fairness by deciding on determinative issues of credibility without holding a hearing or giving the applicant the opportunity to provide explanations regarding the so-called contradictory versions that he was able to provide regarding the allegations made under sections 96 and 97 of the Act. Here, the officer did not even assess the merit of the applicant's express request to hold a hearing and did not explain in her decision why she was not holding a hearing, which is a violation of procedural fairness (*Zokai v Canada (Citizenship and Immigration)*, 2005 FC 1103 (*Zokai*)), or otherwise makes her finding unreasonable, because when a PRRA officer personally makes a credibility finding, he or she must explain the reasons for which a hearing is not being held (*Chekroun v Canada (Citizenship and Immigration)*, 2013 FC 737 at para 72). Therefore, the application for judicial review will be allowed.

[8] First, I do not agree with the respondent that the majority of the risk factors raised by the applicant in his PRRA application do not involve his credibility. Indeed, although some risk factors resulting from the applicant's status in Canada refer to the objective evidence, the fact remains that all the applicant's allegations of risks that led him to leave the DRC call his credibility into question. Moreover, it is clear that the officer calls into question the applicant's subjective fear and his credibility on the basis of real or apparent inconsistency. Furthermore, she did not believe the two letters from the applicant's ex-wife because the applicant had lied previously regarding his identity and his reasons for making a refugee claim. In any event, the officer pointed out that the applicant involved [TRANSLATION] "in his lies the testimony of two people living in Canada". Although she worded some findings in terms of probative value, it is clear that the officer made findings of credibility.

[9] Second, the respondent pointed out the fact that the officer stated in her decision that she would have come to the same result even if she had found the applicant credible, since he did not objectively show that being a witness to the incident was sufficient to be arrested or he would still be a person of interest for the authorities today. Nevertheless, it is not up to the reviewing court to reassess the evidence on file (*Hughes v Canada (Attorney General)*, 2014 FCA 43 at para 11). Although it is possible that the same findings of lack of personalized risk could be made after a hearing where the applicant's credibility would truly have been tested at that time, the violation of procedural fairness is a fatal flaw. Regardless, if I am mistaken on the latter point, I would come to the same result in examining the merit of the officer's reasoning, which seems unreasonable in this case.

[10] At first glance, given the documentary evidence and his status as a failed refugee claimant and inadmissible to Canada for criminality, the applicant had very serious arguments to make before the PRRA officer regarding the existence of a personalized risk whether one believes his story or not. In considering the lack of an objective risk of returning to the DRC, the officer noted that the applicant filed a great deal of evidence showing that some failed refugee claimants, and particularly those returning from the United Kingdom, are at risk. But the officer hastened to specify that it is only because they are considered by the DRC to be "combatants" – since the DRC considers the diaspora from the United Kingdom to be militants who are against the government. Therefore, the officer found that the applicant did not show that a failed refugee claimant, returning from Canada, runs a personalized risk.

[11] I am not persuaded in this case that the officer's higher reasoning provides a logical and rational basis for finding that the risk is not personalized, insofar as the objective documentary evidence speaks eloquently regarding numerous violations to human rights perpetrated by the DRC authorities. Furthermore, there currently exists in Canada a moratorium on deportations to the DRC except in cases of criminality: the deportation of the applicant draws the attention of the authorities, who can easily determine that not only he was returned for criminality, but also that he is a failed refugee claimant. In addition, the applicant presented the officer with a great deal of evidence, in particular from the United Kingdom, which describes the numerous risks that failed refugee claimants face when returning to the DRC, including arrest, interrogation and mistreatment that may go so far as torture. Contrary to the findings made by the officer, it does not seem clear, on its face, that this mistreatment is limited to individuals deported from Great Britain or who are militants, activists or politicians.

[12] The application for judicial review will be allowed and the matter referred back for redetermination by a different officer. No question was proposed for certification by the respondent and I agree with its counsel that it is not timely to certify today the question proposed by counsel for the applicant relating to exercising ministerial authority on whether to hold a hearing, in the case where the RPD did not rule specifically on the credibility of the allegations made by a refugee claimant under sections 96 and 97 of the Act.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review is allowed, the negative decision of the PRRA officer is set aside and the matter is returned for redetermination, after holding a hearing, by a different officer. No question is certified.

"Luc Martineau"
Judge

Certified true translation
Catherine Jones, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7199-14
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APPEARANCES:

Myrdal Firmin	FOR THE APPLICANT
Gretchen Timmins	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Myrdal Firmin Montréal, Quebec	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT