

Federal Court



Cour fédérale

Date: 20230928

Docket: IMM-9086-21

Citation: 2023 FC 1310

Ottawa, Ontario, September 28, 2023

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

DANIEL MUNGAI KIBIKU

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Daniel Mungai Kibiku, is a citizen of Kenya and belongs to the Kikuyu tribe. He fled Kenya and claimed refugee protection in Canada, fearing threats and violence at the hands of the Mungiki criminal gang (i.e. Kikuyu tribal enforcers) and his half-uncles because of a land dispute.

[2] The Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada [IRB] dismissed the Applicant's refugee claim, while the IRB's Refugee Appeal Division [RAD] dismissed his appeal.

[3] The Applicant seeks judicial review of the RAD decision, raising the issues of procedural fairness and reasonableness. He argues that the decision was procedurally unfair because the RAD failed to provide the Applicant an opportunity to respond to a "new issue" considered by the RAD about whether the Applicant's documents were fraudulent. The Applicant also questions the reasonableness of the RAD's determination that the documentation was fraudulent.

[4] I agree with the Applicant that the RAD decision was procedurally unfair, and consequently, I grant this judicial review application. The more detailed reasons below deal only with the procedural fairness issue. I find it unnecessary in the circumstances to address the reasonableness issue.

II. Additional Background

[5] The Applicant asserts that, following the death of his grandfather, his half-uncles (sons of the grandfather and his first wife) inherited land, while the Applicant's father and another uncle (sons of the grandfather and his second wife) did not. The land dispute stems from this inheritance scenario.

[6] The Applicant further describes that attempts to confront the half-uncles led to threats and violence against the Applicant, his father and the other uncle. For example, the Applicant

was slapped by a half-uncle and warned not to pursue the matter, while his father was attacked at home and hospitalized for four days. In addition, the alleged murder of the Applicant's uncle, who apparently was found decapitated in his home, remains unsolved.

[7] The Applicant also states that, before coming to Canada, he fled to Mombasa where two men attacked him and told him he should never inquire about the land.

[8] The Applicant alleges that, since arriving in Canada, his wife who remained in Mombasa has been questioned about the Applicant's whereabouts.

III. Analysis

[9] I find the RAD decision must be set aside for lack of procedural fairness. As explained below, the RAD's determination regarding fraudulent documentation amounts to a "new issue" such that the RAD should have provided the Applicant with an opportunity to respond to the RAD's concerns about the documentation.

[10] Questions of procedural fairness attract a correctness-like standard of review: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 77. The focus of the reviewing court is whether the process was fair and just in the circumstances: *Chaudhry v Canada (Citizenship and Immigration)*, 2019 FC 520 at para 24; *Benchery v Canada (Citizenship and Immigration)*, 2020 FC 217 at para 9.

[11] Procedural fairness requires that the RAD puts any new issue the tribunal considers to an applicant so that the applicant can respond; in other words, the applicant must be given an opportunity to be heard regarding the new issue(s): *Mchedlishvili v Canada (Citizenship and Immigration)*, 2022 FC 229 at para 21, citing *R v Mian*, 2014 SCC 54 at para 54.

[12] A new issue is one that is “legally and factually distinct from the grounds of appeal advanced and cannot reasonably be said to stem from the issues raised on appeal”: *Lopez Santos v Canada (Citizenship and Immigration)*, 2021 FC 1281 at para 45. The RAD can make its own credibility findings against an applicant without notice, but it cannot “make additional findings or analyses on issues unknown to the applicant”: *Kwakwa v Canada (Citizenship and Immigration)*, 2016 FC 600 at para 24.

[13] Here, the RPD did not make any authenticity findings regarding the Applicant’s documents. The determinative issue for the RPD was credibility based on inconsistencies it found regarding key dates, timelines and central facts in the context of the Applicant’s Basis of Claim, supporting documentation, and testimony before the RPD. Although the RPD referred to the Applicant’s documents in the course of its credibility assessment, as is evident from the RPD decision, the RPD did not find the documentation fraudulent or non-genuine.

[14] On appeal, however, the RAD examined the Applicant’s supporting documentation closely, noted a number of irregularities in the Applicant’s documents and determined that several items were not genuine, thus bolstering the RAD’s negative credibility conclusion. These documents include, for example, the hospital report and treatment record pertaining to the attack

against the Applicant's father and the injuries he allegedly suffered, as well as a letter from the Area Chief to the Applicant's father. Based on its treatment of the former documents, the RAD assigned no weight to the medical examiner report regarding the uncle's injuries prior to his death. In my view, this introduces a layer of procedural unfairness to the weight the RAD assigned to the medical examiner report.

[15] An applicant's overall credibility may affect the weight given to documents, and consequently, the RAD may choose to give little weight to them. In this case, however, the RAD opted instead to challenge the documents' authenticity when the RPD undertook no such analysis. In the circumstances, I conclude that the RAD "venture[d] into the record to make further substantive findings" without giving notice to the parties and providing them with an opportunity to make submissions: *Husian v Canada (Citizenship and Immigration)*, 2015 FC 684 at para 10.

IV. Conclusion

[16] For the above reasons, I therefore grant the Applicant's judicial review application. The RAD decision is set aside and the matter will be redetermined by a different panel.

[17] Neither party proposed a question for certification and I find that none arises in the circumstances.

JUDGMENT in IMM-9086-21

THIS COURT'S JUDGMENT is that:

1. The Applicant's judicial review application is granted.
2. The November 15, 2021 decision of the Refugee Appeal Division is set aside and the matter will be redetermined by a different panel.
3. There is no question for certification.

"Janet M. Fuhrer"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-9086-21

STYLE OF CAUSE: DANIEL MUNGAI KIBIKU v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: FEBRUARY 1, 2023

JUDGMENT AND REASONS: FUHRER J.

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