Federal Court  Cour fédérale

Date: 20120606

Docket: IMM-5938-11

Citation: 2012 FC 697

Ottawa, Ontario, June 6, 2012

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

ALAIN MUTSHAMBA KABEYA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, Alain Mutshamba Kabeya, seeks judicial review of a negative decision by a Pre-Removal Risk Assessment Officer (the PRRA Officer), dated June 29, 2011. The PRRA Officer found that there was no more than a mere possibility that the Applicant would be at risk of persecution in the Democratic Republic of the Congo (DRC) and no serious reasons to believe that he would be in danger of torture, a threat to his life or cruel and unusual treatment or punishment as

required by sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

I. Background

[2] A citizen of the DRC, the Applicant arrived in Canada on September 5, 2000 and made a refugee claim on October 30, 2000. His claim was based on his father's involvement with the opposition party, L'Union pour la Démocractie et le Progrès Social (UDPS) as well as his escape from forced recruitment for the Congolese army. However, the Refugee Protection Division of the Immigration and Refugee Board (the Board) rejected his claim on the basis of credibility concerns on August 22, 2002.

[3] As a result of criminal convictions (including assault and breach of conditions) while in Canada, the temporary suspension of removals in place for the DRC no longer applies to him.

[4] The Applicant brought the application for this PRRA on July 27, 2007.

II. PRRA Officer's Decision

[5] In declining the application, the PRRA Officer noted that the Applicant was alleging the same fears as presented to the Board at his initial refugee hearing. The documents submitted relating to violence and the political situation in the DRC did not address the Applicant's specific situation

and did not allow the PRRA Officer to refute the Board's findings regarding the credibility of his allegations.

[6] The PRRA Officer concluded that "[a]lthough the applicant may face criminal acts in DRC, this reality applies to the entire population; it is not probative in the case of the applicant." Moreover, the Applicant had not demonstrated his membership in those groups reported to be discriminated against in the country, nor did he "demonstrate that the situation for him is any more difficult than for the majority of Congolese."

[7] Acknowledging the temporary suspension of removals by the Government of Canada, the PRRA Officer referred to the Applicant's criminal convictions and inadmissibility. It also stated "this does not give rise to an inference that there are personalized hardships for the entire Congolese population."

[8] Finally, the Applicant had not submitted any "personal and probative evidence" to support his allegations that his Canadian wife and son would be in danger in the DRC because of what occurred prior to his departure. The PRRA Officer was of the opinion that the same findings made against the Applicant would apply to his wife and son in the DRC.

III. Issues

[9] The Applicant raises the following issues:

(a) Did the PRRA Officer err in suggesting that the Applicant was alleging the same fears as presented to the Board?

(b) Did the PRRA Officer err by misstating evidence related to the Applicant's background that, in light of country documentation, was a key element of the decision?

(c) Did the PRRA Officer fail to apply the relevant test under section 96 of the IRPA?

IV. Standard of Review

[10] In general, the standard of review applicable to the assessment of a PRRA Officer is reasonableness (see for example *Hnatusko v Canada (Minister of Citizenship and Immigration)*, 2010 FC 18, 2010 CarswellNat 21 at paras 25-26). Certain questions of law that arise may, however, warrant the correctness standard (see for example *Franco v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1087, 2010 FC 1360 at paras 17-20).

V. Analysis

[11] The Applicant contests the PRRA Officer's suggestion that he was alleging the same fears as in his refugee claim before the Board. He insists that this is unreasonable because he raised fresh allegations regarding the ethnic dimension of the risk he would face in the DRC.

[12] The Respondent maintains that the Applicant failed to establish a link between his allegations and information contained in the documentary evidence presented to the PRRA Officer. None of the documents related directly to his situation. As regards the specific allegations of the ethnic dimension of the conflict, the Respondent insists that it was reasonable to conclude that this information has already been considered because, for the purposes of a PRRA under subsection 113(a) of the IPRA, applicants can only present new evidence that arose after the rejection of their refugee claim or that was not reasonably available or could not reasonably have been expected to be presented in the circumstances.

[13] While the Applicant could have been clearer in identifying the supposedly fresh allegations as to the ethnic dimension of the risk posed to him in the DRC, the additional written submissions before the PRRA Officer did refer to some ethnic-based issue based on the region where he was from and his membership in the Luba tribe.

[14] The Respondent raises a valid consideration from the point of the view of the PRRA Officer that this aspect of the risk might have been reasonably available at the time of the hearing and should not necessarily be considered as part of the PRRA. There is, however, no indication from

the PRRA Officer that this was the case. The Respondent is supplementing the existing reasons. It may be open for the PRRA Officer to conclude that these allegations could reasonably have been raised at the refugee hearing and indicate that the purpose of the PRRA is not to have a second determination on the refugee claim (*Kaybaki v Canada (Solicitor General of Canada)*, 2004 FC 32, [2004] FCJ no 27). It should nonetheless provide some indication that this is the case.

[15] As the decision stands, it is unclear whether the PRRA Officer truly considered or had reasons for disregarding such allegations as not being supported by the documents submitted. There are various questions that may arise regarding factors such as the credibility, relevance, newness and materiality of evidence submitted in support of a PRRA. According to Justice Karen Sharlow in *Raza v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385, [2007] FCJ no 1632 at paras 13-15, "[w]hat is important is that the PRRA officer must consider all evidence that is presented, unless it is excluded on one of the grounds stated."

[16] The Applicant further submits that the PRRA Officer erred in noting that he was from Kinshasa as opposed to Lubumbashi in the eastern region. In many cases, such misstatements would not prove central to the determination or constitute a reviewable error. Given the nature of the PRRA Officer's determination in this instance, however, it is a matter of some concern.

[17] The determination was based primarily on the PRRA Officer's insistence that the "applicant has failed to establish the presence of a personal risk to himself in the event that he is returned to DRC." Of particular relevance is the passage where the PRRA Officer makes the misstatement:

> Although the applicant may potentially face criminal acts in DRC, this reality applies to the entire population; it is not probative in the

> case of the applicant. Moreover, the applicant is alleging that he comes from Kinshasa, and according to Freedom House, "aside from the east, most parts of the country were relatively stable in 2009."

[18] The Applicant's evidence is nonetheless consistent that he comes from the Lubumbashi in the eastern region. It is also clear from the documentary evidence that particular issues have arisen in the eastern part of the country. The PRRA Officer should have at least considered whether the instability in the eastern region had any direct implications on the Applicant's situation. In light of the above misstatement, it is unclear whether proper consideration took place in this regard.

VI. Conclusion

[19] For these reasons, the application for judicial review is allowed. The matter is remitted back to the newly constituted panel of the Board for reconsideration.

JUDGMENT

THIS COURT'S JUDGMENT is that this judicial review is allowed and the matter is remitted back to a newly constituted panel of the Board for reconsideration.

" D. G. Near "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**IMM-5938-11**
STYLE OF CAUSE:	**KABEYA v MCI**
PLACE OF HEARING:	**TORONTO**
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