Federal Court  Cour fédérale

Date: 20140620

Docket: IMM-5559-13

Citation: 2014 FC 589

Ottawa, Ontario, June 20, 2014

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

KALALA PRINCE DEBASE BETOUKOUMESOU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] These reasons relate to an application for judicial review of a decision by a Citizenship and Immigration Canada (CIC) Officer refusing Mr. Kalala Prince Debase Betoukoumesou's application for a Pre-Removal Risk Assessment (PRRA). The application was heard in Toronto on May 8, 2014 together with a related application for judicial review of a negative decision regarding an application for permanent residence on humanitarian and compassionate (H&C)

grounds under s 25 of the *Immigration and Refugee Protection Act*, 2001 SC, c 27 [*IRPA*] for which a separate decision will be issued.

I. **BACKGROUND**

[2] Mr. Betoukoumesou is a 52 year-old citizen of the Democratic Republic of Congo (DRC). While living in the DRC, Mr. Betoukoumesou had a small transportation business with two minibuses and a small store. In 1990, he became a member of one of the major opposition parties, the *Union pour la démocratie et le progrès social* (Union for Democracy and Social Progress or UDSP). In September 1991, his shop was pillaged and destroyed by soldiers. From that moment on, he had difficulty providing for his family. In September 1992, he was introduced to someone who worked for the "*Service national d'intelligence et de protection"* (SNIP). Mr Betoukoumesou was eventually hired as a civilian driver for the SNIP. He drove military staff from their homes to the SNIP office in the morning and back home after work.

[3] On February 22, 1993, Mr. Betoukoumesou was asked by his supervisor to take part in an operation that turned out to be a mission to abduct three people. The supervisor ordered that any targets who resisted the abduction be killed. One of the targets was an individual who lived in the same neighbourhood as Mr. Betoukoumesou and who was a member of the political opposition. Mr. Betoukoumesou was recognized and, as a result, was threatened the next day at his home by a mob of approximately 20 people who were all armed with makeshift weapons. They set his house on fire. Mr Betoukoumesou escaped in his car. He spoke to his supervisor to report the incident and request protection and assistance, but this was refused.

[4] Mr. Betoukoumesou attempted to resign his position but this was refused. He says that he was arrested on March 15, 1993 by military men working for the Service d'action et de renseignement militaire (SARM). They found UDSP material when they arrested him and accused him of being a spy. He says he was held for four months by SNIP and routinely tortured. In August he was transferred to a prison where he says he was detained without trial for three years and tortured.

[5] In January 1997 he says he received a letter informing him that he was to be executed on March 15, 1997. He fled to Canada with his wife and four children and claimed asylum.

[6] On May 17, 1999 Mr. Betoukoumesou was found by the Immigration and Refugee Board (IRB) to be excluded from receiving refugee protection on the basis of the exclusion clause 1(F)(a) of the *Convention relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150, (entered into force 22 April 1954) [Refugee Convention]. He was found to have been complicit in SNIP's commission of crimes against humanity in the DRC. Specifically, he was found to have been an accomplice to the abductions of political opponents by armed militiamen, knowing that the militiamen's instructions were to kill any targets who resisted abduction. His wife and four children were granted asylum.

[7] Mr. Betoukoumesou's application for leave and for judicial review of the exclusion decision was dismissed. He filed the underlying application for a PRRA on July 18, 2006. An application for *mandamus* with respect to the PRRA application was denied leave on July 10, 2009.

II. **DECISION UNDER REVIEW**

[8] The officer noted that because the applicant had been found to be excluded from refugee protection, his PRRA could only be considered under s 97 of the IRPA in application of paragraph 113(d) of the IRPA.

[9] In his application, the applicant alleged that he was at risk on the basis of his membership in the UDSP, his former employment by the Mobutu regime, as well as because he had sent some family members in the DRC an article considered to be "subversive". Two of his family members had since disappeared and he claimed that he was wanted by the authorities.

[10] The officer observed that the documentary evidence indicated that individuals who were loyal to Mobutu were no longer persecuted unless they were linked to rebel groups, and that large numbers of Mobutu loyalists had returned to the DRC. The Officer therefore concluded that this ground, on which the applicant's family had been granted asylum, was no longer available today.

[11] The officer refused to consider one of the documents submitted as it was not "new" but pre-dated the applicant's hearing before the IRB.

[12] The officer held that the applicant's past activities as a member of the UDSP had not, on a balance of probabilities, made him a person of interest to the authorities since he had thereafter been hired by the SNIP. As for his present activities as a member of the UDSP, the officer

considered the applicant's submissions that his sister and brother had distributed a document he had sent them and thereafter disappeared, as well as the documentary evidence. The officer reviewed the documentary evidence and gave it little weight due to contradictions within and between the various pieces of evidence submitted in support of this allegation. As a result of the numerous contradictions relating to the applicant's recent activities as a member of the UDSP and the distribution of the "subversive" article, the officer gave no weight to the applicant's allegations relating to his membership in the UDSP.

[13] The officer gave little weight to a BBC article indicating that failed asylum seekers and individuals the authorities believed to be dissidents were interrogated and ran the risk of being detained. The officer held that the applicant had not established that the authorities would believe him to fall into either of these categories. Further, an IRB document indicated that nothing led to the conclusion that failed asylum seekers were persecuted by Congolese authorities, with the exception of individuals having or believed to have had a political past. The officer therefore held that the applicant would not, on the sole basis of being a failed asylum seeker, face the risks set out in s 97 of the IRPA.

[14] As for the general documentary evidence on state conditions, the officer held that these risks were generalized risks faced by the entire population. The officer further held that the applicant had not established that he fell into one of the categories of individuals who do face a personalized risk, such as journalists, politicians and human rights activists. Given the lack of evidence of a personalized risk, the officer held that there were not substantial grounds to believe

that removal would subject the applicant to a danger of torture, or a risk to his life or to a risk of cruel and unusual punishment.

III. **ISSUES**

[15] The applicant submits that the issue is whether the officer erred in law, made a mistake of fact, an error in fairness or exceeded jurisdiction. In my view, no error of law or excess of jurisdiction arises on the facts of this case. The case turns on the officer's review of the evidence and appreciation of the facts.

[16] The standard of review for PRRA decisions overall has been satisfactorily determined by the jurisprudence to be reasonableness: *Singh v Canada (Minister of Citizenship and Immigration)*, 2014 FC 11.

[17] In reviewing a decision against the reasonableness standard, the Court must consider the justification, transparency and intelligibility of the decision-making process, and whether the decision falls within a range of possible acceptable outcomes which are defensible in light of the facts and the law: see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR190 at para 47, and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 [*Khosa*] at para 59.

[18] Procedural fairness is implicated in this matter because the applicant argues that he should have been granted an interview. In that regard the standard of review is correctness. The

Court must determine whether the process followed by the decision-maker satisfied the level of fairness required in all of the circumstances: *Khosa*, above, at para 43.

IV. **ARGUMENTS AND ANALYSIS**

[19] The applicant submits that the officer erred in failing to consider a document that was found to have pre-dated the IRB hearing. This error stemmed from the applicant's mistake in creating an Index to the materials he submitted with his application. The date given in the Index was 1996 whereas it was, in fact, a 2006 document. The applicant submits that the officer would have realized the error had the officer in fact read the article. In my view, this error is not attributable to the officer. The error is repeated in the body of the submissions. In any event, the content of the article is similar to the general country documents which the officer did review. I find that it was not a material error as it cannot be said that the decision would have been different if the officer had considered the article as new.

[20] The credibility of the applicant's claims regarding his association with the UDSP before he left the DRC, was rejected by the officer although this was accepted by the IRB, the applicant submits. The officer found that he did not have a sufficient profile for the authorities to be interested in him despite his association with the UDSP and lengthy detention. It was unlikely that he would have obtained employment with SNIP if he had such a profile and unlikely that he would have worked for an organization the UDSP accused of being responsible for human rights abuses had he been active in the organization. This was a finding within the scope of the officer's discretion.

[21] The applicant asserts that it was unreasonable for the officer to give little weight to his affidavit on the basis that he was the interested party and that it was also unreasonable to dismiss the value of an article that he had cited in his affidavit and letters from non-governmental organizations.

[22] In my view, the officer's consideration of the applicant's evidence fell within the range of reasonableness and no breach of procedural fairness arises from the failure to conduct an interview. The officer provided a number of reasons as to why the evidence was given little weight and the weight to be given to the evidence is within the officer's discretionary decision-making power: *Garcia Cruz v Canada (Minister of Public Safety and Emergency Preparedness),* 2011 FC 853 at para 11.

[23] The questions raised by the officer did not go to the applicant's credibility but to the value of the supporting evidence. The officer does not state that she disbelieves the applicant but points to inconsistencies in the documents. The letter from the *Association Africaine de Défense des Droits de l'Homme* (ASADHO), for example, does not indicate how the organization would have known what the applicant's brother and sister allegedly said under torture. The letter from the UDPF is inconsistent with the allegation that he had previously been considered a traitor to that organization. The content of a letter from an organization styling itself as the "*Bill Clinton Foundation for Peace*" is inconsistent with the applicant's claim. The officer reasonably observes that it is easy to obtain documents at low cost in the DRC. It was also open to the officer to wonder why the applicant would be at risk for sending an article to his siblings from a journal published in Kinshasa a year earlier.

[24] The officer misunderstood a letter from the *Ligue Nationale pour les Elections Libres et Transparentes* (LINELIT) with regard to the transfer of documents in Sun City, South Africa that are said to have caused the arrest of the applicant's brother and sister in the DRC. The letter is confusing as to the provenance of the documents but suggests that they were sent to the applicant. The officer read that as meaning that the applicant was present in Sun City when he could not have been. In any event, this error is not, in itself, sufficient to find the decision as a whole unreasonable.

[25] At the time the decision was rendered, the officer had the negative H&C prepared by a different officer in the PRRA file. The applicant had yet to be notified of that decision and argues that this was a breach of procedural fairness citing *Bhagwandass v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 49, [2001] FCJ no 341 (FCA) [*Bhagwandass*].

[26] *Bhagwandass* concerned the failure to disclose a Ministerial Opinion Report and Request for a Minister's Opinion in the context of a danger assessment. It was clear that the documents contained highly relevant information that the decision maker relied upon in making the discretionary decision and that fairness required that the applicant be provided with an opportunity to respond. That is not the case here. The information in the H&C decision was available to the applicant and had, for the most part, been submitted by him in his application for an exemption. In those circumstances, the failure to disclose the H&C decision prior to the determination of the PRRA application did not constitute a breach of procedural fairness.

[27] In the result, I am satisfied that the decision under review fell within the range of possible acceptable outcomes which are defensible in light of the facts and the law and that the application must be dismissed.

[28] No questions were proposed for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed. No questions are certified.

"Richard G. Mosley"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5559-13
STYLE OF CAUSE:	KALALA PRINCE DEBASE BETOUKOUMESOU V THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 8, 2014
JUDGMENT AND REASONS:	MOSLEY J.
DATED:	JUNE 20, 2014

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