Federal Court Cour fédérale

Date: 20150402

Docket: IMM-6422-14

Citation: 2015 FC 417

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, April 2, 2015

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

TELESPHORE DEREVA
EDITH KANKINDI
NANCY SIBYLLE UWASE
ANGE CEDRICK KAYIGIRE
ARMAND LOIC DEREVA HIRWA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Mr. Dereva and his wife and children are citizens of Rwanda. They came to Canada in 2007, where they applied for refugee protection status. At that time, the principal applicant was facing charges in Rwanda for murder and looting during the genocide. While their application

for refugee protection status was being reviewed, the principal applicant was cleared of the charges by a Gacaca court. Their refugee protection claim was denied by the Refugee Protection Division in June 2010.

[2] Shortly after their refugee protection claim was denied, an international warrant was issued for the arrest of the principal claimant. This warrant included new charges related to other alleged crimes committed during the genocide.

[3] In August 2011, the applicants made an application for a Pre-Removal Risk Assessment [PRRA]. In a decision handed down on June 2014, an officer rejected the PRRA application by the applicants on the grounds that they had failed to establish their risk of persecution or torture, or of cruel and unusual treatment or punishment should they return to Rwanda.

[4] This is an application for judicial review of the PRRA officer's decision.

[5] Several issues are raised in this judicial review.

[6] First, the principal applicant maintains that he should have been entitled to a hearing pursuant to section 167 of the *Immigration and Refugee Protection Regulations* because his credibility was at issue. The respondent believes that the principal applicant's credibility was not seriously in question, and that in fact the issue was rather one of lack of evidence supporting the applicants' claims. Thus, no hearing was necessary.

[7] Second, the principal applicant maintains that the decision was unreasonable because several documents filed in evidence contradicted the conclusion reached by the PRRA officer in regard to the risks that he and his family would face if they returned to Rwanda. In support of this argument, the applicant refers to *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35. This decision recognized that an officer is presumed to have taken into consideration all of the evidence in the record when making the decision. If there is any evidence that would lead to a conclusion other than the one reached by the officer, reasons must be provided to explain why the contrary evidence was rejected.

[8] This having been said, I do not believe that I need to comment on the first two issues raised because it is really the third issue that is decisive in this case.

I. <u>Extrinsic evidence and procedural fairness</u>

[9] I agree with the principal applicant that in handing down his decision, the PRRA officer breached procedural fairness. One of the important pieces of evidence in this case is the letter dated November 13, 2013, addressed to the President of the Security Council by the President of the International Criminal Tribunal for Rwanda [ICTR]. This letter is not in the file and was written after the PRRA application was submitted. The applicants did not have an opportunity to comment on it. This letter is key because it concerns the ICTR's decision to transfer some of its files to the Rwandan judicial system.

[10] The PRRA officer appears to have believed the information contained in the letter without questioning it. Based on this assessment of the contents of the letter, he concluded that if the applicant were to return to Rwanda, he would be entitled to a fair trial.

[11] If the applicants had had the opportunity to respond to this report, they would have been able to file a report by Professor Filip Reyntjens, prepared for *Brown v Government of Rwanda*, [2009] EWHC 770 (Admin), which has since been updated. In this report, Professor Reyntjens maintains that the ICTR files were transferred to the Rwandan judicial system without evidence of any legislative and procedural changes in Rwanda. In this situation, this report could cast doubt on the conclusion reached by the officer and support the applicants' statements.

[12] One of the fundamental principles of our judicial system requires that a party to any proceeding have the opportunity to respond to allegations made about him or her. Our Court has often had to comment on whether the use of extrinsic evidence could lead to procedural unfairness. *Mancia v Canada (Minister of Citizenship and Immigration)*, [1998] 3 FC 461 (FCA), [1998] FCJ No 565 (QL), is the leading case on this question. Writing for the Court, Décary J. held as follows (at paragraph 27):

> a) with respect to documents relied upon from public sources in relation to general country conditions which were available and accessible at Documentation Centres at the time submissions were made by an applicant, fairness does not require the Post Claims Determination Officer to disclose them in advance of determining the matter;
>
> b) with respect to documents relied upon from public sources in relation to general country conditions which became available and accessible after the filing of an applicant's submissions, fairness requires disclosure by the Post Claims Determination Officer where they are novel and significant and where they evidence

> changes in the general country conditions that may affect the decision.

[13] In this case, the parties agree that there appears to have been a lack of consensus in our Court regarding the use of documents that are not in the sources in relation to general country conditions, and those that can be found through Internet search engines. In this regard, the applicants are referring to *Mazrekaj v Canada (Citizenship and Immigration)*, 2012 FC 953, and *Lopez Arteaga v Canada (Citizenship and Immigration)*, 2013 FC 778. The respondent refers to *De Vazquez v Canada (Citizenship and Immigration)*, 2014 FC 530; *Pzarro Gutierrez v Canada (Citizenship and Immigration)*, 2013 FC 623; *Singh v Canada (Citizenship and Immigration)*, 2009 FC 774; and *Al Mansuri v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 22.

[14] In *Lopez Arteaga*, above, Justice Gagné commented on one of my previous decisions, *Zamora v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1414. In that case, I commented on *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3, where the Court writes the following at paragraphs 122 and 123:

> [122] We find that a person facing deportation to torture under s. 53(1)(*b*) must be informed of the case to be met. Subject to privilege or similar valid reasons for reduced disclosure, such as safeguarding confidential public security documents, this means that the material on which the Minister is basing her decision must be provided to the individual, including memoranda such as Mr. Gautier's recommendation to the Minister. Furthermore, fundamental justice requires that an opportunity be provided to respond to the case presented to the Minister. While the Minister accepted written submissions from the appellant in this case, in the absence of access to the material she was receiving from her staff and on which she based much of her decision, Suresh and his counsel had no knowledge of which factors they specifically needed to address, nor any chance to correct any factual

> inaccuracies or mischaracterizations. Fundamental justice requires that written submissions be accepted from the subject of the order after the subject has been provided with an opportunity to examine the material being used against him or her. The Minister must then consider these submissions along with the submissions made by the Minister's staff.
>
> [123] Not only must the refugee be informed of the case to be met, the refugee must also be given an opportunity to challenge the information of the Minister where issues as to its validity arise. Thus the refugee should be permitted to present evidence pursuant to s. 19 of the Act showing that his or her continued presence in Canada will not be detrimental to Canada, notwithstanding evidence of association with a terrorist organization. The same applies to the risk of torture on return. Where the Minister is relying on written assurances from a foreign government that a person should not be tortured, the refugee must be given an opportunity to present evidence and make submissions as to the value of such assurances.

[15] In *Zamora*, I also refer to *Porto Seguro Companhia De Seguros Gerais v Belcan S.A.*, [1997] 3 S.C.R. 1278, where Justice McLachlin (her title at the time) wrote as follows in paragraphs 29 and 36:

> [29] The rule against expert evidence where a judge sits with assessors in admiralty cases suffers from four defects. First, the prohibition on expert evidence violates the principle of natural justice of the right to be heard, *audi alteram partem*. This principle confers the right on every party to litigation to bring forth evidence on all material points. Trial judges possess a discretion to limit evidence or exclude evidence where its relevance is outweighed by the prejudice it may cause to the trial process. But the principle that every litigant has a right to be heard goes against the exclusion of an entire category of evidence. To say that a litigant cannot call any expert evidence on matters that are at issue in the litigation is to deny the litigant's fundamental right to be heard.
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> [36] This, as I conceive it, is the modern conception of how assessors may aid a trial judge. There is no longer any justification for assessors to advise judges on matters of fault without disclosure to, and opportunity for comment by, the parties. Nor is there justification for preventing the parties from calling expert witnesses. The case for reform of the rule on both counts is strong.

[16] It is not enough to claim in this case that certain documents in the docket should have drawn the attention of counsel for the applicant to the information contained in the letter from the President of the ICTR or towards information on the Internet. In fact, a Google search of "Rwanda", "*génocide*" and "*Nations Unies*" yields more than 300,000 results in French. In English, the equivalent search would yield more than 500,000 results. I agree with counsel for the applicant when she claims that there is a limit as to how much so-called "public" information an applicant (or his or her counsel) has to be aware of.

[17] Although both of these are decisions about intellectual property law, I believe that the following quotes drawn from *Remo Imports Ltd. v Jaguar Cars Ltd.*, 2007 FCA 258, and *Janssen-Ortho Inc. v Canada (Health)*, 2010 FC 42, support this reasoning.

[18] In *Remo Imports Ltd.*, Justice Létourneau writes as follows at paragraph 20:

> [20] I should add that, as an American appellate judge once said, judges are not ferrets: cited in *Dow Agrosciences Canada Inc. v. Philom Bios Inc.*, 2007 ABCA 122, at paragraph 53. It cannot be expected that appeal judges will embark on a search of the record to find pieces of evidence which could support or particularize broad allegations made by a party to the appeal.
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> [Emphasis added.]

[19] In *Janssen-Ortho*, Justice Zinn addresses the issue of disclosure in a patent case, writing in the following manner at paragraph 119:

> . . . "jurisprudence does not permit an unescorted and unchaperoned romp through the disclosure."

[20] That being said, a document was available in the file, which the PRRA officer relied on, entitled *Rwanda 2013 Human Rights Report* prepared by the US Department of State. This report acknowledges that certain problems still exist in Rwanda's judicial system. It reads as follows:

> The most important human rights problems in the country remained the government's targeting of political opponents and human rights advocated for harassment, arrest, and abuse; disregard for the rule of law among security forces and the judiciary; restrictions on civil liberties . . .

At the very least, this extract should have caused the PRRA officer to question the capacity of the Rwandan judicial system to ensure that the principal applicant received a fair trial.

[21] It is possible that the decision would have been the same if the applicants had had the opportunity to provide their comments. In that case, the question would have been whether the decision was reasonable. However, the question in this case does not concern the reasonableness of the decision, but rather the breach of natural justice. Justice Le Dain held as follows in *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 at paragraph 23:

> . . . I find it necessary to affirm that the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing.

[22] Consequently, the application for judicial review will be allowed. Counsel did not propose any serious questions of general importance, and none will be certified.

JUDGMENT

FOR THE REASONS GIVEN

THE COURT ORDERS AND ADJUDGES that

1. The application for judicial review is allowed.

2. The decision by the Citizenship and Immigration Canada lead immigration officer dated June 23, 2014, is set aside, and the case is referred back to another immigration officer for redetermination.

3. There is no serious question of general importance to certify.

"Sean Harrington"
Judge

Certified true translation
Johanna Kratz, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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