Federal Court  Cour fédérale

Date: 20170130

Docket: IMM-2651-16

Citation: 2017 FC 111

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, January 30, 2017

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

EDDY MANDEKO MANDJO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] against a decision made by the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada on May 27, 2016, affirming a decision rendered by the Refugee Protection Division [RPD] concluding that the applicant is not

a Convention refugee or a person in need of protection. For the reasons set out below, I do not agree with the applicant's arguments and will dismiss this application.

II. Facts

[2] The applicant is 28 years old and is a citizen of the Democratic Republic of the Congo [DRC]. He alleges the following: Between December 12, 2011, and February 26, 2015, the applicant lived in Canada without interruption on a student visa that expired in August 2015. He returned to the DRC on February 26, 2015, to visit his family and relax.

[3] On March 4, 2015, the applicant participated in a brainstorming session, during which he shared ideas with friends about the political situation in the DRC from a North American perspective. That same day, the applicant and his friends were arrested and detained by police, accused of conspiracy, insurgency and civil disobedience. Some items of value were confiscated from him, such as his watch and his money, as well as his membership card in the Union for Democracy and Social Progress (Union pour la démocratie et le progrès social) [UDPS], an opposition political party in the DRC. During his detention, he was tortured by the police authorities.

[4] On the night of March 6 to 7, 2015, the applicant was released and went into hiding at his grandmother's home. The applicant did not go to a hospital. On March 7, 2015, the applicant contacted a lawyer to file a complaint about this violation of his civil rights.

[5] On March 9, 2015, the applicant left his country of origin with the help of a friend of his father to travel to Canada and subsequently claimed refugee protection.

[6] The RPD's decision was unfavourable to the applicant, who appealed it before the RAD.

III. Decision under judicial review

[7] The RAD first addressed the issue of the admissibility of the new evidence, including a statement from a lawyer in the DRC, a UDPS membership card and a letter from the Fédération de l'UDPS au Canada. The RAD found that those documents were inadmissible, since they did not meet any of the admissibility criteria set out in subsection 110(4) of the IRPA. Pursuant to subsection 110(6) of the IRPA, the RAD found that it was unnecessary to hold a hearing, since no new evidence was admissible.

[8] After describing the standard of review that it had to apply to the RPD decision, the RAD dismissed the applicant's arguments, which were based on breaches of procedural fairness, particularly that the RPD allegedly did not consider all the evidence and based its decision on speculations.

[9] The RAD subsequently confirmed most of the RPD's findings on the applicant's credibility. The RAD found that the applicant had not demonstrated that he belonged to the UDPS on the balance of probabilities. In addition, the applicant apparently did not establish the authenticity of the photographs submitted, which show the applicant and the people who tortured

him and were allegedly taken during his detention. Lastly, the RAD found that the story of the applicant's release and departure was implausible.

[10] However, the RAD set aside the RPD's finding as to the implausibility of how certain documents were obtained, including minutes of a hearing from the police. Nevertheless, the RAD gave those documents no probative value, considering the incongruities and inconsistencies, which are addressed below.

[11] Given the rejection of the additional evidence and the findings that were made as to the implausibility of the applicant's story and his credibility, the RAD dismissed the appeal.

IV. Issues

[12] The applicant alleges that the RAD erred by (a) refusing to admit additional evidence and hold a hearing; (b) breaching its duty of procedural fairness; and (c) making adverse findings as to his credibility.

V. Standard of review

[13] The parties acknowledge that the standard of review that applies to RAD decisions for questions of fact and questions of mixed fact and law is that of reasonableness (*Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93, at paragraphs 32 and 35; *Yeboah v. Canada (Citizenship and Immigration)*, 2016 FC 780, at paragraph 19). However, issues of

procedural fairness are subject to the correctness standard of review (*Dunsmuir v. New Brunswick*, 2008 SCC 9, at paragraph 51 [*Dunsmuir*]).

VI. Analysis

A. *Inadmissibility of additional evidence and the holding of a hearing*

[14] Subsection 110(4) of the IRPA provides that, for appeals before the RAD, only the following new evidence is admissible: (a) evidence that arose after the RPD's rejection of the claim; (b) evidence that was not reasonably available at the time of the claim before the RPD; or (c) evidence that was available at the time of the claim before the RPD, but that the person could not reasonably have been expected in the circumstances to have presented at the time of the rejection. The Court of Appeal recently established that the conditions for admissibility under subsection 110(4) of the IRPA are inescapable and leave no room for discretion on the part of the RAD (*Canada (Citizenship and Immigration) v. Singh*, 2016 FCA 96, at paragraph 35 [*Singh*]). However, the following passage from the Court of Appeal judgment should be noted: "[i]t goes without saying that the RAD always has the freedom to apply the conditions of subsection 110(4) with more or less flexibility depending on the circumstances of the case" (at paragraph 64).

[15] The applicant maintains that the RAD unreasonably rejected three pieces of evidence, including a statement from a lawyer in the DRC, a copy of the UDPS membership card and a letter from the Fédération de l'UDPS au Canada [the Fédération], since they allegedly met the criteria set out in subsection 110(4), as well as those established in *Raza v. Canada (Citizenship*

and Immigration), 2007 FCA 385. The applicant submits that this evidence was not presented to the RPD because it was obtained after the hearing. The applicant argues that if the RPD could have considered that evidence, it would have made a different decision. In support of his argument, the applicant cites *Olowolaiyemo v. Canada (Citizenship and Immigration)*, 2015 FC 895, at paragraph 19, in which Justice Gascon explains the disjunctive, rather than conjunctive, nature of subsection 110(4).

[16] In turn, the Minister argues that it was reasonable for the RAD to reject the additional evidence. Relying on *Abdullahi v. Canada (Citizenship and Immigration)*, 2016 FC 260, at paragraphs 14–15, the Minister maintains that the applicant did not fulfil his obligation to submit the best possible evidence before the RPD and, as a result, attempt to address the deficiencies in his evidence.

[17] There is no doubt that the RAD analyzed the applicant's explanations as to why the evidence was not submitted before the RPD in a timely manner: delays beyond his control and the trauma that he allegedly suffered as a result of his detention in the DRC; communication difficulties with contacts in the DRC; and the fear that those contacts would in turn be arrested by the police.

[18] The RAD found those explanations to be insufficient. In fact, the applicant contacted those people—namely, the lawyer (through the applicant's father) and the Fédération—and they provided evidence to the applicant, well before the RPD's decision was published.

[19] First, regarding the lawyer's statement, the applicant has known the lawyer in question since March 7, 2015. Aside from the time, trauma and communication difficulties, he provides no valid explanation to justify why the statement had not been obtained and submitted before the RPD. In addition, the applicant did not file any evidence showing attempts at communication before his claim was rejected by the RPD.

[20] Second, the RAD explains that the UDPS membership card, which was allegedly confiscated by the police, was apparently issued in March 2008. The applicant does not give any explanation to clarify why the card, which was allegedly confiscated by the police on March 4, 2015, was unavailable before the RPD denied his claim, but was available to the RAD.

[21] Lastly, the RAD rejected the letter from the Fédération, since the applicant has been a member of the Ottawa-Gatineau section since March 9, 2015. The applicant does not explain how his trauma or his difficulties communicating with contacts in the DRC prevented him from obtaining this letter in Canada well before the RPD denied his claim.

[22] At paragraph 54 of *Singh*, the Court of Appeal confirms that "[t]he role of the RAD is not to provide the opportunity to complete a deficient record submitted before the RPD, but to allow for errors of fact, errors in law or mixed errors of fact and law to be corrected." Moreover, in *Ketchen v. Canada (Citizenship and Immigration)*, 2016 FC 388, at paragraph 23, the rejection of additional evidence submitted by the applicant was deemed to be reasonable, given that the explanation provided to justify the delay was vague and general in nature.

[23] In this case, I find that it was reasonable for the RAD to conclude that the applicant's explanations did not justify the failure to obtain and submit the evidence in question before the RPD. In addition, in accordance with subsection 110(6) of the IRPA, since there is no additional evidence to consider, the RAD reasonably found that there was no need to hold a hearing (*Malambu v. Canada (Citizenship and Immigration)*, 2015 FC 763, at paragraph 36).

B. *Did the RAD breach its duty of procedural fairness?*

[24] The applicant alleges in a general and vague manner that the RAD should have granted him a hearing, since it partially set aside the RPD's decision and then gave no probative value to certain documents the applicant submitted before the RPD, including the minutes of a hearing. The applicant does not elaborate on that argument, either in fact or in law. Since there are no breaches whatsoever of procedural fairness, and given the lack of reasoning for this argument, I find that it must be rejected.

C. *Are the findings regarding the applicant's credibility reasonable?*

[25] The applicant states that the RAD's findings regarding his credibility are unreasonable. More specifically, the applicant argues that the decision is unreasonable for numerous reasons, including the fact that the administrative decision-maker: (i) wrote that the applicant responded in a hesitant manner and that there were contradictions in his account, with no justification; (ii) created a contradiction that does not exist in the facts regarding the applicant's failure to obtain his membership card; (iii) contrary to *Maldonado v. Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 (FCA) [*Maldonado*], declared without reason that the applicant

was not a member of the UDPS and erred by judging that the absence of evidence regarding his membership in the UDPS undermined his credibility; (iv) did not understand how the photographs submitted by the applicant constituted proof of his detention; and (v) made findings about the early date of the applicant's flight that were based on pure speculation.

[26] The Minister argues that the RAD's credibility findings are not erroneous. I agree with the Minister, for the following reasons.

[27] The applicant rightly states that, in light of *Maldonado*, an applicant's allegations are presumed to be true. However, the principles arising from *Maldonado* set forth an exception to that presumption if the facts provide a reason to doubt the truthfulness of the applicant's testimony. Moreover, the applicant is right to note that our Court stated that implausibility findings should be made only in the clearest of cases (*Yang v. Canada (Citizenship and Immigration)*, 2016 FC 543, at paragraph 10; *Cao v. Canada (Citizenship and Immigration)*, 2016 FC 669, at paragraph 32).

[28] It should also be noted that certain justices of our Court have recently made observations regarding plausibility, such as Justice Annis, who wrote that "negative plausibility findings, be they related to credibility or otherwise, are essentially the decision-maker's rejection of an alleged inferential fact by a party required to be made on a simple balance of probabilities. When such finding is under review by the Court, it is subject to the same deference owed to any factual finding by an administrative tribunal" (*Bercasio v. Canada (Citizenship and Immigration)*,

2016 FC 244, at paragraph 29; see also the remarks of Justice Shore in *Muhammad v. Canada (Citizenship and Immigration)*, 2016 FC 498, at paragraph 17).

[29] Similarly, according to Justice Kane, "whether the RPD made a plausibility finding or a credibility finding makes no difference, as the finding relates to . . . credibility. . ." (*Demberel v. Canada (Citizenship and Immigration)*, 2016 FC 731, at paragraph 42). Moreover, Kane J., at paragraph 33 of *Yathavarajan v. Canada (Citizenship and Immigration)*, 2014 FC 297 (citing *Aguebor v. Canada (Minister of Employment and Immigration)* (1993), 10 NR 315 (FCA)), states that the administrative tribunal can determine the plausibility of an applicant's entire testimony, and that its findings are entitled to some deference.

[30] Evidently, the credibility findings must be well-reasoned by the administrative decision-maker and must fall within the range of acceptable and reasonable outcomes, as established in *Dunsmuir*. In this case, I find that the RAD's credibility findings are well-reasoned, and, considered as a whole, the decision is reasonable.

[31] First, the RAD considered the principles established in *Maldonado* and, referring to *Magyar v. Canada (Citizenship and Immigration)*, 2015 FC 750, at paragraphs 34–36, stated that the absence of certain evidence may be a factor when the RPD makes its findings as to the claimant's credibility and that the burden is on the claimant to establish the elements of his or her refugee claim. The RAD subsequently found that, given the particular facts of this case, the applicant's testimony on his membership in the UDPS alone was not satisfactory.

[32] I concur that, when considered in isolation, this finding may appear problematic. However, the RAD states at paragraph 41 of its decision that the absence of the membership card from the evidence on record was not the sole ground for its finding that the applicant's account is implausible.

[33] As for the photographs that were allegedly taken by the applicant's cousin while he was detained, I conclude that the RAD's findings are reasonable. Given the limited value of the applicant's responses as to the origin of those photographs (that is, how the photographs were taken by the cousin, obtained by the applicant's father and then sent to the applicant without any interference from state authorities), I find that it would be inappropriate for our Court to intervene in this case.

[34] The RAD went on to consider certain other documents filed by the applicant, namely a document entitled [TRANSLATION] "Note from the OPJ" and the minutes of a summary hearing of the applicant and his friends following their arrest. The RAD disagreed with the RPD regarding the implausibility of how counsel for the applicant had obtained the documents. However, the RAD gave them no probative value given the disparities between the documents, particularly the inconsistency in the applicant's contact information that appears on the minutes and that listed on other documents. In addition, the RAD considered the fact that the minutes do not report any seizures of property by the police, that the questions asked by police as they appear in the minutes do not specifically relate to the facts alleged by the applicant and, lastly, that the note from the OPJ is not dated.

[35] Lastly, the RAD considered the airplane ticket from the advance flight. However, in light of other findings on the applicant's credibility, the panel found that the airplane ticket on its own was insufficient evidence to establish the facts alleged.

[36] It is not open to this Court to reassess all the evidence when the RAD's reasoning and conclusions are intelligible and transparent and are supported by the evidence on record (*Vigan v. Canada (Citizenship and Immigration)*, 2016 FC 398, at paragraph 15).

VII. Conclusions

[37] In light of my reasons presented above and the jurisprudence on which I rely, I find that the RAD's conclusions in this case are based on the evidence in the record and that its assessment of that evidence, when considered as a whole, is reasonable. As a result, this application for judicial review is dismissed. No question is certified, and no costs are awarded.

JUDGMENT

THE COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;
2. No questions for certification were raised by the parties, and none arise from this application;
3. No costs are awarded.

"Alan S. Diner"
Judge

Certified true translation
This 22nd day of October 2019

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2651-16
STYLE OF CAUSE:	EDDY MANDEKO MANDJO v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	OTTAWA, ONTARIO
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Appendix

The following sections of the IRPA are applicable:

Appeal to Refugee Appeal Division	Appel devant la Section d'appel des réfugiés
110 […]	110 […]
Evidence that may be presented	Éléments de preuve admissibles
(4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.	(4) Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet.
Hearing	Audience
(6) The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3)	(6) La section peut tenir une audience si elle estime qu'il existe des éléments de preuve documentaire visés au paragraphe (3) qui, à la fois :
(a) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal;	a) soulèvent une question importante en ce qui concerne la crédibilité de la personne en cause;
(b) that is central to the decision with respect to the refugee protection claim; and	b) sont essentiels pour la prise de la décision relative à la demande d'asile;
(c) that, if accepted, would justify allowing or rejecting the refugee protection claim.	c) à supposer qu'ils soient admis, justifieraient que la demande d'asile soit accordée ou refusée, selon le cas.