Federal Court  Cour fédérale

Date: 20180406

Docket: IMM-1933-17

Citation: 2018 FC 371

Ottawa, Ontario, April 6, 2018

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

AKLIL WELDU AZBAHA (ALSO KNOWN AS AKLILU WOLDU AZBAHA)

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Azbaha is a citizen of Eritrea who sought to enter Canada in March 2017 using a stolen Swedish passport. Although he initially claimed to be a Swedish national he later reported his purpose for entering Canada was to make a refugee claim. It was subsequently determined he was travelling with another individual who was found to be holding Mr. Azbaha's Swiss

residence card, driver's license, and two cellphones. The cellphones contained many photographs of various identity documents and passports, identity documents Mr. Azbaha claimed belonged to family members.

[2] Mr. Azbaha initially reported that he had not previously claimed refugee status. He later admitted to having obtained Convention refugee status in Switzerland. The Minister's Delegate [Delegate] determined that Mr. Azbaha's refugee claim was ineligible to be referred to the Refugee Protection Division [RPD] as he had been recognized as a Convention refugee by Switzerland and could be returned to Switzerland.

[3] Following this determination Mr. Azbaha was arrested and detained on the grounds that it was unlikely he would appear for removal. He was also charged with three offences under the *Immigration and Refugee Protection Act*, SC 2001 c. 27 [IRPA] relating to possession and use of fraudulent documents and misrepresentation.

[4] Mr. Azbaha seeks judicial review of the Delegate's determination that his refugee claim was ineligible. He submits that the process undertaken in determining whether his refugee claim was eligible for referral to the RPD was procedurally unfair. He further argues that the ineligibility determination was unreasonable.

[5] Having carefully reviewed and considered the parties submissions and the record, I am unable to conclude that the process was procedurally unfair or that the determination reached was unreasonable. The application is dismissed for the reasons that follow.

II. Applicable legislation

[6] Refugee claims and eligibility determinations are governed by IRPA sections 99-101. A claim for refugee protection may be initiated by a person at a port of entry:

99 (1) A claim for refugee protection may be made in or outside Canada.	**99 (1)** La demande d'asile peut être faite à l'étranger ou au Canada.
[…]	[…]
(3) A claim for refugee protection made by a person inside Canada must be made to an officer, may not be made by a person who is subject to a removal order, and is governed by this Part.	**(3)** Celle de la personne se trouvant au Canada se fait à l'agent et est régie par la présente partie; toutefois la personne visée par une mesure de renvoi n'est pas admise à la faire.

[7] Within three working days after having received a claim for refugee protection pursuant to subsection 99(3) the officer shall determine if the claim is eligible to be referred to the RPD. The claimant has the burden of proving the claim is eligible and is obligated to answer truthfully all questions posed for that purpose:

100 (1) An officer shall, within three working days after receipt of a claim referred to in subsection 99(3), determine whether the claim is eligible to be referred to the Refugee Protection Division and, if it is eligible, shall refer the claim in accordance with the rules of the Board.	**100 (1)** Dans les trois jours ouvrables suivant la réception de la demande, l'agent statue sur sa recevabilité et défère, conformément aux règles de la Commission, celle jugée recevable à la Section de la protection des réfugiés.
(1.1) The burden of proving that a claim is eligible to be referred to the Refugee Protection Division rests on the claimant, who must answer	**(1.1)** La preuve de la recevabilité incombe au demandeur, qui doit répondre véridiquement aux questions qui lui sont posées.

truthfully all questions put to them.

[8] A claim is ineligible for referral to the RPD where the claimant has been recognized as a Convention refugee by a country other than Canada and can be sent or returned to that country:

101 (1) A claim is ineligible to be referred to the Refugee Protection Division if	**101 (1)** La demande est irrecevable dans les cas suivants :
[…]	[…]
(d) the claimant has been recognized as a Convention refugee by a country other than Canada and can be sent or returned to that country;	**d)** reconnaissance de la qualité de réfugié par un pays vers lequel il peut être renvoyé;

III. Issues

[9] The application raises the following two issues:

1) Was the process unfair? And

2) Was the decision unreasonable?

IV. Standard of Review

[10] Mr. Azbaha submits, and I agree that in considering issues of procedural fairness the Court shall apply a correctness standard of review (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Mission Institution v Khela*, 2014 SCC 24 at para 79). The decision that Mr. Azbaha's claim was ineligible for referral is a question of mixed law and fact that is to be reviewed against a standard of reasonableness (*Wangden v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1230 at para 17).

V. Analysis

A. *Was the process unfair?*

(1) Fresh Evidence

[11] Both parties seek to place evidence before the Court that was not before the Delegate to address the issue of fairness. Mr. Azbaha seeks to rely upon a series of email exchanges between Officer Syed, an Inland Enforcement Officer with the Canada Border Services Agency, and the Consulate General of Switzerland. He submits that the email exchange took place after the ineligibility decision was made and was an attempt to bolster the ineligibility decision. The respondent seeks to rely on the affidavit of Officer Syed dated October 26, 2017 addressing the purpose and nature of his email exchange with the Consulate General of Switzerland.

[12] While new or fresh evidence is generally not admissible on judicial review, there are exceptions to the general rule. Among the recognized exceptions is "evidence relevant to an issue of natural justice, procedural fairness, improper purpose or fraud that could not have been placed before the administrative decision-maker and that does not interfere with the role of the administrative decision-maker as merits-decider" (*Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at para 25). In this case the evidence is advanced in support of or in response to an alleged breach of fairness. It falls within the scope of the recognized exception identified above.

[13] I have considered the fresh evidence for the purpose of addressing the procedural fairness issue.

(2) The Process

[14] Mr. Azbaha submits the process by which he was determined ineligible was flawed and his rights under section 7 of the *Charter of Rights and Freedoms* and para 2(e) of the *Canadian Bill of Rights* were infringed. He argues that on March 10, 2017, the date his claim was found to be ineligible for referral to the RPD, inquiries had not been made with Switzerland to determine his status or his ability to return to Switzerland. He points to the email exchanges between Officer Syed and the Consulate General of Switzerland to show that these inquiries ultimately were made but only after he was found ineligible. He argues this renders the process unfair. I disagree.

[15] I have reviewed the email exchange Mr. Azbaha relies upon. I note that the inquiry was not made by the Delegate who determined the claim was ineligible for referral to the RPD, but by Officer Syed, an Inland Enforcement officer. Officer Syed's affidavit states that his "communications with the Swiss consulate were to determine whether they could issue a Travel Document for the applicant so that he could be returned to Switzerland…My communications with the Swiss consulate had nothing to do with the ineligibility decision that was made on March 10, 2017." Officer Syed's evidence is consistent with the content of the email exchange.

[16] The respondent does not rely on the email exchange to support the reasonableness of the ineligibility decision. Instead the respondent relies upon the information and evidence gathered in the course of the evaluation of Mr. Azbaha's refugee claim in the period preceding the March 10, 2017 decision.

[17] There is no basis to conclude that the email inquiries seeking the issuance of a valid travel document were undertaken to bolster the decision previously made. Routine inquiries made with the Consulate for the purposes of effecting removal were not part of the decision-making process in issue nor have those inquires been relied on to support the decision that had been previously made. There was no breach of procedural fairness and I have therefore not considered submissions alleging a breach of the *Charter* or the *Canadian Bill of Rights*.

B. *Was the decision unreasonable?*

[18] Mr. Azbaha argues that the officer was required to consider a two-part conjunctive test in determining that his claim for refugee protection was ineligible for referral to the RPD: (1) he was recognized as a Convention refugee in a country other than Canada; and (2) he was able to be sent back to that country. He argues there was insufficient evidence upon which the Delegate could reasonably conclude that he had refugee status in Switzerland and that the Delegate completely failed to address the second step. Again I disagree.

[19] Mr. Azbaha had the burden of demonstrating his claim was eligible to be referred to the RPD. He was also obligated to truthfully answer all questions put to him for that purpose. The record indicates that Mr. Azbaha was less than truthful in responding to numerous questions in relation to his claim. Despite his evolving narrative he did ultimately acknowledge that: (1) he had been granted refugee status in Switzerland in 2006 or 2007; and (2) although his temporary residence card had an expiry date, his status did not expire. In addition to this evidence the Delegate also notes that his travelling companion was found to be in possession of a Swiss driver’s license and a Swiss temporary resident permit in Mr. Azbaha’s name. It was on the basis

of this evidence that the Delegate concluded that Mr. Azbaha was recognized as a Convention refugee in a country other than Canada and was able to return to that country. The determination was not unreasonable.

[20] Mr. Azbaha argues, relying on *Jekula v Canada (Citizenship and Immigration)* (1998), [1999] 1 FC 266, 154 FTR 268 (TD) [*Jekula*] that the Delegate had an obligation to make inquiries as to his ability to return to Switzerland. He submits that the failure to make these inquiries renders the decision unreasonable.

[21] *Jekula* provides that a decision-maker may normally assume a right to re-enter where the evidence establishes that a country has granted asylum to the claimant. *Jekula* goes on to state that where there is evidence that a claimant will not be readmitted further inquiries must be made. I note that *Jekula* was decided prior to the enactment of IRPA ss 100(1.1) which places the burden on the claimant to demonstrate he or she cannot return to the country that has granted protection. The obligation *Jekula* imposes must, in my opinion, be considered in light of IRPA subsection 100(1.1).

[22] In this case the Delegate was entitled to consider Mr. Azbaha's statements to the effect that his residence permit had expired in light of all of the evidence and circumstances. It was not unreasonable for the Officer to conclude that his bald statements were insufficient to trigger an obligation to make further inquiries.

VI. Conclusion

[23] I am satisfied that there was no breach of procedural fairness. The decision is transparent, justified and intelligible and it falls within the range of reasonable possible outcomes based on the facts and the law. The application is dismissed.

[24] The parties have not identified a question of general importance for certification, and none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is dismissed; and

2. No question is certified.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1933-17
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