Montréal, Quebec, January 31, 2008

Present: The Honourable Mr. Justice Lemieux

BETWEEN:

BIENVENUE KITSINGA

Applicant

and

MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

<u>REASONS FOR JUDGMENT AND JUDGMENT</u>

<u>INTRODUCTION</u>

[1]   Several minutes after his arrival at Pierre Elliott Trudeau Airport on November 27, 2006, the

applicant, Bienvenue Kitsinga, citizen of the Democratic Republic of Congo ("Congo"), was the

subject of a removal order issued the same day by the Minister's delegate following a report

prepared pursuant to subsection 44(1) of the *Immigration and Refugee Protection Act*, S.C. 2001,

c. 27 (IRPA), by immigration officer Josée Cuerrier, who was of the opinion that the applicant was

inadmissible to Canada under section 41 of the IRPA because he had breached paragraph 20(1)(*b*)

of this same Act, as he was a foreign national who had sought to enter Canada to obtain permanent residence without holding a valid passport.

[2]   The applicant is seeking to have this removal order set aside and seeking order requiring Citizenship and Immigration Canada to refer his case to the Immigration and Refugee Board.

FACTS

[3]   The substance of the problem faced by the applicant is subsection 99(3) of the IRPA, which provides that a claim for refuge protection may be made inside Canada except by a person who is subject to a removal order [Emphasis added.]

[4]   The debate before me involved whether the removal order had been issued before the applicant made his refugee claim. The applicant claimed that it was not; the respondent submitted the contrary.

[5]   The evidence pertaining to the relevant events at Pierre Elliott Trudeau Airport on November 27, 2006, consists of:

      (1)   the affidavit of the applicant;

      (2)   the affidavit of Josée Cuerrier to which she attached her interview notes and the notes of the customs inspector;

(3) the affidavit of Claude Beaudoin, immigration officer, who around 5 :30 p.m. accompanied the applicant when he was transported by ambulance to the Centre hospitalier de LaSalle where the applicant stayed for three days;

(4) the affidavit of enforcement officer Adriano Giannini referring to the computer entries of the Minister's delegate (the FOSS system);

(5) the certified tribunal record.

[6] None of the affiants were cross-examined. The evidence that is not contradicted by the parties established the following facts:

(1) The applicant arrived in Montréal on November 27, 2006, on a Paris-Montréal Air Transat flight;

(2) At approximately 2:34 p.m., he reported to customs inspector Martine Coderre. He had a false passport issued to one Dadi Boduka. After the interview, Martine Coderre referred the applicant to immigration because she had serious doubts about the truthfulness of his statement regarding his country of residence, Belgium, and also about the true purpose of his visit;

(3) At approximately 2:50 p.m., immigration officer Cuerrier began her interview with the applicant. She also examined the applicant's baggage and found many documents, including curriculum vitae, all in the name of Bienvenue Kitsinga. The applicant denied that he was Bienvenue Kitsinga, saying that he was his brother. She confronted him, advising him that she did not believe his story; he continued to say that his story was true;

(4) Officer Cuerrier went to consult the Minister's delegate and recommended that she remove the applicant because she believed that he had travelled with a document that was not his and he did not have any other identification document;

(5) The applicant was interviewed by the Minister's delegate at approximately 4:00 p.m. on November 27, 2006; officer Cuerrier was also there. The Minister's delegate verbally issued a removal order against the applicant after he confirmed, once again, that he had travelled with his own passport.

ANALYSIS

(1) The validity of the exclusion order

[7] The applicant is arguing that the removal order issued against him on November 27, 2006, is invalid. At the hearing, however, he abandoned his arguments to the effect that subsection 99(3) is inconsistent with section 7 of the *Canadian Charter of Rights and Freedoms*. He did not give the attorneys general the notice required by section 57 of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

[8] In his memorandum, the applicant argued that the Minister's delegate misinterpreted sections 41 and 21 of the IRPA and at the hearing submitted only one piece of jurisprudence on the right to hearing. I must dismiss all of his legal claims for which the standard of review is that of correctness.

[9]   There is no doubt that the exclusion order issued by the Minister's delegate was valid. As for the applicant's proposed interpretation of the IRPA, this was dismissed by Mr. Justice Pinard in *Malongi v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1090, a matter remarkably similar to the one before me, by Mr. Justice Blanchard in *Elemuwa v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1026, and by Mr. Justice Simon Noël in *Li v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 941.

[10]   More specifically, my two colleagues, in *Malongi* and *Li*, *supra*, dismissed the applicant's arguments regarding the invalidity of the verbal removal order (see *Malongi* at paragraph 11, and *Li* at paragraphs 40 to 52).

[11]   The case law recognizes that the concept of procedural fairness is eminently variable (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at page 837).

[12]   In fact, the applicant met with the Minister's delegate and had the opportunity to tell his entire story. In my opinion, the procedural fairness requirements were respected in this case.

[13]   I find that the exclusion order issued against the applicant was valid. In my opinion, this exclusion in itself justifies the dismissal of this application for judicial review, but as I stated, the arguments before me were in particular about whether the applicant requested protection from Canada before the exclusion order was issued.

(2) Did the removal order precede the application for protection?

[14]   As stated, the applicant submitted that he claimed protection before the Minister's delegate

had issued the exclusion order. The respondent argued that the balance of probabilities established

the opposite. Before me there is contradictory evidence.

[15]   In order to decide this issue, I must attentively examine the evidence before me.

[16]   It is the applicant who has the burden of establishing the facts he alleges on a balance of

probabilities (*Elemuwa*, *supra*, at paragraph 16).

[17]   For the reasons that follow, I find that the applicant did not advance clear and credible

evidence that he claimed refugee protection before the exclusion order was issued against him.

[18]   He states as follows on this point in his affidavit:

> [TRANSLATION]
>
> 13. When I arrived here, I had a Congolese passport in the name of
> Boduka Dadi, [*sic*]. I used this passport to travel, but it did not belong
> to me. A merchant friend of my brother-in-law gave me the passport;
>
> 14. After crossing two borders, I arrived before an immigration
> officer whose name I do not know. When I presented my travel
> document, she asked me to go sit down while she verified my
> passport;
>
> 15. After awhile, I called an immigration officer to say that I had
> come to Canada to ask for protection. It was an hour or an hour and a
> half after I had arrived in Canada;

16. The immigration officer went to get the first woman who brought me to her office. She asked me questions like: "Why didn't you say so before? What is your problem" I explained the problems that I had in the D.R.C.;

17. She asked me questions about my problems in the Congo. She asked me if I was married and I said yes, the father of three children;

18. I said that I did not feel well, that I needed help. I was asked if I needed a nurse and I said yes;

19. After I saw the nurses, they saw that I was not well and they called an ambulance to bring me to the hospital. I spent three days at the hospital in Lasalle; That is where I learned that I am now diabetic;

20. I was never told at the airport that there was an exclusion order against me. I was given documents before leaving, but I did not read them. I thought that I was being given protection because I had been brought to the hospital;

21. I am still very ill. My eyes hurt a great deal. I saw a doctor this morning because of my problems;

22. I believe that I could not claim refugee protection at the airport because everything happened so quickly. The lady who made the removal order never asked me if I was in danger in my country. I fear for my life based on my political opinion which is contrary to the current regime, I also fear ethnic cleansing in the East of my country;

23. I was informed yesterday December 7 that I would be removed to Paris, and I think they want to remove me to the Congo after. I do not understand why nobody will listen to me.

24. It is for these reasons that I am asking for Canada's protection because Canada is a country that respects human rights and it is a democratic country where I can express my ideas. The Congo is still in hell, and I fear for the worst if I return to the country.

[19]   In my opinion, the applicant's affidavit is vague and ambiguous on the issue of when he

claimed refugee protection in Canada.

[20]   Second, the respondent's evidence is clear and precise on this issue. In particular, the FOSS notes of the Minister's delegate specifically state that it was only after the exclusion order was issued that the applicant changed his story.

[21]   Specifically, the affidavit of officer Cuerrier is more direct. After the interview by the Minister's delegate with the applicant, which the officer attended, it was she who went to the waiting room where the applicant was in order to find out why he felt ill. It was at that time that the applicant first requested Canada's protection.

[22]   On its very face, as there was no cross-examination, I prefer the evidence advanced by the respondent: it is of superior quality to the applicant's; it is also corroborated by other testimony and it is impartial; the applicant's evidence is vague.

[23]   The applicant argued that during the interview he was tired and very ill, having very recently escaped a prison in the Congo before beginning his long journey to Canada.

[24]   The applicant did not adduce any evidence regarding the state of his health except for the fact that he was transported to the hospital after his interview. The evidence appears to indicate that he suffers from diabetes but I have no evidence of how this condition could have influenced his conduct during the interview. Moreover, some doubt still lingers about when exactly the applicant escaped from the Congo prison.

[25]   For all of these reasons, I find that the removal order was issued before his refugee claim was

made.

JUDGMENT

THE COURT ORDERS AND DIRECTS that this application for judicial review is

dismissed. No question of general importance was proposed.

<u>"François Lemieux"</u>
Judge

Certified true translation

Kelley A. Harvey, BCL, LLB