Federal Court  Cour fédérale

Date: 20110708

Dockets: IMM-6403-10
IMM-6404-10

Citation: 2011 FC 845

Ottawa, Ontario, July 8, 2011

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

DOREEN KINOBE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The applicant, Doreen Kinobe, is a citizen of Uganda. She is seeking judicial review of two decisions issued on September 17, 2010 by the same Immigration Officer (the Officer). IMM-6403-10 is a challenge to the refusal to grant her application for permanent residence in Canada based on humanitarian and compassionate grounds (the H&C application) while IMM-6404-10 concerns a negative Pre-Removal Risk Assessment (PRRA) decision. The H&C application was primarily based on the same risk of return to Uganda as expressed in her PRRA application.

[2] The applicant came to this country in July 2002. The heart of her claim centers on a forced marriage with Byenkya Harrison (Harrison) a former resident of their home village whom she met in December 2000 but resisted the arranged marriage because she was already engaged. She claims that in January 2002, Harrison kidnapped her, forced her to live with him over a five month period during which he constantly abused and raped her.

[3] Shortly after being here, she made a refugee claim which the Refugee Protection Division refused on January 17, 2005 for two reasons. First, it found her testimony not credible because her responses to questions of clarification were "often vague, hesitant and evasive". These responses, according to the RPD, were "not plausible or reasonable, but rather contrived and lacking in persuasiveness." Second, the RPD concluded the applicant's claim for refugee status lacked an objective basis finding it implausible she would have been forced to submit to a forced marriage with Harrison in whom she had no interest as a prospective husband as she already had a fiancé. Moreover, she was a well-educated young woman who had recently found employment with a real estate firm in Kampala. Preferring the documentary evidence, the RPD concluded she did not belong to any community in Uganda which practiced forced marriages. Leave to appeal was denied by a Judge of this Court on June 14, 2005.

[4] In order to overcome the findings of the RPD, the applicant, through her counsel, John Howorun, submitted on March 11, 2010 new evidence in support oh her PRRA application which consisted of:

a. A Police Crime Diary Extract from the Ugandan Police (the Police Extract). That extract showed the applicant reported to the police the

kidnapping and assaults; that she was forced to enter into a common-law marriage with Harrison. The police advised her, because her complaint concerned domestic issues, she needed a letter of consent from the Local Council.

b. A copy of her marriage certificate to Harrison dated June 4, 2003 to prove her forced marriage. This document had previously been submitted to the PRRA officer.

c. A letter from the applicant's aunt which states she had been threatened by Harrison as he had paid "bride price" for his marriage to the applicant. The aunt asked her to return to Uganda.

d. A death certificate dated December 15, 2009 indicating her aunt had died through poisoning.

e. A December 21, 2009 document from the Local Council indicating that it was investigating the blocking of an attempt by the aunt's daughter to report the poisoning.

[5] In April 2010, the Officer sent the Police Extract, the marriage certificate and other documents to the Canadian Embassy in Kampala for verification. In June 2010, an official at the Embassy advised the Officer the Police Extract (or police report) and the marriage certificate were both fraudulent.

[6] I set out below the substance of the e-mail which the Officer received:

> As I suspected, the police report is fraudulent.
>
> Police reports in Uganda are hand written not typed. Police stamp is forged. The stationery used is different from that used by police in

> taking statements from complainants The style of statement writing is wrong. Zana police post is called Kikumbi Police Post (as you will see the scanned stamp on the letter from the police in response to our verification request) not The Division Police Zana as stated in the forged stamp. Original letter will be mailed to you tomorrow.
>
> The Registrar of Marriages in Kampala confirms that they do not have representation in Masindi and therefore there is no registrar of marriages in Masindi.
>
> With the above verifications so far, can we consider the job completed on this case and not go after verification of the death certificate and other docs issued in Masindi?

[7] The reference in the e-mail to the "letter from the police in Uganda in response to our verification request was an attachment to the e-mail. It is handwritten and dated April 25, 2011. It states the Police Crime Diary Extract dated 05/02/2002 is a forgery (See pg 309 of the CTR).

[8] After the receipt of the e-mail, the Officer decided to hold a credibility hearing pursuant to section 167 of the *Immigration and Refugee Protection Regulations* (IRPR) "for the purposes for this application and the applicant's application for permanent residence with regards to these fraudulent documents."

[9] A credibility hearing to decide a PRRA application is extremely rare and counsel for both parties recognize this fact. Paragraph 113(b) of the *Immigration and Refugee Protection Act* (IRPA) provides that "a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion a hearing is required."

[10] The prescribed factors for the purpose of determining whether a hearing is required are set out in section 167 of the IRPR which reads:

167. For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors are the following:	**167.** Pour l'application de l'alinéa 113b) de la Loi, les facteurs ci-après servent à décider si la tenue d'une audience est requise :
(a) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;	a) l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur;
(b) whether the evidence is central to the decision with respect to the application for protection; and	b) l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;
(c) whether the evidence, if accepted, would justify allowing the application for protection.	c) la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.
[Emphasis added]	[Notre soulignement]

[11] Section 168 spells out the provisions which a hearing under section 167 is subject to. It reads:

168. A hearing is subject to the following provisions:	**168.** Si une audience est requise, les règles suivantes s'appliquent :
(*a*) notice shall be provided to the applicant of the time and place of the hearing and the issues of fact that will be raised at the hearing;	*a*) un avis qui indique les date, heure et lieu de l'audience et mentionne les questions de fait qui y seront soulevées est envoyé au demandeur;
(*b*) the hearing is restricted to matters relating to the issues of fact stated in the notice, unless the officer conducting the hearing considers that other issues of fact have been raised by statements made by the applicant during the hearing;	*b*) l'audience ne porte que sur les points relatifs aux questions de fait mentionnées dans l'avis, à moins que l'agent qui tient l'audience n'estime que les déclarations du demandeur faites à l'audience soulèvent d'autres questions de fait;
(*c*) the applicant must respond to the questions posed by the officer and may be assisted for that purpose, at their own expense, by a barrister or solicitor or other counsel; and	*c*) le demandeur doit répondre aux questions posées par l'agent et peut, à cette fin, être assisté, à ses frais, par un avocat ou un autre conseil;
(*d*) any evidence of a person other than the applicant must be in writing and the officer may question the person for the purpose of verifying the evidence provided.	*d*) la déposition d'un tiers doit être produite par écrit et l'agent peut interroger ce dernier pour vérifier l'information fournie.
[Emphasis added]	[Notre soulignement]

II. The Credibility Hearing and Follow up

[12] The Officer held the credibility hearing on July 26, 2010 in the presence of the applicant and her counsel. It is conceded by the respondent that the Officer did not disclose prior to the hearing the fact she had received a report from the Canadian Embassy in Uganda stating the Police Extract and the marriage certificate were fraudulent. That information was disclosed to them after the Officer had asked the applicant whether the documents she had supplied in support of her PRRA application were *bona fide* to which question the applicant answered "yes". She also told the Officer that the documents had been sent by her aunt in Uganda through other family members and thought they were genuine. At the hearing, the applicant also asserted the fraudulent documents were a plot to compel her return to Uganda.

[13] At the credibility hearing, the applicant provided a copy of a newspaper dated April 9, 2010 from Kampala called the "Daily Paper" in which appeared an article in the Officer's words in her decision "regarding Harrison and the disappearance of two women who have been in conflict with this man. The article also makes reference to a woman identified as his wife whom Mr. Byenkya Harrison kidnapped and forced into marriage and who later fled the country."

[14] Counsel for the applicant asked the Officer for an opportunity to make written submissions. The Officer stated in her affidavit in support of the respondent's position that she "gave the applicant and Mr. Howorun two weeks to respond to my concerns and to submit any additional documentation if they so wished."

[15] In her affidavit, the Officer stated she read out loud the contents of the e-mail from the Canadian Embassy to the applicant and her Counsel. She also deposed as follows:

> 3. With respect to the allegations that I declined to give the "report" to Mr. Howorun, I note that I never told the Applicant and her counsel that there was an actual report. Neither the Applicant nor her counsel asked me for a copy of the email. After I explained to them why the police report and marriage certificate were fraudulent, they moved on to present other documentary evidence. There is no record of a request to see the email in my notes. It is my practice to note such a request in my notes.

[16] Mr. Howorun took up that opportunity by making written submissions on the Daily Paper as well as other points.

[17] He identified the author of the article in the Daily Paper and its editor. He provided the Officer with a number of e-mails exchanged between himself and the editor whose name is Mukasa Mack with his e-mail address at yahoo.com.

[18] What the e-mails and documents attached to those e-mails show is the following:

a. The person referred to as Harrison's wife in the article in the Daily Paper dated April 9, 2010 who later fled Uganda is a reference to the applicant. The editor says this information was confirmed by the author of the article who obtained the information from a local police station and the information was verified later by one of the relatives. Mr. Howorun submitted to the Officer the e-mail confirmed what the applicant had told the RPD in 2002. (Tribunal Record (TR) p 103)

b. A further e-mail dated August 16, 2010 confirms that Harrison paid a "bride price" for the applicant (TR p 105).

c. A further e-mail dated August 16, 2010 attaches a Medical Examination Report and a letter of Acceptance to get Married and confirmation of the marriage ceremony. The acceptance letter document lists the names of the persons attending the ceremony at which the applicant was not present, since it took place on May 15, 2003 when the applicant was in Canada. The editor's e-mail explains the police found the applicant's file "with only the medical report which she as supposed to use had the police case been filed" (TR p 109).

[19] In his submissions, Mr. Howorun also stated the e-mails also showed that Harrison is now with the Kibooka Squad "which apparently acts as an auxiliary force to the recognized National Police Force in disbursing riots.

III. The Issues

[20] The applicant's counsel raises one sole issue. The Officer breached the principles of natural justice or procedural fairness, first by not complying with the notice requirement in paragraph 168(a) of the IRPR which state that notice of the credibility hearing shall be provided to the applicant including "the issues of fact that will be raised at the hearing". Counsel for the applicant further argues the Officer breached natural justice by conducting on internet search to determine whether the Daily Paper was a newspaper actually published in Uganda as well as reaching conclusions about the nature of the editor's e-mail account. The Officer's findings on these two issues were:

> Of the 15 newspapers identified, the *Daily* Paper was not among them. Given the propensity for the availability of fraudulent documents in Uganda, it is not unlikely that this article was placed in the newspaper in an effort to assist the applicant with her application. The emails provided also originate with an account by yahoo.com and as such, no country of origin can be provided. I note that given the nature of "yahoo", the account could be created by anyone and therefore its origin is uncertain. I find the information provided in the emails to be of limited value and assign it low weight in support of the applicant's stated risk or as evidence to disavow the tendering of fraudulent documents. [Emphasis added]

[21] At the hearing before this Court, counsel for the respondent conceded the Officer breached the notice provisions of paragraph 168(a) of the IRPR but argued the breach was cured by the Officer giving the applicant an opportunity to respond to her concerns. He further argued the breach did not matter because Mr. Howorun, in his submissions, did not challenge the finding the two documents were in fact fraudulent (See AR p 80). Mr. Howorun had written "Even though the documents have been proven to be fraudulent, Ms. Kinobe continues to maintain the information contained in the police report is true".

[22] Counsel for the applicant submits the Officer also breached procedural fairness when dealing with the H&C application. At page 324 of the Tribunal Record there is a letter entitled "withdrawal of sponsorship". It was received on June 5, 2008. It is signed by the sender and states he and Doreen Kinobe are separated and that the applicant, his ex-wife, "only got married to me for landed papers as I discovered later on."

[23] Counsel for the respondent acknowledges "the poison pen letter" was never disclosed to the applicant and seeks to distinguish the applicant's jurisprudence by referring to the Officer's affidavit which states that she never relied on that letter in rendering her H&C decision. I note from the

Officer's decision under review in the H&C file she indicates the applicant had first made an application for permanent residence based on H&C grounds (not sponsored) with risk on October 13, 2005, which she considered was the outstanding application she had to deal with, and noted the applicant had made a sponsored application on March 23, 2007 which was subsequently refused on September 24, 2008 after sponsorship has been withdrawn.

[24] The Tribunal Record also shows at page 155 that on October 7, 2008 the applicant made another application for permanent residence in Canada on H&C grounds but without sponsorship.

IV. Analysis

The Standard of Review

[25] The standard of review depends on the questions to be decided by the Court. It is settled law that the question of a breach of procedural fairness does not engage a standard of review analysis. The Court simply reviews the record to determine if there was a breach and if so, what is the appropriate remedy, if any.

V. Conclusion

[26] For the following reasons, these two judicial review applications must be allowed and the Officer's PRRA and H&C decisions must be quashed. As noted, the H&C decision is essentially based on the risk of return to Uganda.

[27] It is not disputed the Officer embarked upon an inquiry to determine the quality of the evidence the applicant and her counsel submitted after the credibility hearing. Based on her search

she concluded the Daily Paper did not exist and the e-mails exchanged between Mr. Mack and the applicant's counsel and the information they contained were of little or no value because Mr. Mack had an e-mail address at yahoo.com. The Officer did not disclose to the applicant and her counsel the evidence she had uncovered nor asked them to comment on that evidence.

[28] My reading of her decision is that her findings as a result of her self-initiated inquiry were central to her determination the applicant would not be at risk if returned to Uganda because, in effect, the post hearing evidence was fraudulent. She wrote the following in her decision:

> The onus lies on persons, such as the applicant, who rely on documentary evidence originating in Uganda in support of their claim, to be prepared to demonstrate the authenticity of the documentation presented. The applicant has been unable to demonstrate the authenticity of her documentation and I have obtained evidence that supports a conclusion that much of the applicant's supporting documents are not authentic and in fact fraudulent. [Emphasis added]

[29] Clearly, the Officer's inquiry was a breach of natural justice. I need only refer to the Federal Court of Appeal's decisions in *Magnasonic Canada Limited v Canada (Anti-Dumping Tribunal)* [1972] FC 1239; *Canadian National Railway v Handyside* (1994) 170 NR 353 for the principle that procedural fairness requires that parties have an opportunity to comment on critical and relevant material.

[30] The Officer may have been right in concluding that the post-hearing material was of no value and may have been fraudulent but that is not the point. The point is that the applicant and her counsel had no opportunity to comment on the evidence which the Officer herself obtained and relied on to render the decision she reached.

[31] Counsel for the respondent argued the matter should not be sent back on the basis of the Supreme Court of Canada's decision in *Mobil Oil Canada Ltd. v Canada-Newfoundland Offshore Petroleum Board* [1994] 1 SCR 203. In my view, the reference back for reconsideration is not futile. The applicant must have an opportunity to demonstrate the authenticity of the post hearing evidence.

[32] In the circumstances, the certified question suggested by the applicant has no relevance. A copy of these reasons shall be placed on both files.

JUDGMENT

THIS COURT'S JUDGMENT is that the judicial review application in IMM-6403-10 and in IMM-6404-10 are granted; the underlying decision in each file is quashed and the matter returned for redetermination by a different Officer.

"François Lemieux"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-6403-10 and IMM-6404-10
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