Federal Court  Cour fédérale

Date: 20120210

Docket: IMM-3375-11

Citation: 2012 FC 199

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, February 10, 2012

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

ORNELLA MARIE-FRANCE NDUNDU

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I Introduction

> [9] Parliament has determined that refugee claims must be initiated before a removal order is made against a person. Parliament has specifically set out that refugee claims may not be heard in one circumstance, i.e., where a refugee claim is made after a removal order. Parliament's purpose in enacting this section was clearly to prevent people, after being excluded from Canada on the basis of an initial story, from changing their story to claim refugee status. If this Court were to allow removal orders to be reopened in order to permit consideration of these claims, then the section would be rendered marcescent. [Emphasis in original.]

As stated by the Federal Court of Appeal in *Raman v Canada (Minister of Citizenship and Immigration)*, 4 FCA 140.

II Judicial procedure

1. This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of an exclusion order issued by the Minister's delegate against the applicant on May 8, 2011.

III Facts

2. The applicant, Ornella Marie-France Ndundu, was allegedly born on January 30, 1987, in the Democratic Republic of the Congo [DRC], her country of nationality.

3. The applicant allegedly fled her country of origin on November 11, 2011.

4. After passing through Congo-Brazzaville and France, Ornella Marie-France Ndundu arrived in Canada on May 8, 2011, on a passport issued by Belgium in the name of Pamela Wawa Mompa.

5. The applicant told an immigration officer that she wished to enter Canada for 10 days to visit a friend.

6. Since the passport photograph did not match the applicant, the immigration officer questioned her. During this interview, the immigration officer concluded that the applicant was not travelling under her true identity and therefore produced a report, under subsection 44(1) of the IRPA, recommending that the applicant be excluded.

7. The applicant alleges that she lied about her identity in order to comply with the directions of the smuggler, namely, to [TRANSLATION] "defend her Belgian passport" and not to claim Canada's protection until after the first immigration check in Canada.

8. The applicant then met with the Minister's delegate. The interview was held in French. During the interview, the applicant reiterated that her stay was temporary.

9. The Minister's delegate then questioned the applicant to find out whether she had any problems in Belgium.

10. The applicant claims that she did not understand the question. Believing that the Minister's delegate was referring to legal problems, she allegedly replied no. The applicant alleges that she was never asked whether she had problems in the DRC or whether she feared persecution in another country around the world. She also alleges that the Minister's delegate did not ask her whether she was seeking Canada's protection.

11. The applicant claimed Canada's protection immediately after the exclusion order was issued, at which time she revealed her true nationality.

12. The Minister's delegate then informed here that she could no longer claim refugee protection in Canada since she had been excluded.

13. The application was placed in detention until her removal to France.

14. The applicant was removed to France on May 10, 2011. When she arrived, French authorities denied her entry, and the applicant was sent back to Canada.

15. The applicant was again detained. The applicant's departure was postponed to May 20, 2011.

16. The applicant fell ill twice in Canada. She was taken to hospital on the day of her return, on May 10, 2011, and on the day before being removed to France, on May 20, 2011.

17. On May 17, 2011, the applicant was given the opportunity to apply for a pre-removal risk assessment (PRRA).

18. On May 20, 2011, the applicant filed a motion for a stay of her removal. On the same day, she withdrew the motion since the Minister had agreed to an administrative postponement of her removal until her PRRA application had been disposed of.

IV Decision under review

19. The Minister's delegate issued an exclusion order against the applicant making her inadmissible to claim refugee protection under subsection 99(3) of the IRPA. This decision was made following the recommendation contained in a report prepared under subsection 44(1) of the IRPA [report].

V Relevant legislative provisions

20. The following provisions of the IRPA are relevant to the case:

Obligation on entry	Obligation à l'entrée au Canada
20. (1) Every foreign national, other than a foreign national referred to in section 19, who seeks to enter or remain in Canada must establish,	**20.** (1) L'étranger non visé à l'article 19 qui cherche à entrer au Canada ou à y séjourner est tenu de prouver :
(*a*) to become a permanent resident, that they hold the visa or other document required under the regulations and have come to Canada in order to establish permanent residence; and	*a*) pour devenir un résident permanent, qu'il détient les visa ou autres documents réglementaires et vient s'y établir en permanence;
(*b*) to become a temporary resident, that they hold the visa or other document required under the regulations and will leave Canada by the end of the period authorized for their stay.	*b*) pour devenir un résident temporaire, qu'il détient les visa ou autres documents requis par règlement et aura quitté le Canada à la fin de la période de séjour autorisée.
Non-compliance with Act	Manquement à la loi
41. A person is inadmissible for failing to comply with this Act	**41.** S'agissant de l'étranger, emportent interdiction de territoire pour manquement à la présente loi tout fait — acte ou omission — commis directement ou indirectement en contravention avec la présente loi et, s'agissant du résident permanent, le manquement à
(*a*) in the case of a foreign national, through an act or omission which contravenes, directly or indirectly, a provision of	

this Act; and

(*b*) in the case of a permanent resident, through failing to comply with subsection 27(2) or section 28.

l'obligation de résidence et aux conditions imposées.

Rapport d'interdiction de territoire

Preparation of report

44. (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.

44. (1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.

21. The relevant provisions of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations], are as follows:

Documents — temporary residents

Documents : résidents temporaires

52. (1) In addition to the other requirements of these Regulations, a foreign national seeking to become a temporary resident must hold one of the following documents that is valid for the period authorized for their stay:

52. (1) En plus de remplir les autres exigences réglementaires, l'étranger qui cherche à devenir résident temporaire doit détenir l'un des documents suivants, valide pour la période de séjour autorisée :

(*a*) a passport that was issued by the country of which the foreign national is a citizen or national, that does not prohibit travel to Canada and that the foreign national may use to enter the country

a) un passeport qui lui a été délivré par le pays dont il est citoyen ou ressortissant, qui ne lui interdit pas de voyager au Canada et grâce auquel il peut entrer dans le pays de délivrance;

of issue;

Subsection 44(2) of the Act — foreign nationals

228. (1) For the purposes of subsection 44(2) of the Act, and subject to subsections (3) and (4), if a report in respect of a foreign national does not include any grounds of inadmissibility other than those set out in the following circumstances, the report shall not be referred to the Immigration Division and any removal order made shall be

(*a*) if the foreign national is inadmissible under paragraph 36(1)(*a*) or (2)(*a*) of the Act on grounds of serious criminality or criminality, a deportation order;

(*b*) if the foreign national is inadmissible under paragraph 40(1)(*c*) of the Act on grounds of misrepresentation, a deportation order;

(*c*) if the foreign national is inadmissible under section 41 of the Act on grounds of

(i) failing to appear for further examination or an admissibility hearing under Part 1 of the Act, an exclusion order,

(ii) failing to obtain the authorization

Application du paragraphe 44(2) de la Loi : étrangers

228. (1) Pour l'application du paragraphe 44(2) de la Loi, mais sous réserve des paragraphes (3) et (4), dans le cas où elle ne comporte pas de motif d'interdiction de territoire autre que ceux prévus dans l'une des circonstances ci-après, l'affaire n'est pas déférée à la Section de l'immigration et la mesure de renvoi à prendre est celle indiquée en regard du motif en cause :

a) en cas d'interdiction de territoire de l'étranger pour grande criminalité ou criminalité au titre des alinéas 36(1)*a*) ou (2)*a*) de la Loi, l'expulsion;

b) en cas d'interdiction de territoire de l'étranger pour fausses déclarations au titre de l'alinéa 40(1)*c*) de la Loi, l'expulsion;

c) en cas d'interdiction de territoire de l'étranger au titre de l'article 41 de la Loi pour manquement à :

(i) l'obligation prévue à la partie 1 de la Loi de se présenter au contrôle complémentaire ou à l'enquête, l'exclusion,

(ii) l'obligation d'obtenir l'autorisation de l'agent aux termes

of an officer required by subsection 52(1) of the Act, a deportation order,

(iii) failing to establish that they hold the visa or other document as required under section 20 of the Act, an exclusion order,

(iv) failing to leave Canada by the end of the period authorized for their stay as required by subsection 29(2) of the Act, an exclusion order, or

(v) failing to comply with subsection 29(2) of the Act to comply with any condition set out in section 184, an exclusion order; and

(*d*) if the foreign national is inadmissible under section 42 of the Act on grounds of an inadmissible family member, the same removal order as was made in respect of the inadmissible family member.

du paragraphe 52(1) de la Loi, l'expulsion,

(iii) l'obligation prévue à l'article 20 de la Loi de prouver qu'il détient les visa et autres documents réglementaires, l'exclusion,

(iv) l'obligation prévue au paragraphe 29(2) de la Loi de quitter le Canada à la fin de la période de séjour autorisée, l'exclusion,

(v) l'obligation prévue au paragraphe 29(2) de la Loi de se conformer aux conditions imposées à l'article 184, l'exclusion;

d) en cas d'interdiction de territoire de l'étranger pour inadmissibilité familiale aux termes de l'article 42 de la Loi, la même mesure de renvoi que celle prise à l'égard du membre de la famille interdit de territoire.

VI Issues

22. Was the decision of the Minister's delegate to issue an exclusion order against the applicant reasonable?

23. Were the principles of procedural fairness breached?

VII Positions of the parties

24. The applicant submits that the removal order and the report are invalid because of a breach of procedural fairness in that the applicant was never asked whether she was seeking Canada's protection. It was only after the exclusion order was issued that the applicant disclosed her true nationality to the immigration officer and the Minister's delegate and claimed Canada's protection. In support of her argument, the applicant filed as evidence the handwritten notes of the Minister's delegate and of the applicant, obtained under the *Access to Information Act*, RSC 1985, c A-1.

25. In addition, the immigration officer and the Minister's delegate should have considered the applicant's vulnerable state when determining whether she was in a condition to claim protection.

26. To demonstrate the applicant's vulnerability, resulting from her psychological state, the applicant wishes to introduce into evidence a psychological report written after the exclusion order was issued, her submissions supporting the PRRA application, the form regarding her escorted overseas removal dated May 19, 2011, the applicant's medical record and emails from the enforcement officers in charge of the applicant's removal on May 20, 2011. She submits that this evidence is admissible since it supports her arguments alleging breaches of procedural fairness.

27. Alternatively, the applicant submits that there was a breach of natural justice, regardless of the conduct of the immigration officer or the Minister's delegate during the interview, given that the applicant was psychologically vulnerable during the interview.

28. The applicant also submits that her right to life, liberty and security of the person, provided at section 7 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter], was violated by the conduct of the first officer and the Minister's delegate, who, after the exclusion order was issued, allegedly completed the gaps in their notes with information provided by the applicant.

29. In turn, the respondent submits that the applicant is to blame for the consequences of her lies to Canadian authorities, which prevent her from seeking refugee protection from Canada.

30. The respondent submits that these contemporaneous, disinterested notes are clear and demonstrate that the applicant did not wish to seek Canada's protection upon her arrival, since she stated that she wished to stay there as a visitor. In fact, the electronic notes and the affidavit of the Minister's delegate demonstrate that the Minister's delegate made sure to find out whether the applicant wished to seek refugee protection in Canada.

31. No principle of natural justice or procedural fairness was breached since the applicant understood the interview process and the questions she was asked. Not once did she request the presence of an interpreter.

32. The respondent submits, moreover, that the evidence relied on by the applicant to establish her psychological profile is not admissible since it was never brought to the Minister's delegate's attention and relates to events postdating the exclusion order. In the present case, since procedural fairness was not breached, the case law in favour of admitting such evidence does not apply.

33. Relying on the affidavit of the Minister's delegate, the respondent submits that the applicant's psychological state did not affect the conduct of the interview.

VIII Analysis

(1) Was the decision of the Minister's delegate to issue an exclusion order against the applicant reasonable?

34. It is trite law that a high degree of deference is owed to discretionary decisions (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339; *Canada Minister of Citizenship and Immigration) v Deol*, 2009 FC 990 at paragraph 15).

35. The reasoning of Justice Yvon Pinard in *Malongi v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1090, clearly summarizes the circumstances that can lead to an exclusion order:

> [4] The Minister's delegate relied on section 41 and paragraph 20(1)(*b*) of the Act and on section 7 and paragraph 52(1)(*a*) of the Regulations to declare that the applicant was inadmissible.
>
> [5] According to section 41 of the Act, a foreign national is inadmissible for failing to comply with the Act. According to

> paragraph 20(1)(*b*) of the Act, a foreign national, who seeks to enter or remain in Canada, must establish that they hold the visa or other documents required under the Regulations in order to become a permanent resident. Section 7 and paragraph 52(1)(*a*) of the Regulations require that the foreign national must obtain a temporary resident visa and that the foreign national have a passport that was issued by their country of citizenship.
>
> [6] The applicant points out that subsection 20(1) contemplates the case of foreign nationals wishing to enter or remain in Canada as temporary residents. He submits that his intention when he entered Canada was to claim refugee status. However, according to the notes of the Minister's delegate, the applicant declared that he came to Canada to visit friends and that he had no problems in his native country. It is my opinion that paragraph 20(1)(*b*) applies to him. Further, the officer stated in his affidavit that it was only after the exclusion order was given verbally against the applicant that he actually stated that he had wanted to claim refugee status.
>
> [7] The applicant had not obtained a temporary resident visa before coming to Canada, therefore there is a breach of section 7 of the Regulations. With respect to his passport, he had initially denied the fact that it was false, but in his affidavit, at paragraph 13, he admitted that it does not belong to him. The fact that the applicant admits that a passport was not issued to him places him in the category of a foreign national in breach of paragraph 52(1)(*a*) of the Regulations.
>
> [8] Given that the applicant did not have a temporary resident visa before entering Canada and given his admission to the effect that the passport in his possession did not belong to him, it is my opinion that the Minister's delegate was entirely justified in finding that the applicant did not hold the documents required under the Regulations and that, accordingly, he was inadmissible under section 41 of the Act. [Emphasis added.]

36. These paragraphs establish that foreign nationals who choose to lie to the authorities about their intention to be admitted into Canada as visitors, through their attitude, expose themselves to an exclusion order.

37. In the present matter, the two parties provide different versions of what occurred during the interview of May 8, 2011. The reasoning of Justice Edmond P. Blanchard in *Elemuwa v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1026, applies here:

> [16] With respect to the Applicant's contention that the Delegate issued the order despite the fact that a claim for protection had been made, the burden is on the Applicant to establish on the balance of probabilities that the events occurred as alleged in the Applicant's memorandum. In essence, the Applicant alleges that, by failing to receive a claim for protection, an immigration officer acted contrary to the IRPA and to Canada's international obligations. The Applicant questions the officer's integrity and in order to prove such allegations, the facts upon which they are based must be stated. The Applicant's evidence fails to support his allegations and, consequently, the Applicant has failed to discharge his burden of proof.
>
> [17] Further, it would appear from the Applicant's own affidavit that his intention was first to gain admission to Canada and then to make an inland claim for protection. . . . [Emphasis added.]

38. The Operational Manual – Enforcement ENF 6 entitled Review of Reports under A44(1) (ENF 6 Manual) contains the directives to be followed by officers:

> **8. Procedure: Handling possible claims for refugee protection**
>
> Although there is no requirement in IRPA for the Minister's delegate to ask whether the subject of a determination wishes to make a claim for refugee protection, he should be aware of Canada's obligation under *the United Nations Convention relating to the Status of Refugees*, and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.
>
> A99(3) excludes persons under removal order from making a claim for refugee protection. Therefore, the Minister's delegate should satisfy himself that removal would not be contrary to the spirit of Canada's obligations before issuing an order, even when the subject does not explicitly request access to the refugee determination process.

> It must also be recognized that some people who may have a legitimate need of Canada's protection are unaware of the provision for claiming refugee status.

There is a set of procedures for handling a possible claim for refugee protection:

- Where the subjects of a determination for an administrative removal order have not made a claim, the Minister's delegate should ask them how long they intend to remain in Canada.

- If the persons indicate that their intention is or was to remain temporarily, the Minister's delegate should proceed with the removal order decision and issue the removal order, if appropriate.

- If the persons indicate that their intention is or was to remain in Canada indefinitely, the Minister's delegate is to inquire about their motives for leaving their country of nationality and the consequences of returning there before making a decision on issuing a removal order.

- Where the responses indicate a fear of returning to the country of nationality that may relate to refugee protection, the Minister's delegate is to inform the subjects of the definition of a "Convention refugee" or "person in need of protection" as found in A96 and A97, and ask whether they wish to make a claim.

- Where the subjects indicate an intention not to make a claim, the Minister's delegate should proceed with the decision and issue a removal order, if appropriate.

- Where the subjects are uncertain, the Minister's delegate informs them that they will not be able to make a claim for refugee protection after a removal order has been issued [A99(3)], and provide them with an opportunity to make the claim before proceeding with a removal order decision.

- If the persons do not express an intent to make a claim, despite the explanation that this is their last opportunity, the Minister's delegate should proceed with the decision and issue the removal order, if appropriate.

- Whenever the persons indicate a fear of returning to their country of nationality, the Minister's delegate is to refrain from evaluating whether the fear is well-founded. As well, the Minister's delegate must not speculate on their eligibility before they have made a refugee claim, nor speculate on the processing time or eventual outcome of a claim. [Emphasis added.]

39. The applicant admits that she explained to the first immigration officer and the Minister's delegate that she wished to enter Canada temporarily, as a visitor (Applicant's Affidavit at paragraphs 5 and 9, Applicant's Record [AR] at page 15).

40. The Minister's delegate was therefore, according to the ENF 6 Manual, not even obliged to ask her whether she wished to avail herself of Canada's protection. The Minister's delegate nonetheless took care to comply with Canada's international refugee protection obligations.

41. The exchange, which took place in French during the interview of May 8, 2011, was recorded in English, as follows:

> Observations:
>
> *SUBJECT WAS SEEKING ADMISSION AS A TOURIST FOR A PERIOD OF 10 DAYS TO VISIT HER FRIEND . . .
>
> *SHE SAID SHE HAD JUST FINISHED HER NURSING DEGREE AND WANTED A LITTLE BREAK
>
> *Q: HOW DID YOU GET BELGIAN CITIZENSHIP?
>
> *A: I WAS ADOPTED
>
> *Q: BY BELGIAN PARENTS?
>
> *A: NO, A LADY AT CHURCH
>
> *Q: WHAT'S HER NAME?
>
> *A: I DON'T REMEMBER IT'S BEEN MORE THAN 20 YEARS
>
> *Q: WHY DID YOU TELL THE OFFICER YOU ARE 23 YRS OLD WHEN IN FACT YOU ARE ONLY 22?

> *Q: WELL, IN BELGIUM WHEN YOU ARE IN THE COURSE OF THE YEAR, YOU SAY YOU'RE A YEAR OLDER, IT'S COMMON PRACTICE THERE
>
> *Q: IT IS OBVIOUS TO ME AND THE OFFICER THAT YOU ARE NOT THE PERSON ON THE PPT PICTURE, DO YOU HAVE PROBLEMS IN ANY COUNTRY?
>
> *A: NO, CHECK IN BELGIUM MY RECORD, I'M CLEAN
>
> *Q: DO YOUR FEAR PERSECUTION IN ANY COUNTRIES IN THE WORLD?
>
> *A: NO, I DON'T
>
> *Q: DO YOUR KNOW WHAT ASYLUM IS?
>
> *A: YES
>
> *Q: ARE YOU ASKING FOR CANADA'S PROTECTION?
>
> *A: NO, I JUST WANT TO COME AS A TOURIST
> . . .

(Tribunal Record (TR) at pages 5-9).

42. The Court notes, however, that the electronic and handwritten notes of the Minister's delegate do not, in contrast to the report and the notes of the first immigration officer, assist in following the logic behind the decision-making process. After reviewing all of these notes, it is not clear to me at what point in the decision-making process the applicant's true national identity became known. The appearance of transparency in the exclusion order decision-making process is of the utmost importance. As mentioned in the ENF 6 Manual:

> **8. Procedure: Handling possible claims for refugee protection**
>
> . . .
>
> In order to address concerns that may arise subsequent to the issuing of a removal order, it is important that the notes accurately reflect—in detail—the questions asked and the information

> provided by the subject during an exchange such as the aforementioned. [Emphasis added.]

43. Nonetheless, given the particular circumstances of the case, an in-depth analysis of the record as a whole and the evidence it comprises supports the conclusion that the Minister's delegate acted, in accordance with the ENF 6 Manual, within the bounds of her discretion and that the applicant had several opportunities to speak up and to claim refugee protection. Instead, she concealed her true identity and lied about the reason for her stay in Canada. It is only after the exclusion order was issued that she claimed refugee protection.

44. Even if one accepts that the applicant was ill advised in her country of origin, which is the reason provided to explain why she had to defend her false Belgian identity during the interview at the port of entry, this fails to explain her failure to reveal her need for protection. To hold otherwise would amount to distorting subsection 44(1) of the IRPA. As explained by the Federal Court of Appeal in *Raman v Canada (Minister of Citizenship and Immigration)*, [1999] 4 FC 140:

> [9] . . .
>
> Parliament has determined that refugee claims must be initiated before a removal order is made against a person. Parliament has specifically set out that refugee claims may not be heard in one circumstance, i.e., where a refugee claim is made after a removal order. Parliament's purpose in enacting this section was clearly to prevent people, after being excluded from Canada on the basis of an initial story, from changing their story to claim refugee status. If this Court were to allow removal orders to be reopened in order to permit consideration of these claims, then the section would be rendered marcescent. [Emphasis in the original.]

(2) Were the principles of procedural fairness breached?

45. In *Chen v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 719, 151 FTR 8 (QL/Lexis), the Court considered the degree of procedural fairness required during the interview conducted at the port of entry and concluded that the requirements are minimal as long as the foreign national does not intend to exercise his or her right to protection. This principle is explained as follows:

> [7] In my view, the requirements of procedural fairness in this particular scenario were minimal. Firstly, I would point out that the applicant's situation was altogether different than the scenario envisaged in Dehghani. In that instance, the applicant had expressed his wish to claim refugee status, which had led the senior immigration officer to interview him with the view to determining the next procedure to be invoked in order to process his application for refugee status. Conversely, the applicant in the case at bar insisted that she did not wish to claim refugee status and that she had nothing to fear upon her return to China. In the course of her secondary examination, the applicant was asked simple and straightforward questions with respect to the requisite documentation for her entry into Canada (namely a valid and subsisting passport and a visitor's visa), and with respect to the possibility of making a refugee claim. She had the obligation to answer these questions truthfully in accordance with subsection 12(4) of the Immigration Act (the Act). Clearly, once an applicant has expressed the wish to claim refugee status, the procedural protections accorded should become more extensive. Consequently, it cannot be presumed that the same procedural protections applicable in Dehghani will necessarily be fitting in this instance where, in reality, it is the applicant's failure to be forthright which resulted in the loss of the right to make a refugee claim (see, for instance, *Mbulu v. Canada* (M.C.I.) (1995), 94 F.T.R. 81; and *Nayci v. Canada* (M.C.I.) (1995), 105 F.T.R. 122). Under the circumstances of the present case, therefore, I am of the view that fairness did not require that the applicant be advised of the nature and effect of the secondary examination. In reality, it should have been clear to the applicant that one possible repercussion might be that she would not be permitted to enter into Canada. [Emphasis added.]

(See also *Raman*, above at paragraph 16.)

46. The Court agrees with this reasoning. The applicant's conduct was unambiguous: she claimed to a visitor who did not need protection. The Minister's delegate acted within the bounds of her discretion. The procedural safeguards for the need for protection come into play only when refugee protection is actually claimed, which was not the case here.

47. The applicant argues that there was a breach of procedural fairness, regardless of the conduct of the officers, simply because the applicant was vulnerable because of her psychological state. Judicial review is not a trial *de novo*; the Court must therefore be cautious when ruling on the admissibility of evidence that was not submitted to the first decision-maker. Such evidence can be admitted only to establish a breach of procedural fairness (*McFadyen v Canada (Attorney General)*, 2005 FCA 360; *Vennat v Canada (Attorney General)*, 2006 FC 1008 at paragraphs 44 and 45).

48. The Minister's delegate acted in accordance with the principles of procedural fairness in the context. The applicant's state, at the time of the interview, does not appear to have been an obstacle to her making a claim for refugee protection. The crux of the issue is primarily whether the Minister's delegate acted within her duties by giving the applicant the opportunity to claim refugee protection.

49. The psychological report, the hospital record and the exchanges that took place between the various enforcement officers certainly establish the applicant's psychological state after the interview with the Minister's delegate, during other incidents, such as her removal to France and

her detention. They are, however, of now assistance in supporting the applicant's argument regarding her psychological state during the interview (*Kitsinga v Canada (Minister of Citizenship and Immigration)*, 2008 FC 126 at paragraph 24).

50. As to the submission supporting the PRRA application, they relate the applicant's story from a subjective, unconvincing perspective, to establish the applicant's psychological state. One would have to assess the applicant's credibility, but that is not the Court's role.

51. Indeed, is there any need to draw further attention to the fact that the applicant was able to claim protection as soon as the exclusion order was issued (Applicant's Affidavit, at paragraph 11, [AR] at page 17)?

52. The principles of procedural fairness were not breached.

53. For all of the above-mentioned reasons, the application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be dismissed. No question of general importance is certified.

"Michel M.J. Shore"

Judge

Certified true translation
Johanna Kratz, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3375-11
STYLE OF CAUSE:	ORNELLA MARIE-FRANCE NDUNDU and MPSEP
PLACE OF HEARING:	Montréal, Quebec
DATES OF HEARING:	February 9, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	SHORE J.
DATED:	February 10, 2012

APPEARANCES:

Mylène Barrière	FOR THE APPLICANT
Émilie Tremblay	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mylène Barrière Montréal, Quebec	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT