

Federal Court



Cour fédérale

**Date: 20120905**

**Docket: IMM-432-12**

**Citation: 2012 FC 1052**

**Toronto, Ontario, September 5, 2012**

**PRESENT: The Honourable Mr. Justice Zinn**

**BETWEEN:**

**EDOUARD NGABWE MUTABUNGA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] For the reasons that follow, this application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board cannot succeed. The Board determined that the applicant was neither a Convention refugee nor a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 because the applicant's testimony was not credible.

[2] The applicant is a citizen of the Democratic Republic of the Congo. He says that he fled as a result of becoming a potential witness to a murder, which may have been committed by a military officer with the complicity of the police.

[3] Specifically, he alleges that he was at a restaurant, by himself, on the evening of April 22, 2011, having a drink. His table was next to one occupied by three men. He noticed them as they were not speaking the local language, but rather a language “spoken mostly by the military people in the Congo.” He testified that two of the men “were dressed in civilian clothing, where something is written... Congo Nouveau.” “[T]he other man was wearing a blue shirt.”

[4] Early the next morning, the applicant was driving and noticed a group of people looking at what appeared to be a dead body by the side of the road. He pulled over to look and recognized the body as the man from the restaurant who was wearing the blue shirt. The dead man was still in the blue shirt, his face and neck swollen, his eyes wide open, and his tongue sticking out from his mouth. He was apparently strangled.

[5] Shortly after seeing the body, the applicant went to the police to make a report. He recounted to the chief of police what he saw – both at the side of the road and at the restaurant. The chief asked if he was sure. He said he was sure. At the request of the chief, the applicant left his phone number and awaited further word.

[6] The chief asked the applicant to return to the station that afternoon. He asked the applicant if he could identify the two other men from the restaurant. The applicant said he could.

Just then, a military officer approached. The applicant recognized the military officer as one of the other two men from the restaurant. The applicant was dumbfounded and the chief noticed his reaction. The applicant tried to stay calm. The chief then said he could go.

[7] The applicant went to see his girlfriend instead of going straight home. When he got home later in the evening, his maid or helper told him that three men (two of whom were in military uniform) had come looking for him. The men did not say why they were looking for the applicant, but said they would be back. The applicant decided to spend the night at a friend's house.

[8] The next morning when the applicant returned home his maid was missing. The neighbours told him that the maid had been taken by uniformed men. Afraid, the applicant quickly gathered some important documents and fled for Burundi. Sometime thereafter, an individual contacted the applicant's sister, who lives in Burundi, asking if the applicant was hiding there. She denied it. However, given the proximity of the two locales, the applicant decided that he was not safe in Burundi either and fled to Canada.

[9] The Board found it implausible that the applicant could have recognized the body by the side of the road in the condition he described because he and the deceased were merely together in a crowded restaurant and the two made no contact or conversation. The Board also did not find the applicant's fear of the police believable because he never saw or spoke to the officers that allegedly came to his home, did not know why they were there, and did not know whether they were the same officers as those allegedly seen the night before. The Board also found that

the applicant did not provide it with “any evidence” that the police were at his house to arrest him or these officers were even the same as those he had seen previously.

[10] The applicant submits that the Board erred in its credibility and plausibility findings by ignoring the particular evidence and explanation given by the applicant as to how he was able to identify the corpse as the man he saw the previous night in the restaurant.

[11] The evidence the applicant primarily relies upon is set out in an affidavit he filed in support of the leave application, the content of which is repeated in his memorandum, wherein he states that he testified that one of the men in the restaurant was wearing a blue t-shirt bearing the inscription Congo Novo and that he observed that the corpse was wearing the same blue t-shirt with the inscription – Congo Novo – he had seen the previous night.

[12] However, the certified tribunal record clearly reflects that this was not his evidence before the Board. His evidence was that two of the men had shirts bearing the inscription Congo Novo but that the “other” man had on a blue t-shirt. In short, the record does not support the submission that the Board failed to consider this evidence; it was not the evidence before the Board. More problematic is that the applicant filed a false affidavit in support of this application for leave and judicial review.

[13] The applicant’s affidavit is also false in identifying the gender of the maid or helper who he claims was taken by the authorities. In his Personal information Form, through the use of a single pronoun – “her” - the maid is identified as a woman. At the Board hearing, the applicant

many times clearly identifies the maid as a man. The Board did not apparently notice this inconsistency. However, in his affidavit filed in this application the applicant reverts to identifying the maid using the female pronoun “her.”

[14] Although I may not have come to the conclusion the Board did that it was implausible that the applicant could identify the corpse as the man he saw in the restaurant, I cannot say that the decision reached was unreasonable as not being “within the range of possible, acceptable outcomes which are defensible in respect of the facts” as described by the Supreme Court in *Dunsmuir v New Brunswick*, 2008 SCC 9.

[15] Accordingly, on the merits, this application must be dismissed.

[16] Further, even if I had been of the view that the Board erred in reaching the decision, I would not have allowed the application in light of the false evidence the applicant has tendered to the Court on this application.

[17] In *Poveda Mayorga v Canada (Minister of Citizenship & Immigration)*, 2010 FC 1180, at para 18, it was held that this Court has discretion to refuse to grant judicial review when the applicant does not come with clean hands:

In *Thanabalasingham v. Canada (Minister of Citizenship & Immigration)*, 2006 FCA 14 (F.C.A.), at para. 9, the Federal Court of Appeal stated that "if satisfied that an applicant has lied, or is otherwise guilty of misconduct, a reviewing court may dismiss the application without proceeding to determine the merits or, even though having found reviewable error, decline to grant relief." The Court added, (at para. 10) that the factors to be taken into account

in deciding whether to dismiss an application in this manner include:

...the seriousness of the applicant's misconduct and the extent to which it undermines the proceeding in question, the need to deter others from similar conduct, the nature of the alleged administrative unlawfulness and the apparent strength of the case.

[18] In my assessment, the misrepresentation of the applicant in his affidavit as to the evidence he gave to the Board concerning the shirt is very serious. Leave is granted or denied by this Court without the benefit of a full record and invariably without a transcript of the evidence tendered. As such, when an applicant attests that he or she provided specific evidence which the Board ignored or failed to consider, the leave judge must accept that statement as accurate. If on the basis of such a false statement leave is granted, then the filing of a false affidavit is not only improper, it is an abuse of the Court's process. As a result, in this case, I would not have granted judicial review as a remedy even if I had found that the decision under review was unreasonable.

[19] Neither party proposed a question for certification.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** this application is dismissed and no question is certified.

"Russel W. Zinn"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-432-12

**STYLE OF CAUSE:** EDOUARD NGABWE MUTABUNGA v. THE  
MINISTER OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** August 29, 2012

**REASONS FOR JUDGMENT  
AND JUDGMENT:** ZINN J.

**DATED:** September 5, 2012

**APPEARANCES:**

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