Federal Court  Cour fédérale

Date: 20140718

Docket: IMM-5882-13

Citation: 2014 FC 717

Ottawa, Ontario, July 18, 2014

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

NICHOLAS KIOKO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

Overview

[1] Mr. Kioko, a Kenyan citizen, entered Canada as a visitor in September 2005. A few weeks after his arrival, he claimed asylum alleging fear for his life if he had to return to Kenya. In particular, he feared the violent reprisals of a Mr. Kiplagat for an interview he had given a few weeks prior to his departure where he said he was about to denounce some questionable practices of Kenya's Athletics Association. At the time, Mr. Kiplagat was the president of that

Association. Mr. Kioko's asylum claim was granted in May of 2007 but in November 2010, his status as a person in need of protection was vacated as it was found that he had misrepresented some of his asylum claim's material facts, including his previous arrests and convictions in the United States where he had lived with his wife and three children from 2000 to 2004.

[2] Confronted to a removal order, Mr. Kioko sought from the Minister a pre-removal risk assessment. This request was rejected as the Minister was not persuaded, due to a lack of corroborating evidence, that Mr. Kioko would face, upon returning to Kenya, a personalized forward-looking risk to his life or of cruel and unusual treatment or punishment. Mr. Kioko challenged this assessment. In April 2013, this Court ordered that Mr. Kioko' pre-removal risk assessment request be reviewed by taking into account a piece of evidence, namely an arrest warrant allegedly issued against him at the time he left for Canada in 2005, which he could have, but mistakenly did not, file in support of the said request. In July 2013, the Minister concluded that Mr. Kioko's evidence was still insufficient to justify a stay of the removal order.

[3] Mr. Kioko is now challenging this most recent decision and does so in two respects. First, he says this decision is credibility-driven with the result that he was entitled to an oral hearing. Second, he contends that the Minister, in reassessing the evidence, ignored or capriciously rejected material facts and drew conjectural conclusions.

[4] For the reasons that follow, Mr. Kioko has not persuaded me that he was entitled to an oral hearing or that the Minister's decision warrants to be interfered with.

I. **Pre-Removal Risk Assessment's Legal Framework**

[5] The statutory authority for a pre-removal risk assessment is set out in s 112 of the *Immigration and Refugee Protection Act*, SC 2011, c 27 (the Act). That provision enables the Minister – or his delegate – to determine whether a person who faces a removal order is in need of protection. The effect of a positive assessment is to stay the removal order.

[6] A pre-removal risk assessment is conducted on the grounds set out in s 96 and 97 of the Act. In the case of Mr. Kioko, it was conducted on the sole basis of s 97 as he was found, in the context of the November 2010 vacating order, to be inadmissible to remain in Canada on grounds of serious criminality.

[7] Persons applying for a pre-removal risk assessment bear the onus of establishing, on a balance of probabilities, that they need Canada's protection (*Adetunji v Canada (Minister of Citizenship and Immigration)*, 2012 FC 708 at para 19, [2012] FCJ No 698 (QL) [*Adetunji*]; *Ferguson v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1067, at para 22, [2008] FCJ No 1308 (QL)). In the context of an assessment based on the factors set out in s 97 of the Act, the claimants must prove that their removal to their country of nationality would subject them personally to a risk to their life, or to a risk of cruel and unusual treatment or punishment. They also have to prove that they would be unable, or, because of that risk, unwilling to avail themselves of the protection of that country, whatever the geographical area they are removed to.

[8] In the context of a pre-removal risk assessment application, the concept of risks is forward-looking and a personalized risk is a risk that is more significant than the one faced by the population of the country of nationality (*Campos v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1244 at para 9, [2008] FCJ No 1566 (QL) [*Campos*]; An*drade v Canada (Minister of Citizenship and Immigration)* 2010 FC 1074 at para 46, [2010] FCJ No 1348 (QL) [*Andrade*]).

[9] Pre-removal risk assessment's applications are generally assessed on the basis of an applicant's written submissions and documentary evidence (*Adetunji*, above at para 25) but s 113 of the Act provides the Minister with the discretion to hold a hearing when certain factors are present. In essence, these factors, prescribed by s 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations), are whether (a) there is evidence raising a serious issue of the applicant's credibility; (b) the evidence is central to the application for protection; and (c) the evidence, if accepted, would justify allowing the application (*Liban* v. *Canada (Minister of Citizenship and Immigration)*, 2008 FC 1252 at para 12, [2008] FCJ No 1608 (QL).

[10] An oral hearing in the context of such applications remains, however, the exception (*Ahmad v Canada (Minister of Citizenship and Immigration),* 2012 FC 89 at para 38, [2012] FCJ No 96 (QL) [*Ahmad*]; *Adetunji*, above at para 25).

[11] The statutory and regulatory provisions referred to above are reproduced in the Annex to this judgement.

II. **Issues**

[12] This case raises two issu47es. The first is whether the Minister was, in the circumstances of this case, bound to hold an oral hearing. The second is whether the Minister's finding that Mr. Kioko has not established, on a balance of probabilities, that he would face, upon return to Kenya, a personalized risk to his life, or of cruel and unusual treatment or punishment as per s 97 of the Act, is unreasonable.

III. **Issue 1: Was the Minister Bound to Hold a Hearing?**

A. ***Standard of Review***

[13] The standard of review applicable to decisions taken on pre-removal risk assessment applications differs according to the nature of the issues raised. As it is in large part the result of a fact-driven inquiry, the standard of reasonableness has consistently been applied to the determination of risk upon being returned to a particular country. These determinations, including the conclusions regarding the proper weight to be accorded to the evidence, warrant considerable deference because of the Minister's specialized expertise in risk assessments (*Adetunji*, above at para 22; *Ahmad*, above at para 41).

[14] Issues of procedural fairness, on the other hand, call for a more exacting standard of review – the standard of correctness – and no deference is due to the decision-maker (*Adetunji*, above at para 23). The jurisprudence of this Court is however divided on the standard of review

to be applied to the Minister's decision to hold a hearing or not in the context of a pre-removal risk assessment application.

[15] In some judgments, the Court has treated the decision to not hold a hearing as a breach of procedural fairness and has, as a result, applied the standard of correctness. In other judgments, it has been ruled that deciding whether it is appropriate to hold a hearing on the basis of the specific context of a case and the factors prescribed by s 167 of the Regulations involved an exercise of discretion that attracts deference, and was subject therefore to a standard of reasonableness *(Andrade*, above at paras 19-20; *Adetunji*, above at para 24).

[16] In her memorandum of fact and law, counsel for Mr. Kioko took the position that the applicable standard of review of the Minister's decision to allow or not an oral hearing was that of reasonableness (at para 23). However, she argued at the hearing that the applicable standard was that of correctness. The respondent disagrees and contends that the applicable standard is that of reasonableness.

[17] I agree with the respondent that the reasonableness standard applies to such decisions. Section 113 of the Act makes it clear that a hearing in the context of a pre-removal risk assessment application is only to be held in very specific circumstances tailored by the pre-removal risk assessment regulatory scheme. As Justice de Montigny put it in *Adetunji*, above, the decision to hold a hearing is "not taken in the abstract, according to what each Officer thinks is required by procedural fairness"; it is rather taken "by applying the factors prescribed in s. 167 of the *Regulations*, factors to the particular facts of each case" (*Adetunji*, above at para 27).

[18] As such, deciding whether to hold a hearing in the specific context of a pre-removal risk assessment application is clearly, in my view, a question of mixed fact and law and one over which the Minister, being called upon to interpret his own statute, has expertise (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 25, [2009] 1 SCR 339; *Celgene Corp v Canada (Attorney General)*, 2011 SCC 1 at para 34, [2011] 1 SCR 3; *Nolan v Kerry (Canada) Inc.*, 2009 SCC 39 at para 35, [2009] 2 SCR 678; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 41, [2008] 1 SCR 190).

[19] I therefore share the view of those of my colleagues who have held that such decisions attract deference and are reviewable on the reasonableness standard (*Adetunji*, above at para 27; *Andrade*, above at paras 21-22; *Ventura v Canada (Minister of Citizenship and Immigration)*, 2010 FC 871, at para 18, [2010] FCJ No 1079 (QL)).

[20] Based on the factors outlined in s 167 of the Regulations, the question to be decided on this first issue is therefore whether the Minister's decision to reject Mr. Kioko's pre-removal risk assessment application was premised on Mr. Kioko's credibility or rather on the insufficiency of the evidence he presented in order to support a finding that he would be personally at risk if he were to be removed to Kenya (*Adetunji*, above at para 30). If credibility is at issue, then the test to be applied is whether this issue was central to the Minister's decision to reject Mr. Kioko's application (*Latifi v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1388 at para 49, [2006] FCJ No 1738 (QL)).

[21] It is well established that in answering that question, the Court must analyse the impugned decision by looking beyond the words used by the Minister. It must, in other words, determine the true basis of the decision before determining whether it turned on lack of credibility or insufficiency of evidence (*Andrade*, above at paras 31-32).

[22] In order to determine the true basis of the impugned decision in the present instance, it is necessary to look at the facts of the case from the very outset.

B. ***The Facts***

(1) *Mr. Kioko's asylum claim and the subsequent vacating order*

[23] Mr. Kioko is a long-distance runner. When he came to Canada with a temporary resident visa in September 2005, it was to participate in the Montreal Marathon. The asylum claim he filed shortly thereafter was prompted by alleged threats to his life by people from the Kenyan Athletic Association and the government's secret services because of his will to denounce the selling of young Kenyan athletes to some Middle East countries. These threats all stem from a single event, an interview given by Mr. Kioko in the summer of 2005 where he denounced some questionable practices of the country's Athletic Association; and they are all linked to a single individual, Mr. Kiplagat, the president of that Association.

[24] Mr. Kioko alleged that from the moment Mr. Kiplagat learned about the interview, he planned to eliminate him. This threat led Mr. Kioko to leave Nairobi, where he had his residence, for his mother's house in the country. Once at his mother's house, he learned that strangers had

broken into his house in Nairobi, looking for him and seriously injuring his cousin who was keeping an eye on the house at the time. Once in Canada, he was told that his house had been burnt down. The time the police and the fire brigade took to arrive at the scene led him to believe that the perpetrators had police protection. He also apparently learned, once in Canada, that Mr. Kiplagat had arranged for sedition charges to be laid, and an arrest warrant to be issued, against him.

[25] Mr. Kioko claimed asylum as a person in need of protection under s 97 of the Act. The member of the Refugee Protection Division of the Immigration and Refugee Board who interviewed Mr. Kioko believed his story and accepted his claim.

[26] Mr. Kioko's story does not end there, however. While he was securing Canada's protection, evidence that Mr. Kioko had made misrepresentations in his asylum claim on material facts such as his identity, marital status, passports, previous arrests and convictions and orders to leave a country, began to surface.

[27] This all started in January 2007 when Mr. Kioko was arrested and detained by the American border authorities as he was attempting to enter the United States, where he still had family, with false documents. He subsequently pleaded guilty to the offence of "improper entry by alien" and was returned to Canada. This incident brought to light the fact that in 2004, while he was living in the United States to pursue his career and training as a long-distance runner, Mr. Kioko was convicted of the felony of "aggravated battery" on his wife. As a result of this

conviction, he was deported to Kenya in March 2005 where he lived up to his departure for Canada six months later.

[28] This discovery meant that Mr. Kioko might have been inadmissible to enter Canada in September 2005 and that he might have misrepresented himself in his request for Canada's protection. This prompted an investigation on the part of the Canada Border Services Agency which eventually led to Mr. Kioko's asylum status being vacated. From that point on, Mr. Kioko was deemed inadmissible to remain in Canada and his removal to Kenya was, as a result, ordered by the Minister. Mr. Kioko sought, but was denied leave to challenge the vacating order.

(2) ***The first pre-removal risk assessment decision***

[29] Faced with the prospect of being removed to Kenya, Mr. Kioko again sought Canada's protection by requesting this time, from the Minister, a pre removal risk assessment under s 112 of the Act. He alleged, in this regard, that Mr. Kiplagat was still interested – and still had the means through his considerable connections to the Kenyan authorities – to exact vengeance for the summer 2005 interview by arranging for his arrest, detention and conviction on the sedition charges or even for having him killed. In support of Mr. Kiplagat's alleged continued interest in punishing him, Mr. Kioko reported having been told by a relative that one of his uncles had died in a "suspicious" car accident in December 2010, sometime after having been arrested and questioned on his whereabouts.

[30] In July 2012, the Minister, through one of his delegates, Senior Immigration Officer C. Palmer (the Officer), rejected Mr. Kioko's request on the ground that his allegations were not

supported by corroborating evidence such as a copy of the arrest warrant and information about the car accident, the uncle's death and the relative who informed him of these events.

[31] The Officer also reviewed the documentation adduced regarding current country conditions, Mr. Kiplagat and the Kenyan Athletic Association. He found that although corruption and impunity persist in Kenya, as do long standing ethnic rivalries and endemic poverty, the country conditions affected all Kenyans and did not point to an individualized risk to Mr. Kioko.

[32] As for Mr. Kiplagat and the Kenyan Athletic Association, the Officer noted that the issues of the "selling" of Kenyan athletes had been documented in the press well before Mr. Kioko's 2005 interview on the subject, with many other athletes complaining about possible bribery and corruption in the Kenyan athletic world. He found that with the passage of time, and a new generation of athletes, there was insufficient evidence to conclude that Mr. Kioko would still be of interest to Mr. Kiplagat or other figures in the Kenyan Athletic Association. He noted in this regard that no one among Mr. Kioko's family, friends or fellow athletes had submitted information on Mr. Kioko's behalf as to any personalized danger in relation to the summer 2005 interview or from the Kenyan authorities.

(3) ***The second pre-removal risk assessment decision***

[33] Mr. Kioko's pre-removal risk was reassessed, as ordered by this Court, so that the arrest warrant issued against Mr. Kioko be taken into consideration. In support of this reassessment, Mr. Kioko filed a new affidavit where he provided some details as to his uncle's deadly car accident. These details were provided through the affidavit of a family member who was called

to the scene of the accident by the police and who was told by people on the scene that the police had been slow to intervene while his injured uncle was apparently still alive. Mr. Kioko also filed some hospital receipts allegedly related to the medical care his cousin needed after having been beaten by strangers while he was guarding his house in August 2005. Finally, he reported that one of his other uncles had been killed, while his house was being robbed. In particular, he reported that this death had occurred at about the same time his lawyer was appearing before this Court in April 2013. Mr. Kioko recognised however that there was no way to determine whether there was a connection between the two events.

[34] The Minister, through the Officer, gave no weight to the affidavit dealing with the deadly car accident. He found, on the one hand, that there was nothing in this affidavit linking that death to Mr. Kiplagat. He noted, on the other hand, that there was no corroborative information from other members of Mr. Kioko's family indicating that there might be such a link. The Officer's conclusion regarding the death of Mr. Kioko's other uncle in April 2013 was to the same effect as he found no corroborative evidence linking that death to Mr. Kiplagat.

[35] With respect to the medical reports, the Officer found that these reports were from a hospital located outside of Nairobi and were dated from December 2005 whereas the incident that led to Mr. Kioko's cousin's injuries had occurred in August 2005.

[36] As for the arrest warrant, the Officer questioned its validity on a certain number of grounds. First, he questioned the fact that it was dated August 31, 2005, whereas Mr. Kioko was apparently only made aware of its existence once in Canada. Second, he formed the view that if

the warrant had in effect been issued in August 2005, which was before Mr. Kioko's departure for Canada, it could have blocked his departure at the airport or the issuance of his temporary resident visa by the Canadian local consular authorities. Third, the Officer noted that there were no details on the "seditious charges" underlying the issuance of the arrest warrant and that no follow-up documents had been adduced since the end of August 2005 from the courts or the police on either the warrant or the charges. Fourth, he observed that none of Mr. Kioko's family members living in Kenya had written to express concerns as to his return to Kenya or a possible threat from Mr. Kiplagat and his associates, regarding the pending warrant.

[37] The Officer concluded that in the absence of any other corroborating evidence from Kenya, the arrest warrant, considered alone or together with the other evidence adduced, did not represent a personalised, forward-looking risk to Mr. Kioko. Overall, he found, based on the evidence provided in the context of both pre-removal risk assessments, that Mr. Kioko's fears of persecution and cruel punishment upon return to Kenya, either directly or indirectly at the hands of Mr. Kiplagat, to be unsubstantiated.

[38] In particular, he found "inadequate evidence to support a conclusion that Mr. Kiplagat continues to bear a grudge against [Mr. Kioko] since his departure almost eight years ago, and that he will seek to perpetuate this vengeance via the 2005 arrest warrant."

C. ***The parties' position***

[39] Mr. Kioko contends that the Officer came to conclusions that were clearly addressed to his credibility. This, he says, was the case in three specific instances: first, when the Officer

indicated that the affidavit concerning the car accident which resulted in the death of one of Mr. Kioko's uncle, appeared to have been tampered with; second, when he mentioned that only he had raised the possibility of a link between the death of the two uncles and Mr. Kiplagat and that in the absence of probative third party evidence, he was unable to give much weight to this theory; third, when he questioned the validity of the arrest warrant allegedly issued under Mr. Kiplagat's influence.

[40] Mr. Kioko claims, as a result, that all three factors prescribed in s 167 of the Regulations were present: the Officer did not believe the prospective fear alleged by Mr Kioko; the allegations that were not believed could have proven his forward-looking fear; and the sole reason for rejecting his pre-removal risk assessment application was because he had not proven such a fear. He further claims that the Officer had no basis to disbelieve his allegations as his affidavit was evidence that was to be believed if not contradicted.

[41] The respondent submits that the Officer had issue not with Mr. Kioko's credibility but with the fact that the evidence adduced was not sufficient to demonstrate he was facing a personalized forward-looking risk upon his return to Kenya. In other words, the respondent claims that the Officer took issue with the probative value of Mr. Kioko's evidence.

[42] On the weight to be accorded to Mr. Kioko's affidavit, the respondent claims that it was open to the Officer to require more evidence to satisfy the legal burden of establishing a personalized forward-looking risk on balance of probabilities.

D. ***Analysis on the first issue***

[43] On a careful reading of the impugned decision, I am of the view that it was premised on insufficiency of evidence rather than on lack of credibility and that it was open to the Officer, as a result, to decide not to hold a hearing.

[44] Determining whether the requirements of s 167 of the Regulations are present in a given case raises issues of an evidentiary nature: burden and standard of proof on the one hand and credibility and probative value of evidence, on the other hand. These notions are different although that difference is sometimes tenuous.

(1) ***Burden and standard of proof***

[45] As indicated previously, in pre-removal risk assessments, the burden of proof is on the claimant. As in civil matters, this burden requires the claimant to establish, on a balance of probabilities, that he or she would be subject to a risk to life, or to a risk of cruel and unusual treatment or punishment if returned to his or her country of nationality. This is the standard of proof. In order to meet that burden in accordance with the appropriate standard of proof, a claimant must present evidence to the Minister of each of the facts that needs to be proven (*Ferguson*, above at para 22; *Ozzoma v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1167 at para 49, [2012] FCJ No 1232 (QL)).

[46] However, not all evidence is of the same quality. A claimant may have met the evidentiary burden of presenting evidence of each fact that has to be proven but not the legal burden because the evidence presented does not prove the facts required on a balance of probabilities. As this Court stated in *Ferguson*, above, "the determination of whether the evidence presented meets the legal burden will very much depend on the weight or probative value given to the evidence presented" (*Ferguson*, above at para 24).

(2) ***Credibility and probative value of evidence***

[47] In his consideration of the evidence put before him, the Minister may engage in two separate assessments: one of credibility and one of probative value. An assessment as to probative value and weight can however be made without making a determination as to credibility (*Cho v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1299 at para 25, [2010] FCJ No 1673 (QL)). As a result, credibility may not be determinative of an issue if the evidence submitted, whether credible or not, would simply not have sufficient probative value (*Prieto v Canada (Minister of Citizenship and Immigration)*, 2010 FC 253 at para 38, [2010] FCJ No 307 (QL)).

[48] This is where the notion of subjective and objective fears comes into play. As I indicated earlier in these reasons, the concept of risk in the context of pre-removal risk assessments is forward-looking. It is therefore reasonable to expect an applicant to provide objective evidence in support of his own allegations of risk which, in such context, is prospective by definition (*Haji v Canada (Minister of Citizenship and Immigration)*, 2009 FC 889 at para 10, [2009] FCJ No 1082 (QL)). As Madam Justice Dawson (now with the Federal Court of Appeal) rightfully

pointed out in *Campos*, above, "there is no legal basis for the submission that the reality of an objective risk "is in the eye of the beholder**"** (*Campos*, above at para 20).

[49] This means, as I understand it, that when an allegation is critical to the pre-removal risk assessment, it is open to the Minister's delegate to require more evidence than the claimant's own assertions to satisfy the legal burden on balance of probabilities (*Ferguson*, above at para 49).

(3) ***The Officer's decision turns on insufficiency of evidence, not credibility***

[50] Mr. Kioko had to show that but for the credibility issue on his subjective fear, assuming there was one, a positive decision on his pre-removal assessment request would likely have resulted. This required Mr. Kioko to show that he would likely have been able to establish, on a balance of probabilities, the objective component of his fear as that objective component cannot always be fully established simply by relating to one's story in an affidavit. Sometimes, additional probative evidence will be required (*Prieto*, above at para 36; *Haji*, above at para 10; *Ozzoma*, above at paras 52-56; *Adetunji*, above at para 32).

[51] This was the case here. Mr. Kioko did provide supporting evidence but this evidence was however found to be of little probative value in terms of establishing the objective component of the critical element of his alleged prospective fear.

[52] This critical element is the role his alleged persecutor might play upon Mr. Kioko's return to Kenya. Indeed, Mr. Kiplagat is the central piece of Mr. Kioko's story and alleged fear. According to that story, Mr. Kiplagat is an influential figure in Kenya, especially in the world of athletics and he is still interested in exacting vengeance against Mr. Kioko since the interview of July 2005 where Mr Kioko denounced his involvement in the selling of Kenyan athletes. As a result of this interview, Mr Kiplagat has arranged for an arrest warrant to be issued against Mr. Kioko and still wants him to be punished upon his return to Kenya. Since Mr. Kioko left that country in 2005, two of his uncles have died in suspicious circumstances and he believes that Mr. Kiplagat and his agents are involved in these deaths.

[53] Mr. Kioko's pre-removal risk assessment application was rejected by the Officer as he found that there was insufficient probative evidence to support a conclusion that Mr. Kiplagat continues to bear a grudge against Mr. Kioko and that he will seek to perpetuate this vengeance via the August 2005 arrest warrant upon Mr. Kioko's return. The only objective evidence of that alleged prospective fear laid in the unfortunate death of two of Mr. Kioko's uncles, one in 2010, the other in 2013.

[54] I am of the view that it was open to the Officer to ascribe a low probative value and place little weight on that evidence. Indeed, even accepting that the uncle who died in a car accident in December 2010 had been interrogated earlier in that year on Mr. Kioko's whereabouts, the theory of his death being attributed to Mr. Kiplagat or his associates was speculative. The affidavit signed by one of Mr. Kioko's other uncles on the circumstances of this death only

repeated that it occurred in "suspicious circumstance", without any kind of details allowing to establish any kind of a link with Mr. Kiplagat.

[55] The evidence regarding the death of Mr. Kioko's other uncle was even more remote to any kind of role Mr. Kiplagat may have played in this death. Mr. Kioko is simply asserting in that regard that this death occurred at about the same time his counsel was appearing before this Court in April 2013. As Mr. Kioko has himself recognized, it is impossible to establish any link between Mr. Kiplagat and these two events.

[56] As for the hospital receipts related to the August 2005 incident that apparently left Mr. Kioko's cousin badly injured, apart from the dates and hospital location problems identified by the Officer, this was evidence directed at past treatment and not to either current conditions or future risks. As such, it had very little relevance (*Campos*, above at para 21).

[57] The Officer's finding that this evidence was insufficient to support Mr. Kioko's assertion of a forward-looking risk linked to Mr. Kiplagat's desire for vengeance certainly fell within a range of possible outcomes which are defensible in light of the facts and the law. I am not satisfied that this conclusion was credibility-driven and that it required, as a result, that an oral hearing be held. It was rather related to the lack of probative value of the evidence submitted by Mr. Kioko on a critical element of his alleged fear.

[58] My conclusion is no different with respect to the arrest warrant. Again, Mr. Kioko had to prove, on a balance of probabilities, that upon his return to Kenya, Mr. Kiplagat would seek to

perpetuate this vengeance via the arrest warrant by having him arrested, arbitrarily detained and convicted after having been deprived of a fair trial. After having concluded that the evidence concerning the deaths of Mr. Kioko's two uncles had very little probative value, the Officer found that Mr. Kioko's fear in this regard lacked objective corroborative evidence.

[59] As the Officer pointed out, no follow-up documents have been adduced since the warrant was issued and Mr. Kioko left Kenya; Mr. Kioko has had no contact with Mr. Kiplagat since that time; there were no letters from family members, friends or former or current fellow Kenyan athletes living in Kenya to express concerns as to possible threats from Mr. Kiplagat regarding the pending arrest warrant or, more generally, as to Mr. Kioko's return to Kenya.

[60] One important feature of the Officer's decision was the passage of time. He noted that eight years had passed since the 2005 interview and Mr. Kioko's subsequent departure from Kenya. He therefore looked for evidence of some probative value that would establish that Mr. Kiplagat was still seeking to perpetuate his vengeance on Mr. Kioko and still held the kind of power to persecute him via the arrest warrant, as alleged. In other words, the Officer asked himself, as I understand his decision, whether the 2005 alleged threats from Mr. Kiplagat could have dissipated over time. It was certainly within the Officer's purview to evaluate the fact of the passage of time on the reality of the current risk and I see nothing unreasonable with this approach (*Campos*, above at para 20; *N.N.N. v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1281 at para 70, [2009] FCJ No 1641 (QL) ; *J.N.J. v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 1088 at para 35, [2010] FCJ No 1361).

[61] One could reasonably infer that this inquiry into the passage of time was justified in the particular circumstances of this case as there was evidence, as pointed out by the Officer, that Mr. Kioko was not the first, and was not the last, athlete, to denounce the "selling" of young Kenyan athletes to other countries.

[62] Mr. Kioko relies on this Court's decision in *Liban*, above, but the two cases are distinguishable. In *Liban*, the Minister's delegate accepted that homosexuals and alcohol addicts were persecuted and could even face the death penalty in the applicant's country of origin but he did not believe that the applicant was either a homosexual or an alcoholic addict. This Court found that these findings were conclusions about the applicant's credibility and that they were central to the officer's decision since, if the applicant had been believed on these two crucial points, he would likely have found him at risk (*Liban*, above at paras 13-14).

[63] Here, the Officer accepted that Mr. Kioko had a conflict with Mr. Kiplagat in 2005 and that two of his uncles had died in tragic circumstances, but he was not satisfied that there was sufficient probative evidence supporting a finding that Mr. Kiplagat was still, today, interested in exacting vengeance on Mr. Kioko upon his return to Kenya and that these unfortunate deaths were a sign of things to come in this respect.

[64] Mr. Kioko has therefore not persuaded me that the true basis of the Officer's decision was credibility-driven and that, as a result, the requirements of s 167 of the Regulations, which would have entitled him to a hearing, were present.

IV. **Issue 2 : Was the Officer's Decision Reasonable?**

A. ***Standard of Review***

[65] It is well established that deference is owed to the Minister's factual determinations, including his conclusions with respect to the proper weight to be accorded to the evidence placed before him, when he proceeds to a pre-removal risk assessment. In the absence of a failure to consider relevant factors or reliance upon irrelevant ones, the weighing of the evidence lies within the purview of the Minister and does not normally give rise to judicial review (*Ahmad*, above at para 41).

[66] The role of the Court in this context is not to reweigh the evidence that was before the Minister but to ensure that the Minister's decision falls within a range of possible outcomes which are defensible in light of the facts and the law. The fact that the Court may have reached a different conclusion than the one reached by the Minister is irrelevant to the analysis (*Ahmad*, above at para 41; *Adetunji*, above at para 22; *Ferguson*, above at para 49).

[67] There is no dispute between the parties as to the standard of review applicable to the Officer's finding that Mr. Kioko has failed to establish a forward-looking risk upon returning to Kenya.

B. ***Mr. Kioko's claim***

[68] Mr. Kioko contends that the Officer ignored or capriciously rejected material facts and drew conjectural conclusions and that, as a result, the impugned decision is unreasonable.

[69] In particular, Mr. Kioko claims that the Officer committed a reviewable error by arbitrarily choosing to believe the facts that led him to leave Kenya in 2005 but not those respecting the arrest warrant and his uncles' death and by requiring the more recent facts be supported by corroborative evidence. He says that this "relentless" suggestion that more documents were needed set a higher standard than what is required by law.

[70] Mr. Kioko also submits that although the Officer made reference to the Refugee Protection Division's decision accepting his asylum request, he never analysed it and, in so doing, he ignored a crucial fact that suggested a different outcome than the one he ultimately reached.

[71] Finally, Mr. Kioko challenges, as pure speculation, the Officer's finding that the arrest warrant, if valid, as alleged, could have prevented him from leaving Kenya or from getting a Canadian visa.

C. ***Analysis***

[72] My analysis on the first issue is in large part dispositive of this second issue.

[73] As I already indicated, it was open to the Officer to ascribe a low probative value and place little weight on the evidence of prospective fear based on the unfortunate death of Mr. Kioko's two uncles. The Officer did not question these deaths but he found this evidence not to be helpful in establishing, on a balance of probabilities, any kind of a link with Mr. Kiplagat and his alleged desire for vengeance.

[74] The same can be said about the arrest warrant. On a careful reading of the Officer's decision, the key finding regarding the arrest warrant clearly appeared to be that there was no probative corroborative evidence establishing that Mr. Kiplagat, especially given the passage of time, was still seeking to perpetuate his vengeance on Mr. Kioko and still held the kind of power to persecute him via the arrest warrant.

[75] Even assuming that it was still valid, there was nothing on record, according to the Officer, to support a finding that the arrest warrant itself represented a forward-looking personalized risk for Mr. Kioko. It was Mr. Kioko's burden to establish that prospective risk on a balance of probabilities. The Officer concluded that he had not met his burden. I cannot say that this was an unreasonable conclusion in light of the evidence that was before the Officer.

[76] This conclusion is dispositive of Mr. Kioko's claim that the Officer drew conjectural conclusions in his questioning of the arrest warrant's validity. This finding, as I read the decision, was not central to the Officer's overall conclusion that Mr. Kioko had not established that he was facing a forward-looking risk upon returning to Kenya. What was central to his conclusion was that there was inadequate evidence to support a finding that Mr. Kiplagat

continued to bear a grudge against Mr Kioko since his departure in 2005 and that he was still seeking to perpetuate this vengeance via the 2005 arrest warrant.

[77] Even assuming, therefore, that the Officer drew conjectural conclusions with respect to Mr. Kioko's capacity to leave Kenya or get a visa from the Canadian consular authorities when he left Kenya given the alleged existence of the arrest warrant at the time, this, in my view, is not enough to disturb the Officer's decision.

[78] In the absence of sufficient evidence showing that Mr. Kiplagat still represented a risk for Mr. Kioko upon his return to Kenya, the Officer looked at the country conditions and found that the problems Kenya is facing affected all Kenyans and did not point to an individualized risk to Mr. Kioko. This finding was not challenged.

[79] Again, the issue here is not whether, confronted to the same body of evidence, I could have reached a different conclusion but whether the Officer's overall finding regarding Mr. Kioko's evidence of a prospective risk falls within a range of possible outcomes which are defensible in light of the facts and the law. In my view, it does.

[80] Finally, the fact that the Officer did not make an explicit finding on the Refugee Protection Division's decision accepting his asylum claim is of no avail to Mr. Kioko. It is well settled now that a decision-maker may not include in his reasons all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred and is not required to make an explicit finding on each constituent element leading to its final conclusion

(*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708, at para 16).

[81] As long as the reasons allow the reviewing court to understand why the tribunal made its decision and determine whether the conclusion is within the range of acceptable outcomes, there is no basis for intervention (*Newfoundland and Labrador Nurses' Union*, above, at para 16).

[82] In my view, this is the case here. The Refugee Protection Division's decision was not a "crucial fact", as Mr. Kioko contends. First, Mr. Kioko would have been found inadmissible to enter Canada in 2005 if he had not concealed material facts in his immigration forms. Second, as a result of the vacating order, this decision is void; in theory, therefore, Mr. Kioko was never granted Canada's protection. But most importantly, one could reasonably say that this decision is relevant to establish past treatment, as oppose to future risk.

[83] That decision from the Refugee Protection Division was therefore highly problematic and certainly not a "crucial fact" in the particular circumstances of the case. The absence of an explicit finding on said decision in the Officer's reasons was not enough to prevent the Court from understanding why the Officer made his decision and determining whether the conclusion he has reached falls within the range of acceptable outcomes.

[84] For all of these reasons, Mr. Kioko's judicial review application is dismissed.

[85] Neither party has proposed a question of general importance. None will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The present application for judicial review is dismissed.

2. No question is certified.

"René LeBlanc"

Judge

Immigration and Refugee Protection Act
SC 2001, c 27

PART 2 REFUGEE PROTECTION DIVISION 1

PARTIE 2 PROTECTION DES RÉFUGIÉS SECTION 1

REFUGEE PROTECTION, CONVENTION REFUGEES AND PERSONS IN NEED OF PROTECTION

NOTIONS D'ASILE, DE RÉFUGIÉ ET DE PERSONNE À PROTÉGER

Convention refugee

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

Définition de « réfugié »

96. A qualité de réfugié au sens de la Convention – le réfugié – la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Person in need of protection

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not

Personne à protéger

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle

have a country of nationality, their country of former habitual residence, would subject them personally

a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes – sauf celles infligées au mépris des normes internationales – et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Person in need of protection

Personne à protéger

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes

protection.

auxquelles est reconnu par règlement le besoin de protection.

DIVISION 3
PRE-REMOVAL RISK ASSESSMENT

SECTION 3
EXAMEN DES RISQUES AVANT RENVOI

Protection

Protection

Application for protection

112. (1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).

Demande de protection

112. (1) La personne se trouvant au Canada et qui n'est pas visée au paragraphe 115(1) peut, conformément aux règlements, demander la protection au ministre si elle est visée par une mesure de renvoi ayant pris effet ou nommée au certificat visé au paragraphe 77(1).

Exception

(2) Despite subsection (1), a person may not apply for protection if

(a) they are the subject of an authority to proceed issued under section 15 of the Extradition Act;

(b) they have made a claim to refugee protection that has been determined under paragraph 101(1)(e) to be ineligible;

Exception

(2) Elle n'est pas admise à demander la protection dans les cas suivants :

a) elle est visée par un arrêté introductif d'instance pris au titre de l'article 15 de la Loi sur l'extradition ;

b) sa demande d'asile a été jugée irrecevable au titre de l'alinéa 101(1)e);

(b.1) subject to subsection (2.1), less than 12 months, or, in the case of a person who is a national of a country that is designated under subsection 109.1(1), less than 36 months, have passed since their claim for refugee protection was last rejected – unless it was deemed to be rejected under subsection 109(3) or was rejected on the basis of section E or F of Article 1 of the Refugee Convention – or determined to be withdrawn or abandoned by the Refugee Protection Division or the Refugee Appeal Division;

b.1) sous réserve du paragraphe (2.1), moins de douze mois ou, dans le cas d'un ressortissant d'un pays qui fait l'objet de la désignation visée au paragraphe 109.1(1), moins de trente-six mois se sont écoulés depuis le dernier rejet de sa demande d'asile – sauf s'il s'agit d'un rejet prévu au paragraphe 109(3) ou d'un rejet pour un motif prévu à la section E ou F de l'article premier de la Convention – ou le dernier prononcé du désistement ou du retrait de la demande par la Section de la protection des réfugiés ou la Section d'appel des réfugiés;

(c) subject to subsection (2.1), less than 12 months, or, in the case of a person who is a national of a country that is designated under subsection 109.1(1), less than 36 months, have passed since their last application for protection was rejected or determined to be withdrawn or abandoned by the Refugee Protection Division or the Minister.

c) sous réserve du paragraphe (2.1), moins de douze mois ou, dans le cas d'un ressortissant d'un pays qui fait l'objet de la désignation visée au paragraphe 109.1(1), moins de 36 mois se sont écoulés depuis le rejet de sa dernière demande de protection ou le prononcé du retrait ou du désistement de cette demande par la Section de la protection des réfugiés ou le ministre.

(d) [Repealed, 2012, c. 17, s. 38]

d) [Abrogé, 2012, ch. 17, art. 38]

Exemption

(2.1) The Minister may exempt from the application of paragraph (2)(b.1) or (c)

(a) the nationals – or, in the case of persons who do not have a country of nationality, the former habitual residents –

Exemption

(2.1) Le ministre peut exempter de l'application des alinéas (2)b.1) ou c) :

a) les ressortissants d'un pays ou, dans le cas de personnes qui n'ont pas de nationalité, celles qui y avaient leur

of a country;	résidence habituelle;
(b) the nationals or former habitual residents of a country who, before they left the country, lived in a given part of that country; and	b) ceux de tels ressortissants ou personnes qui, avant leur départ du pays, en habitaient une partie donnée;
(c) a class of nationals or former habitual residents of a country.	c) toute catégorie de ressortissants ou de personnes visés à l'alinéa a).
Application	Application
(2.2) However, an exemption made under subsection (2.1) does not apply to persons in respect of whom, after the day on which the exemption comes into force, a decision is made respecting their claim for refugee protection by the Refugee Protection Division or, if an appeal is made, by the Refugee Appeal Division.	(2.2) Toutefois, l'exemption ne s'applique pas aux personnes dont la demande d'asile a fait l'objet d'une décision par la Section de la protection des réfugiées ou, en cas d'appel, par la Section d'appel des réfugiés après l'entrée en vigueur de l'exemption.
Regulations	Règlements
(2.3) The regulations may govern any matter relating to the application of subsection (2.1) or (2.2) and may include provisions establishing the criteria to be considered when an exemption is made.	(2.3) Les règlements régissent l'application des paragraphes (2.1) et (2.2) et prévoient notamment les critères à prendre en compte en vue de l'exemption.
Restriction	Restriction
3) Refugee protection may not result from an application for protection if the person	(3) L'asile ne peut être conféré au demandeur dans les cas suivants :
(a) is determined to be inadmissible on grounds of security, violating human or international rights or organized criminality;	a) il est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée;

(b) is determined to be inadmissible on grounds of serious criminality with respect to a conviction in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years or with respect to a conviction outside Canada for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years;

b) il est interdit de territoire pour grande criminalité pour déclaration de culpabilité au Canada pour une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou pour toute déclaration de culpabilité à l'extérieur du Canada pour une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;

(c) made a claim to refugee protection that was rejected on the basis of section F of Article 1 of the Refugee Convention; or

c) il a été débouté de sa demande d'asile au titre de la section F de l'article premier de la Convention sur les réfugiés;

(d) is named in a certificate referred to in subsection 77(1).

d) il est nommé au certificat visé au paragraphe 77(1).

Condideration of application

Examen de la demande

113. Consideration of an application for protection shall be as follows:

113. Il est disposé de la demande comme il suit :

(a) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection;

a) le demandeur d'asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'il n'était pas raisonnable, dans les circonstances, de s'attendre à ce qu'il les ait présentés au moment du rejet;

(b) a hearing may be held if the Minister, on the basis of prescribed factors, is of the

b) une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs

opinion that a hearing is required;

réglementaires;

(c) in the case of an applicant not described in subsection 112(3), consideration shall be on the basis of sections 96 to 98;

c) s'agissant du demandeur non visé au paragraphe 112(3), sur la base des articles 96 à 98;

(d) in the case of an applicant described in subsection 112(3) – other than one described in subparagraph (e)(i) or (ii) – consideration shall be on the basis of the factors set out in section 97 and

d) s'agissant du demandeur visé au paragraphe 112(3) – sauf celui visé au sous-alinéa e)(i) ou (ii) – , sur la base des éléments mentionnés à l'article 97 et, d'autre part :

(i) in the case of an applicant for protection who is inadmissible on grounds of serious criminality, whether they are a danger to the public in Canada, or

(i) soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un danger pour le public au Canada,

(ii) in the case of any other applicant, whether the application should be refused because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of Canada; and

(ii) soit, dans le cas de tout autre demandeur, du fait que la demande devrait être rejetée en raison de la nature et de la gravité de ses actes passés ou du danger qu'il constitue pour la sécurité du Canada;

(e) in the case of the following applicants, consideration shall be on the basis of sections 96 to 98 and subparagraph (d)(i) or (ii), as the case may be:

e) s'agissant des demandeurs ci-après, sur la base des articles 96 à 98 et, selon le cas, du sous-alinéa d)(i) ou (ii) :

(i) an applicant who is determined to be inadmissible on grounds of serious criminality with respect to a conviction in Canada punishable by a maximum term of imprisonment of at least 10

(i) celui qui est interdit de territoire pour grande criminalité pour déclaration de culpabilité au Canada pour une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans et pour

years for which a term of imprisonment of less than two years – or no term of imprisonment – was imposed, and

(ii) an applicant who is determined to be inadmissible on grounds of serious criminality with respect to a conviction of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, unless they are found to be a person referred to in section F of Article 1 of the Refugee Convention.

laquelle soit un emprisonnement de moins de deux ans a été infligé, soit aucune peine d'emprisonnement n'a été imposée,

(ii) celui qui est interdit de territoire pour grande criminalité pour déclaration de culpabilité à l'extérieur du Canada pour une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans, sauf s'il a été conclu qu'il est visé à la section F de l'article premier de la Convention sur les réfugiés.

Immigration and Refugee Protection Regulations
SOR/2002-227

DIVISION 4
PRE-REMOVAL RISK ASSESSMENT

Hearing – prescribed factors

167. For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors are the following:

(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;

(b) whether the evidence is central to the decision with

SECTION 4
EXAMEN DES RISQUES AVANT RENVOI

Facteurs pour la tenue d'une audience

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) 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) l'importance de ces éléments de preuve pour la

respect to the application for protection; and

(c) whether the evidence, if accepted, would justify allowing the application for protection.

prise de la décision relative à la demande de protection;

c) la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5882-13
STYLE OF CAUSE:	NICHOLAS KIOKO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	MAY 21, 2014
JUDGMENT AND REASONS:	LEBLANC J.
DATED:	JULY 18, 2014

APPEARANCES:

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