

Federal Court



Cour fédérale

Date: 20160721

Docket: IMM-5901-15

Citation: 2016 FC 858

Ottawa, Ontario, July 21, 2016

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

MARTIN RUTY NGEZE

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. **Introduction**

[1] This is an application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] of the decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada [RPD], dated December 8, 2015, wherein it determined that the Applicant is not a Convention refugee nor a person in need of protection under sections 96 and 97 of the Act.

II. Background

[2] The Applicant, Martin Ruty Ngeze, is a Congolese citizen from the North Kivu Province, located in the eastern part of the Democratic Republic of the Congo [DRC].

[3] The Applicant alleges he is at risk of persecution in the DRC on the basis of his ethnicity as a Congolese Tutsi. He fled to Rwanda in 2000 due to on-going conflict and violence in the DRC, returning on two occasions: in 2005 and again in 2010.

[4] While in Rwanda, the Applicant claims to have been kidnapped by the Rwanda Military Intelligence Department and was subsequently handed over to the M23 rebel group to fight against the Congolese armed forces. The Applicant escaped, crossed the border into Uganda, and travelled to Canada via the United States using a fraudulently obtained Rwandan passport. The Applicant fears persecution from the M23 rebels, the Congolese Militia, the Democratic Forces for the Liberation of Rwanda [FDLR], and the Rwanda Military Intelligence Department.

[5] In October 2012, the Applicant filed a claim with the RPD seeking refugee protection.

[6] By decision dated December 8, 2015, the RPD rejected the Applicant's claim. The determinative issues were identity and credibility. The RPD found that the Applicant had not met his burden of proof under Rule 11 of the *Refugee Protection Division Rules*, SOR/2012-256, as he had not provided credible documents establishing his personal or ethnic identity.

[7] The RPD noted serious credibility concerns and dismissed the claim as having no credible basis pursuant to subsection 107(2) of the Act, finding there was no credible or trustworthy evidence upon which it could have made a favourable decision.

[8] At the hearing, the Applicant provided a driver's license from the DRC issued in 2005, and a birth certificate issued in 2010 to establish his Congolese identity.

A. *Driver's Licence*

[9] The RPD concluded that the Applicant's driver's licence was fraudulent. It found the Applicant's testimony that he obtained the license by going to police in the DRC contradicted his testimony that when he returned to the DRC from Rwanda, he did so in hiding. Accordingly, the RPD drew a negative credibility inference.

[10] The RPD also questioned the authenticity of the driver's licence itself, as it bore the heading of the Republic of Zaire, despite being issued eight years after the Republic of Zaire was renamed to the DRC. Additionally, the RPD noted that the driver's licence contains internal inconsistencies, such as the fact its cover page indicates it was valid from 2005 to 2010, yet there are licence renewals elsewhere in the document from 2005 to 2006 and from 2006 to 2007.

[11] The RPD went on to note that the Applicant listed the driver's licence as authentic in his refugee claim form and attested to its authenticity during the hearing. By presenting the document as authentic, the RPD found that the Applicant had misrepresented a fact that had a direct bearing on the issue of his identity, and therefore made a negative credibility assessment.

Moreover, the RPD found the Applicant's testimony with respect to how he obtained his driver's licence inconsistent with information in the National Documentation Package [NDP].

B. *Birth Certificate*

[12] The RPD also concluded that the Applicant's birth certificate was a fraudulent document. It drew a negative credibility inference from the Applicant's testimony that the information in his birth certificate was obtained from Congolese registries, which record personal information of its citizens, as the NDP made no mention of such registries. Additionally, the RPD noted that the birth certificate contained several French grammar mistakes, the template and content of the document was inconsistent, and how it had been obtained was unclear and unconvincing.

[13] Again, the RPD noted that the Applicant had listed the birth certificate as authentic in his claim form and later confirmed its authenticity during the hearing, which for the same reasons provided above, negatively impacted his credibility.

C. *Lack of Other Identity Documents*

[14] The RPD drew a further negative credibility inference from the Applicant's testimony that he did not know about an attestation of lost documents, given that he had provided his brother's attestation of lost documents in the record. The RPD also concluded that during the three years between filing his Personal Information Form [PIF] and the date of the RPD hearing, the Applicant could have taken steps to obtain a recognized piece of official identification, but failed to do so. Despite information in the NDP setting out the difficulties associated with

obtaining documentation in the DRC, the RPD concluded the Applicant had not taken reasonable steps to obtain identity documentation, and thus had failed to establish his personal and ethnic identity.

D. *Brother's Documentary Evidence*

[15] The RPD considered documentary evidence filed by the Applicant post-hearing, which consisted of photocopied documents pertaining to the Applicant's brother, who had gained refugee status in Canada in 2009. That evidence includes: a signed statement by the brother; two identity documents from the DRC; a letter about the brother from the United Nations High Commissioner for Refugees [UNHCR] in Rwanda; the RPD decision accepting the brother's refugee claim in June 2009; and a further document from the UNHCR regarding refugees in Rwanda. The RPD determined that, in light of the credibility concerns with Applicant, the documents were insufficient to establish the Applicant's personal, national and ethnic identity, as the only link between the documents and the Applicant was his own testimony.

E. *The Applicant's Testimony*

[16] The RPD further found that the Applicant's abundant testimony about the situation in Rwanda did not suffice to establish his identity. Moreover, the RPD had no way to assess the Applicant's knowledge of Kinyarwanda – the language of the group to which the Applicant says he belongs – as he did not testify in that language.

F. *Rwandan Documents*

[17] To establish his residence in Rwanda, the Applicant provided a letter from Mount Kenya University confirming his admission and a fees clearance card. The RPD found that the Mount Kenya University letter was insufficient to establish the Applicant was in Rwanda due to inconsistencies between the document and the Applicant's testimony. The RPD found that the Applicant did not establish he was a university student in Rwanda, or how he was able to register at the university without identity documents and drew a negative credibility inference.

[18] The RPD also identified irregular font features on the fees clearance cards and noted that the card templates were inconsistent. The RPD went on to find that the Applicant provided inconsistent evidence with respect to the date of his alleged arrival in Rwanda.

G. *Re-Availment*

[19] The Applicant had returned twice to the DRC, specifically to the area from which he fled, which the RPD found contradicted his alleged subjective fear of persecution.

H. *Failure to Claim Elsewhere*

[20] The RPD further concluded that the Applicant's explanation for not making a refugee claim in Rwanda – because his parents did not want their children to claim in Rwanda – was contradicted by evidence that his brother made a claim in Rwanda with the UNHCR.

Accordingly, the RPD held that the Applicant's failure to make a refugee claim in Rwanda was unreasonable and drew a negative credibility inference on this basis.

III. Issues

[21] The issues are:

- A. Did the RPD breach the Applicant's right to procedural fairness?
- B. Is the RPD's decision reasonable?

IV. Standard of Review

[22] Issues of procedural fairness are reviewed on the correctness standard.

[23] The RPD's identity findings are fact-driven and entitled to deference, and are thus reviewed on the standard of reasonableness (*Liu v Canada (Minister of Citizenship and Immigration)*, 2012 FC 377 at para 8). The standard of review to be applied to the RPD's credibility findings is also reasonableness (*Triana Aguirre v Canada (Minister of Citizenship and Immigration)*, 2008 FC 571 at para 14).

V. Analysis

[24] As a preliminary matter, the Respondent objects to various paragraphs of the Applicant's affidavit (paragraphs 6, 13-24 and 26-28) and the affidavit of the Applicant's brother (paragraphs 5 and 8-16) on the basis that they improperly contain argument or opinion, the interpretation of evidence, or evidence not before the RPD.

[25] In response, the Applicant submits that the Court should consider this evidence, as it falls within one of the exceptions to the general rule against the receipt of evidence not before the administrative decision-maker in an application for judicial review (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 14-20). Specifically, the Applicant claims the information in the affidavits “goes to the root of the breach of procedural fairness in the case at bar”.

[26] The material provided in the affidavits does not fall within one of the exceptions to the general rule that the evidentiary record before the Court on judicial review is restricted to the evidentiary record that was before the decision-maker. The impugned paragraphs are argumentative in nature, contain opinion evidence, and interpret evidence previously considered by the RPD.

[27] I have considered this evidence and have given the impugned paragraphs limited weight.

A. *Did the RPD breach the Applicant’s right to procedural fairness?*

[28] The Applicant submits that the RPD breached his right to procedural fairness by failing to provide him or his brother an opportunity to address concerns with the post-hearing evidence in support of the Applicant’s identity.

[29] I disagree. As stated by the Respondent, the RPD’s concern with the post-hearing evidence was not with the documents themselves, but was instead that the only evidence linking the documents to the Applicant was the Applicant’s testimony – testimony found not to be

credible. This finding did not require an opportunity to respond, and I do not find that the RPD breached the Applicant's right to procedural fairness.

[30] Furthermore, the post-hearing evidence was relevant to the underlying issue of identity, which is always at issue in section 96 and 97 hearings, is essential to any protection claim, and must be established by the Applicant on a balance of probabilities. This would have been known by Applicant's counsel and the RPD's finding that this further documentation did not establish the Applicant's identity did not necessitate an opportunity to respond (*Behary v Canada (Citizenship and Immigration)*, 2015 FC 794 at para 18). The Applicant was informed at the RPD hearing that his identity was at issue, and was given an opportunity to provide written evidence, post-hearing, to address this very point.

B. *Is the RPD's decision reasonable?*

[31] The Applicant submits it was unreasonable for the RPD to not consider his brother's supporting documentation. The Applicant relies on decisions of this Court which hold that the more relevant the evidence, the more incumbent it is on the decision-maker to address the evidence in its reasons, especially if the information directly contradicts the RPD's findings (*Cepeda-Guiterrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 at para 17; *Ozdemir v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 331 at para 9).

[32] The Applicant also submits that the RPD erred in its assessment of his identity documents. He claims the RPD unreasonably rejected his explanation for why his driver's licence was issued by the Republic of Zaire instead of the DRC. Moreover, further NDP

evidence not addressed by the RPD speaks to the difficulties in obtaining official identity documents in the DRC.

[33] The Applicant further argues that care must be taken when making plausibility findings not to impose cultural ideals on the situation at hand, and that in this case the RPD's plausibility findings failed to meet this standard (*Ghannadi v Canada (Minister of Citizenship and Immigration)*, 2014 FC 879 at para 33).

[34] Finally, the Applicant points to several factual errors concerning his cultural background and ethnicity, which he says are so erroneous that this Court should grant relief under subsection 18.1(4)(d) of the *Federal Courts Act*, RSC 1985, c F-7, as being made in a perverse or capricious manner or without regard for the material before it. The Applicant also says the RPD's decision is unreasonable for failing to consider the merits of his claim, despite its finding on the issue of credibility.

[35] The Applicant had the burden of establishing his identity through the production of acceptable documentation, failing which he must provide a reasonable explanation for its absence (section 106 of the Act). It is well established that the failure to establish identity is fatal to further consideration of a claim for protection. The issues of identity and credibility lie at the very core of the RPD's expertise, and the Court must be wary of second-guessing the RPD's findings in this regard (*Rahal v Canada (Minister of Citizenship & Immigration)*, 2012 FC 319 at paras 47, 48 [*Rahal*]).

[36] I find that based on the evidence in the record, the RPD's negative credibility determination with respect to the Applicant's identity was reasonable, given:

- a. inconsistencies between the Applicant's testimony and the documents he provided;
- b. inconsistencies between the Applicant's testimony and the NDP documents;
- c. the Applicant's decision not to claim refugee status in Rwanda;
- d. the Applicant's voluntary returns to DRC; and
- e. the finding that the Applicant had provided fraudulent documents in support of his claim.

[37] These inconsistencies and credibility concerns went to the heart of the Applicant's claim, pertaining most importantly to his identity as an alleged DRC national – a crucial element to his refugee protection claim – failing which the basis upon which he fears persecution cannot be established. The RPD provided cogent reasons for not accepting the Applicant's explanations, and its conclusion the Applicant had not credibly established his identity was reasonable.

[38] Contrary to the Applicant's argument that the RPD erred in not addressing key credible identity documentation from his brother (*Mishel v Canada (Minister of Citizenship and Immigration)*, 2015 FC 226 at para 29), the RPD did not fail to consider the post-hearing evidence. Instead, it assessed the evidence, but refused to give it significant weight in light of the Applicant's limited credibility.

[39] It was reasonable for the RPD to determine that the only link between the post-hearing evidence and the Applicant was the Applicant's testimony, found not credible, and thus provide it little weight. It was also reasonable for the RPD to conclude that the post-hearing evidence was

insufficient to overcome its serious credibility concerns and establish the Applicant's personal, national and ethnic identity.

[40] Although the Applicant points to additional evidence before the RPD which he claims provides a link to his brother's statement in support of his identity, such as the 2009 decision granting his brother refugee status and the Applicant's attestation to such in his PIF, this evidence came from the Applicant, not an independent witness or by way of sworn testimony.

[41] Ultimately, the Applicant is asking the Court to reweigh the post-hearing evidence and substitute its own finding, which is not the Court's task on reasonableness review (*Hughes v Canadian Airport workers Union (STCA Canada)*, 2012 FCA 236 at para 8).

[42] As well, I do not find that the RPD unreasonably assessed the Applicant's identity documents. The RPD provided ample reasons for its determination that the driver's licence was fraudulent, including: the Applicant's contradictory testimony that he obtained the licence by going to the DRC police, despite also testifying that he was hiding from DRC authorities; that the licence was issued by the Republic of Zaire eight years after the Republic of Zaire was renamed to the DRC; inconsistencies with the driver's licence itself; information in the NDP about the prevalence of fraudulent identity documents in the DRC; and information in the NDP which contradicted the Applicant's testimony as to how he had obtained the driver's licence.

[43] Similarly, with respect to the Applicant's birth certificate, the RPD noted it is not among the documents recognized as establishing identity by DRC authorities. The RPD also found the

document to be fraudulent given that the Applicant's testimony regarding the source of the information contained in the birth certificate was inconsistent with the document itself and the information set out in the NDP.

[44] Though the RPD did appear to erroneously specify the Applicant's claimed ethnicity in describing the allegations in the decision, it is evident that this discrepancy did not have any bearing on the RPD's analysis with respect to the authenticity of the Applicant's identity documents or overall. It was not a perverse or capricious error that impacted the decision and RPD's analysis in any material way.

[45] Determinations of credibility and identity fall within the heart of the RPD's expertise, and in light the RPD's thorough assessment of the evidence, and the deference to which the RPD is entitled in determining such issues, the RPD's decision was reasonable (*Rahal*, above, at para 48).

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;
2. There is no question for certification.

"Michael D. Manson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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