Federal Court  Cour fédérale

Date: 20170512

Docket: IMM-2938-16

Citation: 2017 FC 493

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, May 12, 2017

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

JOAO BAYEKULA NZUNGU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] The applicant is seeking judicial review of three decisions: (1) a decision on the ineligibility of his refugee claim under subsection 101(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]; (2) the inadmissibility report prepared under

subsection 44(1) of the IRPA; and (3) the exclusion order issued against him under section 228 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR].

[2] This application for judicial review was filed under section 72 of the IRPA. Leave to apply for judicial review was granted only for the decision on the ineligibility of the refugee claim.

II. Facts

[3] The applicant did not submit an affidavit on his behalf to support his claim, alleging a lack of funds and the fact that he was sent back to the United States. The only affidavit filed in support of the claim is that of the applicant's alleged nephew. That affidavit repeats the legal arguments put forward by the applicant in his factum and is largely devoid of facts.

[4] The applicant, Joao Bayekula Nzungu, is from the Republic of Angola.

[5] Mr. Nzungu arrived in the United States on a visa to attend a work conference. Following his arrival, he stayed in New York State for several months.

[6] On June 24, 2016, the applicant went to the Fort Erie border crossing from the United States to claim refugee status. He stated that he was meeting his alleged nephew there, Nsimba Afonso, a Canadian citizen, and would therefore receive a family member exception to the ineligibility of his claim.

[7] After questioning the applicant and, by telephone, Mr. Afonso, the officer found that the applicant had not proven a family relationship with Mr. Afonso. Consequently, since he had no family in Canada, his claim was deemed ineligible by the Minister's delegate on the basis of the officer's report.

[8] On the same day, the officer prepared a report under subsection 44(1) of the IRPA, in which he stated his opinion that the applicant was inadmissible for failing to comply with the Act pursuant to section 41 of the IRPA. The Minister's delegate subsequently issued an exclusion order under section 228 of the IRPR. Consequently, the applicant was sent back to the United States.

III. Impugned decision

[9] The Minister's delegate found, based on the officer's recommendations indicating that the applicant had no family in Canada, that his refugee claim could not be referred to the Immigration and Refugee Board's Refugee Protection Division. Given that he does not have any family in Canada within the meaning of section 159.5 of the IRPR and that he entered by land via the United States, a safe third country under paragraph 101(1)(e) of the IRPA and section 159.3 of the IRPR, his claim was deemed ineligible.

IV. Issues

[10] This case raises the following issues:

1. Did the officer violate the principles of procedural fairness?

2. Was the decision by the Minister's delegate unreasonable?

V. Analysis

A. *Standard of review*

[11] Issues involving procedural fairness are reviewed under the correctness standard (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at paragraph 43).

[12] The lawfulness of the decision, in the absence of a matter of importance to the system that is outside the expertise of the decision-makers, as is the case here, is reviewable on the reasonableness standard (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at paragraph 60 [*Dunsmuir*]). According to this standard, the Court will intervene only if the decision is not justifiable, transparent, or intelligible, and if it does not fall within a range of possible, acceptable outcomes in respect of the facts and law (*Dunsmuir* at paragraph 47).

(1) *Did the officer violate the principles of procedural fairness?*

[13] First, the applicant submits that the officer [TRANSLATION] "erred in law and fact" by failing to notify the applicant of his right to seek leave and judicial review either at the time of making his decisions or afterwards. The applicant submits that these errors constitute violations of procedural fairness since he was allegedly [TRANSLATION] "deprived of the remedies available to him under the Act."

[14] The applicant does not make any legal arguments or cite any authority to support his submissions. He refers only to Citizenship and Immigration Canada's *operational bulletins and manuals for guidance, ENF 6, "Section 5.4 Notification to persons of their right to appeal or file an application for judicial review."* Oddly, it appears that the Department no longer publishes this operational manual, since it was removed from its website. Furthermore, the manual concerns the administrative procedure regarding reports issued under subsection 44(1) of the IRPA and not the ineligibility of his refugee claim. Moreover, the notification in question, namely of the right to apply for judicial review, does not appear in the manual's procedural fairness section. Therefore, the fact that the applicant is currently seeking judicial review of the decisions rendered in his case necessarily makes the issue moot (*Borowski v. Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*]). The applicant was notified of his rights in one way or another. He was not deprived of any right or recourse. Under the circumstances, the Court sees no reason to consider the issue.

[15] Second, the applicant submits that he did not truly benefit from his right to an interpreter. He argues that the officer who questioned him asked him questions in French before his Portuguese interpreter arrived. The officer then reportedly used the applicant's answers to identify inconsistencies during the formal interview. The applicant also submits that the certified record is incomplete because the questions the officer allegedly asked prior to the interview do not appear anywhere in the officer's notes. The applicant does not advance any legal argument or precedent to support his submission.

[16] It should be noted that the Court did not receive an *affidavit* from the applicant and that this submission comes solely from the written and oral submissions of his counsel.

[17] The applicant objectively received the services of an interpreter. The applicant also signed a statement to that effect. He also explicitly stated on two occasions, in response to the officer's questions, that he understood the interpreter.

[18] The only evidence that could support the applicant's submission that the officer questioned him before the interpreter arrived and used his answer against him is a question regarding the applicant's marital status in the officer's notes. On its face, the question suggests that the officer asked the applicant a question about his spouse before the interview during which the applicant had an interpreter.

[19] In the absence of a statement from the applicant himself or from the officer, there is no evidence, other than the questions and answers of which we have the transcript, to establish that a question was asked beforehand. The burden of proof is on the application.

[20] Although this question is problematic, the answer was not determinative, nor was it even mentioned by the Minister's delegate in his decision on the ineligibility of the refugee claim. The applicant was not prejudiced by the question on his marital status. Unrelated to his relationship to Mr. Afonso, this question alone did not lead to his claim being rejected. The officer's notes identified a number of inconsistencies in the applicant's testimony. These notes concerned the interview questions and formed the basis of his recommendation to the Minister's delegate.

[21] Ultimately, the applicant was objectively able to exercise his right to an interpreter and, since he did not submit any evidence, the Court cannot validly find that procedural fairness was breached in this case.

[22] Third, the applicant submits that the officer breached the principles of procedural fairness by questioning the alleged nephew of the applicant in English instead of in French, as he had supposedly requested. Once again, he presents no legal arguments or precedents to support his assertion.

[23] The *affidavit* of the applicant's alleged nephew merely states that he was denied his choice of official language. There is nothing in the evidence to support this argument. Furthermore, the officer's notes, including the excerpts concerning the alleged nephew, are in French. Therefore, the applicant's procedural rights were not breached.

(2) *Was the decision by the Minister's delegate unreasonable?*

[24] All the applicant's submissions are based on alleged breaches of procedural fairness. He submits that the errors identified above render the ineligibility decision unreasonable. However, he provides no legal argument or authority to support his submission.

[25] In the case at hand, the officer asked the applicant over 70 questions. The questions concerned him and his family, as well as the reason for and location of his travels in the United States. Based on the questions that he asked, the officer noted 14 issues in the applicant's testimony, with some points contradicting Mr. Afonso's testimony.

[26] The essential element of the officer's recommendation was that the applicant failed to establish that Mr. Afonso was actually his nephew and, consequently, that the applicant could not benefit from the family exception set out in section 159.5 of the IRPR to the ineligibility of his claim under paragraph 101(1)(e) of the IRPA.

[27] In particular, the officer was unable to confirm the authenticity of the documentation Mr. Afonso provided to prove his relationship to the applicant. The applicant also mistook the name of his alleged nephew more than once. Furthermore, their versions of the frequency of their communications differed, not to mention that Mr. Afonso was unaware of the purpose of the applicant's visit to Canada.

[28] The Minister's delegate noted that the applicant claimed to have a nephew in Canada, Mr. Afonso. The applicant attempted to submit a birth certificate for his nephew. However, it could not be authenticated, namely because of its lack of security marks. The applicant was unable to provide specific information on his family members, including Mr. Afonso. The delegate noted that several inconsistencies were identified in the interviews of both men. The Minister's delegate concluded that the applicant had failed to establish that he had family in Canada. He therefore found that the applicant's refugee claim was ineligible. That finding fell within the range of possible outcomes under the circumstances.

[29] In short, the applicant did not allege or establish any reviewable error in the decision on the ineligibility of his refugee claim. In the absence of a reviewable error, it is not the role of this Court to substitute itself for the administrative decision-maker (*Khosa* at paragraph 59;

Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board), 2011 SCC 62 at paragraph 15).

VI. Conclusion

[30] For these reasons, the application for judicial review is dismissed.

JUDGMENT in IMM-2938-16

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

There are no questions of general importance to be certified.

"Richard G. Mosley"
Judge

Certified true translation
This 24th day of September 2019

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

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