Federal Court  Cour fédérale

Date: 20180126

Docket: IMM-1089-17

Citation: 2018 FC 74

Ottawa, Ontario, January 26, 2018

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

ACHILLE RUVUSHA RUBAYI

Applicant

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATOIN

Respondent

JUDGMENT AND REASONS

I. Background

[1] These Reasons explain why I am granting judgment in favour of the Applicant, Achille Rubusha Rubayi. Mr. Rubayi is a citizen of the Democratic Republic of Congo [DRC] who claims that his mother and father were killed by the DRC army because of his father's political activities with the Forces républicaines fédéralistes [FRF] and that he was accused by the DRC army of being a rebel and a member of the FRF himself. Mr. Rubayi also contends that he was

discriminated against and threatened because of his Tutsi ethnicity. He left the DRC in 2008 for Ireland, where he unsuccessfully sought refugee status.

[2] After his arrival in Canada on April 19, 2012, where he again claimed refugee status, Mr. Rubayi's refugee claim was rejected by the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada on November 22, 2012 as lacking credibility [the RPD Decision]. Mr. Rubayi applied for leave and judicial review of the RPD Decision, but leave was denied.

[3] The Applicant's first H&C application was rejected on October 13, 2015. This judicial review challenges Mr. Rubayi's second H&C application which was rejected by an immigration officer [Officer] on February 21, 2017 [Decision].

[4] While the Decision under review is in French, the Certified Tribunal Record contains a certified English translation. The parties agree that I should reference the certified translation in these Reasons.

II. Issues and Standard of Review

[5] Mr. Rubayi alleges three reviewable errors made by the Officer:

a. a procedural fairness breach by not giving Mr. Rubayi a chance to respond to concerns about the authenticity of his identity documents;

b. the wrong legal test regarding "hardship"; and

c. an unreasonable "establishment" analysis.

III. Analysis

A. *Procedural Fairness*

[6] The standard of review for matters of procedural fairness is currently the subject of some dispute (*Vavilov v Canada (Citizenship and Immigration)*, 2017 FCA 132 at para 11). However, the parties agree that the procedural fairness issue raised in this application is reviewable on a standard of correctness and, since that standard remains acceptable at present, it shall apply.

[7] Mr. Rubayi deposes that he had no indication from the Officer of any concerns about the authenticity of his identity documents and was taken by surprise by this aspect of the Decision. Mr. Rubayi points out that he relied on copies of his birth certificate and driver's licence before the RPD, which accepted his identity, and that the same identity documents were submitted on his first H&C application without issue or comment. He argues that the duty of procedural fairness in this context required the Officer to provide him with a chance to respond to identity concerns. Mr. Rubayi further argues that, because the Officer did not explain how the negative identity finding impacted the Decision, it is impossible for this Court to know whether the Officer's conclusions would have been reached absent concerns over identity. Mr. Rubayi therefore submits that the Decision must be quashed and sent back for redetermination.

[8] I agree with Mr. Rubayi that it was procedurally unfair for the Officer to impugn his identity documents without affording him an opportunity to respond to those concerns. Mr. Rubayi was entitled to know the case he had to meet.

[9] I acknowledge that in many contexts such knowledge can be imputed (*Munoz v Canada (Citizenship and Immigration)*, 2015 FC 677 at para 13 [*Munoz*]). However, this case is unusual: Mr. Rubayi could not have reasonably known that his identity would be an issue for the Officer when both the RPD and the first H&C officer accepted his identity on the basis of the same identity documents without comment. Mr. Rubayi's case is therefore distinguishable from those where a claimant is on notice that his or her identity documents may not be acceptable (see *Diarra v Canada (Citizenship and Immigration*, 2006 FC 1515 at paras 13-15).

[10] I further agree that the Decision offers no insight as to how the Officer's concerns over Mr. Rubayi's identity factored into the overall analysis. As this Court cannot determine whether the Officer would have concluded differently had procedural fairness principles not been breached, the Decision must be set aside (see *Munoz* at para 18).

[11] I have considered the Respondent's argument that the Officer made no findings on Mr. Rubayi's identity *per se*, but merely considered the identity documents as one part of his profile within the overall H&C assessment, within which they were found to have little probative value. However, I am not persuaded by the Respondent's attempt to draw this distinction, given that the Officer took issue with Mr. Rubayi's birth certificate and driver's license, noting that they were both of poor quality. He also found that the photograph on the driver's license did not establish Mr. Rubayi's identity, and noted that the birth certificate seemed to have been manually amended.

[12] In short, I do not see how these comments are anything short of an indictment of Mr. Rubayi's very identity; they do not underlie any subsidiary finding, such as whether Mr. Rubayi was indeed a member of a group for which he held a membership card, or whether the issuance date of these cards contradicted his.

[13] But, even if the Respondent's interpretation is correct and the identity issue is indeed a red herring, I find there to be further problems with the Decision justifying the Court's intervention.

B. *Hardship*

[14] Mr. Rubayi challenges the Officer's conclusion that unfavourable conditions in the DRC indiscriminately affected most of the population and did not apply "more specifically" to him. Mr. Rubayi argues that the Officer incorrectly insisted that he demonstrate a profile distinguishable from the DRC population at large, thereby improperly importing a section 97(1) analysis, which sets too high a standard of "hardship" in light of the relevant jurisprudence (*Diabate v Canada (Citizenship and Immigration)*, 2013 FC 129 at para 32 [*Diabate*]; *Martinez v Canada (Immigration, Refugees, and Citizenship)*, 2017 FC 69 at para 12 [*Martinez*]; and *Maroukel v Canada (Citizenship and Immigration)*, 2015 FC 83 at para 32 [*Maroukel*]). Mr. Rubayi submits that the Officer applied the "wrong test", such that this issue is reviewable on a standard of correctness.

[15] The Respondent contends that it was reasonable for the Officer to consider "risk" within the hardship context, and that doing so does not automatically mean the wrong test was applied.

The Respondent urges the Court to consider the Decision in its entirety and submits that a fair reading shows the Officer understood the test.

[16] Although I agree with Mr. Rubayi that this issue was settled in *Diabate*, which has been followed since by cases such as *Maroukel* and *Martinez*, I have reviewed the matter on the standard of reasonableness (*Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53 at para 132).

[17] *Diabate* found that importing a requirement of section 97(1) into the H&C analysis — namely, that an individual must face risk not generally borne by the population in his or her country of origin — strips section 25(1) of its function. Justice Gleason then clarified that the H&C analysis focuses on hardship from the perspective of the claimant:

> 36 […].It is both incorrect and unreasonable to require, as part of that analysis, that an applicant establish that the circumstances he or she will face are not generally faced by others in their country of origin. Rather, the frame of analysis for H&C consideration has to be that of the individual him or herself, which involves consideration of whether the hardship of leaving Canada and returning to the country of origin would be undue, undeserved or disproportionate.

[18] On this point, *Maroukel* is also instructive: "[T]he focus should be upon the hardship to the individual and, once established, that hardship need not be greater than that faced by anyone else in that country" (at para 35).

[19] *Diabate* has consistently been followed by this Court. In *Lauture v Canada (Citizenship and Immigration)*, 2015 FC 336 [*Lauture*], for instance, Justice Rennie, as he then was, found

that the analysis in *Diabate* was dispositive of the application before him (at para 31). Most recently, Justice Brown accepted "the law as stated in *Diabete*" (*Martinez* at para 12). I find that *Diabate* is also applicable in this application, in that the officer erred by conflating and confusing the H&C analysis with considerations required under a refugee analysis.

[20] I do not agree with the Respondent that the Officer's analysis on the whole was reasonable. The Decision contains several irregularities that make this submission unpersuasive.

[21] First, the Officer incorrectly noted that Mr. Rubayi did not pursue judicial review of the negative RPD Decision. Although the relevance of this erroneous finding to the Officer's analysis is not apparent in the Decision, it appears in the section entitled "Adverse conditions in the country of origin". To the extent that the Officer drew any negative inferences based on his or her mistaken finding that Mr. Rubayi had not pursued judicial review of the RPD Decision that was clearly unreasonable.

[22] Second, I agree with Mr. Rubayi that the Officer did not properly consider the temporary suspension of removals [TSR] to the DRC. The Officer acknowledged the TSR, but dismissed this factor as non-determinative:

> Although he spent a few years outside his country of origin as a result of the temporary suspension of removals, it is important to point out that the jurisprudence expressly establishes the fact that there is a TSR does not guarantee that an application on humanitarian and compassionate grounds will be <u>automatically accepted.</u>
>
> [Emphasis in original]

[23] The Officer cited *Lalane v Canada (Citizenship & Immigration)*, 2009 FC 5 in support of this analysis, which I note is a decision of this Court on section 97(1) of the Act, not section 25(1). While it is true that a TSR is not determinative of an H&C application (*Likale v Canada (Citizenship and Immigration)*, 2015 FC 43 at para 40), Mr. Rubayi correctly points out that "non-determinative" does not mean "irrelevant". To the contrary, a TSR may inform the H&C analysis. *Lauture* adopted the reasoning in *Maroukel* as follows:

> 42 I turn to the fourth error in the decision, and that was with respect to the Officer's failure to consider the implications of the fact there was, and remains, a temporary suspension of removals to Haiti. This implies that the conditions are sufficiently dire or unstable that Canada will not removal nationals to that country.
>
> 43 It is unclear, in my mind, how the Officer rationalized her conclusion that there would be no undue burden in applying from Haiti when Canada, by its own policy decision, has determined it is unsafe or unfair to return individuals to that very country. In this regard, I adopt the analysis of Justice Keith Boswell in *Maroukel v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 83 (F.C.) at para 32, in the context of a refused H&C application in respect of Syria:
>
> > In my view, it also was unreasonable for the Officer, on the one hand, to conclude that country conditions in Syria are "dangerous" and then, on the other, to ignore the direct negative impact such conditions would have upon the Applicants since it "is not comfortable for anyone who lives there".

[24] Here, the Officer was required to consider whether the TSR justified H&C relief, in light of all of Mr. Rubayi's circumstances. Although the TSR might ultimately not have tipped the scales in favour of H&C relief, it was unreasonable for the Officer to effectively not consider the TSR simply because it was non-determinative of the H&C application. This approach disregards the requirements set out in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at

paras 32-33 and 45 [*Kanthasamy*] to consider the applicant's "circumstances as a whole" to justify exemption (see also *Miyir v Citizenship and Immigration*, 2018 FC 73 at para 15) [*Miyir*].

[25] Finally, tying all these weaknesses together is the fact that there is not a single mention in the Decision of the word "hardship" (*Miyir* at paras 16 and 28). I recognize that the Supreme Court of Canada instructed in *Kanthasamy* that decision-makers must not allow the words "unusual and undeserved or disproportionate hardship" to limit their ability to give weight to all relevant H&C considerations in a particular case. But while "hardship" is neither a crucial nor magic phrase in H&C analyses, in my view, the Officer's failure in this case to even mention "hardship" reflects his or her misunderstanding of the test to be applied — namely, whether or not the relevant factors, assessed globally and cumulatively, warranted H&C relief (*Kanthasamy* at para 28). Here, like in *Miyir*, where hardship was specifically argued as a ground justifying H&C relief, the Officer had a duty — at least briefly — to address that issue.

C. *Evidence of establishment*

[26] Mr. Rubayi also argues that the Officer unreasonably questioned the authenticity of the 14 letters submitted in support of his H&C application. Mr. Rubayi relies upon the following comments of Justice Roy at paragraph 54 of *Delille v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 508:

> […] Not only does the letter under consideration invite further communications, but the telephone number is written twice, together with the address. Despite such overture, no attempt was made at reaching out and obtaining confirmation about authorship. At the very least, a more careful examination of the letter is required with a view to analysing its content to establish reasons why it would not be reliable.

[27] Mr. Rubayi takes issue with the Officer's statement that: "…the identity of the letter writers was not established", when each letter contained the contact information of its author. I agree with Mr. Rubayi that this comment is troubling, given that the identity and contact information of each letter's author in this case is apparent. However, given my findings above, it is not necessary for me to decide whether the Officer's treatment of the letters of support was unreasonable, as the other grounds have been found to be thus.

IV. Conclusion

[28] The Application is granted and the Decision is set aside and remitted for redetermination. No questions for certification exist and none arise.

JUDGMENT in IMM-1089-17

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted and the matter is remitted back for redetermination by a different officer.

2. There are no questions for certification, and none arise.

3. There is no award as to costs.

"Alan S. Diner"
Judge

FEDERAL COURT

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