Federal Court Cour fédérale

Date: 20181214

Docket: IMM-326-18

Citation: 2018 FC 1268

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, December 14, 2018

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

MOUSSA DIAKITÉ

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Background

[1] The applicant, Moussa Diakité, is a citizen of Guinea. He entered Canada with a study permit valid until March 31, 2017.

[2] On January 5, 2018, the applicant left Canada for the United States, accompanied by a friend. That same day, he arrived at the Canadian border without a passport or a valid visa. He had a Guinean driver's licence and a student ID card issued by a university in Quebec.

[3] After checking the Global Case Management System and conducting an interview with the applicant that focussed on his admissibility to Canada, a Canada Border Services Agency (CBSA) officer completed a report in accordance with subsection 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The officer deemed that the applicant was inadmissible to Canada under section 41 of the IRPA because the applicant was trying to enter Canada without a visa or other documents as required under paragraph 20(1)(b) of the IRPA.

[4] The Minister's delegate, who was present during the interview, deemed the report to be well-founded and issued an exclusion order against the applicant pursuant to subparagraph 228(1)(c)(iii) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR]. The applicant was provided with a copy of the report as well as the exclusion order, both of which he signed.

[5] The applicant is challenging the exclusion order issued against him. He maintains that the decision of the Minister's delegate was unreasonable because it was rendered in violation of his fundamental rights and his right to procedural fairness. He alleges that, among other things, the CBSA officer: (1) failed to inform him that the interview could lead to the issuance of an exclusion order; (2) asked him only one question about the risks of returning to his country of origin when he had a fear of returning to that country due to his sexual orientation; and (3) failed

to explain to him that he had the right to the services of legal counsel for free. He also alleges that the decision of the Minister's delegate was made hastily since he had made a mistake in travelling to the United States and because it failed to comply with sections 7 and 12 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11 [Charter] and other international instruments.

II. Analysis

[6] The appropriate standard of review applicable to the decision of the Minister's delegate to issue an exclusion order is that of reasonableness (*Mbaye v Canada (Citizenship and Immigration)*, 2016 FC 1037 at para 12 [*Mbaye*]; *Sibomana v Canada (Citizenship and Immigration)*, 2012 FC 853 at para 18).

[7] When the reasonableness standard applies, the role of the Court is to determine whether the decision falls within the range of "possible, acceptable outcomes which are defensible in respect of the facts and law." When "justification, transparency and intelligibility [exist] within the decision-making process", it is not open to the Court to substitute its own preferable outcome (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para 59).

[8] With respect to the allegation of a breach of procedural fairness, the Federal Court of Appeal recently clarified that questions of procedural fairness do not necessarily lend themselves to a standard of review analysis. Instead, the role of this Court is to determine whether the

procedure is fair considering all the circumstances (*Canadian Pacific Railway Company* v. *Canada* (*Attorney General*), 2018 FCA 69 at para 54; *Dunsmuir* at para 79).

[9] The Court is of the view that there is no cause for intervention in this case.

[10] According to section 41 of the IRPA, a foreign national may be inadmissible to Canada for failure to comply with the IRPA. In this case, the applicant failed to comply with paragraph 20(1)(b) of the IRPA, which provides that a foreign national seeking to enter or remain in Canada must establish, to become a temporary resident, that they hold the visa or other document required under the regulations and will leave Canada by the end of the period authorized for their stay.

[11] However, the record indicates that when the applicant arrived at the border on January 5, 2018, he did not have a valid visa. His study permit had been expired since March 31, 2017. His subsequent application had been refused, and he had not sought to restore his status.

[12] Consequently, the applicant had no status in Canada.

[13] Under these circumstances, the Minister's delegate could reasonably decide to issue an exclusion order against the applicant, pursuant to subparagraph 228(1)(c)(iii) of the IRPR. It is recognized that the discretionary margin of the Minister's delegate is limited, if not non-existent (*Mbaye* at para 12; *Laissi v Canada (Public Safety and Emergency Preparedness)*, 2013 FC 393 at paras 18-20; *Rosenberry v Canada (Citizenship and Immigration)*, 2010 FC 882 at para 36),

and the applicant failed to demonstrate that the decision of the Minister's delegate falls outside a range of possible, acceptable outcomes which are defensible in respect of the facts and law as stated in *Dunsmuir*.

[14] The Court considers the applicant's arguments concerning procedural fairness to be without merit with regard to both the facts and law.

[15] First, the record indicates that a new application for a study permit had already been refused when the applicant arrived at the border crossing on January 5, 2018. Moreover, the fact that the applicant made a [TRANSLATION] "mistake" when he presented himself at the border crossing is not relevant for the purposes of assessing the validity of the exclusion order. From the moment that the applicant arrived at a port of entry without a valid visa, he exposed himself to being the subject of an exclusion order. In addition, the information provided in the CBSA notes on the record as well as in the officer's affidavit, produced in support of the respondent's response, indicates that the nature of the interview was explained to the applicant and that he was informed of issues concerning his admissibility. The CBSA officer specifically asked him whether there is a risk to his life or safety in Guinea due to his religion, political opinion or sexual orientation, and he had answered no to this question.

[16] Moreover, with respect to the allegation that his right to legal counsel was violated, it has long been established that the right to assistance from legal counsel does not exist during an interview conducted by an immigration officer. This right arises when the person concerned is detained or arrested (*Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] 1

SCR 1053 [*Dehghani*]; *Sulaiman v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 832 at para 13; *Heredia v Canada (Citizenship and Immigration)*, 2010 FC 1215 at paras 14-15; *Rodriguez Chevez v Canada (Citizenship and Immigration)*, 2007 FC 709 at para 11). In this case, this was a routine interview intended to verify whether the applicant met the conditions for admission to Canada (*Dehghani* at p 1074). The officer's notes on the record demonstrate that the applicant was informed of his right to consult legal counsel as soon as he was detained for failing to confirm that he would in fact report, at the scheduled time, to establish the terms and conditions for his departure from Canada. Moreover, according to the text that was read to the applicant and was reproduced in the officer's affidavit, the applicant was informed of his right to hire a lawyer of his choice and of his right to obtain legal advice from duty counsel immediately and free of charge. He was provided with telephone numbers that he could use to contact duty counsel or legal aid. The officer's notes also demonstrate that the applicant confirmed that he understood that he had the right to legal counsel and that he did not respond when asked whether he wanted to consult a lawyer. In light of this evidence, the Court cannot agree with the applicant's argument that his right to counsel was violated.

[17] Lastly, with respect to the applicant's argument that sending him back to Guinea would violate sections 7 and 12 of the Charter as well as Canada's international obligations because he would be exposed to the risk of torture and a risk to life if he were deported to Guinea, the Court deems that this argument is premature at this stage. The focus of this review is limited to assessing the validity of the exclusion order. The eventual enforcement of the removal order is not at issue here. Furthermore, the Court notes that the applicant has in fact filed an application for a pre-removal risk assessment.

[18] The applicant did not demonstrate any reviewable error. The application for judicial review must therefore be dismissed. No question of general importance was submitted for certification, and the Court is of the view that this case does not give rise to any.

JUDGMENT in Docket IMM-326-18

THIS COURT ORDERS AND ADJUDGES that

1. The application for judicial review is dismissed;

2. No question of general importance is certified.

"Sylvie E. Roussel"
Judge

Certified true translation
This 4th day of January 2019

Margarita Gorbounova, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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