Federal Court  Cour fédérale

Date: 20210629

Docket: IMM-1988-20

Citation: 2021 FC 655

[ENGLISH TRANSLATION]

Ottawa, Ontario, June 29, 2021

Present: The Honourable Madam Justice St-Louis

BETWEEN:

ALEX-AIMÉ MARCEL BOUEKASSA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Alex-Aimé Marcel Bouekassa is seeking judicial review of a decision, dated February 11, 2020, of a Senior Immigration Officer [the Officer] rejecting his application for a pre-removal risk assessment [PRRA].

[2] For the reasons that follow, the application for judicial review is dismissed.

II. Background

[3] Mr. Bouekassa is a citizen of Burundi and the Republic of Congo [the Congo].

[4] On September 13, 2006, Mr. Bouekassa, then 14 years old, arrived in Canada and claimed refugee protection. Mr. Bouekassa's mother and half-brother, who are citizens of Burundi but not of Congo, were granted refugee protection in 2001 and 2006 respectively, but Mr. Bouekassa's claim was rejected. On February 25, 2008, the Refugee Protection Division [RPD] found that Mr. Bouekassa had not met his burden of proof and rejected his claim. With respect to his fear of returning to the Congo, the RPD noted that the facts presented suggest that this is a family conflict rather than a problem of persecution, and found that Mr. Bouekassa had no fear of returning to the Congo since he could freely return to live with his father there.

[5] Furthermore, in the PRRA decision being challenged in this case, the Officer provided an account of Mr. Bouekassa's criminal record in Canada, facts which are not disputed.

[6] On September 2, 2011, in Laval, Mr. Bouekassa pleaded guilty to robbery, thereby committing an indictable offence under section 343(b) of the *Criminal Code*, a crime punishable by life imprisonment. In the same case, Mr. Bouekassa pleaded guilty to conspiracy, thereby committing an indictable offence under paragraph 465(l)(c) of the *Criminal Code*, a crime punishable by life imprisonment, and pleaded guilty to offences relating to peace officers, thereby committing an offence under section 129(a) of the *Criminal Code*, a crime punishable by

up to two years' imprisonment. Mr. Bouekassa was sentenced to one year in prison for these crimes.

[7] On October 14, 2011, in Montreal, Mr. Bouekassa pleaded guilty to failing to comply with a condition of an undertaking or recognizance, thereby committing an indictable offence under subsection 145(03) of the *Criminal Code*, which is punishable by up to two years' imprisonment. On the same date, Mr. Bouekassa pleaded guilty to unauthorized possession of prohibited or restricted weapons, an indictable offence under subsection 91(2) of the *Criminal Code* that is punishable by up to five years' imprisonment. He received a sentence of seven days in jail for these offences.

[8] On January 12, 2012, Mr. Bouekassa was issued a report on inadmissibility on grounds of serious criminality under paragraph 36(1)(a) of the *Immigration and Refugee Protection Act*, LC 2001, c. 27 [the Act], and on April 4, 2012, was received a deportation order.

[9] While Mr. Bouekassa was serving his prison sentence, he had the opportunity to apply for a PRRA. Thus, on May 10, 2012, Mr. Bouekassa filed a PRRA application and requested more time to submit additional evidence. On September 12, 2012, Mr. Bouekassa provided written submissions and additional documents.

[10] In his submissions, Mr. Bouekassa began by asserting that he had a legitimate fear of being ostracized and persecuted in both Burundi and Congo Brazzaville because of his membership in a social group. As someone of Tutsi–Hutu mixed ethnicity who was born to

unmarried parents and has suffered severe psychological damage as a result of serious trauma during his childhood, he is unable to provide for his basic needs in either country. In addition, Mr. Bouekassa said he feared that his life would be at risk because he would become an easy target for recruitment by rebels on both sides in exchange for protection. Mr. Bouekassa emphasized that he would not be able to return to his family, either in Burundi or in Congo Brazzaville.

[11] With respect to the threat in the Congo in particular, Mr. Bouekassa maintains that he would be vulnerable because he no longer has any ties in that country following his father's rejection and because he would be easily identifiable as a Tutsi, despite his Congolese name.

[12] Mr. Bouekassa then requested a risk assessment interview on the basis that [TRANSLATION] "having testified to the Refugee Protection Division when he was only 16 years old and in a post-traumatic state, the claimant's credibility could not be fully assessed". He added that the RPD made a material error of fact in finding a family problem, since Mr. Bouekassa's mother and half-brother were granted refugee protection on the basis of the same facts.

[13] In addition to his PRRA application, Mr. Bouekassa submitted an application for permanent residence on humanitarian and compassionate grounds under section 25 of the Act and updated it to reflect the death of his father in Burundi. That application was refused on October 18, 2018.

[14] On February 11, 2020, the Officer denied Mr. Bouekassa's PRRA application, a decision that is the subject of this application for judicial review.

III. Decision under review

[15] In his decision, the Officer began by noting that Mr. Bouekassa is subject to paragraphs 112(3)(b) and 113(e)(i) of the Act due to the nature of the criminal offences at issue. The Officer went on to provide a procedural history and noted that Mr. Bouekassa had been asked to update his PRRA application on October 23, 2018, but did not do so.

[16] He then noted that the refugee protection claims made by Mr. Bouekassa's mother and half-brother had been allowed, but that, unlike Mr. Bouekassa, they did not hold Congolese citizenship. He continued by recounting the findings of the RPD, particularly with respect to the fear of returning to the Congo.

[17] With respect to Mr. Bouekassa's submissions in support of his PRRA application, the Officer acknowledged the information contained in Mr. Bouekassa's sworn statement and reiterated the alleged risk to Mr. Bouekassa of returning to Burundi and to the Congo. In reference to the Congo, the Officer noted that Mr. Bouekassa emphasized that the unemployment rate was high and the democracy was fragile, and that there was widespread corruption, and for this reason, he could not expect to obtain state protection. The Officer pointed out that Mr. Bouekassa stated that the risks he faced were not from lack of adequate health care, but rather from returning to a country where he had been persecuted as a child.

[18] The Officer listed the documents that Mr. Bouekassa had submitted, and since Mr. Bouekassa is a citizen of both Burundi and the Congo, the Officer assessed the risks of returning to the Congo.

[19] The Officer reported that Bouekassa found a job and attended school when he arrived in Canada, but after his claim for refugee protection was denied, he became depressed and committed a robbery. He also allegedly attempted suicide, which resulted in psychiatric treatment and follow-up. The Officer noted that Mr. Bouekassa explained that he is no longer in touch with his father and that he is allegedly ostracized because of his mixed origins in Burundi and persecuted as a Tutsi in the Congo. He added that the Hutus are in power in Burundi and would be unable to protect him. The same is true in the Congo, where there is also high unemployment and widespread corruption.

[20] The Officer then noted the documentary evidence in support of Mr. Bouekassa's allegations (particularly with respect to his mental health). The Officer went on to review the testimony and determined that Mr. Bouekassa’s father did not kick him out of the Congo. The Officer added that, even if he had, Mr. Bouekassa's problems in the Congo are family related and that he is now an adult who no longer needs to reside with and be mistreated by his stepmother. The Officer emphasized that the other issues raised relate to Mr. Bouekassa’s mental health and the economic situation in the Congo, which are humanitarian in nature and do not constitute a risk under sections 96 and 97 of the Act.

[21] As for the risk Mr. Bouekassa raised due to his mixed origins, the Officer noted that Mr. Bouekassa failed to explain how he would be identified as such in Congo. The Officer pointed out that Mr. Bouekassa did not mention having physical characteristics associated with Tutsis, that his father is Congolese, that Mr. Bouekassa has a Congolese passport and has a Congolese name, so the Officer did not believe that Mr. Bouekassa would be identified as a Tutsi in the Congo or that he would be persecuted for that reason. The Officer also quoted a document that Mr. Bouekassa submitted in evidence, from Burundi, which noted that an individual generally inherits his father's ethnic identity and that ethnic mixing is [TRANSLATION] "technically unthinkable". Accordingly, the Officer found, on a balance of probabilities that, unlike other members of his family who are Burundian, Mr. Bouekassa would be regarded in Burundi and Congo as a Hutu–Bantu. Finally, the Officer noted that the documentation that Mr. Bouekassa submitted did not contain evidence that people who are mixed or perceived as Tutsi are persecuted in the Congo.

[22] The Officer noted that he could not consider humanitarian and compassionate factors in the context of the PRRA decision, and also noted that paragraph 97(1)(b)(ii) of the Act excludes generalized risk from the definition of refugee.

[23] Considering the record as a whole, the Officer found that Mr. Bouekassa failed to demonstrate that he would face more than the mere possibility of persecution under section 96 of the Act. Similarly, the Officer found that there were no substantial grounds to believe that Mr. Bouekassa would be at risk of torture, threats to his life or cruel or unusual treatment or punishment within the meaning of paragraphs 97(l)(a) and 97(1)(b) of the Act if he returned to

the Congo. Finally, the Officer noted that since Mr. Bouekassa may be repatriated to the Congo, his risks of returning to Burundi were not considered.

[24] Lastly, the Officer found that the case did not meet the criteria for a hearing under section 167 of the *Immigration and Refugee Protection Regulations* SOR/2002-227 [the Regulations].

IV. Arguments raised by the parties

[25] Mr. Bouekassa raises three issues before this Court:

- Did the Officer violate the applicant's procedural rights, thereby denying the applicant procedural fairness because of the unreasonable and excessive delay, in this case almost eight years, between the filing of the PRRA application in May 2012, and the delivery of the decision on March 4, 2020?
- Did the Officer violate procedural fairness by failing to conduct an interview despite the fact that the applicant's credibility was in question?
- Was the Officer's decision based on an erroneous finding made in a perverse or capricious manner without regard to all of the evidence before him?

[26] In addition to submissions relating to Mr. Bouekassa's three arguments, mentioned below, the Minister submitted that the remedies granted in a judicial review are discretionary in nature. An applicant is thus required to appear before the Court with a clear record, i.e., with "clean hands". In this case, the Minister pointed out Mr. Bouekassa's many serious crimes. He submitted that preserving the integrity of the judicial and administrative systems and sanctioning

non-compliance with Canadian law greatly outweigh the applicant's interest in having the legality of the decision reviewed.

[27] As noted below, I am not persuaded by the arguments raised by Mr. Bouekassa to grant his application for judicial review. Accordingly, it is not necessary to provide an alternative finding on this point.

V. Parties' submissions and analysis

A. *Standard of Review*

[28] I agree with the parties that the standard of reasonableness applies to decision (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65) [*Vavilov*]. In essence, according to *Vavilov*, the standard of review that is presumed to apply is reasonableness, and there is nothing to rebut the presumption in this case (see *Flores Carrillo v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at para 36; *Benko v. Canada (Citizenship and Immigration)*, 2017 FC 1032 at para 15; *Fares v. Canada (Citizenship and Immigration)*, 2017 FC 797 at para 19).

[29] When the reasonableness standard of review is applied, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov* at para 100). The Court's focus "must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" (*Vavilov* at para 83) to determine whether the decision is "based on an internally coherent and rational chain of analysis and that is justified in

relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). It is not the role the court to re-weigh the evidence or to substitute its preferred outcome (*Vavilov* at para 99).

[30] As Gascon J. noted in *Canga v. Canada (Citizenship and Immigration)*, 2020 FC 749, before suggesting that the standard of reasonableness should apply: "With respect to the decision to hold a hearing in the context of a PRRA application, the Court's jurisprudence regarding the applicable standard of review has been variable and has taken different approaches to characterizing the issue at hand (*Huang v Canada (Citizenship and Immigration)*, 2018 FC 940 at paras 12–16). Some decisions apply the standard of correctness because the issue is considered to be one of procedural fairness, while others apply the standard of reasonableness because the issue is considered to be a question of mixed law and fact concerning the interpretation of the IRPA." However, like Gascon J. in that case, my findings would remain unchanged if I applied the more stringent standard of correctness.

B. *First argument: Excessive delay between the 2012 PRRA application and the 2020 decision*

[31] Mr. Bouekassa submitted that the eight-year delay between the filing of his PRRA application and the decision was excessive and unreasonable, that he had not waived the right to a timely decision, and that the Officer had failed to explain the cause of the delay.

[32] He added that his vulnerability arising from his young age, his mental health problems and the circumstances of his childhood should have prompted the Officer to make a more timely decision. Unlike the other two members of his family, he was unable to rebuild his life in Canada

because of the delay. He also noted that he would suffer irreparable harm if he returned to the Congo, since he no longer had any family there.

[33] He therefore submitted that the delay was unreasonable and excessive and that it had tainted the process. He cited *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 [Blencoe], and noted that nothing has been established to justify it.

[34] The Minister responded that according to *Blencoe*, a delay amounting to an abuse of process is one that "has directly caused significant psychological harm to a person, or attached a stigma to a person's reputation, such that the human rights system would be brought into disrepute" (at para 115). Such delays are rare, and the court must be satisfied that "the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted". The proceedings must be "unfair to the point that they are contrary to the interests of justice" (at paras 115 and 120).

[35] The Minister added that with respect to refugee claims in particular, the Federal Court of Appeal stated in *Hernandez* that "the 'unreasonable delay' argument cannot be perceived as a fertile basis for setting aside decisions of tribunals" (*Hernandez v. Canada (Minister of Employment and Immigration)* (FCA), [1993] FCJ No. 345 at para 4), that the delay was not excessive and has not, in any event, caused sufficient harm. In particular, the Court has held that delays in excess of eight years do not constitute an abuse of process (see for example *Chabanov v. Canada (Citizenship and Immigration)*, 2017 FC 73).

[36] In *Yamani v. Canada (Citizenship and Immigration)*, 2003 FCA 482, the appellant alleged abuse of process by the Minister in initiating new removal proceedings against him, a permanent resident, on a ground which he could have relied on for eight years. The appellant alleged as an injury that he was nervous and tense, always unhappy, had difficulty concentrating and had poor appetite and insomnia. His spouse had stomach problems and was nervous, tense and anxious. The Federal Court of Appeal found that there was no abuse of process. Justice Rothstein wrote for the Court:

> The circumstances faced by the appellant are unfortunate, but as the Supreme Court has recognized, "stress, anxiety, and stigma may arise from any criminal trial, human rights allegation, or even a civil action, regardless of whether the trial or process occurs within a reasonable time" (*Blencoe* at 345).”

[37] The Minister added that there was no evidence that the delay in this case was “excessive,” i.e., that it offends the community’s sense of fairness (*Ching v. Canada (Citizenship and Immigration)*, 2018 FC 839, at para 78), and that the Court has found that much longer delays, including an eleven-year delay, did not meet the threshold of abuse of process because the applicant had not adduced sufficient evidence to show that he or she suffered significant prejudice as a direct result of the delay (*Chabanov v. Canada (Citizenship and Immigration*), 2017 FC 73, at para 65; *Bernataviciute v. Canada (Citizenship and Immigration)*, 2019 FC 953 at para 34).

[38] In light of the foregoing, while the delay in this case may have caused uncertainty and anxiety, it was not so long as to be one of those “clearest of cases” and extremely rare cases of abuse of process according to the teachings of the Supreme Court and the Federal Court of Appeal.

[39] As the Minister noted, a finding of abuse of process is an exceptional remedy that cannot be applied in this case under the relevant case law. Mr. Bouekassa failed to meet the high threshold of establishing abuse of process by reason of the delay and to satisfy the Court that the delay caused prejudice in such a way as to vitiate the proceedings.

[40] I therefore cannot find that the Officer violated Mr. Bouekassa's procedural rights.

C. *Second argument: Failure to conduct an interview*

[41] Mr. Bouekassa also submitted that the Officer violated procedural fairness by failing to conduct an interview. He noted that his request for a hearing was relevant to the criteria outlined in section 167 of the Regulations. Mr. Bouekassa added that his credibility was relevant, as he could not be assessed for his psychological disorder and could not explain his contradictions, which also led to the rejection of his refugee protection claim. Mr. Bouekassa further argued that the Officer challenged his credibility by accepting the RPD's findings and that he needed a hearing to assess his credibility in light of his psychological issues. Mr. Bouekassa submitted that the Officer attacked his credibility and that the only place where Mr. Bouekassa could defend his credibility was before the Officer. Mr. Bouekassa cited *Zokai v. Canada (Citizenship and Immigration)*, 2005 FC 1103 (at para 17), which states that failure to consider the appropriateness of holding a hearing may constitute a breach of procedural fairness, and that at no time did the Officer consider the appropriateness of holding a hearing.

[42] The Minister responded that the right to a hearing is the exception to the standard set out in section 161 of the Regulations and that all the criteria in section 167 of the Regulations must

be met. The Minister added that there is no obligation to hold a hearing in the context of a PRRA review, except where credibility is the key element of the decision (see for example *Garces Canga v. Canada (Citizenship and Immigration)*, 2020 FC 749 (at para 64)).

[43] The Minister argued that, in this case, the Officer did not find that the applicant lacked credibility, but found that the evidence submitted was insufficient to substantiate his assertions regarding risk. The Officer assessed the probative value of the evidence submitted, not the credibility of the evidence. Specifically, the Officer noted that Mr. Bouekassa's problems in the Congo were familial and occurred while he was living with his father as a child. Since his father is deceased and he is now an adult, he has no obligation to live with his stepmother. The Minister cited *Zdraviak v. Canada (Citizenship and Immigration)*, 2017 FC 305 (at paras 17–18), to the effect that a sworn statement is not necessarily sufficient evidence, and that this finding was not one of credibility. In these situations, a hearing is not required (*Samuel v. Canada (Citizenship and Immigration)*, 2012 FC 967 (at para 12)).

[44] As the Minister pointed out, holding a hearing is an exception to section 161 of the Regulations. Section 167 of the Regulations sets out the cumulative factors for holding a hearing, namely:

> (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 respect to the application for protection; and
>
> (c) whether the evidence, if accepted, would justify allowing the application for protection.

[45] In this case, however, the Officer did not call into question Mr. Bouekassa's credibility in his PRRA decision; rather, the Officer's findings related to the weight and sufficiency of the evidence adduced to establish risk and the nature of the alleged risk. While the Officer referred to the credibility finding made by the RPD in its decision, he did not make credibility findings himself, and he could have done so (*Titkova v. Canada (Citizenship and Immigration)*, 2017 FC 691).

[46] Moreover, the PRRA process does not provide an opportunity to appeal the RPD's decision to review the credibility findings made by the RPD. This is precisely what Mr. Bouekassa relied on to justify the interview.

[47] Accordingly, the Officer's finding that the criteria in section 167 were not met is reasonable given that he did not raise any issues related to Mr. Bouekassa's credibility. His findings point to the insufficiency of evidence. Moreover, Mr. Bouekassa has not convinced me that the Officer violated procedural fairness by deciding not to conduct an interview.

D. *Third argument: A perverse and capricious conclusion without consideration of all the evidence before him*

[48] Mr. Bouekassa submitted that the Officer employed discrimination and stereotypes by claiming that the applicant had to show that he had Tutsi physical features and that having a Congolese name would protect him from his origins in the Congo (*Ponniah v. Canada (Minister of Citizenship and Immigration*), 2003 FC 1016).

[49] Mr. Bouekassa also submitted that the Agent dissected the documentary evidence and used only particular portions in isolation to support his view. He noted that ignoring or excluding relevant evidence may constitute an error, and that conclusions should not be drawn from the evidence in a perverse or capricious manner.

[50] Mr. Bouekassa submitted that the Officer selectively chose paragraphs from Mr. Bouekassa's sworn statement, ignoring others, and acted unreasonably in setting aside his testimony due to the lack of other corroborative evidence without analyzing the available evidence on its merits. He also set aside his testimony and other corroborative evidence. In particular, he cited *Pantas v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 64 at para 102. The officer did not mention the documents relating to risks in the Congo, except to say that he had examined them. He characterized Mr. Bouekassa's fears as family-related only. He did not address Mr. Bouekassa's lack of family in the Congo or his fears for his safety.

[51] The Minister responded that the decision was not based on stereotypes. In addition to Mr. Bouekassa's passport and name, the evidence stated that mixing ethnicities was technically unthinkable and that a man inherited the ethnic identity of his father. The Minister added that the applicant has not submitted any documentary evidence that persons perceived to be Tutsi were persecuted in the Congo on that basis.

[52] Mr. Bouekassa has not convinced me that the Officer has drawn arbitrary conclusions without considering all of the evidence.

[53] In fact, a thorough reading of the submissions filed in support of the PRRA application confirms that Mr. Bouekassa failed to explain how he would be identified as Tutsi or as being of mixed ethnicity in the Congo, especially when it is established that his father is Congolese, that Mr. Bouekassa has a Congolese passport and that he bears a Congolese name. Furthermore, the record also shows that Mr. Bouekassa only submitted a document from Burundi on the matter, which indicated that an individual generally inherited his father's ethnic identity and that ethnic mixing was "technically unthinkable". Therefore, the Officer did not require the applicant to demonstrate that he had Tutsi physical traits, but simply—to reiterate—pointed out that Mr. Bouekassa did not state how he would be identified as a Tutsi or a person of mixed ethnicity in the Congo. The evidence submitted on this point supports the Officer's finding, and the Officer could reasonably conclude that it was more likely than not that Mr. Bouekassa would be perceived as a Hutu–Bantu in Burundi and the Congo.

[54] It also appears from the record that Mr. Bouekassa did not submit any evidence that people who are of mixed ethnicity or perceived as Tutsis are persecuted in the Congo. The Officer's finding was therefore reasonable in light of the evidence in the record.

[55] In fact, in reaching his conclusion, the Officer found there was insufficient evidence to support Mr. Bouekassa's claim. Moreover, contrary to Mr. Bouekassa's contentions, the Officer did address all of his arguments. The nature of legal reasoning is to assign greater probative value to certain elements, which then make it possible to draw a conclusion. Finally, apart from the reference to his sworn statement, Mr. Bouekassa did not mention the documents or elements that were allegedly ignored.

[56] I find that Mr. Bouekassa is essentially attacking the Officer's assessment of the evidence. However, the role of the Court on judicial review is to determine the reasonableness of the Officer's finding. In this regard, the Federal Court of Appeal stated in *Canada (Citizenship and Immigration) c. Solmaz*, 2020 FCA 126, at paras 124–125, that [TRANSLATION] " . . . it is for the IAD [or PRRA officer] to decide the weight to give to the evidence, not the Court . . . the Supreme Court of Canada recalled in *Vavilov* that 'the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings.'"

VI. Conclusion

[57] For the reasons stated above, the application for judicial review is dismissed.

JUDGMENT in IMM-1988-20

THE COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No question is certified.

"Martine St-Louis"
Judge

Certified true translation
This 21st day of July 2021

Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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