Date: 20080314

Docket: IMM-2347-07

Citation: 2008 FC 348

Ottawa, Ontario, March 14, 2008

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

PATRICK KADIMA WA KABONGO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Wa Kabongo is a citizen of the Democratic Republic of Congo (DRC), born in 1981. He seeks judicial review of a decision of the Refugee Protection Division (RPD), dated April 26, 2007.

[2] The applicant lived with his Rwandan Tutsi mother and Congolese father in Kinshasa from 1993 to 1998, at which point his parents fled a worsening situation to live in Goma, a town in the North Kivu region (on the Rwandan border). Mr. Wa Kabongo remained with his paternal uncle in Kinshasa to finish his schooling. He claims that in 2001 he was expelled and barred from re-

attending university because of his participation in protests against tuition fee increases. He went to live with his parents in Goma where they were operating a camp to help Rwandan refugees. When rifles were found in the camp in October 2005, they were arrested, beaten and imprisoned. His uncle eventually arranged for his release by paying a bribe. He then fled to Canada arriving on February 3, 2006 and claimed refugee protection the same day.

The Decision under Review:

[3] The Panel found the applicant's story lacking in credibility on a great number of points. These included:

- A lack of objective medical evidence about the injuries Mr. Wa Kabongo claims to have sustained while imprisoned;
- Doubts as to why Mr. Wa Kabongo would go to his parents in North Kivu, given the chaotic political situation and the fact that a volcano was due to erupt in the area;
- A lack of credible explanation of a lack of evidence of attempts to locate his parents;
- A lack of evidence that Mr. Wa Kabongo would be subject to persecution based on his mother's Tutsi heritage; and
- Mr. Wa Kabongo's failure to claim protection in countries he transited, including the United Kingdom and United States

[4] As a result the Panel found that the applicant was neither a Convention refugee nor a person in need of protection.

Issues:

[5] At the hearing, the issues pressed by the applicant were whether the Panel erred in failing to assess the objective risk which he faced upon return by reason of his Rwandan nationality, derived from his mother, and because of the treatment accorded returning deportees suspected of having criticized the Congolese government while abroad. The issue of whether the Panel had properly assessed risk under both sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) was withdrawn during argument.

Argument and Analysis:

[6] This matter was heard before the recent decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. 9. Prior to that decision, this Court was largely in agreement on the standards of review applicable to decisions of the RPD. Findings of fact were reviewable on a patently unreasonable standard; mixed fact and law attracted the reasonableness *simpliciter* standard; and, pure errors of law were reviewed on the correctness standard: *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, [1998] S.C.J. No. 46.

[7] The effect of *Dunsmuir* is to collapse the two reasonableness standards into one. It further allows that, where the type of decision being reviewed has been thoroughly assessed for the applicable standard, subsequent decisions may rely on that standard. In applying these principles, I

find that decisions of the RPD, except where they concern pure questions of law, are reviewable on the reasonableness standard.

[8] The applicant submits that the Panel was required to analyse the objective risk to a member of the group the applicant belongs to, even where she found his specific narrative not to be credible: *Seevaratnam v. Canada (Minister of Citizenship and Immigration)*, (1999), 167 F.T.R. 130, [1999] F.C.J. No. 694. His identity card carried his mother's name which was recognizable as being of Rwandan nationality. While the Panel member considered the documentary evidence respecting the treatment of those of Tutsi ethnicity in the DRC, she did not expressly consider the evidence which dealt with the persecution of those of Rwandan nationality.

[9] In the alternative, the applicant submits that the Panel erred in failing to consider the objective risk to the applicant as a returned failed refugee claimant. The documentary evidence before her showed that the risk is real. The Panel is tasked with assessing all relevant issues to a refugee claim, even where the specific grounds are not raised during the hearing: *Viafara v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1526, [2006] F.C.J. No. 1914.

[10] The respondent concedes that it would have been preferable for the Panel member to have referred to the issue of objective risk in terms of nationality as well as ethnicity but argues that it is clear from the transcript of the hearing that the applicant related the risk to his mother's ethnicity and not her country of origin. Moreover, the documentary evidence referred to both "Tutsis" and "Rwandans" suggesting that the two terms were used interchangeably to refer to the persecuted refugees in the DRC.

[11] The applicant's reliance on *Seevaratnam* is misplaced, the respondent submits, as Justice Danièle Tremblay-Lamer has recently clarified her finding in that case to exclude those situations where the applicant's testimony is the only evidence linking the applicant to his or her claim: *Soosaipillai v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1040, [2007] F.C.J. No. 1349.

[12] Regarding the applicant's alternative argument, the respondent submits that the case law shows that the Panel does not err when it fails to address an issue which was not raised at the hearing of the claim, especially where the claimant is represented by counsel: *Ranganathan v. Canada (Minister of Citizenship and Immigration) (C.A.)*, [2001] 2 F.C. 164, [2000] F.C.J. No. 2118. The applicant should not be permitted to raise new risk allegations at the judicial review stage, but would more appropriately raise these concerns at a pre-removal risk assessment: *Raza v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385, [2007] F.C.J. No. 1632.

[13] The applicant asserts that he is precluded from raising his alternative claim in a PRRA as he did not raise it before the Panel. I disagree. PRRA officers may assess risks to claimants on return to their countries of origin where the claimed grounds have not previously been raised: *Zenunaj v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1715, [2005] F.C.J. No. 2133. Indeed, as the PRRA officer in that situation would be the first decision maker to assess the newly claimed risk, he or she would be required to review all relevant evidence, not merely that which fits the parameters set out in paragraph 113(*a*) of the IRPA: *Cupid v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 176, [2007] F.C.J. No. 244.

[14] Turning to the issues raised on this application, as was noted by Justice Robert L. Barnes in his recent decision *Krishnapillai v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 563, [2007] F.C.J. No. 760, an assessment of the generalized risk faced by a claimant is not required in every instance where, as here, the Panel has categorically rejected the applicant's claims.

[15] In this instance, the Panel went so far as to find that the applicant had not been in Goma for the three years he claimed and that neither he nor his parents had been jailed. Given that he was found to suffer no persecution and has not contested the Panel's credibility findings, on the facts of this case there was no need for an assessment of objective risk based on his identity. If it were necessary to find that an objective assessment was required, I am satisfied that it was adequately addressed by the Panel's consideration of the evidence relating to the treatment of refugees persecuted in the DRC by reason of their Tutsi ethnicity.

[16] Regarding the second issue, I do not agree that the Panel erred in omitting to assess the applicant's risk of persecution as a failed refugee claimant. The documentary evidence of an objective basis for this risk in the record was scant and was linked to a perception that asylum seekers in Europe had criticized the DRC. There was no evidence that Mr. Wa Kabongo fell into that category. Moreover, he evidently did not think it warranted mention during his evidence, nor did his counsel. *Viafara* is distinguishable, in my view, as the Panel in that case completely overlooked a subjective basis for the claim.

[17] No questions of general importance were proposed for certification and none will be certified.

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that the application is dismissed. No question is certified.

" Richard G. Mosley "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2347-07
STYLE OF CAUSE:	PATRICK KADIMA WA KABONGO and THE MINISTER OF CITIZENSHIP AND IMMIGRATON
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	February 27, 2008
REASONS FOR JUDGMENT AND JUDGMENT:	MOSLEY, J.
DATED:	March 14, 2008

APPEARANCES:

Raoul Boulakia	FOR THE APPLICANT
John Provart	FOR THE RESPONDENT

SOLICITORS OF RECORD:

RAOUL BOULAKIA Barrister & Solicitor Toronto, Ontario	FOR THE APPLICANT
JOHN H.SIMS,Q.C. Deputy Attorney General of Ontario Toronto, Ontario	FOR THE RESPONDENT