Federal Court  Cour fédérale

**Date: 20140113**

**Docket: T-1307-12**

**Citation: 2014 FC 34**

**Ottawa, Ontario, January 13, 2014**

**PRESENT: The Honourable Mr. Justice Annis**

**BETWEEN:**

**EKENS AZUBUIKE**

**Applicant**

**and**

**THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS ET AL**

**Respondents**

## REASONS FOR JUDGMENT AND JUDGMENT

### INTRODUCTION

[1] This is an application under section 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7, for judicial review of an alleged abuse of discretion by the respondents, the Minister of Public Safety and Emergency Preparedness, and the Canadian Border Services Agency [CBSA], in disclosing certain information from the applicant's refugee claim to a third party, namely, the Government of Nigeria, in contravention of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

The applicant seeks an order restraining the respondent from "any communication with the Government … of Nigeria … directly or indirectly, with all sensitive materials."

[2] For the following reasons, the application is dismissed.

**BACKGROUND AND DECISION UNDER REVIEW**

[3] The applicant, Mr Ekens Azubuike, is a citizen of Nigeria. He arrived in Canada on November 3, 2007 and made a claim for refugee protection that same day. The claim was based on the applicant's alleged membership in the Movement for the Actualization of the Sovereign State of Biafra ["MASSOB"], a group which advocates for an independent State of Biafra. The applicant claimed that he was tried in absentia for membership in this group, found guilty of treason and sentenced to life imprisonment in his country. This claim was corroborated by a copy of a judgment from the High Court of IMO State and the Orlu Judicial Division in Nigeria, rendered by the Hon Justice Nwaiwu Ekeoma, dated December 19, 2005.

[4] On February 4, 2009, CBSA sent a request to the High Commission of Canada in Ghana (the High Commission) to verify the authenticity of this judgment. This request was because several of the other documents on which the applicant's claim was based were found to be inauthentic or fraudulently obtained.

[5] To verify the authenticity of the judgment document, on February 25, 2009, the High Commission sought the assistance of the Interpol National Centre Bureau of Nigeria ("Interpol Nigeria").

[6] On March 26, 2009, the applicant was granted protected person status in Canada by the Immigration and Refugee Board [IRB].

[7] On December 16, 2010, Interpol Nigeria informed the High Commission, which in turn informed CBSA, that the court judgment was a forged document that was not issued by the Court in issue, and that the judge named in that judgment had never presided at that Court.

[8] On the basis that the applicant had obtained protected person status as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter in his claim for protection, on February 23, 2011, the respondent filed an Application to Vacate the IRB's decision to grant the applicant protected person status. The IRB has yet to render a decision on that matter.

**ISSUE**

1. Should this application have been preceded by an application for leave?

**STANDARD OF REVIEW**

[9] There has not yet been a decision rendered in the case of the applicant. Rather, he is challenging the nature of the process carried out by the respondents in arriving at a decision (that is, to vacate his status), which brings up questions of procedural fairness. Procedural fairness is reviewable on a correctness standard, as stated by the Supreme Court in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at paragraph 43.

**STATUTORY PROVISIONS**

[10] The following provisions of *IRPA* are applicable in these proceedings:

*Immigration and Refugee Protection Act*, SC 2001, c 27

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| 4. (2) The Minister of Public Safety and Emergency Preparedness is responsible for the administration of this Act as it relates to | 4. (2) Le ministre de la Sécurité publique et de la Protection civile est chargé de l'application de la présente loi relativement : |
| […] | […] |
| (*b*) the enforcement of this Act, including arrest, detention and removal; | *b*) aux mesures d'exécution de la présente loi, notamment en matière d'arrestation, de détention et de renvoi; |
| […] | […] |
| 72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court. | 72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation. |
| […] | […] |
| 109. (1) The Refugee Protection Division may, on application by the Minister, vacate a decision to allow a claim for refugee protection, if it finds that the decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter. | 109. (1) La Section de la protection des réfugiés peut, sur demande du ministre, annuler la décision ayant accueilli la demande d'asile résultant, directement ou indirectement, de présentations erronées sur un fait important quant à un objet pertinent, ou de réticence sur ce fait. |
| […] | […] |

138. (1) An officer, if so authorized, has the authority and powers of a peace officer — including those set out in sections 487 to 492.2 of the *Criminal Code* — to enforce this Act, including any of its provisions with respect to the arrest, detention or removal from Canada of any person.

[…]

150.1 (1) The regulations may provide for any matter relating to

(*a*) the collection, retention, use, disclosure and disposal of information for the purposes of this Act or for the purposes of program legislation as defined in section 2 of the *Canada Border Services Agency Act*;

(*b*) the disclosure of information for the purposes of national security, the defence of Canada or the conduct of international affairs, including the implementation of an agreement or arrangement entered into under section 5 or 5.1 of the *Department of Citizenship and Immigration Act* or section 13 of the *Canada Border Services Agency Act*;

[…]

138. (1) L'agent détient, sur autorisation à cet effet, les attributions d'un agent de la paix, et notamment celles visées aux articles 487 à 492.2 du *Code criminel* pour faire appliquer la présente loi, notamment en ce qui touche l'arrestation, la détention et le renvoi hors du Canada.

[…]

150.1 (1) Les règlements régissent :

*a*) la collecte, la conservation, l'utilisation, le retrait et la communication de renseignements pour l'application de la présente loi ou de la législation frontalière au sens de l'article 2 de la *Loi sur l'Agence des services frontaliers du Canada*;

*b*) en matière de sécurité nationale, de défense du Canada ou de conduite des affaires internationales — y compris la mise en oeuvre d'accords ou d'ententes conclus au titre de l'article 5 ou 5.1 de la *Loi sur le ministère de la Citoyenneté et de l'Immigration* ou de l'article 13 de la *Loi sur l'Agence des services frontaliers du Canada* —, la communication de renseignements;

[…]

| | |
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| (2) Regulations made under subsection (1) may include conditions under which the collection, retention, use, disposal and disclosure may be made. | (2) Ces règlements prévoient notamment les conditions relatives à la collecte, la conservation, l'utilisation, le retrait et la communication de renseignements. |

**ANALYSIS**

[11] As a preliminary matter, I would like to clarify the proper respondents in this matter, as there appears to be some confusion on the part of the applicant, who named Her Majesty the Queen and Citizenship and Immigration Canada [CIC] as two of the four respondents. In their Memorandum of Fact and Law, the respondents argue that Her Majesty the Queen and CIC should be struck out as respondents. Because it was the respondent Minister who carried out the disclosure of the applicant's documents, the Court agrees with the respondent's position, and chooses to hear this matter with the Minister and CBSA, which falls under the authority of the Minister in virtue of the *Canada Border Services Agency Act*, SC 2005, c 38, s 6(1), as the only respondents.

[12] Turning to the applicant's contentions, in his Memorandum of Fact and Law he cites passages from the "Annex Regarding the Sharing of Information on Asylum and Refugee Status Claims to the Statement of Mutual Understanding on Information Sharing" between Citizenship and Immigration Canada and the Bureau of Citizenship and Immigration Services of the U.S. Department of Homeland Security, alleging that it is forbidden to disclose information regarding individual refugee status claimants to third parties without the subject's written consent. He also contends that protection of refugee claimants includes protecting the confidentiality of an individual's identity and the information provided in the individual's refugee status claim. He

further contends that his consent should have been obtained before any information was released, and that he refused to grant this consent at his refugee status hearing in front of the IRB.

[13] He alleges that there was an abuse of discretion on the part of the respondents.

[14] He further alleges that the respondents are acting in concert with the Nigerian government to hunt him down.

[15] However, before these issues are raised, there is a question of jurisdiction that renders this application invalid. The applicant's allegations concern the discretion of the respondent Minister to exercise its powers under s 138(1) of *IRPA* in order to uphold the Act, a matter clearly falling within the ambit of *IRPA*. As a result, the applicant's challenge to this action should have been commenced with an application for leave and for judicial review. As s 72(1) of *IRPA* states, applicants must seek leave from the Court to file an application for judicial review with respect to any matter under *IRPA*. Because no leave was sought, nor granted, from this Court, I do not have jurisdiction to hear the matter.

[16] However, there are two decisions of this Court on the matter of jurisdiction under *IRPA* that merit discussion in this instance: *Mahabir v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 133, (1991), 85 DLR (4th) 110, 15 Imm LR (2d) 303, 137 NR 377 (CA) [*Mahabir*] and *Toussaint v Canada (Attorney General)*, 2010 FC 810, [2010] FCJ No 987 [*Toussaint*].

[17] In *Mahabir*, the Federal Court of Appeal held that even if a constitutional question is at issue, if the redress sought is contemplated by *IRPA*, an application for leave must be brought. The Court stated the following, in reference to s 82(1), the provision of the predecessor to *IRPA*, the *Immigration Act*, RSC, 1985, c I-2, that, like s 72(1) of *IRPA*, mandated that leave be sought for judicial review under the Act:

> **4** In Bains v. Canada (Minister of Employment & Immigration), the Court held that the requirement of section 83.1 of the Act that leave to appeal be obtained did not impair rights guaranteed refugee claimants under either section 7 or 15 of the Charter. The applicant, however, argues that the fact that the decision sought to be set aside is a determination of Charter guaranteed rights, not rights arising under the Immigration Act, distinguishes the present case from Bains. He argues that while the 28 application concerns the Immigration Act it is not brought under it; rather it is brought under section 24 of the Charter and the leave requirement of the Immigration Act cannot impede it.
>
> **5** In my opinion there is a transparent fallacy in the basic assumption on which the applicant's argument is premised. The remedy sought is certainly about the Immigration Act but, equally, it is sought under the Immigration Act because it is section 82.1 of that Act as well as section 28 of the Federal Court Act that authorizes the proceeding the applicant has purported to initiate. Section 82.1 expressly modifies the right to seek judicial review otherwise provided by section 28. This Court can no more ignore section 82.1 in dealing with an application under section 28 seeking to set aside a decision or order made under the Immigration Act than, for example, it can ignore the privative provisions of subsection 22(1) of the Canada Labour Code in dealing with a section 28 application seeking to set aside a decision under Part I of the Code. Having chosen to seek his Charter remedy by a proceeding authorized by the Immigration Act rather than, for example, suing for a declaration of those rights, the applicant is bound by the condition precedent that he obtain leave to so proceed. It is well established that neither subsection 24(1) of the Charter nor subsection 52(1) of the Constitution Act, 1982 of themselves give jurisdiction to a Court. Rather subsection 24(1) gives a remedial power, and subsection 52(1) a declaratory power, to be exercised in disposing of matters properly before the Court. A decision or order, whether it concerns the Constitution or not is made under the Immigration Act.

[18] Similarly, in the case of the applicant, while he may be alleging the violation of various of his rights, including under the *Charter*, the starting point of his claims is the actions taken by CIC and CBSA pursuant to s 138(1) of *IRPA*. As a result, leave must be sought.

[19] The *Mahabir* decision can be contrasted with *Toussaint*, where Justice Zinn held that denying coverage under the Interim Federal Health Program [IFHP] was not an immigration matter under *IRPA*. IFHP was created in the 1950s, before *IRPA* came into force, in order to provide health care to refugee claimants. The legal basis for the program is not an Act of Parliament, but rather an Order-in-Council. As a result, the legal basis for a decision made in regards to IFHP lies in the Order-in-Council, and not *IRPA*, and therefore leave does not need to be sought under s 72(1). At paragraph 27 of his decision, Justice Zinn stated that:

> It is my view that properly interpreted, for a decision to be subject to subsection 72(1) of the Act, it must be made pursuant to the Act or its associated Regulations. Decisions related to IFHP eligibility cannot be said to be "under this Act" because there is no statutory authority for the IFHP under either the Act or the Regulations. The Order-in-Council pursuant to which this decision was made and the others that preceded it were not made under the Act; indeed the Act, as it currently stands, did not exist at the time.

[20] Unlike in *Toussaint*, the matter at hand clearly springs from the exercise of statutory authority under *IRPA*. The applicant is attempting to judicially review this exercise of statutory authority, and as a result must seek leave under s 72(1). I must therefore decline jurisdiction.

[21] As for the question of whether an injunction can be issued against the respondent Minister and CBSA, because this matter is not in my jurisdiction, I prefer to leave this question to be decided by the body ultimately seized of the matter.

**CONCLUSION**

[22] This application for judicial review should be dismissed.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** this application for judicial review is denied.

"Peter Annis"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-1307-12 |
| **STYLE OF CAUSE:** | EKENS AZUBUIKE v<br>THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS ET AL |
| **PLACE OF HEARING:** | MONTREAL, QUEBEC |
| **DATE OF HEARING:** | NOVEMBER 20, 2013 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | ANNIS J. |
| **DATED:** | JANUARY 13, 2014 |

**APPEARANCES:**

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| Ekens Azubuike | FOR THE APPLICANT<br>(ON HIS OWN BEHALF) |
| Ian Demers | FOR THE RESPONDENTS |

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