Federal Court  Cour fédérale

Date: 20141218

Docket: IMM-5200-13

Citation: 2014 FC 1239

Toronto, Ontario, December 18, 2014

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

ÉTIENNE AVOUAMPO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], of the decision of a Citizenship and Immigration [CIC] officer [Officer] dated May 22, 2013 refusing the Applicant's pre-removal risk assessment [PRRA].

II. Facts

[2] Étienne Avouampo [the Applicant] is a citizen of the Republic of Congo who fears returning to his country of origin due to imputed political opinion and his failed refugee claim. He first came to Canada in 2001. His refugee claim was denied in 2003. He submitted a humanitarian and compassionate [H&C] application, and in 2005, he also submitted a PRRA application. His H&C application was approved in principle in 2009, and so processing of his PRRA was suspended. However, the Applicant's permanent resident status was ultimately denied in 2012, due to a criminal conviction in 2010 and failure to comply with the requirements of *IRPA*.

[3] On April 30, 2013, CIC advised the Applicant that it was re-opening his PRRA and that he had until May 24, 2013 to send submissions in support thereof [Fairness Letter]. On May 8, 2013, the Applicant's counsel replied to CIC, requesting it to "hold off initiating the PRRA process for Mr. Avouampo", given the recent filing of a second H&C application [Delay Letter]. CIC did not reply.

[4] On May 22, 2013, the Officer denied the Applicant's PRRA application [Decision]. The decision was delivered to the Applicant on June 27, 2013.

[5] On May 24, 2013, in accordance with the deadline in CIC's letter, the Applicant's counsel sent PRRA submissions on the Applicant's behalf to CIC by fax and courier [Submission Letter].

III. Issue

[6] The sole issue in this matter is whether the Officer breached the duty of procedural fairness by making his decision prior to the deadline given to the Applicant for making PRRA submissions.

IV. Standard of Review

[7] The standard for determining whether the decision maker complied with the duty of procedural fairness is correctness: See *Mission Institution v Khela*, 2014 SCC 24 at para 79; *MCI v Khosa*, 2009 SCC 12 at para 43. However, the content of the duty is flexible and may differ depending on the context: See *Baker v MCI*, [1999] 2 SCR 817 at paras 21-28; *Khela* at para 89.

V. Parties' Submissions

[8] The Applicant submits that the Officer breached the duty of fairness by making his decision on May 22, 2013, two days prior to the deadline given to the Applicant to make submissions on the PRRA. Relying on the May 24 deadline, the Applicant made risk-based submissions on that date. Yet it is clear the Officer did not take those submissions into account, instead using the May 8 Delay Letter upon which to base the PRRA refusal.

[9] The Applicant further submits that, when the Officer received the Submission Letter, he should have reconsidered his May 22 decision, taking the submissions into consideration (*Chudal v MCI*, 2005 FC 1073 at paras 19-21; CIC's PP3 Manual). The Applicants submit that a

PRRA officer cannot render a decision prior to the deadline provided to the Applicant, and indeed must take into account "late-delivered" documents, including new evidence up to the point of the decision being communicated: see *Chudal, Zokai v Canada (MCI)*, 2005 FC 1103, and Gil *Arango v Canada (MCI)*, 2014 FC 370.

[10] Here, the Applicant had a legitimate expectation that he would have at minimum until the May 24 CIC deadline, and had every right to submit a preliminary delay request in the interim period: see also *Figurado v Canada (Solicitor General)*, 2005 FC 347 at para 40. This expectation was particularly valid in view of the fact that CIC had taken years with the Applicant's file, and two extra days would have made no difference, as the few days extra days made no difference given the June 27 delivery.

[11] The Officer should have voiced his concerns about the May 8 letter or refused the extension request, instead of treating it as substantive PRRA risk submissions: *Zokia*, above.

[12] The Respondent submits that the Officer did not breach a duty of procedural fairness. First, the Applicant had no legitimate expectation that the Officer would wait until May 24, 2013 to make his decision, rather than promptly considering the submissions received on May 8 "in response to" the Fairness Letter: *Vasanthakumar v MCI*, 2012 FC 74 at para 12. Second, since the May 8 Letter and attached documents did not contain information relevant to the PRRA, it was reasonably open to the Officer not to take it into account. Third, the Applicant failed to advise CIC in the May 8 Letter that further submissions were forthcoming.

[13] Overall, the Applicant argues that the 30 day Fairness Letter represented a window that opened, and the window closed once a response had been received, with no obligation or further requirement for the Officer to reopen the window once he closed it with his May 22 Decision. In other words, any submissions made were taken as a response – whether complete, deficient or somewhere in between – after which the Officer was entitled to make a final PRRA decision at any time, and which occurred in this case on May 22.

[14] The Respondent further submits that even if the Officer had considered the Submission Letter, these submissions would not have changed the outcome of the PRRA.

[15] Finally, the Respondent submits in the alternative that if this Court finds that the Officer erred in failing to consider the Submission Letter, the Decision should not be set aside since the PRRA Officer also looked at other evidence on the record, and the May 24 submissions added nothing substantial to that evidence: see *Patel v MCI*, 2002 FCA 55 and *Toussaint v Canada (AG)*, 2010 FC 810 at para 59.

VI. Analysis

[16] In my view, the Officer had a duty to consider the Submission Letter in the circumstances and breached his duty of procedural fairness by failing to do so.

[17] The Respondent relies on *Vasanthakumar*, above, at para 12 for the proposition that the Applicant did not have a legitimate expectation that he would have a further opportunity to provide additional submissions prior to the Decision being rendered. Unlike in *Vasanthakumar*,

however, CIC in this case provided the Applicant with a clear deadline by which he was required to make submissions.

[18] As such, the Applicant was entitled to rely on that date and to make submissions both in advance of and up to that date, particularly because the Delay letter of May 8 contained nothing related to risk or the PRRA analysis, and never held itself to be anything but a request for delay. The Officer therefore had every reason to expect that submissions on the basis of the PRRA would follow, since the Applicant had responded – but only on the procedural request for a PRRA delay, rather than on the basis for the PRRA. Finally, there was nothing in the CIC Fairness Letter that suggested the Applicant was allowed to submit only one letter.

[19] While the Respondent is correct that PRRA matters are to be dealt with in a timely fashion, this goal should not prejudice an applicant's opportunity to present evidence and to put his or her case forward in full, especially where life and security of the person are at stake. This must also be the case in situations where there have been long processing CIC delays. The Applicant had been in Canada for well over a decade when CIC issued the 30 day Fairness Letter. Surely in these circumstances it could have waited until those 30 days had run their course before finalizing the case.

[20] In view of all the circumstances, the duty of fairness in this case required the Officer to wait until May 24, 2013, before making his determination on the Applicant's PRRA. By not doing so, he breached his duty of procedural fairness.

[21] I further find that regardless of whether the Officer should have waited until May 24, 2013 to make his decision, he was required to consider the Submission Letter as the Applicant submitted the letter before he was notified that the Decision had been made. This Court has determined that a PRRA officer has an obligation to consider all evidence which may affect the determination even after the officer has written the decision, so long as the evidence is received before the applicant is notified that the decision has been made, or before the date on which the applicant has been told a decision will be made: See *Chudal*, above, at para 19; *Ayikeze v MCI*, 2012 FC 1395 at para 16.

[22] Even though the Officer had made a Decision when the Applicant's Submission Letter arrived, the Submission Letter arrived well before the Applicant was notified of the said Decision, and therefore before the Decision became final: see *Chudal*, above, at paras 16-21; see also *Gil Arango* and *Zokai*, above. He therefore had an obligation to consider these submissions.

VII. Conclusions

[23] This application for judicial review is allowed. The Officer had an obligation to make his decision only after the date on which the Applicant had been given as a deadline to make submissions. The Officer thereby breached his duty of procedural fairness by making his decision prior to that date, and by failing to reconsider his decision in light of the submissions made by the Applicant on the deadline date, two days later, in the weeks after those submissions were received and before the Decision was communicated.

[24] I therefore will allow this Application and send the matter back to be reconsidered by a different Officer, having regard to all the material, including the submissions of May 24, 2013, and any new material on risk.

[25] No questions for certification were raised and I will certify none.

JUDGMENT

THIS COURT'S JUDGMENT is that this Application is allowed and the matter is sent back to be reconsidered by a different Officer, having regard to all the material, including the submissions of May 24, 2013, and any new material on risk. No questions for certification were raised and none will be certified.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5200-13
STYLE OF CAUSE:	ÉTIENNE AVOUAMPO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	DECEMBER 2, 2014
JUDGMENT AND REASONS:	DINER J.
DATED:	DECEMBER 18, 2014

APPEARANCES:

Azadeh Tamjeedi	FOR THE APPLICANT
Sybil Thompson	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Azadeh Tamjeedi Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT