Federal Court  Cour fédérale

Date: 20170511

Docket: IMM-4677-16

Citation: 2017 FC 492

Ottawa, Ontario, May 11, 2017

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

CHENJERAI MAZHANDU

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] Mr. Mazhandu does not want to return to Zimbabwe. He has been here for seven years, has a Canadian spouse, and a Canadian born child. He may, or may not, also have a well-founded fear of persecution in Zimbabwe, both because he claims to be an outspoken foe of the regime in power and as the father in a mixed-race family.

[2] He has no legal status in Canada as his student visa has since long expired. In addition, he has been convicted under the *Criminal Code* for having refused to take a breathalyzer test. He was ordered deported in May 2016, being inadmissible on the grounds of criminality.

[3] The issue in this judicial review is whether the Canadian Border Service Agency Officer had inquired as to why he did not wish to return to Zimbabwe before ordering him deported. If she had, and if his stated reasons included fear of persecution, the directives which guided the officer required her not to issue the deportation order which would allow him to put forward a claim for refugee protection.

[4] Stripped to its essence, and perhaps shorn of his lies, Mr. Mazhandu's case is that, if he had been so asked, he would have stated he feared persecution in Zimbabwe and wanted to present his refugee claim in an oral hearing before a member of the Refugee Protection Division of the Immigration and Refugee Board of Canada. He asks that the deportation order be quashed so as to now allow him to pursue that route. As it is, s 99(3) of the *Immigration and Refugee Protection Act*, (*IRPA*) provides that a claim for refugee protection may not be made by a person who is the subject of a removal order.

The facts

[5] Mr. Mazhandu came to the attention of the authorities for two reasons. His student visa had expired more than a year earlier and he had not applied for a renewal. The second was that he had been charged with failing to take a breathalyzer test. When he was first interviewed, the criminal charge was still pending.

[6] On December 18, 2015, Mr. Mazhandu was interviewed by Inland Enforcement Officer Sherie Craik of the Canada Border Services Agency together with Officer Justin Curtis. She took very detailed, contemporaneous notes. The notes have nothing to say about a possible return to Zimbabwe. Mr. Mazhandu insists that at the meeting he did express a fear of persecution. However, the record shows that he plays fast and loose with the truth. Based on those notes, I find not only that he expressed no fear about returning to Zimbabwe, but more importantly he was not asked what he thought would happen to him should he be returned.

[7] In accordance with s 56 of *IRPA*, Mr. Mazhandu was not detained but released on conditions. This interview does not appear to have been an admissibility hearing as contemplated by ss 44 and 45 of *IRPA*.

[8] Mr. Mazhandu pled guilty, in February 2016, to the charge of having refused to take a breathalyzer test, contrary to the provisions of the *Criminal Code*.

[9] He then received a written call-in notice to discuss his Canadian status. He was interviewed on April 8th by Officer Craik together with Officer Paul Finn. He was told he was inadmissible and reported under s 44 of *IRPA*. He was then ordered deported.

[10] However, that report was faulty in that it stated that he had been convicted of driving while impaired. Once the error was noted, a new deportation order was issued on May 13, 2016. It is that order which is the subject of this judicial review.

[11] No notes were taken during the April 8th interview. At its conclusion, Mr. Mazhandu was given a pre-removal risk assessment (PRRA) package. Sections 112 and following of *IRPA* provide that a person subject to a removal order may nevertheless apply for Canada's protection. A person who unsuccessfully pursued a refugee claim may only present new evidence that arose after the rejection, or was not reasonably available, or which he could not reasonably have been expected to have been presented. However, since Mr. Mazhandu had not filed a refugee claim, the PRRA also took into account all the evidence he could have presented at a refugee hearing.

[12] Mr. Mazhandu applied for a pre-removal risk assessment. A hearing may be held, on a PRAA, if the Minister is of the opinion that it is required. There was no hearing. The assessment went against him. He applied to this Court for leave and judicial review. Leave was refused.

Analysis

[13] This case turns on Citizenship and Immigration Canada's Guideline (ENF 6 – Review of Reports under A-44(1)).

[14] Section 44(1) of *IRPA* provides that an officer who is of the opinion that a permanent resident or foreign national in Canada is inadmissible may prepare a report setting out the relevant facts. The guideline consists of twenty-four parts and three appendices. Relevant to this analysis are Part 5 (Departmental Policy) and Part 8 (Procedure: Handling possible claims for refugee protection).

[15] Section 5.1 which deals with procedural fairness states: "It is important for the Minister's delegate to make notes detailing the process followed in exercising his decision-making powers". Section 8 identifies a set of procedures for handling a possible claim for refugee protection. There are eight signposts. The first four and the last apply to Mr. Mazhandu:

> • Where the subjects of a determination for an administrative removal order have not made a claim, the Minister's delegate should ask them how long they intend to remain in Canada.
>
> • If the persons indicate that their intention is or was to remain temporarily, the Minister's delegate should proceed with the removal order decision and issue the removal order, if appropriate.
>
> • If the persons indicate that their intention is or was to remain in Canada indefinitely, the Minister's delegate is to inquire about their motives for leaving their country of nationality and the consequences of returning there before making a decision on issuing a removal order.
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> • Where the responses indicate a fear of returning to the country of nationality that may relate to refugee protection, the Minister's delegate is to inform the subjects of the definition of a "Convention refugee" or "person in need of protection" as found in A96 and A97, and ask whether they wish to make a claim.
>
> […]
>
> • Whenever the persons indicate a fear of returning to their country of nationality, the Minister's delegate is to refrain from evaluating whether the fear is well-founded. As well, the Minister's delegate must not speculate on their eligibility before they have made a refugee claim, nor speculate on the processing time or eventual outcome of a claim.

[16] It is trite to say that guidelines are not the law, and are not binding on this Court (*Agraira v Canada*, 2013 SCC 36 at para 85; see also *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 72). However, there are guidelines, and then there are

guidelines. To use the words of Mr. Justice LeBel who, in speaking of another guideline, stated in *Agraira* at para 98:

> 98 In the case at bar, the Guidelines created a clear, unambiguous and unqualified procedural framework for the handling of relief applications, and thus a legitimate expectation that that framework would be followed.

[17] ENF 6 was not followed. If the December 2015 interview had been an inadmissibility hearing, the Officer's notes are comprehensive and clearly show that Mr. Mazhandu was not asked what he thought would happen to him were he to be returned to Zimbabwe. On the other hand, the April 2016 interview was definitely an inadmissibility hearing. No notes were taken and so it cannot even be inferred that Mr. Mazhandu was asked whether he feared returning to Zimbabwe and, if so, why.

[18] The Minister submits that all of this is a colossal waste of time. Mr. Mazhandu never expressed any fear of returning to Zimbabwe before his PRRA. The PRRA was negative and his application for leave to this Court for judicial review was dismissed. There are instances where a lack of procedural fairness can make no difference (see *Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202; *Cha v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126; and *Gennai v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 8). In *Cha*, Mr. Justice Décary, speaking for the Court of Appeal, referred to the decision in *Correia v Canada (Minister of Citizenship and Immigration)*, 2004 FC 782, where Mr. Justice Phelan said at para 36:

> 36 This is one of those rare cases where there was a breach of procedural fairness but where the remedy should not be the quashing of the decision. The Applicant was unable to suggest what relevant facts could have been put to the Delegate which

> could have in any way altered the decision to refer. There is no purpose to be served in repeating the process to end at the same result. It is unfair to both parties to order a repeat of the removal process. To do so would be a triumph of form over substance.

[19] If I were allowed to speculate, I might well be of the view that this judicial review is simply a delaying tactic to buy more time while Mr. Mazhandu's application to remain in Canada on humanitarian and compassionate grounds is being processed.

[20] Although natural justice and procedural fairness do not always require an oral hearing, in *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177 at paras 58 and 59, Madam Justice Wilson criticised the *Immigration Act*, as it then was, which provided that refugee claims could be decided on written submissions. She said:

> 59 I should note, however, that even if hearings based on written submissions are consistent with the principles of fundamental justice for some purposes, they will not be satisfactory for all purposes. In particular, I am of the view that where a serious issue of credibility is involved, fundamental justice requires that credibility be determined on the basis of an oral hearing.

[21] The law was subsequently changed. *IRPA* now provides for an oral refugee hearing.

[22] Mr. Mazhandu's credibility is certainly at issue. One may be a liar and refugee both (*Canada (Public Safety and Emergency Preparedness) v Gunasingam*, 2008 FC 181). This is not a case of form over substance.

[23] As Mr. Justice LeDain stated in *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 at pp 660 and 661:

> Certainly a failure to afford a fair hearing, which is the very essence of the duty to act fairly, can never of itself be regarded as not of "sufficient substance" unless it be because of its [page 661] perceived effect on the result or, in other words, the actual prejudice caused by it. If this be a correct view of the implications of the approach of the majority of the British Columbia Court of Appeal to the issue of procedural fairness in this case, I find it necessary to affirm that the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing. [my emphasis]

JUDGMENT

For reasons given, the deportation order dated May 13, 2016 is quashed. There is no question to certify for the Federal Court of Appeal.

"Sean Harrington"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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