Federal Court  Cour fédérale

Date: 20190125

Docket: IMM-2671-18

Citation: 2019 FC 107

Toronto, Ontario, January 25, 2019

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

FUNDU NSUNGANI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of the negative Pre-Removal Risk Assessment [PRRA] decision dated April 13, 2018 [the Decision], by a Senior Immigration Officer [the Officer], which assessed risks to which the Applicant would be subject if returned to the Democratic Republic of the Congo [DRC].

[2] As explained in greater detail below, this application is dismissed, because I have found that the Applicant was not deprived of procedural fairness, and the Decision, when reviewed in conjunction with the evidence before the Officer, demonstrates a reasonable analysis of the risks alleged by the Applicant and the evidence related thereto.

II. **Background**

[3] The Applicant, Fundu Nsungani, is a 30-year-old citizen of the DRC. He left his country in 2002 when he was 14 years old. After arriving in Canada, Mr. Nsungani and his five siblings made a claim for refugee protection, which was rejected by the Refugee Protection Division [RPD] because the claimants were found not to be credible. The Federal Court dismissed their application for judicial review of that decision.

[4] Subsequently, Mr. Nsungani became involved in criminal activities, and as a result of a conviction for robbery in Toronto in November 2007, he was found to be inadmissible to Canada on grounds of serious criminality pursuant to s 36(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[5] In 2012, Mr. Nsungani applied for a PRRA, which was negative because it was found that he had not overcome the RPD's credibility findings. In November 2017, he applied for a second PRRA. As this was Mr. Nsungani's second PRRA, he did not benefit from a statutory stay of removal. Also, while Canada has a Temporary Suspension of Removals [TSR] in place with respect to the DRC, it does not apply to Mr. Nsungani because of his inadmissibility. He was scheduled for removal on December 6, 2017, but he did not report for removal, and a

warrant was issued for his arrest. He was subsequently apprehended on May 5, 2018 in Toronto, and he has been in immigration detention since that time.

[6] In the meantime, Mr. Nsungani's second PRRA was rejected in the Decision dated April 13, 2018, which is the subject of this application for judicial review.

III. **Decision under Review**

[7] In the Decision, the Officer observed that Mr. Nsungani is inadmissible to Canada pursuant to s 36(1) of IRPA for his 2007 robbery conviction, but noted that the PRRA assessment would nevertheless be performed under ss 96 and 97 of IRPA. The Officer also noted that the TSR for the DRC did not apply because of the serious criminality conviction.

[8] The Officer then referred to the risks identified by Mr. Nsungani, observing that he asserts fear for his life, and risk of irreparable harm, torture, and cruel and inhuman treatment at the hands of the state if he is returned to the DRC. He fears that he will be seen as a threat to the government and that the state cannot protect him. The Officer noted that Mr. Nsungani also alleges that he is at risk as a failed asylum-seeker. Other than that risk, the Officer noted that Mr. Nsungani's claims were largely the same as those asserted before the RPD.

[9] The Officer reviewed the RPD's findings of lack of credibility regarding Mr. Nsungani's 2003 refugee claim, which involved allegations that his brother was wanted for the murder of President Laurent-Désiré Kabila. The Officer also noted Mr. Nsungani's earlier negative PRRA, as well as observing that he failed to appear for his scheduled removal. The Officer then listed

the documents that Mr. Nsungani submitted in support of this PRRA application, including country condition documentation [CCD] related to the DRC.

[10] In relation to the CCD, the Officer first addressed a media article from *The Guardian*, dated February 15, 2014, which referred to opponents of the government being tracked down and arrested. However, the Officer afforded this article little weight, explaining that it did not mention Mr. Nsungani or his brother by name or refer to the death of President Laurent-Désiré Kabila. The Officer also observed that the article did not provide a copy of the leaked document on which it was apparently based. The Officer then referred to more recent objective information on this issue, citing a document submitted by Mr. Nsungani, identified as *UK Upper Tribunal document: BM and others (returnees – criminal and non-criminal)*, dated May 30, 2015 [the UK Upper Tribunal Document], and a 2015 document entitled *Country Information and Guidance-Democratic Republic of Congo: treatment on return*, which was not submitted by Mr. Nsungani but is footnoted and hyperlinked by the Officer in the Decision.

[11] The Officer referred to the UK Upper Tribunal Document as identifying risks to those who fled the DRC on false passports, but noted that Mr. Nsungani had provided no evidence that he left without his own passport. The Officer concluded that Mr. Nsungani had not discharged his burden of proving that he used fraudulent documentation to flee the DRC.

[12] The Officer identified CCD submitted by Mr. Nsungani as explaining that human rights conditions in the DRC are poor and that the government has committed arbitrary and unlawful killings and torture. However, the Officer noted that the document entitled *2016 Country Reports*

on Human Rights Practices for DRC, also submitted by Mr. Nsungani, indicated that the government has cooperated with the United Nations Human Rights Commission in assisting returning refugees and that internally displaced persons had returned to certain parts of the country.

[13] In conclusion, the Officer found that Mr. Nsungani had not demonstrated that he would be at risk in returning to the DRC, either because of accusations against his brother, because he left the DRC under a false passport, or because he was a failed refugee claimant. The Officer recognized that Mr. Nsungani may encounter some difficulties upon his return, but held that these issues are unrelated to persecution for Convention reasons and do not correspond to risk of torture, risk to life, or risk of cruel and unusual treatment or punishment.

IV. **Issues and Standard of Review**

[14] The Applicant identifies the following three issues for the Court's consideration:

A. Did the Officer breach procedural fairness by relying on extrinsic evidence?

B. Did the Officer err in analysing the country condition documentation?

C. Did the Officer err by failing to analyse the Applicant's risk profile as a deportee with a criminal record in Canada?

[15] The procedural fairness issue is governed by the standard of correctness, and the other two issues by the reasonableness standard.

[16] The Respondent also raises, as an additional issue, an argument that the Court should dismiss this application or decline to grant relief because of the Applicant's failure to report for removal.

V. **Analysis**

A. *Failure to Report for Removal*

[17] The Respondent argues that Mr. Nsungani's breach of immigration law, by failing to report for removal from Canada in December 2017, is alone sufficient for the dismissal of his application for judicial review. The Respondent relies on the principles explained by the Federal Court of Appeal in *Canada (Minister of Citizenship and Immigration) v. Thanabalasingham*, 2006 FCA 14 at [*Thanabalasingham*] paras 9-10:

> [9] In my view, the jurisprudence cited by the Minister does not support the proposition advanced in paragraph 23 of counsel's memorandum of fact and law that, "where it appears that an applicant has not come to the Court with clean hands, the Court must initially determine whether in fact the party has unclean hands, and if that is proven, the Court must refuse to hear or grant the application on its merits." Rather, the case law suggests that, if satisfied that an applicant has lied, or is otherwise guilty of misconduct, a reviewing court may dismiss the application without proceeding to determine the merits or, even though having found reviewable error, decline to grant relief.
>
> [10] In exercising its discretion, the Court should attempt to strike a balance between, on the one hand, maintaining the integrity of and preventing the abuse of judicial and administrative processes, and, on the other, the public interest in ensuring the lawful conduct of government and the protection of fundamental human rights. The factors to be taken into account in this exercise include: the seriousness of the applicant's misconduct and the extent to which it undermines the proceeding in question, the need to deter others from similar conduct, the nature of the alleged administrative unlawfulness and the apparent strength of the case, the importance of the individual rights affected and the likely

> impact upon the applicant if the administrative action impugned is allowed to stand.

[18] As one of the factors to be taken into account in considering the Respondent's submission is the apparent strength of Mr. Nsungani's case, at least some analysis of the merits of this application for judicial review is required before the Court could rule upon the *Thanabalasingham* argument. For the reasons explained below, considering the merits, my conclusion is that Mr. Nsungani's application must be dismissed. It is therefore unnecessary for the Court to consider whether his breach of immigration law would in itself be a basis to dismiss the application.

B. *Did the Officer breach procedural fairness by relying on extrinsic evidence?*

[19] Mr. Nsungani submits that he was deprived of procedural fairness because, in dismissing his PRRA, the Officer relied in part on a piece of "extrinsic evidence" that had not been submitted by Mr. Nsungani or disclosed by the Officer to him to afford him an opportunity to make submissions thereon (see, e.g. *Ahmed v Canada (Minister of Public Safety and Emergency Preparedness)*, 2018 FC 471 [*Ahmed*] at paras 27-19). This evidence is the document referenced in the Decision as entitled *Country Information and Guidance- Democratic Republic of Congo: treatment on return*, a publication of the United Kingdom Home Office dated September 2015 [the UK Home Office Document].

[20] It appears to be common ground between the parties that the Officer did not provide Mr. Nsungani with notice that the UK Home Office Document would be relied upon in making the Decision. However, the Respondent notes, and Mr. Nsungani does not appear to dispute, that this

document forms part of the July 31, 2017 version of the National Documentation Package [NDP] for the DRC, publicly accessible on the website of the Immigration and Refugee Board of Canada [IRB].

[21] The Respondent argues that the jurisprudence establishes that country condition evidence found in the IRB's NDP is not extrinsic evidence of the sort which requires disclosure by a PRRA officer before it can be relied upon in making a decision. *Guzman v Canada (Minister of Citizenship and Immigration)*, 2004 FC 838 [*Guzman*] held at paragraph 5 that the research documents prepared by the IRB which are available at IRB documentation centres are not considered extrinsic evidence and that procedural fairness does not require disclosure of such documents to an applicant prior to a PRAA determination been reached.

[22] Mr. Nsungani argues that *Guzman* does not stand for the proposition that all contents of the NDP can be relied upon by a PRRA officer without prior disclosure to an applicant. He submits that *Guzman* is distinguishable, as the document considered in that case was a country report on human rights conditions issued by the United States Department of State, which he argues is a source of documentary evidence widely relied upon in immigration matters. Mr. Nsungani's position is that a publication of the United Kingdom Home Office, of the sort relied upon by the Officer in the present case, does not fall into the same category. In support of his position, that *Guzman* does not apply to all country condition documentation that is publicly available on the Internet, he relies on *Ahmed*, in which Justice Brown set aside a danger opinion issued by a Minister's delegate under s 115(2)(a) of IRPA, because of the delegate's failure to

disclose intended reliance on material found on the website www.refworld.org maintained by the United Nations High Commissioner for Refugees.

[23] Even if I were to accept Mr. Nsungani's argument that the conclusion in *Guzman* does not apply to all material in the IRB's NDP, I find no basis to distinguish that authority in the case at hand. First, I note that the material under consideration in *Ahmed* was not part of the NDP. Moreover, as I read the analysis in that decision, the procedural fairness concern was that the information found on the www.refworld.org website was dated after the deadline for the applicant's submissions, such that the applicant could not have been expected to have knowledge of that information.

[24] In contrast, in the case at hand, the UK Home Office Document forms part of the IRB's NDP, which Mr. Nsungani's PRRA submissions referenced as the source of some of the country condition evidence on which he was relying. It also emanates from the same country (the United Kingdom) and dates from roughly the same timeframe as the UK Upper Tribunal Document on which he relied. In addition, as emphasized by the Respondent and as is evident from its title (*Country Information and Guidance- Democratic Republic of Congo: treatment on return*), the UK Home Office Document addressed precisely the risk profile which Mr. Nsungani was advancing in support of his PRRA. In fact, as I read the document, it relies heavily on the conclusions in the UK Upper Tribunal Document on which Mr. Nsungani was relying.

[25] As such, employing the analysis described in *Ahmed* at paragraph 27, as to whether the evidence in question is novel and significant and also represents information of which the

applicant could not reasonably have been expected to have knowledge, I find that neither of these criteria are met and that the UK Home Office Document therefore does not qualify as extrinsic evidence that the Officer was required to disclose before making the Decision. There has therefore been no breach of procedural fairness in this case.

C. *Did the Officer err in analysing the country condition documentation?*

[26] Mr. Nsungani submits that the Decision is unreasonable, both because it provides inadequate reasons, precluding an understanding as to why the Officer rejected the CCD evidence submitted by Mr. Nsungani in support of his alleged risks, and because it represents a selective review of the CCD, failing to engage with evidence which directly contradicts the Officer's conclusions.

[27] The Officer refers to the article from *The Guardian* but affords it little weight, in part because there is more recent documentary evidence regarding the issues raised by that article. The documents to which the Officer refers are the UK Upper Tribunal Document and the UK Home Office Document. The Officer then references specifically sections VIII(iv) and 119(iv) of the UK Upper Tribunal Document, noting that they refer to issues including risks if a person departed the DRC with fraudulent documentation. The Officer then notes that, although Mr. Nsungani alleged that he left the DRC with a false passport, he provided no evidence to support this, and therefore concludes that Mr. Nsungani had not discharged the burden of demonstrating that he had committed a document fraud in departing the DRC.

[28] Mr. Nsungani submits that this analysis fails to explain why the Officer rejected the evidence he submitted in support of the risk of failed asylum seekers being subjected to ill treatment upon return to the DRC.

[29] While the Officer's reasons are relatively brief, I find that a review of those reasons, in combination with the CCD upon which the Officer relies, demonstrates an intelligible analysis. Sections VIII and 119 of the UK Upper Tribunal Document represent the conclusion sections of that document. In summary, the relevant conclusions in that document are that DRC nationals who have been convicted of offenses in the United Kingdom or who have unsuccessfully claimed asylum in the United Kingdom are not at real risk of being persecuted upon return to the DRC, but that the DRC authorities have an interest in certain types of convicted or suspected offenders. Sections VIII(iv) and 119(iv), to which the Officer refers, describe the categories of persons in which DRC authorities have an interest as those who have unexecuted prison sentences or arrest warrants in the DRC, or who have supposedly committed an offense, such as document fraud, when departing the DRC. Such persons are at risk of lengthy imprisonment and proscribed treatment.

[30] I read the Decision as demonstrating that the Officer relied on the conclusions in the UK Upper Tribunal Document as showing that the profile which would create risk for a returning DRC citizen was one involving criminality in the DRC, including criminality associated with a document fraud when departing the country. This is the reason the Officer did not find compelling Mr. Nsungani's assertion that he was at risk merely as a returning failed asylum

seeker. It is also the reason the Officer focused upon whether Mr. Nsungani had established that he had left the DRC using fraudulent documentation.

[31] I find not only that this analysis is intelligible but that it is reasonable in the context of the documentary evidence that was before the Officer. Mr. Nsungani argues that the Officer failed to engage with evidence in the UK Upper Tribunal Document demonstrating risk to returning failed asylum seekers. He relies on the principle explained in *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 (Fed TD) to the effect that, while a decision-maker need not address every piece of evidence before it and is presumed to have considered all the evidence, a Court may draw a reasonable inference that the decision-maker ignored evidence that directly contradicts its conclusions.

[32] In my view, this principle does not assist Mr. Nsungani on the facts of the present case. The UK Upper Tribunal Document canvasses evidence from a variety of sources, some of which supports Mr. Nsungani's assertion of risk as a failed asylum seeker. However, other evidence canvassed in that document supports the contrary conclusion, and the document demonstrates that the UK Upper Tribunal itself, having considered all the evidence before it, reached the conclusions captured in sections VIII and 119, to the effect that returning asylum seekers do not face a risk unless they have a profile of criminality in the DRC. As explained above, I find the Decision intelligible because it demonstrates that the Officer relied on the conclusions in the UK Upper Tribunal Document. It is therefore not possible to infer, from the absence of express references to individual pieces of evidence referenced in the UK Upper Tribunal, that the Officer ignored that evidence.

[33] I therefore find no reviewable error arising from the Officer's treatment of the country condition evidence.

D. *Did the Officer err by failing to analyse the Applicant's risk profile as a deportee with a criminal record in Canada?*

[34] Mr. Nsungani submits that the Officer failed to analyse a component of his risk profile, i.e. that he would be returning to the DRC with a record of foreign criminality. He accurately points out that the Decision does not refer to that profile as a component of the risk that he is asserting and does not expressly analyse that risk.

[35] This argument must be considered in the context of how Mr. Nsungani framed his risk profile in his PRRA submissions. He submitted that he would face risk as a failed refugee, not as a returnee with a history of foreign criminality. Having said that, I recognize that portions of the documentary evidence which Mr. Nsungani submitted with his PRRA application include references to returnees being detained by DRC authorities if they have a foreign criminal record, and excerpts to that effect from the documentary evidence were included in the body of his PRRA submissions. There is no doubt that the Officer was obliged to consider the potential risk arising from foreign criminality, as that risk that was evident from the CCD, even if not expressly raised by Mr. Nsungani (see, e.g., *Jama v Canada (Minister of Citizenship and Immigration)*, 2014 FC 668 at para 19). However, given that Mr. Nsungani did not expressly frame his PRRA in terms of risk arising from his criminality, the fact the Officer did not frame the risk in this manner does not necessarily suggest that this aspect of the risk was overlooked.

[36] Rather, it is necessary to assess the analysis in the Decision to determine whether the evidence of risk arising from foreign criminality was considered. I return to the above explanation of my understanding of the Officer's reasoning. The Officer relied upon the conclusions in the UK Upper Tribunal Document, which include the conclusion that returnees to the DRC do not face real risk of persecution arising from criminality other than criminality in the DRC, and focused upon the one allegation of DRC criminality made by Mr. Nsungani, that he had employed fraudulent documentation to exit the country. In my view, this analysis demonstrates that the risk arising from criminality was considered but found not to be present in Mr. Nsungani's circumstances. Again, I find no basis for a conclusion that the Decision is unreasonable.

[37] Having considered Mr. Nsungani's grounds of review and having identified no reviewable errors on the part of the Officer, this application for judicial review must be dismissed. Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-2671-18

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

No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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