Federal Court  Cour fédérale

Date: 20220114

Docket: IMM-1358-21

Citation: 2022 FC 40

Ottawa, Ontario, January 14, 2022

PRESENT: The Honourable Madam Justice Aylen

BETWEEN:

DOUDOU MPUMUDJIE KIKEWA

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant seeks judicial review of the February 18, 2021 decision of the Immigration Division of the Immigration and Refugee Board of Canada [Board], wherein the Board concluded that there were reasonable grounds to believe that the Applicant is a member of a criminal organization and therefore inadmissible for organized criminality pursuant to section 37(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] The Applicant submits that given the Applicant's conditions of detention, mental health concerns and lack of access to effective counsel, the Board's decision to proceed *in absentia* breached his procedural fairness rights as his participatory rights were violated without justification. The Applicant asserts that the Board should not have expected his designated representative to provide legal submissions on behalf of the Applicant, particularly given that the designated representative had raised serious concerns about her inability to provide legal representation.

[3] The Applicant further submits that the decision of the Board was unreasonable, not only due to being tainted by the denial of procedural fairness, but also as a result of the Board's unreasonable treatment of the evidence before it.

[4] For the reasons that follow, I am satisfied that there was no breach of procedural fairness and that the Board's decision was reasonable. Accordingly, the application for judicial review shall be dismissed.

II. Background

[5] The Applicant is a 31-year old citizen of the Democratic Republic of the Congo and has been a permanent resident since April 4, 2006.

[6] On February 19, 2019, the Applicant was detained and charged, along with three other men, with multiple offences related to identity theft in the Provincial Court of Newfoundland and Labrador. On August 14, 2019, the Applicant was convicted of identity theft, unlawfully procuring

and possessing the identity documents of another person and failure to comply with an appearance. The Applicant received a sentence of 175 days and 18 months probation for his identity theft conviction, a sentence of 175 days and 18 months probation for his unlawful possession and procurement of the identity document of another person convictions and a sentence of 67 days and 90 days of sentence served for his failure to comply with an appearance conviction.

[7] The Applicant's criminal record demonstrates other similar convictions in other Canadian jurisdictions (such as Longueuil, Laval, Montreal, Edmonton and Ottawa), as well as two outstanding warrants of arrest in Saskatchewan and Alberta.

[8] The Applicant served his consecutive sentences at Her Majesty's Penitentiary in St. John's Newfoundland. He was subsequently detained on immigration grounds.

[9] While in detention, the Minister brought forward allegations of inadmissibility based on serious criminality pursuant to section 36 of the *IRPA* and the Applicant was ultimately found inadmissible on those grounds. He received a five-month sentence with the possibility to appeal, but no appeal was filed.

[10] The Minister subsequently referred the Applicant's alleged inadmissibility to the Immigration Division for an admissibility hearing pursuant to section 44(2) of the *IRPA*, this time based on section 37 (organized criminality). At the time of this referral, the Applicant remained in detention and had begun experiencing distressing mental health issues and had been placed in

solitary confinement and under suicide watch, as he had been observed banging his head repeatedly against the wall.

[11] The admissibility hearing was scheduled to be heard on July 15, 2020 at the same time as the Applicant's detention review hearing. However, several days before the hearing, the Applicant demonstrated concerning behaviour that resulted in the appointment of Julie Champagne, Director of the Halifax Refugee Clinic, as the Applicant's designated representative [Designated Representative]. This appointment was made by the Board and with the consent of the Designated Representative for the purpose of the Applicant's section 37 proceeding and his detention review hearings.

[12] At the July 15, 2020 hearing, counsel for the Applicant and the Designated Representative requested an adjournment. The Applicant was present and was not in agreement with the adjournment, wishing to proceed. The Board granted the adjournment and the admissibility hearing was re-scheduled to August 14, 2020.

[13] On August 14, 2020, the Applicant's counsel cited difficulties in communication with the Applicant due to COVID-19 restrictions and protocols and requested another adjournment. The Board agreed to adjourn the hearing to August 27, 2020.

[14] On August 27, 2020, the Applicant was absent from the hearing, without explanation. His counsel was also absent and submitted a letter explaining that he was ill and unable to attend. The

Board indicated that counsel for the Applicant's behaviour was unprofessional, but nonetheless agreed to adjourn the hearing to September 25, 2020, which date was fixed on a peremptory basis.

[15] In the days leading up to the September 25, 2020 hearing, counsel for the Applicant contacted the Respondent to indicate that his relationship with the Applicant had broken down. Counsel for the Applicant did not similarly communicate with the Designated Representative.

[16] On September 25, 2020, the Applicant was present by telephone but hung up prior to the commencement of the hearing, leaving his Designated Representative to represent him. At the hearing, the Designated Representative removed the Applicant's counsel from the file as she felt it was clear that counsel was no longer adequately representing the Applicant.

[17] The Board stated that it intended to proceed with the hearing, as the Board had indicated on August 27, 2020 that the September 25, 2020 hearing date was peremptory, whether the Applicant or his counsel were present or not. The Designated Representative was asked by the Board whether she was prepared to proceed and she indicated that she was prepared to proceed. The Designated Representative also agreed to proceed immediately to written submissions to be delivered on a later date, hopefully with the assistance of legal counsel. The Board marked as exhibits various documents tendered by the Applicant, which included documentation regarding the Applicant's criminal convictions and arrest warrants, a report of the RCMP, a criminal record report of a third party (who was found to be a member of the criminal organization) and news articles. The Board noted that, as discussed with the parties, there would be no witnesses. A

timetable for written submissions was put in place, with the agreement of the Designated Representative.

[18] In November of 2020, the Designated Representative requested an extension of time to provide written submissions on the basis that she required the assistance of legal counsel in order to prepare the submissions. The requested extension of time was granted.

[19] On January 27, 2021, the Designated Representative provided written submissions to the Board on behalf of the Applicant. The submissions addressed the section 37 allegation before the Board, but also contained a section detailing the absence of legal representation for the Applicant and in particular, the efforts undertaken by the Designated Representative to unsuccessfully retain legal counsel for the Applicant and the limitations on the Designated Representative's ability to provide legal submissions.

[20] The Respondent also provided the Board with written submissions.

[21] On February 18, 2021, the Board issued its decision finding that there existed reasonable grounds to believe that the Applicant was a member of a criminal organization as contemplated by section 37 of the *IRPA*. The Board found that the criminal organization was simple and informal, consisting of a criminal cell involving the Applicant and three other men, who used the same *modus operandi* to commit various crimes related to identity theft using high quality and sophisticated falsified documents. The Board concluded that the Applicant was inadmissible to

remain in Canada and consequently, an expulsion order under section 45(d) of the *IRPA* was issued against the Applicant.

III. Issue and Standard of Review

[22] The following two issues arise on this application:

A. Whether there was a breach of procedural fairness; and

B. Whether the Board's decision was reasonable.

[23] In relation to the first issue, breaches of procedural fairness in administrative contexts have been considered reviewable on a correctness standard or subject to a "reviewing exercise ... 'best reflected in the correctness standard' even though, strictly speaking, no standard of review is being applied"[see *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54]. The duty of procedural fairness is "eminently variable", inherently flexible and context-specific. It must be determined with reference to all the circumstances, including the *Baker* factors [see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 77]. A court assessing a procedural fairness question is required to ask whether the procedure was fair, having regard to all of the circumstances [see *Canadian Pacific Railway Company v Canada (Attorney General), supra* at para 54].

[24] In relation to the second issue, the parties submit, and I agree, that the presumptive standard of review is reasonableness. No exceptions to that presumption have been raised nor apply [see *Vavilov, supra* at paras 23, 25].

[25] In assessing whether a decision is reasonable, the Court will assess whether the decision is appropriately justified, transparent and intelligible. To meet these requirements, the decision must reflect "an internally coherent and rational chain of analysis" and be "justified in relation to the facts and law that constrain the decision maker". Both the outcome and the reasoning process must be reasonable [see *Vavilov, supra* at paras 83, 85 and 99].

IV. Analysis

A. *Was there a breach of procedural fairness?*

[26] The Applicant asserts that a section 37 proceeding attracts a higher duty of procedural fairness (as compared to paper-based decisions by the Minister), as the concerned person is given the opportunity to testify, put forward witnesses and to cross-examine the credibility and trustworthiness of the evidence. Greater procedural protections must be afforded to the Applicant given the complex and adversarial nature of the proceeding, given the absence of an appeal before the Immigration Appeal Division (which could otherwise consider humanitarian and compassionate grounds, and where the hearing is *de novo)* and given the potential dire impact of the decision on the Applicant (which could include the loss of permanent residence status, expedited removal and indefinite family separation).

[27] The Applicant asserts that the Board's decision to proceed *in absentia* violated the Applicant's participatory rights, notwithstanding that his Designated Representative appeared and participated in the hearing. The Applicant asserts that the Board was keenly aware of his serious mental health problems, but failed to engage with and address how these problems prevented the

Applicant from meaningfully participating in the proceeding, all of which were raised by the Designated Representative in her submissions. The Applicant asserts that the Designated Representative's concerns regarding the inhibiting effects of the Applicant's mental health problems were not trivial, as the problem of prolonged solitary confinement of immigration detainees is real and chronic.

[28] The Applicant submits that, while the Designated Representative and the Minister decided to proceed immediately to written submissions, in reality, the Designated Representative was not given a real choice by the Board, and she felt compelled to provide submissions, given the Board's interest to proceed despite the absence of counsel.

[29] The Applicant asserts that the Board should not have elected to proceed in a peremptory manner, nor should it have expected the Designated Representative to provide legal submissions on the Applicant's behalf, particularly given that the Designated Representative had raised serious concerns about her inability to provide legal representation. The Applicant submits that the Board ought to have given more consideration to the deplorable detention conditions he was being held under and his need for legal representation, rather than insisting on the promptness of the process.

[30] As noted above, the content of the duty of procedural fairness is variable and contextual. Several factors must be considered in determining the scope of the duty of procedural fairness, including: (a) the nature of the decision being made and the process followed; (b) the nature of the statutory scheme; (c) the importance of the decision to the individual affected; (d) the legitimate expectations of the person challenging the decision; and (e) the choice of the procedure made by

the agency [see *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para. 22].

[31] Considering these factors, I agree with the Applicant that the procedural fairness obligation owed to the Applicant in this case was heightened. However, I am satisfied that the Board met this heightened procedural fairness obligation.

[32] As recognized by the Federal Court of Appeal in *Hillary v Canada (Minister of Citizenship and Immigration)*, 2011 FCA 51 at para 35, "the right to representation in an administrative proceedings normally means the right of a party to appoint someone, often legal counsel, to conduct the case before the tribunal on their behalf". In addition, section 167(1) of the *IRPA* obligates the Board to appoint a designated representative for a person who is the subject of proceedings where the Board is of the opinion that the person is unable to appreciate the nature of the proceeding. In this case, the Board recognized the Applicant's significant mental health problems and in accordance with their section 167(2) obligation, appointed the Designated Representative so as to ensure that the Applicant's interests were properly represented. As such, I reject the Applicant's assertion that the Board failed to engage with the impact of the Applicant's serious mental health problems on his ability to participate in the proceeding.

[33] I agree with the Applicant that the Designated Representative was not acting as a substitute for legal counsel. A designated representative and legal counsel serve distinct roles. As stated in the Immigration and Refugee Board of Canada's "Designated Representative Guide", the key role of a designated representative is to protect and advance the interests of the subject of the

proceedings they represent. Put differently, they stand in the shoes of the Applicant so as to be alert to their needs and their best interests. The duties of the designated representative include retaining counsel, instructing counsel, making decisions with respect to the proceeding, assisting in obtaining evidence, providing evidence and being a witness and acting in the best interests of the Applicant [see *Duale v Canada (Minister of Citizenship and Immigration)*, 2004 FC 150 at para 17].

[34] Contrary to the assertion of the Applicant, I find that the Board did not treat the Designated Representative as a substitute for legal counsel. The Designated Representative's role was to take the steps in the proceeding that the Applicant would otherwise take, which could include instructing and retaining counsel. However, it must be kept in mind that the right to counsel is not absolute in an administrative proceeding [see *Mervilus v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1206 at para 25]. There will be circumstances where an applicant will proceed without legal counsel and in those circumstances, an applicant will be obligated to prepare any legal submissions required for the purpose of the proceeding. Where a designated representative is appointed and the matter proceeds without legal counsel, it falls on the designated representative to deliver such legal submissions on behalf of an applicant, regardless of their absence of legal training or the complexity of the proceeding. Accordingly, I find that the Board's requirement that the Designated Representative deliver written submissions on behalf of the Applicant was not unfair or unreasonable. The Board made the same demands of the Designated Representative that it would have made of a self-represented applicant.

[35] While the Applicant is critical of the Board's decision to proceed on September 25, 2020 in absence of legal counsel for the Applicant and its reliance on its prior determination that the September 25, 2020 hearing would be peremptory, it is vital to note that at no time did the Designated Representative request an adjournment of the September 25, 2020 hearing so as to enable legal counsel to be retained or for the Applicant to participate at the hearing. The Designated Representative was well aware of her ability to seek an adjournment, which she had previously done in relation to the July 15, 2020 hearing. Rather than seek an adjournment, the Designated Representative requested that the Applicant's legal counsel be removed as solicitor of record and thereafter agreed to proceed without legal counsel and without the Applicant in attendance. While the Applicant asserts that the Designated Representative felt that she had no choice but to proceed, I find that there is nothing in the transcript of the September 25, 2020 hearing that would support such an assertion.

[36] It is apparent to the Court that the Designated Representative made extensive (but ultimately unsuccessful) efforts to secure legal counsel for the Applicant to assist with the delivery of her written submissions. It remained open to the Designated Representative to seek a further extension of time to deliver her written submissions (one extension having already been requested by, and granted to, the Designated Representative) in order to continue her efforts to secure legal representation or assistance for the Applicant. However, the Designated Representative made no such request.

[37] While the Board's September 25, 2020 hearing was set down as peremptory, this fact was not determinative of whether the matter had to proceed on September 25, 2020. It was open to the

Board to reconsider its earlier determination, as the Board cannot overlook its procedural fairness obligations [see *Gargano v Canada (Minister of Citizenship and Immigration),* [1994] FCJ No 1385 at para 19]. However, in light of: (i) the three prior adjournments granted at the Applicant's request; (ii) the absence of any request by the Designated Representative to adjourn the September 25, 2020 hearing; and (iii) the Designated Representative's consent to proceeding, I find that the Board cannot be faulted for proceeding with the hearing on September 25, 2020 or proceeding to render its decision after the delivery of the Designated Representative's written submissions.

[38] In all of the circumstances, I am satisfied that the Board did not breach its procedural fairness obligations to the Applicant as the Applicant, through his Designated Representative, was afforded a meaningful opportunity to present his case fully and fairly.

B. *Was the Board's decision reasonable?*

[39] The Applicant asserts that the decision of the Board was unreasonable for two reasons. First, the Applicant asserts that the Board's decision fails to demonstrate a meaningful account for the central procedural fairness concerns raised by the Applicant, when the Designated Representative devoted an entire section of her submission to the constrained conditions produced by the Applicant's solitary confinement and the impact of his lack of access to effective counsel on his participatory rights. Rather, the Applicant asserts that the Board simply provided a factual account of the procedural history, without providing any justification for why promptness trumped the Applicant's procedural fairness concerns at stake.

[40] I disagree with the Applicant's characterization of the Board's reasons for decision. Commencing at paragraph 33 of the decision, the Board provided an explanation as to why it proceeded in the absence of the Applicant and its explanation cannot be characterized as merely a factual recital. Moreover, in the absence of a request from the Designated Representative to adjourn the September 25, 2020 hearing or adjourn the delivery of written submissions, I find that it was not incumbent upon the Board to provide a more detailed rationale for proceeding with the hearing beyond that which was provided and of the nature one would expect to see in a case where an adjournment has been requested [see *Siloch v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 10 (FCA); *Sandy v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1468].

[41] The second argument put forward by the Applicant is that the decision is unreasonable as a result of the Board's unreasonable treatment of the evidence. The Applicant asserts that if the only evidence of the organized crime group is the Applicant's activities or if the only evidence of his membership was his involvement in those same activities, this may create "unreasonable circularity" as found in *Pascal v Canada (Citizenship and Immigration)*, 2020 FC 751 at para 83. The Applicant asserts that the Board relied heavily on the reports authored by Corporal Emberley regarding the arrest and charges raised against the Applicant in Newfoundland and the Respondent did not provide other evidence with respect to the development or history of this group.

[42] Moreover, the Applicant asserts that his criminal history is not relevant evidence, as it is not conclusive of organized criminality nor of the existence of the group the Respondent alleges formed a criminal organization.

[43] The Applicant further asserts that the Board's reliance on news articles (which was justified on the basis that the articles were not contradicted by other evidence) and third party criminal reports was unreasonable, particularly given that the Applicant was not given an opportunity to test that evidence or produce his own evidence due to his unrepresented status and conditions of detention.

[44] Finally, the Applicant asserts that the Board's finding that the organized group was simple, informal and without hierarchy on one hand, and finding that the Applicant played "un rôle prédominant au sein du groupe" on the other, is internally inconsistent. Moreover, without justification for characterizing the Applicant's role as central, the Applicant asserts that the decision lacks transparency.

[45] I find that the Applicant has not adequately demonstrated how the Board's reliance on the reports authored by Corporal Emberley would constitute unreasonable circularity, nor has the Applicant explained why the reports would lack the evidentiary sufficiency to support the Board's determination. In any event, I am satisfied that when considered as a whole, the reasons demonstrate that the Board relied on more than simply the Emberley reports to establish both the existence of the organization and the Applicant's membership in the organization. As such, I find that the Board's reliance on these reports was not unreasonable.

[46] While the Applicant asserts that his criminal history is not relevant, I am satisfied that the Board has adequately and intelligibly explained the relevance of this evidence at paragraph 53 of its decision.

[47] With respect to the Applicant's remaining evidentiary arguments regarding the newspaper articles and third party criminal reports, I find that the Applicant has not established that the Board's reliance on these documents was unreasonable. I reject the Applicant's assertion that he did not have an opportunity to test this evidence. The Designated Representative made the decision on behalf of the Applicant to proceed by way of written submissions only and thus forego the opportunity to test or respond to the evidence. Moreover, in the case of the newspaper articles, the Board specifically noted that it would have come to the same conclusion with or without the newspaper articles.

[48] With respect to the Applicant's assertion regarding the decision's alleged lack of transparency due to internal inconsistency, I find no such inconsistency in the decision. The Board's determination that the Applicant played a predominant or important role in the organization (which determination I find was reasonable on the evidence before it) is not inconsistent with the Board's finding that the organization, as a whole, was simple and informal, without hierarchy. As such, I find that the Applicant has not established that the decision lacks transparency or intelligibility.

V. Conclusion

[49] For the reasons set out above, I find that there was no breach of procedural fairness and that the Board's decision was reasonable, as it was based on an internally coherent and rational chain of analysis and was justified in relation to the evidence before it and the applicable legal principles.

[50] Accordingly, the application for judicial review shall be dismissed.

[51] No question for certification was raised by the parties and I agree that none arises.

JUDGMENT in IMM-1358-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. The parties proposed no question for certification and none arises.

"Mandy Aylen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1358-21
STYLE OF CAUSE:	DOUDOU MPUMUDJIE KIKEWA v MINISTER OF PUBLIC SAFTY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	HEARD BY VIDEOCONFERENCE
DATE OF HEARING:	JANUARY 10, 2022
JUDGMENT AND REASONS:	AYLEN J.
DATED:	JANUARY 14, 2022

APPEARANCES:

Gabriella Utreras Sandoval	FOR THE APPLICANT
Kaitlin Stephens	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Halifax Refugee Clinic Halifax, Nova Scotia	FOR THE APPLICANT
Attorney General of Canada Halifax, Nova Scotia	FOR THE RESPONDENT