

Federal Court



Cour fédérale

**Date: 20220211**

**Docket: IMM-2465-17**

**Citation: 2022 FC 191**

**Ottawa, Ontario, February 11, 2022**

**PRESENT: Mr. Justice McHaffie**

**BETWEEN:**

**HENDRICK MUKENDI TSHISUMPA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] For unknown reasons, Hendrick Mukendi Tshisumpa's counsel did not receive the Minister of Citizenship and Immigration's notice of intervention and related documents until the day of his hearing before the Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada (IRB). Counsel requested an adjournment of the hearing since he had not received the documents, which included notes of an interview between Mr. Tshisumpa and

an officer with the Canada Border Services Agency (CBSA). The RPD denied the request for an adjournment and proceeded with the hearing, trying to address the potential prejudice to Mr. Tshisumpa by avoiding questions on the new documents until a later date. The RPD nonetheless asked Mr. Tshisumpa questions about the substance of his refugee claim, including matters discussed in the CBSA officer's notes.

[2] When the hearing was reconvened, Mr. Tshisumpa was asked questions about a perceived inconsistency between his evidence on the first hearing day and an aspect of the CBSA officer's notes. The RPD was not satisfied with the explanation, and made an adverse credibility finding against Mr. Tshisumpa on this basis. This finding was important in the RPD's rejection of Mr. Tshisumpa's refugee claim.

[3] I agree with Mr. Tshisumpa that the refusal of the adjournment request and subsequent questioning on the substance of matters addressed in the new documents on the first hearing day created a material procedural unfairness. Despite the RPD's efforts, this unfairness was not avoided by postponing questions on the documents to the second hearing day. It was procedurally unfair to Mr. Tshisumpa to require him to give his evidence on the substance of his claim without an opportunity to first review the Minister's documents related to that claim, including in particular the CBSA officer's notes. Contrary to the Minister's submissions, I find that the credibility finding resulting from this unfairness was sufficiently central to the RPD's conclusions that the decision cannot stand.

[4] The application for judicial review is therefore granted. Mr. Tshisumpa's refugee claim is remitted to the RPD for rehearing.

## II. Issues and Standard of Review

[5] Mr. Tshisumpa claims it was procedurally unfair for the RPD to refuse his request for an adjournment. He also challenges the merits of the RPD's credibility findings. Given my conclusions on the fairness issue, I need not address Mr. Tshisumpa's challenges to the credibility findings themselves.

[6] Issues of procedural fairness are reviewed by this Court by assessing "whether the procedure was fair having regard to all of the circumstances": *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54; *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35 [CARL]. This assessment may be considered either akin to review on a "correctness" standard or as applying no standard of review: *Canadian Pacific* at paras 34, 54; *CARL* at para 35.

## III. Analysis

### A. *Mr. Tshisumpa's refugee claim*

[7] The thrust of Mr. Tshisumpa's claim for protection is that he is at risk from the intelligence agency of the Democratic Republic of Congo (the *Agence nationale de renseignements*, or ANR). Mr. Tshisumpa owns a small transport company. On September 19, 2016, he claims he was in the DRC after the death of his niece when he and a driver came across a group of protestors who had been injured when protesting against the Kabila government. He and the driver took 26 of the injured protestors to a hospital in Kinshasa.

[8] Mr. Tshisumpa alleges that on October 6, 2016, the ANR stopped his truck while it was being driven by the same driver. The ANR seized the truck and notified the driver to have its owner, Mr. Tshisumpa, appear in person the following day. Mr. Tshisumpa's lawyer found out that the ANR wanted to speak to him about the assistance he gave the protestors on September 19, 2016. Fearing he would be arrested and mistreated by the ANR, the lawyer counseled Mr. Tshisumpa to flee the DRC. Travelling on a false Angolan passport with a United States visa that he had acquired some time ago, Mr. Tshisumpa left the DRC for the United States on October 20, 2016. He then travelled to Canada in January 2017 and claimed refugee protection.

[9] Mr. Tshisumpa's refugee claim was eligible to be referred to the RPD despite arriving from the United States, since his nephew is a Canadian citizen: *Immigration and Refugee Protection Regulations*, SOR/2002-227, s 159.5(b)(ii). However, he had no right of appeal to the Refugee Appeal Division and therefore seeks judicial review of the RPD's refusal of his claim: *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], s 110(2)(d)(ii). I note for completeness that Mr. Tshisumpa's application for judicial review was held in abeyance for about 20 months pending the decision of the Federal Court of Appeal in *Kreishan v Canada (Citizenship and Immigration)*, 2019 FCA 223 and the determination of an application for leave to appeal that decision to the Supreme Court of Canada.

B. *The RPD's refusal to adjourn*

[10] A hearing of Mr. Tshisumpa's refugee claim was scheduled for March 14, 2017. The Minister intervened in the claim pursuant to paragraph 170(e) of the IRPA and Rule 29 of the

*Refugee Protection Division Rules, SOR/2012-256 [RPD Rules]*. At the outset of that hearing, after the Minister began referring to documents, Mr. Tshisumpa's counsel advised the RPD that he had not received either the Minister's notice of intervention or the Minister's documents, although the RPD had advised him by telephone of the intervention. This also meant some of Mr. Tshisumpa's documents had not been sent to the Minister.

[11] Both counsel requested an adjournment. The Minister's counsel sought time to analyse the authenticity of Mr. Tshisumpa's identity documents, noting that the principal reason for the Minister's intervention was on the issue of identity. Mr. Tshisumpa's counsel submitted he had not seen the notice of intervention including the Minister's arguments and had not received, in particular, notes of the interview Mr. Tshisumpa had had with the CBSA officer. He noted the importance of determining whether his client had fully prepared his case. Counsel also raised the possibility of calling additional witnesses in light of the Minister's intervention.

[12] The RPD rejected both requests for an adjournment. The RPD gave the following oral reasons for rejecting Mr. Tshisumpa's request:

Despite the notice of service we have of the Minister's notice of intervention and exhibits, we are told that these exhibits and this notice of intervention were not received. This is rather surprising, but having said this, I think I must proceed with the hearing today on the merits and no questions will be asked on the notice of intervention or the documents attached to it. And as a result, there will be no prejudice to the applicant.

This will not prevent the tribunal from asking questions about identity. Identity is always a determinative question. However, the use of documents related to identity will be limited to those that were in the package given to the applicant when he sought refugee protection. All questions regarding the additional documents that are in the Minister's exhibits or in Exhibits C-6 and following will be deferred to a later date.

[Emphasis added; my translation.]

[13] I pause at this stage to make two observations. First, I agree with the Minister that the transcript of the RPD's oral reasons for refusing the adjournment constitutes the RPD's reasons for decision. There was no obligation on the RPD to address the matter again in its written decision refusing the refugee claim. Second, the RPD hearing was conducted in French and the RPD's decision was issued in that language. Before this Court, the parties made their written and oral submissions in English.

C. *The resulting evidence*

[14] As specified by the RPD, the hearing proceeded with Mr. Tshisumpa giving his evidence in response to questions from the panel, followed by questions from the Minister's counsel and questions from his own counsel. The RPD asked no questions directly on the Minister's documents or on the documents the Minister had not received from Mr. Tshisumpa. However, the RPD's questioning included a series of questions about the steps Mr. Tshisumpa took between the events of October 6, 2019 and his departure on October 20, 2019. In particular, the RPD asked questions about what Mr. Tshisumpa did to secure false entry stamps in his false Angolan passport with the assistance of a former classmate who worked in the immigration service.

[15] The responses to these questions became material to the RPD's adverse findings regarding Mr. Tshisumpa's credibility. When the hearing reconvened six weeks later to hear further evidence and ask questions about the documents, the RPD confronted Mr. Tshisumpa

with the CBSA officer's notes from an interview with Mr. Tshisumpa in February 2017. The notes, written in English of an interview conducted in French, say that Mr. Tshisumpa "gave his passport to an express service who looks after getting visa." The Minister considered this an inconsistency with Mr. Tshisumpa's testimony that it was a friend who helped him with the passport. The Minister pointed out the inconsistency in closing submissions, translating the reference in the CBSA officer's notes to "an express service" as "*un service express*." The RPD considered this warranted further questioning and put the asserted inconsistency to Mr. Tshisumpa. He testified that there was no "*service express*" that looks after such matters and reiterated that he had used a friend to help him leave the country. He said he did not know why the words "express service" appeared in the notes, but that since he had to leave the country quickly, he had to resort to a person who had to do him an express service to help him leave ("*c'est recourir à une personne, une personne qui devait me rendre un service express pour me faire partir*").

[16] The RPD did not accept Mr. Tshisumpa's explanation and considered the inconsistency between the reference in the CBSA officer's notes to giving his passport to an "express service" and his testimony about giving it to his friend to be a material inconsistency that undermined his credibility. Despite counsel's submissions regarding the language of the notes and the difficulty Mr. Tshisumpa had in understanding the CBSA officer's French, the RPD presumed that, absent evidence to the contrary, those working for the CBSA did their jobs well, and that Mr. Tshisumpa must have said the words "*service express*" for them to appear in the notes.

[17] This identified inconsistency was a central aspect of the RPD's conclusion that the events alleged by Mr. Tshisumpa did not occur and its rejection of his refugee claim.

D. *The refusal of the adjournment and proceeding with examination was unfair*

[18] The *RPD Rules* provide for disclosure of documents to a refugee claimant: *RPD Rules*, Rules 33, 34, 36. Rule 34, in particular, provides that documents disclosed by a party must be provided 10 days before the date fixed for the hearing: *RPD Rules*, Rule 34(3)(a). Like all disclosure rules, these rules exist to avoid trial by ambush: *Awan v Canada (Citizenship and Immigration)*, 2006 FC 1040 at para 6(2). Like the duty of fairness generally, they allow a claimant to know what documentary evidence may be relied on at the hearing, to know the case they have to meet, and to prepare for the hearing of their refugee claim accordingly.

[19] As the Minister points out, the *RPD Rules* also dictate that refugee hearings proceed expeditiously. Rule 54 provides that the RPD "must not allow" an application to change the date or time of a proceeding, including an oral adjournment request, unless there are "exceptional circumstances." Examples of such circumstances given in the *RPD Rules* include accommodating a vulnerable person or an "emergency or other development outside the party's control and the party has acted diligently": *RPD Rules*, Rule 54(4). The IRB has issued Guidelines regarding scheduling and adjourning proceedings, which confirm the importance of Rule 54, while recognizing the need to adjourn where necessary to conform with the principles of natural justice: *Chairperson Guideline 6: Scheduling and Changing the Date or Time of a Proceeding*, Amended December 15, 2012, ss 7.1, 7.3.



[20] In the present case, the RPD was faced with a situation where Mr. Tshisumpa, for unknown reasons, had not received the Minister's documents. He requested an adjournment to allow him to review those documents before the hearing. It is clear that the RPD was attempting to address the situation as best as possible in the circumstances, to avoid unnecessary delay, and to comply with the *RPD Rules*, notably Rule 54.

[21] It is also clear that the RPD recognized there would be an unfairness in proceeding to examine Mr. Tshisumpa on the documents he had not had the opportunity to review and that it had the discretion to adjourn the hearing to address that fairness concern. It did so in part, adjourning that part of the hearing that directly addressed the documents.

[22] However, the result of this was that the RPD conducted its primary examination of Mr. Tshisumpa regarding material facts underlying his refugee claim at a time when, to its knowledge, Mr. Tshisumpa had not received or had the opportunity to review documents disclosed by the Minister that pertained directly to those facts, including a document purporting to record his prior statements on the subject. In my view, despite the RPD's efforts to manage the fairness concern, its manner of proceeding created a clear unfairness to Mr. Tshisumpa.

[23] This concern was exacerbated in this context by the fact that the RPD did have the documents when conducting its examination. Indeed, the transcript shows that the RPD itself found it difficult at times to question Mr. Tshisumpa about the facts without referring to the documents. It is to be noted in particular that the RPD started asking questions about the friend putting stamps in the Angolan passport before Mr. Tshisumpa referred to them in his evidence,

suggesting that the RPD's questions were prompted by its review of the CBSA officer's notes, which refer to Mr. Tshisumpa having obtained false entry stamps.

[24] I agree with Mr. Tshisumpa that this unfairness was not cured by the later continuation of the proceeding to address the documents. While the Minister is correct that the specific questions about the "express service" were not asked until the second day of the hearing, the RPD's credibility finding relied on Mr. Tshisumpa's evidence given at the first day of hearing, and an asserted inconsistency between that evidence and the CBSA officer's notes. The unfairness arose by eliciting Mr. Tshisumpa's evidence before he had the opportunity to review the documents.

[25] Nor can I conclude that the RPD's determination was "legally inevitable" regardless of the breach of fairness: *Canada (Attorney General) v McBain*, 2017 FCA 204 at paras 9, 12. It may be that Mr. Tshisumpa's evidence would have been the same and his response to the CBSA officer's notes would have been the same. In such circumstances, the reasonableness of the RPD's credibility findings, if they had also been the same, would then come into play. However, the principles of fairness do not generally allow the Court to speculate on what might have happened in a fair proceeding: *Lin v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 8444 (FC) at paras 21–23, citing *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 at p 661.

[26] As I find that the RPD's decision was reached in breach of the duty of procedural fairness, I need not address Mr. Tshisumpa's arguments regarding the reasonableness of the RPD's decision, and in particular its credibility findings.

IV. Conclusion

[27] The application for judicial review is therefore granted, and Mr. Tshisumpa's refugee claim is remitted to the RPD for rehearing.

[28] There was some question at the hearing of this matter as to whether the Court should specifically order that the transcripts or recording of the evidence at Mr. Tshisumpa's first RPD hearing not be part of the evidence before the RPD on the rehearing. I am satisfied that the RPD's normal practice is to recognize that evidence arising from an unfair process is not to be considered at a new hearing, and that this need not be included in the Court's order.

[29] Neither party raised a question for certification. I agree that none arises in the matter.

**JUDGMENT IN IMM-2465-17**

**THIS COURT'S JUDGMENT is that**

1. The application for judicial review is allowed. The decision of the Refugee Protection Division dated May 12, 2017 is set aside and Mr. Hendrick Mukendi Tshisumpa's claim for refugee protection is remitted to the Refugee Protection Division for rehearing by a differently constituted panel.

“Nicholas McHaffie”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-2465-17

**STYLE OF CAUSE:** HENDRICK MUKENDI TSHISUMPA v THE  
MINISTER OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** HELD BY VIDEOCONFERENCE

**DATE OF HEARING:** NOVEMBER 24, 2021

**JUDGMENT AND REASONS:** MCHAFFIE J.

**DATED:** FEBRUARY 11, 2022

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