Date: 20070822

Docket: IMM-4074-06

Citation: 2007 FC 845

Ottawa, Ontario, August 22, 2007

PRESENT: The Honourable Mr. Justice Blais

BETWEEN:

ISHMAEL JUNIOR BEMA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), for judicial review of a decision of the Immigration and Refugee Board, Refugee Protection Division (the Board), dated July 4, 2006, denying the applicant's claim for refugee protection under section 96 and subsection 97(1) of the Act.

BACKGROUND

[2] Ishmael Junior Bema (the applicant) is a citizen of Zimbabwe.

[3] The applicant bases his claim of having a well-founded fear of persecution on grounds of membership in a particular social group and political opinion. As a person opposing the government of Zimbabwe and as a member of the Movement for Democratic Change (MDC), the applicant alleges that he is a person in need of protection who would face a risk to life or a risk of cruel and unusual treatment or punishment in his country of origin. Specifically, the applicant claims to have been beaten by three members of the Zimbabwe Africa National Union (ZANU-PF) green bombers who told him that he must join the green bombers or be killed. Following this incident, his parents sent him to live with relatives while they arranged for him to obtain a visa to travel to the United States.

[4] The applicant arrived in the United States in July 2005. He then came to Canada on November 16, 2005, and made a claim for refugee protection.

[5] At the time of his arrival in Canada, the applicant was 17 years old and as such, Ms. Daiva Kelertas, a settlement worker at the Fort Erie Multicultural Centre, agreed to be the applicant's designated representative. The applicant was also represented by counsel at the time he completed his Personal Information Form (PIF) as well as at the hearing. Moreover, at the time the hearing was held on May 23, 2006, the applicant was 18 years old.

[6] In a decision dated July 4, 2006, the Board determined that the applicant was neither a Convention refugee nor a person in need of protection, in light of the inconsistencies and pivotal omissions in his testimony. The Board stated that the determinative issue in the applicant's claim

was the lack of credibility in his testimony, particularly with regards to establishing an objective fear of persecution at the hands of the green bombers and to his claim of being sought as a member of the MDC or as the family member of an MDC member.

ISSUES FOR CONSIDERATION

[7] The following issues are raised in this application:

1) Did the Board err in making a negative credibility finding based on the failure of the applicant to include in his PIF the measures taken against his family?
2) Did the Board err by not adjourning the hearing to allow the applicant to file additional documentation?
3) Did the Board violate the applicant's right to procedural fairness through its failure to follow the Chairperson's Guideline respecting unaccompanied minor refugee claimants?

STANDARD OF REVIEW

[8] As was confirmed by the Supreme Court of Canada in *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100, the choice of the proper standard of review for substantive decisions of the Board is driven mainly by the nature of the decision. On questions of fact, such as the Board's findings on the credibility of the applicant and its assessment of the evidence, the proper standard of review will be patent unreasonableness. Therefore, on questions of fact, the reviewing court can intervene only if it considers that the Board "based its decision or order on an erroneous finding of fact that it made in a perverse or

capricious manner or without regard for the material before it", as per the wording of paragraph 18.1(4)(*d*) of the *Federal Courts Act* R.S.C. 1985, c. F-7.

[9] With respect to any issue of procedural fairness, the Supreme Court of Canada has held that correctness is the proper standard (*Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, [2001] 1 S.C.R. 221). Therefore, if a breach of procedural fairness is found, the decision must be set aside (*Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, [2004] 2 S.C.R. 650).

ANALYSIS

[10] As a preliminary matter, the applicant seeks to file a document from the Institute of War and Peace Reporting, in which it is stated that the Zimbabwe Military only recruits young people between the ages of 18 and 22. This document is meant to provide an explanation for why the green bombers did not attempt to recruit the applicant's brothers who were 29 and 30 years old at the time the alleged incident occurred. The applicant maintains that he would have filed this document with the Board had he known that he was to include measures, or lack of such, taken against his family.

[11] It is settled law that, barring exceptional circumstances, evidence that was not before the decision-maker is not admissible before the Court in a judicial review proceeding (*Bekker v. Canada*, [2004] F.C.J. No. 819 (2004), 323 N.R. 195 (F.C.A.)). In the present case, I am not

satisfied that there are exceptional circumstances that would permit the introduction of this new evidence.

[12] Moreover, having reviewed the transcript of the hearing, I am not satisfied that this new evidence can be said to support the allegations made by the applicant. When asked why his brothers were not targeted by the green bombers for recruitment, the applicant's initial answer was that he did not know. If the green bombers only recruit from a specific age group, I would expect the applicant who supposedly lived in fear of them to know this fact. He later explained that one of his brothers was mentally challenged and that the other was addicted to marijuana. Evidently, the document the applicant now seeks to introduce does nothing to support these explanations provided to the Board and is of no use in reviewing the reasonableness of the credibility finding by the Board.

1) Did the Board err in making a negative credibility finding based on the failure of the applicant to include in his PIF the measures taken against his family?

[13] In finding that the applicant was not credible, the Board focused on a number of elements, including an important contradiction between the Port-of-Entry (POE) notes and the PIF narrative, with regards to the measures taken against his family. In the POE notes, the applicant stated that the altercation with the green bombers prompted his family to leave their home and move from relative to relative. In his PIF however, the applicant made no mention of this, but instead stated that, following his departure from the country, his parents' home was destroyed by the green bombers, allegedly for being improperly zoned, and one of his brothers

was badly injured in the process. As per the PIF, it was following this incident that his family began living with relatives and moving from place to place.

[14] When asked by the Board why the story told in the POE notes was not included in the PIF, the applicant's initial explanation was that he must have forgotten to include it. When asked again by his counsel, he gave the same explanation and stated that he thought that if he made too many changes to his PIF it would look like he was putting too much information that was irrelevant. Towards the end of the hearing, after a brief recess where counsel conferred with the applicant and his representative, the applicant's counsel sought permission from the Board to ask a few additional questions to the applicant. One of those questions was with respect to his understanding of the information to be included in the PIF. It is only at this point that the applicant stated that he believed he was only supposed to talk about himself, not his family, as it is called a 'personal' information form, and that he did not recall reading the instructions on question 31 which set out the type of information to be included in the narrative.

[15] The applicant argues that the Board made a reviewable error by holding the applicant accountable for not mentioning measures taken against his family in his PIF, even though he specifically told the Board that he was not aware that he needed to mention such measures.

[16] I can find no merit to the applicant's argument since the Board, in assessing the credibility of the applicant, was entitled "to base its decision on evidence adduced in the proceedings which it considers credible and trustworthy in the circumstances" (*Mugesera,* above,

paragraph 38). Considering the different explanations provided by the applicant, the fact that this requirement is clearly stated under question 31 of the PIF, and the fact that the applicant had the assistance of a designated representative and a legal counsel in filling out this form, the Board was perfectly justified in assigning little weight to the explanations provided by the applicant. This conclusion of the Board was reasonable and does not create a ground for review.

[17] The Board further noted that the applicant claimed during the hearing to have asked his father to swear an affidavit with regards to the destruction of his house and to submit documents confirming that his brother was seriously injured and hospitalized, but that his father refused to do so, which the Board found puzzling and which further undermined the applicant's credibility. Furthermore, as noted by the respondent, the fact that the applicant sought such documents in the first place does seem to indicate that he was aware that measures taken against his family would be an issue and that supporting documentation might be needed.

[18] Finally, the issue was not simply one of omission from the PIF, but one of blatant contradiction between the POE notes and the PIF and its impact on the plausibility of his story, to which the applicant could provide no satisfactory explanation.

2) Did the Board err by not adjourning the hearing to allow the applicant to file additional documentation?

[19] The applicant argues that the Board, having found that the applicant did not submit sufficient evidence to support his case, should have adjourned the hearing to allow the applicant

to acquire more documents to support his claim. Again, the applicant argues that allowances should have been made for the fact that he was unaware that he should have included evidence to support allegations relating to his family.

[20] It is important to note that no adjournment was requested by the applicant's counsel at the hearing, so that the applicant is not arguing that the Board erred by failing to grant the adjournment requested by the applicant, but by failing to suggest such an adjournment.

[21] On this point, the respondent submits that the lack of supporting documentation was only one factor that led the Board to reject the claim, as the Board mainly based its negative credibility finding on the important inconsistencies and omissions in the applicant's testimony. The respondent relies on the decision of the Federal Court of Appeal in *Sheikh v. Canada (Minister of Employment and Immigration)*, [1990] F.C.J. No. 604, where the Court held that a general finding of lack of credibility may extend to all relevant elements emanating from a claimant's testimony, and that it was thus open to the Board to dispose of the applicant's claim on the basis that they simply did not believe him, making the submission of additional evidence superfluous.

[22] On this issue, I find that the applicant's argument is wholly without merit. Essentially, as the respondent notes, it is trite law that the onus is on the applicant to prove his claim at the hearing, and thus to submit the necessary documentation (*Refugee Protection Division Rules*, SOR/2002-228, Rule 7). I would add that there is certainly no requirement on the part of the

Board to adjourn a hearing, without even being asked, so that a claimant who has failed to submit sufficient documentation to support his case can be given another chance to do so.

3) Did the Board violate the applicant's right to procedural fairness through its failure to follow the Chairperson's Guideline respecting unaccompanied minor refugee claimants?

[23] The applicant submits that the Board violated his right to procedural fairness by failing to follow the provisions respecting unaccompanied minor refugee claimants in Guideline 3 on Child Refugee Claimants (the Guideline). Specifically, the applicant argues that the Board failed to expressly refer to the applicant's age in its reasons, that it did not consider the special evidentiary issues that arise when eliciting evidence of children and addressing that evidence, and finally, that no pre-hearing conference was held.

[24] First, it must be kept in mind that the Board was not dealing with a young child or a young teenager, but someone who arrived and claimed refugee protection in Canada just 4 months shy of his 18th birthday. He had the assistance of a designated representative and legal counsel throughout the application process, and was legally an adult at the time of the hearing. Furthermore, while the Guideline is meant to apply to all claimants under the age of 18, it is obvious that different evidentiary issues will arise when dealing with a 5-year old, a 12-year old or someone of the applicant's age, so that flexibility in the interpretation of the Guideline will be required to reflect the particular circumstances of each case.

[25] The applicant relies on the decision of Madam Justice Eleanor Dawson in D*uale v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 150. Referring to the reasons of the Board in that case, Madam Justice Dawson noted:

> The failure to expressly acknowledge Mr. Duale's age and the impact that age may have had on the completion of his PIF, his testimony and the assessment of his testimony, while perhaps by itself not a reviewable error, does not enhance the credibility findings.

[26] Not only did Madam Justice Dawson not find the omission of the Board to be, in itself, a reviewable error, but that case can easily be distinguished, as the claimant was only 16 years old at the time he arrived in Canada, and never received the assistance of a designated representative. In the present case, the Board did note, in the first paragraph of its reasons, that the applicant was 18 at the time of the hearing and that he had a designated representative at the time his PIF was prepared who was also in attendance at the hearing. The Board was clearly aware of the applicant's age and its failure to mention it elsewhere in the decision does not constitute a reviewable error.

[27] In terms of the conduct of the hearing and the application of the Guideline, I note that there did not appear to be any objection from counsel or from the designated representative to the Board member's approach in conducting the hearing. There was no request for any conference during the hearing and the Board member did ask the applicant's counsel at the beginning of the hearing if he objected to her questioning the claimant first, which he did not. As such, I can find no reviewable error in the approach of the Board at the hearing.

[28] While I can find no violation of procedural fairness arising from the conduct of the hearing by the Board, it is indisputable that no pre-hearing conference was held in this case, despite the fact that it is clearly stated in the Guideline that “a pre-hearing conference should be scheduled within 30 days of the receipt of the Personal Information Form”.

[29] The respondent argues that the Chairperson’s Guidelines, including Guideline 3, are not binding, and that failure to fully apply them does not vitiate a decision. Furthermore, the respondent maintains that the applicant has failed to show that he was prejudiced by the absence of a pre-hearing conference.

[30] On this point, I agree with the respondent that the Guidelines are not legally binding. However, as argued by the applicant, Board members are normally expected to follow these Guidelines. The applicant refers this Court to the case of *Khon v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 143, where Madam Justice Danièle Tremblay-Lamer wrote at paragraph 18:

> Although the panel is not obliged to apply the Guidelines because they do not have the force of law, they must be examined by the members of the panel in appropriate cases.

[31] While I agree that the Board should normally follow the Guidelines, I do not believe that the omission of the Board to hold a pre-hearing conference in this case would be sufficient to justify setting aside the decision, unless the applicant can show that he was prejudiced in some way by this omission. In *Duale*, above, Madam Justice Dawson set aside the Board’s decision because she concluded that the appointment of a designated representative was likely to have

"affected the outcome" of the case, as the designated representative could have assisted the applicant in gathering the necessary evidence to support his claim. In *Gajic v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 108, the applicant also argued that she was denied procedural fairness because the Board failed to properly apply the Guideline. This argument was rejected by Mr. Justice John A. O'Keefe who wrote, at paragraph 24:

> Although the guideline was not fully applied in this case, I am of the view that this did not result in any prejudice to the applicant.

[32] Here, the applicant claims to have been prejudiced by this omission, as the lack of a pre-hearing conference and what the applicant considers to be a non-informative screening form, deprived him of his right of reasonable notice and opportunity to present evidence. While counsel's argument was not entirely clear, the issue once again appears to revolve around the applicant having no knowledge of the fact that he was required to provide information regarding any incident of persecution affecting family members.

[33] It must first be noted that even if there had been a pre-hearing conference, it would have had no impact on the preparation of the PIF, which would have preceded the pre-hearing conference in any event. At most, the applicant could have made amendments to his PIF following the pre-hearing conference.

[34] Second, it must be emphasized that it is the applicant's responsibility to read the PIF instructions and that the instructions for question 31 clearly state: "Indicate the measures taken against you and members of your family". Moreover, at the time the applicant prepared his PIF,

he not only had the assistance of a designated representative, but also had legal representation. As noted by the respondent, not only should these individuals have been in a position to advise him of the relevant issues of the claim, but they could also have requested a pre-hearing conference if they felt that it was necessary. In *Diagana v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 330, at paragraph 25, Mr. Justice Frederick E. Gibson considered the absence of any objection at or before the hearing to be a waiver of procedural defect:

> The presiding member of the RPD was thorough in ensuring that both the Applicant and his counsel at hearing were ready to proceed and had no objections to the process before the RPD, to that time, that they wanted to raise. In particular, they were given full opportunity to raise failure to fully comply with the Guideline. In light of the foregoing, I am satisfied that the Applicant and his counsel waived any procedural defect in the process leading to the hearing before the RPD, including compliance with the Guideline.

[35] Third, as for the screening form sent to the applicant in preparation for the hearing, it did contain instructions to the effect that the applicant should provide documents showing "personal and family membership and activity with the MDC, and documents establishing loss of property and claims/reports made by claimant's parents regarding this", 'this' evidently referring to the destruction of the family home described in the PIF.

[36] Fourth, as I have noted above, the fact that the applicant sought an affidavit, medical documents and proof of membership in the MDC from his father, does seem to indicate that he was aware that measures taken against his family would be an issue and that supporting documentation might be needed.

[37] Finally, as previously discussed, lack of documentary evidence was only one factor on which the Board based its decision, and what was clearly more troubling to the Board was not the fact that the applicant had failed to obtain supporting evidence from his family, but that he claimed to have contacted his father who refused to sign an affidavit and provide copies of medical records. In light of the applicant's claim to have been sent abroad by his loving parents to protect him, the Board felt that this refusal was most peculiar, particularly since the applicant did submit a letter allegedly obtained by his father testifying to his membership in the MDC. Once again, it is highly unlikely that a pre-hearing conference could have helped to address this weakness in the applicant's claim as the Board could not force the applicant's father to submit supporting documentation.

[38] In light of these factors, I am not convinced that the absence of a pre-hearing conference affected the outcome of the claim or prejudiced the applicant in anyway and therefore, that there was a breach of the duty of procedural fairness, which justifies the intervention of this Court.

[39] For the above reasons, this application for judicial review is dismissed.

[40] The applicant suggests a question for certification:

> If the Refugee Protection Division, without any reason whatsoever, does not schedule or hold a Pre-hearing Conference for an unaccompanied minor refugee claimant, as required under the Immigration and Refugee Board Chairperson's Guideline 3, is this a Breach of Procedural Fairness?

[41] The respondent opposes the certification on the basis that the question does not raise a question of general importance.

[42] In fact, this question of the absence of a pre-hearing conference is a minor point in this case. Counsel representing the applicant at the time of the hearing asked for a hearing as soon as possible but never asked for a pre-hearing conference. As pointed out by counsel for the respondent, the major reason why the applicant's claim for refugee protection was denied is the absence of credibility.

[43] In my view, this question does not raise a question of general importance and therefore, will not be certified.

JUDGMENT

1. The application is dismissed.

2. No question for certification.

"Pierre Blais"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-4074-06
STYLE OF CAUSE:	ISHMAEL JUNIOR BEMA v. MCI
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	AUGUST 15, 2007
REASONS FOR JUDGMENT AND JUDGMENT:	BLAIS, J.
DATED:	AUGUST 22, 2007

APPEARANCES:

PETER M. SHEN	FOR APPLICANT
ASHA GAFAR	FOR RESPONDENT

SOLICITORS OF RECORD:

PETER M. SHEN BARRISTER & SOLICITOR 20 HUGHSON ST. S., SUITE 500 HAMILTON, ON L8N 2A1	FOR APPLICANT
JOHN H. SIMS, QC TORONTO, ON	FOR RESPONDENT