Date: 20080501

Docket: IMM-3367-07

Citation: 2008 FC 562

Montréal, Quebec, the 1st day of May 2008

Present: THE HONOURABLE MR. JUSTICE MAURICE E. LAGACÉ

BETWEEN:

JIMMY NKONGOLO MUBIAYI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Immigration and Refugee Board's Refugee Protection Division (the panel), in which the applicant was found not to be a "Convention refugee" or a "person in need of protection" under sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) on the grounds that it found his narrative concerning a fear of persecution implausible to the point of being impossible to believe.

[2] After examining the case and considering the parties' oral and written submissions, the Court finds in favour of upholding the decision because it is not unreasonable given the factual background and the panel's analysis.

Facts

[3] Citizen of the Democratic Republic of the Congo (DRC), the applicant claimed protection in Canada on the grounds that he feared persecution in his country of origin because of his political opinions. He claims that he is a "person in need of protection" pursuant to subsection 97(1) of the Act.

[4] When he worked as an assistant professor, the applicant allegedly spoke out against the government of the day to students. He also allegedly took part in meetings and demonstrations organized by the Union for Democracy and Social Progress (UDPS).

[5] Because of his activities and a stronger stand on some other issues, the applicant allegedly feared for his life when he left the DRC on August 26, 2006. Although he already held a DRC passport, he arrived in Canada to claim refugee protection with a false passport obtained from a smuggler.

Impugned decision

[6] The refugee claim was rejected mainly because the applicant's allegations were implausible, he lacked credibility, and he improvised answers to get himself out of embarrassing situations and to avoid questions. As well, there were contradictions in his narrative concerning the events on which he based his claim for refugee protection and for the status of a person in need of protection. More specifically, the panel relied on the following points (among others) against the applicant in its decision:

(a) He was unable to give sufficient details on his role as an instigator even though he was invited to do so;

(b) He was unable to explain to the panel's satisfaction the political role that he is claiming to have played in raising public awareness in opposition to the government and finally admitted that his messages were non-political but targeted only the country's economy;

(c) He was unable to state the approximate year that he was threatened but was able to state the approximate month, and confronted with the fact that, according to his narrative, his fear started in September 2004 after he had received threats, he admitted that he had not been paying attention to the questions before answering them;

(d) He was unable to state specifically when he had received the telephone calls that he claimed to have received between 2004 and 2006;

(e) He did not think it a good idea to file as evidence the four summonses that he had apparently received before leaving the DRC, and he was unable to explain why he did not think it a good idea to obtain them from the friend who is still keeping them for him, in order to provide them as evidence, instead of providing only the two that he received after he had left the DRC when he no longer had anything to fear;

(f) He did not cite a single personal event that could have justified his decision to leave the DRC, providing only a general description of the situation in his country. Then, in response to leading questions from his representative, he ended up specifying that, when he had participated in a peaceful demonstration in July 2006, the police had questioned him in a [TRANSLATION] "strange tone of voice". However, while he talked about a police questioning done in a [TRANSLATION] "strange tone of voice" in his testimony, he did not mention, despite his counsel's leading questions, his earlier statement that he had felt threatened by the police's firing their guns in the air.

[7] The gaps and contradictions in the evidence and the inferences drawn from them by the panel led it to be unable to believe the applicant's testimony and to find that his story had been invented to support his refugee claim.

[8] In conclusion, the panel stated that it had tried to apply to the applicant's situation subsection 97(1) of the Act, which defines a "person in need of protection", but was unable to find a single element of credibility that would justify a favourable decision under that subsection.

The parties' submissions

[9] The applicant is mainly challenging the conduct of the presiding panel member. More specifically, he is challenging the way she conducted the proceedings, her interventions, and the irritation and impatience that she allegedly demonstrated at the hearing. According to the applicant, the member decided to find him not credible even before the start of the hearing. He also claims that she did not accept his explanations, made findings of fact that were contrary to the evidence, and did not accept corroborating evidence that supported his claim.

[10] The respondent, in turn, is emphasizing a little too much the irregularities of the affidavit of a law student, who, after listening to the recording, merely summarized the various stages of evidence and exchanges before the panel. That affidavit adds nothing to the proceedings or to the hearing transcript, which the Court has read and reread to better assess the allegations against the presiding panel member. Since the Court attaches no weight to the content of the affidavit, it sees no use in settling the preliminary issue concerning the irregularities in the date of signature and of swearing in. It prefers to concentrate instead on the hearing transcript, which it has to assess.

[11] Challenging the applicant's allegations against the panel and its decision, the respondent maintains that the applicant failed to discharge his burden of demonstrating the panel's bias and also

that, far from being unreasonable, the decision is justified in fact and in law. For these reasons, the respondent is seeking the dismissal of the application for judicial review.

Issues

[12] There are essentially only two issues for this Court to decide:

1. Is the presiding panel member's conduct of a nature to give rise to a reasonable apprehension of bias?
2. Did the panel commit a reviewable error in its weighing of the evidence?

Standard of review

[13] The standard of review applicable to a panel's decision based on the refugee claimant's lack of credibility is reasonableness as defined in *Dunsmuir v. New Brunswick*, 2008 SCC 9 (*Dunsmuir*):

> [47] . . . In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

Obviously, in cases where a presiding panel member's bias can be demonstrated, the entire judicial process is rendered invalid, and procedural fairness requires a new hearing. Let us see whether the applicant's allegations that the presiding panel member was biased and committed errors in her decision are viable.

Analysis

Is the presiding panel member's conduct of a nature to give rise to a reasonable apprehension of bias?

[14] Concerning the claim that the panel was biased, the Court would recall the test in *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 found at page 394 and cited in other judgments, including *Pasion v. Canada (Citizenship and Immigration)*, 2008 FC 91:

> [11] The test applicable to determine whether there was a breach of procedural fairness due to bias is whether a reasonable and well-informed member of the community would perceive bias (see *Mohamed v. Minister of Citizenship and Immigration*, 2006 FC 696, [2006] F.C.J. No. 881 (T.D.) (QL)).

[15] After reading, rereading with the parties, rereading again in chambers, and then analyzing the transcript, the evidence on the record and the impugned decision, the Court cannot accept the applicant's claims that the presiding panel member was biased. Although she intervened as often as she judged useful or necessary to clarify the applicant's testimony, it was far from the case where an informed person, viewing the matter realistically and practically – and having thought the matter through – could conclude that the presiding panel member was biased.

[16] On the contrary, in the Court's opinion, the interventions that the panel is criticized for making were clearly aimed only at helping the applicant be more specific with his testimony instead of stating generalities, or to clarify for the panel the main thread of the events related. The Court fails to see how questioning the applicant to allow him to give more details on his story could later become an indication of bias, unless a person wanted to ascribe motives unjustified by the evidence.

Yes, the decision is obviously not what the applicant expected. Yes, the panel sided against his claim by disbelieving his story. However, does the panel not have to pick a side in every decision?

[17] One thing for certain, the applicant had the opportunity to be heard. The presiding panel member was clearly interested in his story, but wanted to obtain more details on the facts that could justify the fear in question. This was her task. If the applicant was unable to meet the panel's expectations and to satisfy it that his narrative was true, he alone must pay the price, because the burden of proof was on him. An objective reading of the transcript demonstrates that, far from being biased, the presiding panel member, through her interventions, was trying to clarify the narrative so that she could be satisfied.

Did the panel commit a reviewable error in its weighing of the evidence?

[18] Despite a strict standard of review, the applicant maintains that this Court should allow his application for judicial review based on two allegations against the panel: (1) making negative findings without considering the facts and evidence available; (2) erring in failing to consider the corroborating evidence.

[19] Let us recall, in regard to the first allegation, the gaps indicated by the panel in the applicant's evidence, which forced it to find that he had failed to discharge his burden of proof, mainly because he lacked credibility.

[20] The second allegation is closely related to the first. According to the applicant, instead of weighing the evidence submitted, the panel did not mention the corroborating evidence in its decision. However, it was not because it did not mention it that it did not consider it, since, once a panel does not believe a claimant's story, it does not have to discuss in its decision all the pieces of evidence filed, or all those that it does not need to make its finding.

[21] In fact, dissatisfied with the panel's decision, the applicant is requesting that this Court reassess the evidence and substitute its opinion for that of the panel in the hope that his application would have a different outcome. The Court must resist such an invitation because its role must be limited to analyzing the panel's decision and verifying whether, in light of the factual background in evidence and of the evidence accepted to support it, the decision can be labelled "unreasonable". A lack of credibility finding, as in this case, can be established on implausibilities, contradictions, irrationality and common sense (*Shahamati v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 415 (C.A.) (QL)). In addition, contrary to the applicant's claims, the panel does not have to mention in its reasons all the pieces of evidence considered or all those that were submitted (*Florea c. Canada (Minister of Employment Immigration)*, [1993] F.C.J. No. 598 (C.A.) (QL)). Such a criticism becomes even more excusable in this case, because the panel attributed no credibility to the applicant's story.

[22] It is also important to note the expertise and complete jurisdiction of the panel to judge the plausibility, credibility and explanations of the applicant in support of his reasons to claim refugee

protection (*Aguebor v. Canada (Minister of Employment and Immigration*), [1993] F.C.J. No. 732 (C.A.) (QL)).

[23] Armed with its knowledge and expertise, the panel can ask questions to obtain more details on the evidence provided. It can also make inferences from the evidence and assess it at its true value without being accused of bias and of not considering all the evidence as the applicant is claiming. Presiding panel members have the right to use their experience as well as common sense to judge whether a narrative is viable and true or simply implausible and not credible.

[24] When a claimant presents evidence to a decision maker, he or she can expect that it will be accepted entirely, accepted in part only or rejected entirely. It is for the panel to choose and accept the evidence considered the most probative and credible in order to come to a correct finding. If, following the decision, the facts accepted or rejected are not what the refugee claimant would like because they do not help his cause, this does not mean that there is a valid reason for a judicial review of the decision, as the applicant is implying in this case.

[25] In this case, nothing indicates that the panel selectively analyzed the evidence that it heard. It was its responsibility to assess the evidence and to accept the pieces that were the most valid, and no one else was in a better position to judge and evaluate the applicant's credibility, since the panel had heard him out and was able to observe his conduct and his manner of testifying. The mere fact that there was evidence contrary to that accepted by the panel does not warrant this Court's intervention, especially when the evidence that was accepted supports the decision, as in this case

(*Chowdhury v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 363, [2002] F.C.J. No. 477 (T.D.) (QL)).

[26] For these reasons, the Court must find the decision at issue to be reasonable and justified in both fact and law. The applicant's application will thus be dismissed.

[27] The Court concurs with the parties that this matter raises no question of general importance to be certified.

JUDGMENT

FOR THESE REASONS, THE COURT dismisses the application for judicial review.

"Maurice E. Lagacé"
Deputy Judge

Certified true translation
Susan Deichert, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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