Federal Court  Cour fédérale

Date: 20100624

Docket: IMM-5855-09

Citation: 2010 FC 690

Ottawa, Ontario, June 24, 2010

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

FREDRICK ONYANGO NYAYIEKA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) of the decision of a Pre-Removal Risk Assessment Officer (the Officer) where the Applicant was found not to be a person described in sections 96 or 97 of the Act.

[2] The Applicant, Fredrick Onyango Nyayieka, is a citizen of Kenya who claims that he faces a risk of death at the hands of his father's family in Kenya as the result of a land dispute. It seems that his father was killed due to this dispute and that as his sole heir; the Applicant is also in danger.

[3] The Applicant arrived in Canada in September 2006 from the United States, where he had been living for twelve years. He originally entered the United States on a student visa valid from 1994 to 1999 and did not make a claim for refugee protection in the United States. He made a claim one week after his arrival in Canada. However, his claim was declared abandoned on November 17, 2006 after he missed the deadline to submit his Personal Information Form (PIF) and failed to attend a scheduled abandonment hearing. The Applicant applied to have his claim reopened, on the basis of incompetence of the part of previous counsel, but this was refused in April 2007.

[4] He then applied for a Pre-Removal Risk Assessment (PRRA) in October 2007. An oral hearing was held as part of the PRRA application in December 2008. The PRRA application was subsequently refused on September 30, 2009 and is the subject of this judicial review.

[5] The Officer's refusal of the PRRA application is based on four issues: delay in claiming and subjective fear; inconsistencies and omissions; documentation provided and country conditions as explained in her reasons.

[6] It is well recognized that the assessment of a PRRA application is in large part a fact driven inquiry and should be reviewed on a standard of reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190). In conducting such a review, the Court looks to the justification, transparency and intelligibility of the decision and whether it falls within the range of acceptable outcomes defensible on the facts and in law (*Dunsmuir* at paragraph 47).

[7] The Applicant raises an issue with regard to procedural fairness. As the Federal Court of Appeal found in *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2006] 3 F.C.R. 392, the standard of review analysis does not apply when the issue is an alleged denial of procedural fairness. Rather, it is left to the Court to determine whether the process followed by the decision-maker satisfied the level of fairness required in all of the circumstances (paragraphs 52 and 53).

[8] The Applicant has argued that there was a breach of procedural fairness as he was not alerted to each discrepancy that was relied on by the Officer and that this justifies the intervention of the Court. I do not accept this argument and find that there was no breach of procedural fairness in this case – the Applicant was asked about two significant credibility issues and given the opportunity to disabuse the Officer of her concerns.

[9] The notes from the PRRA oral hearing show that the Applicant was given a chance to explain both his delay in claiming protection and the numerous omissions in his PIF (Certified Tribunal Record at pages 98 to 101). Both of those explanations were rejected by the Officer in her reasons.

[10] With regard to the delay in making a claim for refugee protection, it is accepted that a delay is a behaviour that can be used in assessing an applicant's subjective fear and can justify a negative inference with regard to an applicant's credibility (*Espinosa v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1324, [2003] F.C.J**.** No. 1680 at paragraph 16). Also, it can be fatal to the

claim if the Applicant cannot provide any satisfactory explanation for the delay (*Espinosa* at paragraph 17). The Applicant's explanation for his delay in this case was found to be insufficient by the Officer and that conclusion was reasonable. Considering the length of the delay and the reason given by the Applicant, it seems to me that this is a case where the explanation is so lacking that it could have justified the dismissal of the application on that ground alone.

[11] As for the PIF omissions, the Officer's concerns were justified and were not simply minor or collateral omissions from the Applicant's PIF (*Feradov v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 101, [2007] F.C.J. No. 135 at paragraph 18). The drawing of a negative inference was justified in this case and a significant omission on the PIF is a reasonable basis by itself for a finding that the applicant is not credible (*Huang v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1266, [2008] F.C.J. No. 1611).

[12] Furthermore, I would note that one of the factors required in order for a hearing to be held as part of the PRRA application pursuant to section subsection 113(b) of the Act and section 167 of the *Immigration and Refugee Protection Regulations*, S.O.R/2002-227 is that there be evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act. Thus it seems reasonable to me to infer that if an oral hearing is granted, the Applicant should be aware that credibility is an issue in his application. The Applicant and his counsel could have provided any explanations and documents he wanted, during and after the oral hearing and did not do so other than to provide some of the requested pieces of documentary evidence.

[13] Although some of the inconsistencies and omissions referred to by the Officer are questionable, I am satisfied that the decision taken as a whole is reasonable and falls within a range of acceptable outcomes defensible on the facts and in law.

[14] No question for certification was proposed and none arises.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be dismissed. No question is certified.

"Michel Beaudry"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5855-09
STYLE OF CAUSE:	**FREDRICK ONYANGO NYAYIEKA** and **THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	Toronto, Ontario
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REASONS FOR JUDGMENT:	BEAUDRY J.
DATED:	June 24, 2010

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