Federal Court  Cour fédérale

Date: 20140915

Docket: IMM-33-14

Citation: 2014 FC 875

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, September 15, 2014

Present: The Honourable Mr. Justice Martineau

BETWEEN:

JEAN DE DIEU IKUZWE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant challenges the legality of a decision of the Refugee Protection Division of the Immigration and Refugee Board (Board) denying his application to reopen the refugee claim.

[2] The applicant is a citizen of Rwanda of Tutsi ethnicity who left his country to come to Canada in January 2001. On April 24, 2003, his refugee claim was refused by the Board for the reason that there are serious reasons to think that he was complicit in crimes against humanity

within the meaning of article 1F(a) and (c) of the *Convention Relating to the Status of Refugees* (Convention) and that he cannot avail himself of the protection of Canada under section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act). This last decision has not been the subject of an application for judicial review. On December 3, 2013, the Board denied the application to reopen, which was presented more than 10 years after original decision, because there was no breach of a principle of natural justice, hence this application for judicial review.

[3] The standard of correctness applies to the issue of whether a breach of a principle of natural justice was established by the applicant: *Hillary v Canada (Citizenship and Immigration)*, 2011 FCA 51 at paras 27 to 30. In this case, the applicant based his application to reopen on the adverse effects of the original decision-maker's erroneous legal analysis of his exclusion. As a new fact, the applicant alleged that he suffered from schizophrenia (a medical condition not diagnosed at the time), to the extent that [TRANSLATION] "this mental state could have had an impact on the assessment of the applicant's 'credibility' if that could have been submitted before the RPD during his hearing".

[4] The applications to reopen refugee claims are governed by section 62 of the *Refugee Protection Division Rules*, SOR/2012-256 (the Rules):

62. (1) At any time before the Refugee Appeal Division or the Federal Court has made a final determination in respect of a claim for refugee protection that has been decided or declared abandoned, the claimant or the	62. (1) À tout moment avant que la Section d'appel des réfugiés ou la Cour fédérale rende une décision en dernier ressort à l'égard de la demande d'asile qui a fait l'objet d'une décision ou dont le désistement a été prononcé, le demandeur

Minister may make an application to the Division to reopen the claim.	d'asile ou le ministre peut demander à la Section de rouvrir cette demande d'asile.
…	[…]
(6) The Division must not allow the application unless it is established that there was a failure to observe a principle of natural justice.	(6) La Section ne peut accueillir la demande que si un manquement à un principe de justice naturelle est établi.
(7) In deciding the application, the Division must consider any relevant factors, including	(7) Pour statuer sur la demande, la Section prend en considération tout élément pertinent, notamment :
(a) whether the application was made in a timely manner and the justification for any delay; and	a) la question de savoir si la demande a été faite en temps opportun et, le cas échéant, la justification du retard;
(b) the reasons why	b) les raisons pour lesquelles :
(i) a party who had the right of appeal to the Refugee Appeal Division did not appeal, or	(i) soit une partie qui en avait le droit n'a pas interjeté appel auprès de la Section d'appel des réfugiés,
(ii) a party did not make an application for leave to apply for judicial review or an application for judicial review.	(ii) soit une partie n'a pas présenté une demande d'autorisation de présenter une demande de contrôle judiciaire ou une demande de contrôle judiciaire.

[5] At the time of the original decision, the applications to reopen were governed by section 55 of the *Refugee Protection Division Rules*, SOR/2002-228, which read as follows:

55. (1) A claimant or the Minister may make an application to the Division to reopen a claim for refugee	55. (1) Le demandeur d'asile ou le ministre peut demander à la Section de rouvrir toute demande d'asile qui a fait

protection that has been decided or abandoned.	l'objet d'une décision ou d'un désistement.
…	[…]
(4) The Division must allow the application if it is established that there was a failure to observe a principle of natural justice.	(4) La Section accueille la demande sur preuve du manquement à un principe de justice naturelle.

[6] Under subsection 62(6) of the Rules and according to recognized case law, an application to reopen will only be allowed if the original decision-maker breached a principle of natural justice, i.e. in very limited circumstances (*Seyoboka v Canada (Minister of Citizenship and Immigration)*, 2010 FC 488 at para 24). Since December 2012, the new subsection 62(7) of the Rules requires the Board to consider any relevant factors, including the reasons why a party has not presented an application for leave and judicial review.

[7] In his application to reopen, the applicant complained of a breach of a principle of natural justice flowing from a misapplication of law by the original decision-maker. Indeed, the Supreme Court of Canada decided in 2013 in *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 (*Ezokola*), that the threshold to pass to be complicit within the meaning of article 1F(a) of the Convention is higher than the test previously applied under case law. Therefore, the Board did not apply the correct test in its original decision, which constitutes gross unfairness, to the extent that everything must now be started over. The applicant also alleged that he suffered from paranoid schizophrenia that was not diagnosed at the time of the original hearing and that the Board was not able to consider this particular medical condition during the assessment of his credibility.

[8] No reviewable error was committed by the Board. Must it be repeated that natural justice relates to the procedural protections and do not cover the errors of law that could have been committed by the original decision-maker. Moreover, the Board refused the application to reopen essentially because the original decision was consistent with the state of the law applicable at the time. Regardless, the Board did not commit any reviewable error of law in noting that *Ezokola* has no retroactive effect. With respect to the conclusion that there was no breach of a principle of natural justice, the Board could also rely on the fact that the applicant was represented at the time by experienced counsel and that a designated representative was assisting the applicant. Further, the applicant's learned counsel does not claim that there could have been a breach of natural justice because the applicant was poorly represented by his former counsel, neither does he claim that she should have requested to postpone the hearing because the applicant was not in a mental state to testify or understand what was going on. In addition, nothing prevented the applicant from requesting the review of the 2003 decision if he was of the opinion that the original decision-maker had misapplied the Convention principles. The applicant did not have to wait for a judgment of the Supreme Court in another matter to clarify the applicable law.

[9] The applicant claims today that the schizophrenia diagnosis could have had an impact on the assessment of his credibility. Very well. However, a new fact is not in itself sufficient to justify an application to reopen. A breach of a principle of natural justice must be shown. At the risk of repeating myself, the original decision-maker was conscious of the mental state of the applicant who, at the time, said that he suffered from [TRANSLATION] "insomnia and almost nightly nightmares, obsessive flashbacks, memory trouble and concentration". The applicant's former counsel had also raised the particular mental condition of her client and a designated

representative had been appointed for him, to the effect that the applicant did not demonstrate to the Court that a principle of natural justice was breached in this case. In any event, it is not even certain that, according to the new evidence on the record, the applicant indeed suffered from schizophrenia in 2003.

[10] This application for judicial review must be dismissed. Counsel agree that no question of law of general importance was raised in this matter.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed. No question is certified.

"Luc Martineau"

Judge

Certified true translation

Catherine Jones, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Annick Legault	FOR THE APPLICANT
Michel Pépin	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Annick Legault Montréal, Québec	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT