

Federal Court



Cour fédérale

Date: 20160530

Docket: IMM-4016-15

Citation: 2016 FC 600

Ottawa, Ontario, May 30, 2016

PRESENT: The Honourable Mr. Justice Gascon

BETWEEN:

ROLAIN KWAKWA

Applicant

And

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Mr. Rolain Kwakwa, claims to be a citizen of the Democratic Republic of Congo [DRC], born and raised in that country, and a photojournalist for the *Le Phare* newspaper in the DRC. Mr. Kwakwa challenges a decision of the Refugee Appeal Division of the Immigration and Refugee Board [RAD] dated July 30, 2015 where the RAD determined that he

was not a Convention refugee or a person in need of protection, thus upholding a decision of the Refugee Protection Division [RPD] issued on October 3, 2013. In essence, the RPD and the RAD are of the view that Mr. Kwakwa is more likely a citizen of Angola.

[2] This is the second decision of the RAD concerning Mr. Kwakwa. An initial decision by the RAD, dated January 9, 2014, had dismissed the initial appeal of the RPD decision. Mr. Kwakwa's application for judicial review of that decision was however allowed by Madam Justice Saint-Louis on April 7, 2015 (*Kwakwa v Canada (Minister of Citizenship and Immigration)*, IMM-811-14), and the file was sent back to the RAD for redetermination.

[3] In this application for judicial review, Mr. Kwakwa contends that the RAD once again erred, this time in three respects. First, Mr. Kwakwa submits that, in relying on the reasonableness standard of review, the RAD applied the wrong standard to the decision of the RPD. Second, he asserts that the RAD's findings are unreasonable because they presume that the Congolese documents submitted by Mr. Kwakwa are unreliable as fraudulent Congolese documents can be obtained through corruption. Third, Mr. Kwakwa argues that the RAD committed a breach of natural justice, as its decision relied on a new set of arguments, implausibility findings and reasoning without affording him an opportunity to respond.

[4] For the reasons that follow, Mr. Kwakwa's application for judicial review is allowed as I find that, regardless of the standard of review that is applicable by the RAD to the RPD's findings, the RAD breached the rules of natural justice by failing to give Mr. Kwakwa an opportunity to reply to the additional arguments, findings and reasoning retained by the RAD in

support of its conclusions. In light of my decision on this point, I do not need to address the other errors alleged by Mr. Kwakwa.

II. Background

[5] In its decision, the RAD confirmed the conclusions of the RPD and found that Mr. Kwakwa is not a Convention refugee nor a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[6] The RPD hearing revolved around Mr. Kwakwa's alleged Angolan citizenship. In July, 2013, Mr. Kwakwa had entered Canada from the United States and claimed refugee protection, basing his claim on his fear of persecution in the DRC, where he alleges to have been detained, beaten and threatened. However, Mr. Kwakwa had entered Canada on an Angolan passport and not on a passport from the DRC.

[7] The RPD held that the determinative issue on the refugee claim was whether Mr. Kwakwa had Angolan citizenship. The RPD analyzed the documents provided by Mr. Kwakwa in order to establish his Congolese citizenship but observed an absence of clear documentation linking his Congolese identity to documentation existing prior to 2007. The RPD did not find it credible that Mr. Kwakwa had obtained an Angolan passport preventively, given his job as a journalist in the DRC. It found that the level of risk a journalist is exposed to is not sufficient for a reasonable person to obtain a fraudulent passport and travel to Angola in order to take the required digital fingerprints.

[8] The RPD thus determined that it was more likely that Mr. Kwakwa was a citizen of Angola rather than the DRC. Consequently, and since Mr. Kwakwa had not alleged a fear of returning to Angola, the RPD concluded that he was neither a “Convention refugee” nor a “person in need of protection.”

[9] Turning to the RAD decision, the RAD noted that Mr. Kwakwa bears the burden of establishing the facts underlying his refugee claim on a balance of probabilities. More specifically, on the establishment of identity and citizenship, persons claiming refugee status have the burden of establishing that they are who they say they are. Pursuant to section 106 of the IRPA and section 11 of the *Refugee Protection Division Rules*, SOR/2012-256, it is incumbent on an applicant to present acceptable documents to establish his or her identity. The RAD found that Mr. Kwakwa did not establish that he is a Congolese citizen.

[10] More specifically, in support of its decision, the RAD conducted a detailed review of the Congolese identity documents put forward by Mr. Kwakwa, namely his Congolese birth certificate, his voter identification card and his “laissez passer” journalist card, and discussed why these documents could not sustain Mr. Kwakwa’s claim.

[11] Regarding his Congolese birth certificate, the RAD noted that the birth certificate did not include an address, photo or digital fingerprints, and was issued in 2007, not in 1969 when Mr. Kwakwa was born. With respect to the voter identification card, the RAD noted that the card did not include an address and states that it is a temporary identity card. Moreover, Mr. Kwakwa did not explain before the RPD which identity documents he used to obtain the birth certificate or the

voter identification card. Regarding the “laissez passer” card, the RAD observed that it did not bear a date of publication and included grammatical errors.

[12] The RAD also noted that birth certificates can be easily obtained from corrupt authorities as there is no national register with copies of birth certificates in the DRC. Similarly, counterfeit identity cards can be easily obtained through corruption in the DRC. In light of this assessment of the evidence and of the RPD’s decision, the RAD thus reasoned that these identity documents were not reliable for the purposes of establishing the identity of Mr. Kwakwa as a citizen of the DRC.

[13] On the issue of Mr. Kwakwa’s Angolan citizenship, the RAD also mentioned the security measures in place to obtain an Angolan passport, and referred to the requirement that applicants must register their fingerprints when they submit their applications, as well as when they pick up their passports. As fingerprints have to match, it is not possible to retrieve a passport for someone else. In its decision, the RAD thus questioned Mr. Kwakwa’s testimony on this issue, finding that it was not possible for a fingerprint to be taken from a blank piece of paper and inserted in an application form or passport.

[14] While the RPD had discussed the evidence on Mr. Kwakwa’s alleged identity in its decision, this analysis conducted by the RAD went beyond the findings of the RPD and identified additional arguments and reasoning to support the implausibility findings against Mr. Kwakwa. These were not shared with Mr. Kwakwa prior to the issuance of the RAD decision.

[15] The RAD ultimately considered that the explanations provided by Mr. Kwakwa on his Congolese identity were not reasonable. The RAD thus concluded that the RPD's finding on the probability that Mr. Kwakwa is an Angolan citizen was justified and reasonable.

III. Analysis

[16] The sole issue to be determined is whether the RAD committed a breach of natural justice by failing to put to Mr. Kwakwa the additional arguments, implausibility findings and reasoning it relied on to reach its decision.

[17] Mr. Kwakwa alleges that the RAD breached natural justice, as it advanced a new set of arguments, implausibility findings and reasoning without affording Mr. Kwakwa an opportunity to reply. Mr. Kwakwa contends that, if the RAD wanted to pursue new arguments as to what the RPD's reasons should have been or why Mr. Kwakwa's testimony that he did work as a journalist and lived under his claimed identity in the DRC should be disbelieved, Mr. Kwakwa should have been given an opportunity to respond.

[18] I agree.

[19] The standard of review to be applied to procedural fairness issues is the stricter correctness standard. This means that when such issues arise, the Court must determine whether the process followed by the decision-maker satisfies the level of fairness required in all the circumstances (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Zhou v Canada (Minister of*

Citizenship and Immigration), 2013 FC 313 at para 12). More specifically, whether the RAD breached procedural fairness by making additional credibility findings without sharing those concerns with the parties must be reviewed on the standard of correctness (*Ortiz v Canada (Citizenship and Immigration)*, 2016 FC 180 [*Ortiz*] at para 17; *Husian v Canada (Citizenship and Immigration)*, 2015 FC 684 [*Husian*]).

[20] In this case, I find that the process followed by the RAD contravened the rules of natural justice and infringed Mr. Kwakwa's right to a fair hearing.

[21] In various recent decisions, this Court has confirmed the limits to which the RAD must be held in conducting its analysis on appeal of RPD's decisions. As pointed out by Mr. Justice Hughes in *Husian* at para 10, "[t]he point is that if the RAD chooses to take a frolic and venture into the record to make further substantive findings, it should give some sort of notice to the parties and give them an opportunity to make submissions."

[22] The RAD cannot give further reasons based on its own review of the record, if the refugee claimant had not had the chance to address them. In *Ortiz* at para 21, Mr. Justice Shore took issue with the fact that the RAD did not stop its analysis to an assessment of the RPD's decision but made additional credibility findings against the applicant. It is useful to reproduce the following extract of that decision:

[21] [T]he RAD, in conducting its independent assessment of the evidence, held that numerous evidence, including the police report, should not be given weight. [...] Instead, the RAD, as pointed out by the Respondent in its Memorandum of Facts, independently made numerous findings regarding the Applicant's credibility:

- The Applicant failed to produce crucial documents to corroborate his claim regarding the sale of his first pharmacy even though he produced several other documents;
- The inconsistent testimony of the Applicant regarding his cousin before the RPD;
- The Applicant moved to two areas where the FARC is actively recruiting children, even though documentary evidence suggest that the FARC has been weakened in Colombia; and,
- The police report submitted by the Applicant in support of his claim did not appear to conform to the descriptions found in the country conditions documents.

[23] In *Ortiz*, Justice Shore referred to and summarized Madam Justice Kane's recent decision in *Koffi v Canada (Citizenship and Immigration)*, 2016 FC 4 [*Koffi*], which also dealt with independent findings made by the RAD :

[22] In *Koffi*, above, Justice Catherine M. Kane stated that even if the RAD made independent findings of credibility against an applicant, without putting it before the applicant and giving him or her the opportunity to make submissions, the RAD's decision may still be reasonable. This is the case where "the RAD did not ignore contradictory evidence on the record or make additional findings on issues unknown to the applicant" (*Koffi*, above at para 38). In the present case, the Court does not find that this exception applies. As an example, the RAD independently held that the police report does not appear to conform to the normally followed process, as described in the documentary evidence (see para 48 of the RAD's decision). The RAD is therefore raising doubts about the genuineness of the police report, an issue which was not discussed by the RPD, and, neither put forth to the Applicant. As a result, the Court finds that a breach of procedural fairness occurred.

[24] In other words, the RAD is entitled to make independent findings of credibility or plausibility against an applicant, without putting it before the applicant and giving him or her the opportunity to make submissions, but this only holds for situations where the RAD does not ignore contradictory evidence or make additional findings or analyses on issues unknown to the applicant.

[25] In *Ching v Canada (Minister of Citizenship and Immigration)*, 2015 FC 725, the Court concluded that, when a new question and a new argument have been raised by the RAD in support of its decision, the opportunity must be given to the applicant to respond to them. In that case, the RAD had considered credibility conclusions which had not been raised by the applicant on appeal of the RPD decision. This amounted to a “new question” on which the RAD had the obligation to advise the parties and offer them the opportunity to make observations and provide submissions. Similarly, in *Ojarikre v Canada (Minister of Citizenship and Immigration)*, 2015 FC 896 at para 20 and *Jianzhu v Canada (Minister of Citizenship and Immigration)*, 2015 FC 551 at para 12, the RAD had raised in its decision questions which had not been reviewed or relied on by the RPD or advanced by the applicant. These situations can be distinguished from *Sary v Canada (Citizenship and Immigration)*, 2016 FC 178 at para 31, in which I found that the RAD did not examine any “new questions” but rather referred to evidence in the record which supported the conclusions reached by the RPD. A “new question” is a question which constitutes a new ground or reasoning on which a decision-maker relies, other than the grounds of appeal raised by the applicant, to support the valid or erroneous nature of the decision appealed from.

[26] This is the case here. I conclude that, in reaching its decision, the RAD identified additional arguments and reasoning, going beyond the RPD decision subject to appeal, and yet did not afford Mr. Kwakwa with an opportunity to respond to them. More specifically, the RAD relied on arguments about the wording of Mr. Kwakwa's Congolese identity documents and asserted that there ought to be an address in the heading of the voter identity card and that a journalist card should not ask authorities to cooperate with the journalist. I find that the RAD made a number of additional comments regarding the documents submitted by Mr. Kwakwa in support of his Congolese identity, and that were not raised or addressed specifically by the RPD. It may be that these findings and arguments can effectively be supported by the evidence on the record, but I agree with Mr. Kwakwa that he should at least have been given an opportunity to respond to those arguments and statements made by the RAD before the decision was issued.

[27] In addition, the RAD's findings that it is not possible for a fingerprint to be taken from a blank page and inserted into an application form or passport amounted to the tribunal taking judicial notice of such fact. Judicial notice requires disclosure and cannot be taken by a tribunal without disclosing it to the applicant and providing him or her with an opportunity to respond. It was thus an error for the RAD to create the impression that such judicial notice has influenced its decision, while failing to put these considerations to Mr. Kwakwa for reply.

[28] I do not believe that the additional findings and statements made by the RAD fall within the narrow exception circumscribed by the Madam Justice Kane in *Koffi*. It is not a case where the RAD made additional findings or developed arguments on matters known to Mr. Kwakwa (*Koffi* at para 38). True, Mr. Kwakwa was well aware that the main issue before the RAD was

his identity and the alleged use of fraudulent documents to establish his Congolese citizenship. But, the RPD had not made firm conclusions on the fraudulent nature of the documents provided by Mr. Kwakwa, and it cannot be said that, in light of the additional arguments and reasoning adopted by the RAD, Mr. Kwakwa truly knew the case he had to meet, or that he did have an opportunity to respond and deal with the specific plausibility concerns raised by the RAD in its reasons.

[29] The issue of fraudulent documents in establishing his identity had been flagged by the RPD throughout its decision, but it was more than merely extrapolated and fleshed out further by the RAD. Even if the identity issue was an integral part of Mr. Kwakwa's refugee claim, before both the RPD and the RAD, it is not a situation where the RAD simply assessed the evidence on file independently (*Haji v Canada (Minister of Citizenship and Immigration)*, 2015 FC 868 at paras 23 and 27). In this case, new arguments were raised by the RAD and the RAD did not simply review the credibility and plausibility assessments made by the RPD to conclude that such assessments were reasonable based on its own review of the evidence.

[30] I acknowledge that there is a fine (and sometimes blurred) line between situations where the RAD raises and deals with a "new question" and those where it simply makes reference to an additional piece of evidence on the record to support an already existing conclusion of the RPD on a factual assessment or on a credibility issue. Sometimes, these factual or credibility issues have been dealt with extensively by the RPD in its decision or by the applicant in his or her representations. In the current case, however, I am not persuaded that the issues retained by the RAD in support of its adverse decision against Mr. Kwakwa were properly put to Mr. Kwakwa

to allow him to address them. Neither were they so central to the RPD decision and to the appeal filed by Mr. Kwakwa that it could be assumed that Mr. Kwakwa was necessarily aware of them.

[31] In the circumstances, I am therefore of the view that the process followed by the RAD was not fair to Mr. Kwakwa and violated both the letter and the spirit of the rules of procedural fairness.

[32] I am mindful of the fact that, by once again returning this matter to the RAD, the result could ultimately be the same after the RAD will have completed his analysis and given Mr. Kwakwa the opportunity to respond to the additional arguments, findings and reasoning raised in support of the adverse decision issued against him. Mr. Kwakwa will, however, have enjoyed his full right to appeal as granted to him under the IRPA.

IV. Conclusion

[33] As the RAD committed a breach of procedural fairness, I must grant this application for judicial review. Counsel for Mr. Kwakwa proposed that questions be certified if the application was dismissed. If I had decided the case against Mr. Kwakwa, I might have certified questions for appeal to preserve his procedural rights. However, as Mr. Kwakwa is successful in his application for judicial review, I do not find it necessary to certify questions for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;
2. The RAD decision is set aside;
3. The matter is referred back to the RAD for re-determination on the merits by a differently constituted panel;
4. No question of general importance is certified.

"Denis Gascon"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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