Federal Court  Cour fédérale

Date: 20180820

Docket: IMM-5459-17

Citation: 2018 FC 845

[ENGLISH TRANSLATION]

Montréal, Quebec, August 20, 2018

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

HAMADOU BAHITI KONE

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review filed by Hamadou Bahiti Kone (the applicant) of two decisions. The first decision, dated December 5, 2017, is an exclusion order issued by a delegate of the Minister of Public Safety and Emergency Preparedness (the Minister) stating that

the applicant was inadmissible for having violated the conditions of his study permit. The second decision, dated December 9, 2017, dismissed the applicant's application to have his study permit restored based on the fact that he was subject to an exclusion order.

II. Undisputed facts

[2] The applicant, a citizen of Côte d'Ivoire, arrived in Canada on August 8, 2015 as a temporary resident with a study permit valid until October 8, 2017. Subsection 220.1(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 states that the holder of a study permit shall enroll and remain enrolled at a designated institution and shall actively pursue their program.

[3] Initially, the applicant was enrolled in a program of study at the University of Ottawa.

[4] In May 2016, the applicant's father died and the applicant travelled to Côte d'Ivoire for the funeral. He only returned to Canada on September 14, 2016, after the start of classes in the fall of 2016.

[5] The applicant did not take any courses in the fall of 2016. After his father's death, the applicant moved to Montréal to live with his brother. He registered for the winter 2017 program at the Teccart Institute.

[6] In the fall of 2017, the applicant returned to Ottawa and re-enrolled at the University of Ottawa.

[7] The expiry of the applicant's Côte d'Ivoire passport resulted in delays, and the applicant was only able to apply to have his study permit renewed on or about October 17, 2017, a few days after it expired.

[8] On December 4, 2017, the applicant was arrested by City of Ottawa police as part of a search involving one of his Ivorian friends suspected of fraud. The applicant had the opportunity to speak to counsel on the telephone at the police station. No criminal charges were brought against him or his friends.

[9] At approximately 9:00 p.m. on December 4, 2017, the applicant was interviewed by a Canada Border Services Agency (CBSA) enforcement officer, Daniel Carré, and a Minister's delegate, Gholamhossein Valioghli, regarding his identity and status in Canada (the first interview).

[10] Following this initial interview, Officer Carré found that there was reason to believe that the applicant was inadmissible for having failed to meet the conditions of his study permit: attending classes and attending school. Officer Carré prepared an inadmissibility report under section 44 of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 (IRPA) in this regard.

[11] The applicant was re-arrested by CBSA officers and taken to the CBSA offices. Early on December 5, 2017, the applicant was re-interviewed by the Minister's delegate (Officer Valioghli) and Officer Carré (the second interview). The purpose of this second interview was to determine whether Officer Carré's section 44 report was well-founded.

[12] Following this second interview, Officer Valioghli made the exclusion order, which is one of the issues involved in this application for judicial review.

[13] A few days later, on December 9, 2017, the applicant's application to restore the applicant's study permit was dismissed because the applicant was the subject of a removal order that had come into force.

III. Disputed facts

A. *Facts regarding the applicant's studies*

[14] The applicant alleges that he attended his classes at the University of Ottawa during the fall of 2015 and the winter of 2016 and that he was doing well. The respondents allege that during the first interview, the applicant admitted that he had not passed his courses.

[15] The applicant attached a document to his reply memorandum that appears to indicate his grades for the fall of 2015. This document indicates limited success. There is no reference to the winter 2016 session. More importantly, this document is not part of the evidence because it was not attached to an affidavit.

[16] The applicant alleges that he attended classes at the University of Ottawa in the fall of 2017 but stopped when his study permit expired on October 8, 2017. The respondents allege that during the first interview, the applicant admitted that he did not show up for his courses in the fall of 2017.

B. *Facts regarding the events of December 4 and 5, 2017*

[17] The applicant alleges that he was released by the police and re-arrested by the CBSA prior to the first interview. The applicant further alleges that he did not have the opportunity to speak to counsel after he was re-arrested.

[18] The respondents allege that the first interview took place while the applicant was still detained by the police and that the purpose of the interview was simply to identify the applicant and verify his status. The respondents allege that the detainee was transferred from the police to the CBSA only a few minutes before midnight on December 4, 2017, after the end of the first interview and after Officer Carré found that there was reason to believe that the applicant was inadmissible.

[19] The applicant alleges that the first interview lasted several hours. The respondents allege that it lasted only 20 to 30 minutes.

[20] The applicant alleges that during the first interview he was hungry and cold, and he felt compelled to answer every question and consent to every request. The applicant further alleges that he never consented to having his smartphone searched. The respondents allege that neither Officer Carré nor Officer Valioghli asked or ordered the applicant to provide them with his smartphone. The respondents allege that it was the applicant who suggested they check his telephone to confirm that he was enrolled at university.

[21] The applicant alleges that the second interview took place at around 6:00 a.m. on December 5, 2017. The respondents indicate that it occurred at 2:15 a.m.

[22] The applicant alleges that prior to the second interview he was advised that there were no lawyers available. He also alleges that he was not given the option to wait for a lawyer to be available. The respondents allege that the applicant was advised of his right to counsel before the second interview, and a telephone and a list of lawyers were made available to him for at least 20 minutes. The respondents further allege that the officers also helped him to identify French-speaking lawyers.

[23] The respondents allege that at the second interview the applicant confirmed that he understood the purpose of the interview and that he did not have any evidence to introduce or questions to ask.

IV. Issues

[24] The issues fall into two categories: (i) issues of procedural fairness; and (ii) the reasonableness of the decisions at issue.

[25] The issues of procedural fairness are related to the following topics:

1. Right to counsel;
2. Search of the smartphone;
3. Opportunity to provide evidence during the interviews; and
4. Inadequate reasons.

[26] The issues regarding the reasonableness of the decisions are related to the following topics:

1. Fall 2017 studies;
2. Fall 2015 studies;
3. Designated learning institution;
4. Fall 2016 studies;
5. Fall 2017 studies; and
6. The December 9, 2017 decision dismissing the application to have the study permit restored.

V. Analysis

A. *Standard of review*

[27] There is no debate on the applicable standard of review in this case. The parties agree that matters involving core areas of the decision-maker's discretionary authority—the exclusion order in this case—must be reviewed on the standard of reasonableness: *Canada (Citizenship and Immigration) v. Khosa,* 2009 SCC 12 at paragraphs 59 and 61. Procedural fairness issues are to be determined on the basis of a correctness standard of review: *Khosa,* at paragraph 43.

B. *Preliminary note*

[28] The respondents object to the admission of the ENF 6 manual regarding the review of reports under subsection 44(1) of the IRPA, as evidence. Although this document was mentioned in the applicant's supplementary memorandum, it was not adduced in evidence.

[29] The applicant responds that the defendants are very familiar with the ENF 6 manual and that this document can be persuasive in the context of this application. The applicant refers to this document in support of his argument regarding the duty to advise him of his right to counsel.

[30] In my opinion, it is not necessary for me to rule on the question of the admissibility of the ENF 6 manual. It does not have the force of law. More importantly, the ENF 6 manual is germane to the review of section 44 reports, not their creation. Therefore, the ENF 6 manual pertains to the procedures followed during the second interview instead of the first. Finally, I find below that the applicant's rights have not been violated.

C. *Issues*

(1) Right to counsel

[31] The applicant argues that his right to counsel and being informed of this right was violated before both interviews. Despite the fact that he was able to speak to counsel before being questioned by the police, he submits that the purpose of the first interview with Officer Carré was different. He argues that he was entitled to be re-advised of his right to counsel, which was not done. Regarding the second interview, the applicant complains that he was unable to reach a lawyer in the middle of the night and that the officers should have provided him with the option to postpone the second interview until a lawyer was available.

[32] As noted above, the ENF 6 manual does not pertain to the procedures followed during the first interview. In addition, I accept the respondents' allegation that the applicant was still

detained by the police during the first interview. The evidence satisfies me that the applicant was transferred from the police to the CBSA shortly before midnight on December 4, 2017 and that prior to this transfer he remained under the control of the police.

[33] More importantly, the applicant did not challenge Officer Carré's decision to file his section 44 report. The decisions under review are (i) the exclusion order issued after Officer Carré's report had been examined, and (ii) the dismissal of the application to have the study permit restored. In the absence of a challenge to Officer Carré's decision, it is not at all clear that the applicant's objection to the procedures that were followed during the first interview is admissible.

[34] At any rate, I am not persuaded that the applicant was entitled to be re-advised of his right to counsel prior to the first interview.

[35] The applicant relies on *Rodriguez Chevez v. Canada (Citizenship and Immigration)*, 2007 FC 709 (*Chevez*). However, I note that at paragraph 11 of this decision the judge indicated that there is no right to counsel *per se* at an immigration assessment. I understand that this sentence applies to the first interview. *Chevez* mainly concerns the right to counsel before the review of the section 44 report (the second interview). Also, the facts in this application are different from the facts in *Chevez*. The applicant was detained for several days and had asked for a lawyer. There was a lawyer in the building, but he was not available at that time. In this case, I accept the allegation that staff helped the applicant contact a lawyer before the second interview.

I also accept that the applicant never indicated that he could not reach a lawyer. In my opinion, *Chevez* does not help the applicant.

[36] The applicant also referred to *Canada (Citizenship and Immigration) v. Paramo de Gutierrez*, 2016 FCA 211. This decision is also different than the case before us: it concerned the right to counsel in the context of a claim for refugee protection.

[37] The facts in *Chen v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 910, on which the applicant also relies, were different as well. Mr. Chen was detained for several days without being given the opportunity to consult a lawyer. Eventually, his statements during this time were used to contradict his testimony in the context of his claim for refugee protection.

[38] The applicant also relies on the Supreme Court of Canada's decision in *R. v. Sinclair*, 2010 SCC 35 (*Sinclair*), which, at paragraph 57, discussed the obligation to provide an additional opportunity to consult counsel "when it becomes clear, as a result of changed circumstances or new developments, that the initial advice, viewed contextually, is no longer sufficient or correct." I am not persuaded that *Sinclair* confirmed the applicant's right to be re-advised of his right to counsel. First, I note that the facts in *Sinclair* involved criminal law. In addition, I do not accept that the applicant's circumstances had changed so much that the advice that the applicant would initially have received was no longer sufficient. In the first place, the applicant knew he had no identification documents and was in Canada on the basis of an expired study permit that was in the process of being renewed. It was foreseeable that he would be questioned about his identity and status in Canada.

[39] I am persuaded that the evidence upon which the Minister's delegate relied (including Officer Carré's report) was obtained in a way that respects the rights of the applicant. Therefore, even if I granted the application and set aside the decision of the Minister's delegate, I am sure that another delegate would come to the same decision if the report were reconsidered. It is not at all clear what evidence the applicant could provide to defend himself against his failure to attend classes in the fall of 2016 and 2017.

[40] I do not accept that the applicant's hunger, cold or lack of sleep is a relevant factor. I accept the respondents' evidence that the second interview took place at around 2:15 a.m. on December 5 and not around 6:00 a.m. as the applicant alleges. Therefore, there was no serious lack of sleep. In addition, because the applicant has made other statements that I do not accept (referred to in this decision), I do not accept his testimony concerning his hunger, his having been cold and his allegation that he cooperated during the first interview because of these factors.

[41] Nor do I accept the applicant's argument that officers Carré and/or Valioghli confused the applicant with his friend Ahmed Kone and that is why they concluded that the applicant had the opportunity to consult a lawyer. I do not see any indication of such confusion. In my view, this is speculation on the part of the applicant.

(2) Search of the smartphone

[42] This issue arises from a material factual conflict. As noted above, the applicant alleges that he never consented to having his smartphone searched. However, the defendants allege that

the applicant requested that the officers verify his university registration by checking his telephone.

[43] I believe the respondents' version of the facts. Officers Carré and Valioghli had no reason to lie, especially since the information on the telephone was not very revealing. I reject the applicant's argument that he would never have offered to have his telephone searched knowing that its contents were not sufficient to avoid the exclusion order. It is entirely possible that the applicant offered evidence of his university registration hoping that it would be sufficient.

[44] The applicant is asking me to draw a negative inference against the respondents because officers Carré's and Valioghli's notes did not mention the search of the applicant's smartphone. I will not. Since the contents of the telephone did not reveal anything conclusive, I am not surprised that the officers did not refer to it in their notes.

[45] Even if I were to accept the applicant's version of the facts, I would not be willing to grant this application on this basis. The exclusion of any evidence obtained from the telephone would not change the outcome of the decisions at issue.

(3) Opportunity to present evidence at interviews

[46] The applicant complains that because of his detention, the brevity of the second interview, and the absence of a lawyer, he did not have the opportunity to present evidence in his favour until the exclusion order was issued.

[47] However, the applicant admitted that he had not taken courses during the 2016 and 2017 fall sessions. This admission still applies to the fall of 2016, whereas the applicant now denies having admitted that he stopped attending his fall 2017 courses before his study permit expired. I have not been shown any objective evidence, before the Minister's delegate or otherwise, that contradicts the finding that the applicant was failing to comply with the conditions of his study permit.

[48] The opportunity to present evidence to respond to the lack of evidence of the applicant's registration at the Teccart Institute in the winter of 2017 would not have changed the outcome.

(4) Inadequate reasons

[49] The applicant argues that procedural fairness requires adequate written reasons to justify the administrative decision.

[50] This argument must be rejected. The total absence of reasons may constitute a breach of a duty of procedural fairness, but where, as here, there are reasons, "the reasoning/result of the decision should therefore be made within the reasonableness analysis": *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraph 22.

(5) Fall 2017 studies

[51] This is another issue that arises from a material factual conflict. The respondents allege that the applicant admitted that he did not attend any classes at the University of Ottawa during the fall of 2017, whereas the applicant denies that he made this admission.

[52] The evidence confirms his registration but not his attendance.

[53] Once again, I accept the respondents' version of the facts because I see no reason not to believe the testimony provided by Officer Carré and Officer Valioghli. Even before me, the applicant did not submit any evidence, other than his own statement indicating that he had attended his classes before his study permit expired.

[54] The applicant argues that the Court did not consider that he was no longer entitled to attend his classes after his study permit expired on October 8, 2017. This argument is irrelevant because of the evidence, which I accept, of the applicant's admission that he did not attend his classes in the fall of 2017, even before his study permit expired.

[55] I do not accept the applicant's argument that it is inconceivable that he would have incurred the tuition fees without having attended his classes. This possibility depends on the amount of fees paid. Officer Carré's notes indicate that the University of Ottawa informed him that, at the time of the first interview on December 4, 2017, the applicant owed the University

$7,230. I have not seen any evidence to the contrary. It therefore seems that the applicant did not incur any university tuition fees.

[56] In my opinion, Officer Valioghli's finding that the exclusion order was made because of the applicant's failure to take courses in the fall of 2017 was reasonable.

(6) Fall 2015 studies

[57] The applicant submits that it is inconceivable to claim that he allegedly told the officers that he failed all his courses in the fall of 2015 when the evidence indicates otherwise.

[58] First, I note that it is inaccurate to claim that the respondents' submission is that the applicant had failed all his courses. The respondents submit that he admitted that he "did not pass his courses." This is supported by Officer Carré's notes that the applicant stated that he "went [to] the University of Ottawa in 2015 but did not pass." Although the evidence of the applicant's fall 2015 grades was not properly filed (see paragraph 10 above), I refer to it to demonstrate that the respondents' submission is not inconsistent with his grades. The document filed by the applicant indicates that his grades were: D, D +, C, E. Assuming that "E" is a failing grade, the applicant's statement that he did not pass is conceivable.

[59] At any rate, the applicant's failure to attend classes in the fall of 2016 and 2017 was sufficient to justify the exclusion order. Even if there was an error in considering the applicant's course attendance during the fall of 2015, it would not change the result.

(7) Designated learning institution

[60] The applicant submits that Officer Valioghli erred in stating that his study permit restricted him at the University of Ottawa. I see no such indication by Officer Valioghli.

(8) Fall 2016 studies

[61] The applicant does not dispute that he did not attend any courses in the fall of 2016. However, he submits that he was unable to register for the fall 2016 session because he returned to Canada too late.

[62] First, I note that the applicant makes no reference to any authority indicating that his absence from Canada could excuse him.

[63] Second, I note the lack of evidence that the applicant could not have returned to Canada soon enough to register, or that he could not have registered abroad.

[64] In addition, the scope of Minister's delegate's discretion was narrow: *Hussein v. Canada (Citizenship and Immigration)*, 2018 FC 44 at paragraph 66.

[65] In my opinion, Officer Valioghli's decision to issue the exclusion order because of the applicant's failure to take courses in the fall of 2016 was reasonable.

(9) Winter 2017 studies

[66] Officer Valioghli's notes indicate that there is no evidence that the applicant attended classes in the winter of 2017. The evidence before me indicates that the applicant was actually enrolled at the Teccart Institute in the winter of 2017. The applicant cites this evidence as an example of what he could have submitted at the second interview had he been given the opportunity.

[67] In my opinion, it is not clear that the lack of evidence that he had registered for courses in the winter of 2017 was one of the reasons for the exclusion order. However, even if the applicant's right to submit evidence that he had registered for courses in the winter of 2017 was violated, the exclusion order would still have been issued because the applicant had failed to attend courses in the fall of 2016 and 2017.

(10) The December 9, 2017 decision dismissing the application to have the study permit restored

[68] Because I do not find any errors in the exclusion order, it follows that the dismissal of the applicant's application to have the study permit restored was not erroneous.

VI. Conclusion

[69] For the above reasons, this application must be dismissed.

[70] The parties agree that there is no serious question of general importance to be certified.

JUDGMENT in IMM-5459-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No serious questions of general importance were certified.

"George R. Locke"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5459-17
STYLE OF CAUSE:	HAMADOU BAHITI KONE v. THE MINISTER OF IMMIGRATION, REFUGIES AND CITIZENSHIP and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JULY 10, 2018
JUDGMENT AND REASONS:	LOCKE J.
DATED:	AUGUST 20, 2018

APPEARANCES:

Marwa Racha Younes	FOR THE APPLICANT
Sarah Jiwan	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Marwa Racha Younes Counsel Ottawa, Ontario	FOR THE APPLICANT
Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENTS