Date: 20060420

Docket: IMM-9797-04

Citation: 2006 FC 502

Ottawa, Ontario, the 20th day of April 2006

BETWEEN:

MIKE BILOMBA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] On January 20, 2004 an individual went to the Immigration and Refugee Board (IRB) in downtown Montréal. This individual represented himself as one Mike Bilomba and he filed a refugee claim status. On December 18, 2003, Mr. Bilomba had apparently taken an Air Canada flight from London to Montréal on a false French passport with the name "Jean Dupont". At the IRB Mr. Bilomba did not submit this passport or the boarding pass.

[2] Mr. Bilomba claimed that he was originally from the Democratic Republic of Congo (DRC). He tried to claim refugee protection for his political opinions, membership in a political group, the Union pour la démocratie et le progrès social (UDPS), and his association with that group as well as his Luba ethnic identity.

[3] The applicant said that at the meeting of this political group on October 30, 2003, he was arrested, detained and tortured by armed civilians. This was the event which ultimately led to his refugee claim. On December 10, 2003, he was able to escape the place where he was being held thanks to the help of one of the civilians.

[4] After he went to the IRB and filed his refugee claim, the IRB Refugee Protection Division (RPD) held a hearing with the applicant on September 1, 2004. It is important to note that, at the outset, Mr. Bilomba's counsel objected to a reverse order of examinations and indicated her intention to put questions to him before the tribunal began its questioning. However, in view of Directive No. 7 on the preparation and the holding of RPD hearings and the fact that the panel has complete control of its procedure, it decided that the refugee protection agent (RPA) should intervene first.

[5] The RPD dismissed Mr. Bilomba's refugee claim as the latter was not a "person in need of protection" within the meaning of sections 96 and 97 of the *Immigration and Refugee Protection Act*. Essentially, the panel based its decision on a lack of credibility.

[6] Mr. Bilomba accordingly sought judicial review of that decision. The application for judicial review turns on the following two arguments:

1. the RPD did not observe the rules of procedural fairness and natural justice; additionally, Directive No. 7 contravenes sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*;

2. In relation to the applicant's credibility, the findings of fact and legal rulings of the RPD were patently unreasonable.

Procedural background

[7] After Mr. Bilomba was granted leave to appeal in the application for judicial review and before hearing, Mr. Justice Blanchard rendered a decision on the reverse order of examinations and Directive No. 7. *Thamotharem v. Canada (M.C.I.)*, 2006 FC 16: he held that, in some circumstances, the effect of the reverse order of examinations, and in particular Directive No. 7, was to fetter the exercise of the RPD's discretion and to infringe the rules of natural justice. Further, he certified three important questions which could support an application for an appeal before the Federal Court of Appeal. That appeal is currently pending.

[8] In view of *Thamotharem, supra*, Chief Justice Lutfy ordered that all pending cases which involved Directive No. 7 be specially managed. The two judges responsible for the special management were Madam Justice Snider and Mr. Justice Gibson.

[9] In her order dated February 20, 2006, in *Benitez v. Canada (Minister of Citizenship and Immigration)*, Court docket No. IMM-9766-04, Madam Justice Snider separated the issues to be considered under rule 105 of the *Federal Courts Rules* and then ordered that the proceedings relating to Directive No. 7 be consolidated before a judge sitting alone on March 7, 2006. Mr. Bilomba's case was one of these.

[10] Madam Justice Snider's order also stated that the other issues raised by each of the consolidated applications would be decided in separate hearings presided over by one or more judges, as soon as possible after the accelerated hearing of the issue relating to Directive No. 7.

[11] The applications regarding Directive No. 7, including the one at bar, were heard by Mr. Justice Mosley in Toronto on March 7 and 8, 2006.

[12] By order in this case and by reasons stated in *Benitez v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 461, dated April 10, 2006, Mr. Justice Mosley dismissed the applications for judicial review in respect of all the issues relating to Directive No. 7: "This application for judicial review is dismissed with respect to the issues that were heard by the Court at Toronto, Ontario on Tuesday, the 7 th of March and Wednesday, the 8th of March by reason of the consolidation order dated February 20, 2006". He nevertheless certified seven questions of general importance.

[13] In view of the foregoing procedural background, it is now necessary to note that this application for judicial review at bar only concerns the substantive issues raised by Mr. Bilomba, except for those relating to Directive No. 7. In other words, this Court does not have to rule on the RPD's reasons, which all have to do with a conclusion of a lack of credibility.

Issues

[14] There are only two issues in this part of this case. First, what is the applicable standard of review on a question of credibility, and second, was the RPD's decision patently unreasonable?

Standard of review

[15] Credibility turns on the interpretation of facts. The case law appears to indicate that the applicable standard of review on interpretation of facts is patent unreasonableness: see *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100, at paragraph 38; *Kaur v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 2112 (QL); and *Canada (Minister of Citizenship and Immigration) v. Sittampalam*, 2004 FC 1756, [2004] F.C.J. No. 2152 (QL).

Analysis

[16] Since Directive No. 7 is not at issue, this Court only has to make a determination based on the issue of credibility. The Court must exercise great restraint with respect to a finding by the RPD that the applicant lacked credibility. The Minister relied on *Aguebor v. M.E.I.* (1993), 160 N.R. 315 (F.C.A.), as support for the argument that it is the function of the RPD, as a specialized tribunal, to assess the testimony of a refugee protection claimant and determine the credibility of his statements in the context of the evidence as a whole.

[17] Notwithstanding this rule, however, we should bear in mind that witnesses should not be treated with scepticism; rather, one must be willing to believe that they are telling the truth, and to abide by that belief until there is a clear and important reason to think otherwise: see *Anthonimuthu v. Canada*, [2005] F.C.J. No. 162 (QL), at paragraph 46. As indicated in *Maldonado v. Canada (Minister of Employment and Immigration)*, [1980] 2 F.C. 302, there is a rebuttable presumption that the applicant's testimony is accurate.

[18] In its reasons, the RPD considered the applicant's identity, and despite its concern the panel nevertheless undertook an analysis of the application, while indicating that [TRANSLATION] "even if his identity had been established, the applicant is not credible". The RPD must instead undertake an analysis of credibility in general terms rather than focusing on the applicant's identity. At least, that is what the panel should have done.

[19] Reading the RPD's reasons, this Court sees quite clearly that the panel never really succeeded in dissociating the issue of the applicant's identity and the other elements affecting his credibility.

[20] For example, the RPD dwelt at great length on the Air Canada flight taken by the applicant to come to Canada. Ordinarily, it is true that the applicant's flight may be a serious point which the RPD must consider. Flight documents are often the only documentary evidence which is objective and verifiable. While it is acceptable for the RPD to ask questions about the way in which the applicant came to Canada, in the circumstances the RPD did not make a finding on the fact that the passenger list did not show the name of the passport held by Mr. Bilomba, that is "Jean Dupont". There are a number of possible reasons why this name was not on the list: Mr. Bilomba may have lied, he may have mistaken his date of arrival, there may have been a misspelling of the name "Jean Dupont" or Air Canada could have made a mistake. Despite all these possible explanations, the RPD did not try to check with Mr. Bilomba other information that might have been relevant: for example, it could have asked him about the weather in London when he left, the weather in Canada when he arrived and so on. Despite the importance which the RPD appeared to attach to the flight

and the passenger list, it was not conclusive in Mr. Bilomba's refugee claim as his identity and the way in which he arrived here are two distinct questions.

[21] Although the RPD tried to separate the other reasons pertaining to credibility, they are all related. In short, those reasons primarily bear on his political beliefs and membership in the UDPS. We should also always bear in mind that in his refugee claim, Mr. Bilomba expressly mentioned that he had been the victim of several attacks on account of his political opinions and Luba ethnic origin.

[22] From reading the RPD's reasons as to the remaining factors, it seems clear to the Court that the panel did not undertake a logical and fluid analysis. On the contrary, the other reasons were based on minor inconsistencies. In particular, the RPD tried to find a genuine contradiction between the fact that the applicant did not mention the UDPS at the point of entry, the extent of his participation in that party, and his testimony. On the contrary, there is no contradiction since the immigration officer at the point of entry indicated to Mr. Bilomba that it was not necessary for him to specify the reasons why he came to Canada, as he could put this information into his Personal Information Form (PIF), which he did. In his PIF, Mr. Bilomba referred clearly to his association with the UDPS. The RPD sought to establish a lack of credibility on account of the fact that the applicant claimed he was a sympathizer, whereas the documentary evidence mentioned his membership in the UDPS. This cannot be conclusive, since the distinction between holding a membership card and being a sympathizer may quite simply be a matter of language.

[23] Further, this Court cannot ignore the fact that the RPD never considered the event which led to the refugee claim, namely his arrest on October 30, 2003 at a UDPS meeting, which led to the detention and torture of the applicant by armed civilians. The RPD also made no mention of the applicant's ethnic origin as a reason for the application. In view of the panel's concerns regarding the applicant's flight, it may be assumed that the RPD would at least have required the applicant to explain this point. However, the RPD's reasons make no mention of the matters noted above.

[24] In *Singh v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 426 (QL), while the RPD determined that omissions on points essential to the claim, namely the applicant's failure to mention the death of his father and his cousin, were sufficient to support a finding that he was not credible, Mr. Justice Simon Noël held that these contradictions were quite minor and could not undermine the applicant's credibility. As the RPD did not analyze the core of the problem or the events surrounding the protection application in Mr. Bilomba's case, I accept my colleague's analysis at paragraphs 21 and 22 of *Singh, supra*:

> [TRANSLATION]
>
> ¶ 21 In my opinion, this is a very minor contradiction which can be understood from reading the applicant's testimony. Such a contradiction clearly could not undermine the applicant's credibility. The RPD should not demonstrate excessive zeal in finding contradictions where there are none (see in particular *R.K.L. v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 162, 2003 FCTD 116).
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> ¶ 22 For these reasons, I am of the view that the decision by the RPD on the applicant's credibility is based on certain mistakes of fact and contradictions which are so minor that the decision cannot be allowed to stand. The decision on the applicant's credibility is patently unreasonable. The RPD may have had valid reasons for considering that the applicant was not credible, but these reasons do not appear in its decision. The matter must accordingly be referred back to the RPD to be considered by a differently constituted panel.

[25] As my colleague Mr. Justice Teitelbaum noted in *Ahortor v. Canada (M.E.I.)*, [1993] F.C.J. No. 705 (QL), at paragraphs 36 and 37, the panel should not try to find fault with the applicant's testimony without basing itself on concrete evidence contradicting his testimony.

[26] Accordingly, it appears to the Court that the RPD's reasons are in fact patently unreasonable. This finding of "patently unreasonable" was noted by Mr. Justice Iacobucci in *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, at paragraph 52:

> ¶ 52 The standard of reasonableness *simpliciter* is also very different from the more deferential standard of patent unreasonableness. In *Southam, supra*, at para. 57, the Court described the difference between an unreasonable decision and a patently unreasonable one as rooted "in the immediacy or obviousness of the defect". Another way to say this is that a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" (*Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, at pp. 963-964, *per* Cory J.; *Centre communautaire juridique de l'Estrie v. Sherbrooke (City)*, [1996] 3 S.C.R. 84, at paras. 9-12, *per* Gonthier J.). A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.

[27] While the determination of credibility falls within the expertise of the RPD, in Mr. Bilomba's case the RPD's statements seem to me to be arbitrary and not supported by very convincing evidence. Accordingly, it is worth mentioning the comments by Mr. Justice O'Halloran in *Faryna v. Chorny* (1952), 2 D.L.R. 354, at page 356:

> The credibility of interested witnesses, particularly in cases of conflict of evidence cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

The RPD's analysis in Mr. Bilomba's case does not harmonize with the context.

Conclusion

[28] It is quite clear that Mr. Bilomba's identity and the RPD's doubts in this regard detracted the latter's attention from the other reasons regarding the applicant's credibility. Despite the deference which this Court must show the RPD on issues of credibility, that does not allow the RPD to make erroneous findings of fact based on a biased perception, which it did. The RPD did not offer sufficiently clear and reasonable grounds to persuade the Court that the applicant lacked credibility. Further, Mr. Bilomba's application regarding persecution was never analyzed.

[29] It is for this reason that I must allow this application for judicial review.

[30] There is no question to be certified.

ORDER

IN VIEW OF the application for judicial review of the Refugee Protection Division decision on October 30, 2004 that Mr. Bilomba was not a Convention refugee and was not a "person in need of protection";

IN VIEW OF the reasons for the order of this date;

THIS COURT ORDERS that, for the reasons given in this order in this judicial proceeding heard in Montréal on April 12, 2006, the applicant's application for judicial review is allowed and the matter referred back to the Refugee Protection Division before a differently constituted panel for reconsideration.

"Sean Harrington"
Judge

Certified true translation
François Brunet, LLB, BCL

FEDERAL COURT

SOLICITORS OF RECORD

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