

Date: 20071130

Docket: IMM-797-06

Citation: 2007 FC 1260

Ottawa, Ontario, November 30, 2007

PRESENT: The Honourable Madam Justice Dawson

BETWEEN:

KIN-HARRY BAMENGZUT

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Kin-Harry Bamengzut is a citizen of Ghana who served as a soldier in his country's military forces until he deserted in September of 2000. He says that he has a well-founded fear of persecution in Ghana on two grounds. First, he states that he was one of several military personnel that arrested a number of "machomen" in Ghana for arms smuggling. He says that the machomen still seek retribution against him because of his involvement in their arrest. Second, he states that he fears imprisonment in Ghana because of his desertion from the military.

[2] The Refugee Protection Division of the Immigration and Refugee Board (RPD or Board) rejected Mr. Bamengzut's claim for refugee protection because it "found the two essential elements

of the claim to be lacking in credibility to such an extent that I believe no part of the story other than that the claimant served in the Ghanaian military".

[3] Three issues are raised in this application for judicial review of that decision: first, whether the application should be dismissed without consideration of its merits because Mr. Bamengzut filed a false or misleading affidavit in support of his application; second, whether the RPD breached the duty of procedural fairness that it owed to Mr. Bamengzut; and finally, whether the RPD misconstrued the evidence and drew patently unreasonable inferences in reaching its decision. Prior to the hearing, Mr. Bamengzut withdrew the issue he had raised in his written submissions in relation to unfairness arising out of reverse-order questioning.

[4] For the reasons that follow, the application for judicial review is dismissed because:

1. While the applicant filed an affidavit that was materially misleading in at least one respect, the application is not dismissed on that basis because to do so would leave serious allegations of unfairness on the part of the RPD outstanding.
2. Mr. Bamengzut failed to establish any breach of procedural fairness.
3. None of the Board's impugned findings of fact can be characterized as being patently unreasonable.

The impugned affidavit evidence

[5] The Minister puts in issue the accuracy of four paragraphs from Mr. Bamengzut's affidavit filed in support of this application. Three of the impugned paragraphs describe the hearing process

and support Mr. Bamengzut's argument that he did not receive a fair hearing. The fourth deals with Mr. Bamengzut's testimony at the hearing as to whether, during a certain period of time, he was safe from harm because he lived in a protected environment.

[6] With respect to Mr. Bamengzut's affidavit evidence on the last point, his testimony before the Board was not as clear as his affidavit would suggest. However, after a careful review of the transcript as it relates to this point, the affidavit evidence did not so diverge from the evidence recorded in the transcript that I can conclude that Mr. Bamengzut's affidavit was false or misleading on this issue.

[7] This leaves for consideration the three impugned paragraphs that relate to the issue of procedural fairness. Given the importance of ascertaining whether Mr. Bamengzut's affidavit evidence was false or misleading and the importance of this evidence to the alleged breach of procedural fairness, the three impugned paragraphs are set out in full. They are paragraphs 3, 6, and 10 of Mr. Bamengzut's affidavit:

3. At the very beginning of the hearing before we went on the record the [presiding member] told my counsel and I that his hearing was very poor, and that his hearing aid did not function properly, hence we should face him when we spoke and articulate as clearly as possible.

[...]

6. When my counsel began to question me he reminded me to continue to face the Member when I gave my answers, and to articulate my words clearly. Notwithstanding that I did so, it was immediately apparent that as soon as my counsel began asking questions [the presiding member], rather than looking at me, as he maintained he must do in order to hear me, spent the entire time while I answered questions looking through papers on his desk, looking up only occasionally to see if I

was speaking. This was observed both by myself and my counsel. It is my recollection that a couple of times during the questioning by my counsel he reminded me about facing the Member and articulating clearly. This was not because I was not doing so, but rather to try and bring this issue to the Member's attention, so that he would face me and be able to hear my testimony.

[...]

10. I also testified that the AWOL [absent without official leave] documents were produced in one location in draft and then transmitted by radio operator to another location where they might be put on official army letterhead. However, the copies that I obtained through the assistance of a colleague in Ghana were file copies and hence did not have the letterhead. All of this was explained to the Member. He asked how this could be verified and I volunteered to do so. However, he said he would undertake to do this. I drew his attention to the telephone numbers and contact information on these documents so that he could verify the information. It is apparent that he did not do so notwithstanding that he said he would. In that regard he also said that when he was confirming the veracity of the AWOL documents he would ascertain that I could not resign from the military until I had served at least five years. It is apparent that he did not verify this information either.

The evidence contained in the tribunal record

[8] Paragraphs 3 and 6 of Mr. Bamengzut's affidavit are relevant to the first alleged breach of procedural fairness. He asserts that his right to a fair hearing was breached because the matter was heard "by a Member who acknowledged that he suffered from a significant hearing impairment, and did not conduct a hearing in a manner such that he could hear the testimony of the Applicant".

[9] Paragraph 10 of the affidavit is relevant to Mr. Bamengzut's assertion that the Board breached requirements of procedural fairness by failing to fulfill the undertakings it gave to verify

his evidence with respect to the AWOL documents and Mr. Bamengzut's ability to resign from the military.

(a) The ability of the presiding member to hear the evidence

[10] The transcript is obviously silent as to what may have happened before the parties went on the record. It does, however, reflect the following:

- At the commencement of the hearing, the presiding member advised "I asked for a small room because my hearing is not very good. I have a hearing aid that's not very good. So, when you speak to me, can you look at me and speak up so I can hear everything that you say?"
- When, following questioning by the presiding member, Mr. Bamengzut's counsel began questioning him, counsel said "Mr. Bamengzut, I'm going to be asking you questions, but I want you to look at the Member because he's asked you to do so, so that he's clear on what you're saying".
- At no other time during his questioning did Mr. Bamengzut's counsel remind Mr. Bamengzut about the need to face the presiding member and speak clearly. (In oral argument, Mr. Bamengzut's counsel argued that these reminders were non-verbal.)
- There is no evidence that, when counsel was questioning Mr. Bamengzut, the presiding member did not hear Mr. Bamengzut's answers. The presiding member did not ask for answers to be repeated and his questions were responsive to

Mr. Bamengzut's answers. On one occasion during the hearing, the presiding member also correctly heard evidence that Mr. Bamengzut's counsel did not.

- When Mr. Bamengzut's counsel was questioning him, the presiding member intervened to ask pertinent follow-up questions.

(b) The alleged undertakings

[11] The transcript reflects that:

- The presiding member made no undertaking to verify the AWOL documents. (In oral argument counsel for Mr. Bamengzut suggested that such undertaking was made off the record.)
- The AWOL documents and the ability of Mr. Bamengzut to resign from the military were discussed at pages 356 to 371 of the transcript. There is no indication that at any time the parties went off the record. A short pause recorded in the transcript at page 356 is explained, on the record, by the member's immediate advice that he was trying to find the documents that showed Mr. Bamengzut to be AWOL.
- When concluding his questioning of Mr. Bamengzut, the presiding member stated:

I may do an information request to clarify this business about when is it possible for other ranks to resign from the army military.

If we get that information, it will just tell me -- it will confirm what you said. You have to serve with them for five years before you can resign.

All right?

I might do that.

- Mr. Bamengzut did not volunteer to verify the accuracy of the file copies of the AWOL documents that were not on letterhead.

Should the Court dismiss the application without considering its merits?

[12] In *Balouch v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 1934, my colleague Mr. Justice Gibson dismissed an application for judicial review of a negative decision of the RPD on the ground that the applicant had acted improperly by putting an affidavit containing one or more negligent misrepresentations before the Court. I adopt as my own Justice Gibson's instruction at paragraphs 7 and 15 of his reasons that:

7 An applicant's affidavit is critical to the leave process. Counsel for the Respondent must be able to rely on the Applicant's affidavit in preparing his or her Memorandum of Argument. The Court itself must be able to rely on the Applicant's affidavit in determining whether or not to grant leave.

[...]

15 I reiterate Justice Reed's comments and my own comments earlier in these reasons to the effect that an applicant's affidavit is critical to the just determination of the leave stage of an application such as this. That being said, it is clear that, in the preparation and swearing of an applicant's affidavit, great care is required of the applicant and, where appropriate, his or her counsel, to ensure that Respondent's counsel and the Court are not misled. On the facts of this matter, I find that both Respondent's counsel and the Court have been misled through the swearing by the Applicant of a false affidavit, whether that false affidavit was sworn intentionally or merely negligently. In the result, this application for judicial review will be dismissed without consideration on the merits.

[13] In the present case, when served with the applicant's affidavit and memorandum of law, counsel for the Minister advised the Court that she could not respond to the natural justice issue

raised by Mr. Bamengzut without first obtaining the certified tribunal record. In consequence, the Minister did not oppose the leave application [see letter dated April 10, 2006 on A file]. I am satisfied that leave was granted on the basis of the procedural fairness issue raised in Mr. Bamengzut's affidavit because I see no merit in the remaining issue.

[14] As for whether the affidavit was misleading, I have no doubt that the affidavit was misleading to the extent that it asserted that the member made and breached undertakings to verify the AWOL documents and the ability of Mr. Bamengzut to resign from the military.

[15] With respect to the AWOL documents, as conceded by counsel for Mr. Bamengzut, no such undertaking appears on the record. I give no weight to counsel's suggestion that the undertaking was made off the record. Not only does the transcript not reflect any session off the record, but some affidavit evidence is required to support such a serious allegation. Preferably, the affidavit would be sworn by counsel who has no self-interest in the outcome of the proceeding. I find that no undertaking was made by the presiding member with respect to the AWOL documents.

[16] With respect to Mr. Bamengzut's ability to resign from the military, the transcript, as set out above, speaks for itself. No undertaking was made with respect to this matter.

[17] I would be inclined to dismiss the application on the basis of the applicant's improper conduct in filing a misleading affidavit, but for one consideration. Serious allegations of unfairness have been raised in respect of the conduct of the RPD. To deal with the application other than on the merits would leave those allegations outstanding. For that reason, I turn to the merits of the

application. It is in that context that I consider the allegations that the presiding member could not, or did not, hear the evidence.

Did the Board breach Mr. Bamengzut's right to a fair hearing?

(a) The ability of the presiding member to hear the evidence

[18] It is common ground between the parties that the requirements of procedural fairness would be breached if the presiding member conducted the hearing in a manner such that he could not hear the evidence adduced before him. What is in issue is whether Mr. Bamengzut has established that this occurred.

[19] In support of this allegation, Mr. Bamengzut has sworn that, before the parties went on the record, the presiding member advised that Mr. Bamengzut and his counsel should face him when they spoke and that they should speak as clearly as possible because of his poor hearing and poor hearing aid. Then, when Mr. Bamengzut's counsel began to question him, the presiding member failed to look at Mr. Bamengzut "as [the presiding member] maintained he must do in order to hear me". Mr. Bamengzut also points to the member's advice on the record about his hearing ability, set out above, to his counsel's remarks when he began questioning Mr. Bamengzut, also quoted above, and to the non-verbal reminders that his counsel suggested in argument were made.

[20] At the outset, I give no weight to counsel's reference in argument to non-verbal reminders because there is no evidence to support that this occurred. As for the rest of the evidence that Mr. Bamengzut relies upon, in view of my finding that Mr. Bamengzut misstated his evidence with respect to the undertakings, I place more reliance upon what is recorded in the transcript and prefer

that evidence to Mr. Bamengzut's affidavit evidence. A careful review of the transcript satisfies me, as referred to above, that the presiding member heard Mr. Bamengzut's evidence both when questioning Mr. Bamengzut and when Mr. Bamengzut was questioned by his own counsel. If that were not the case, how would the member be able to intervene in counsel's examination in order to ask pertinent follow-up questions? The member's admission of his hearing difficulty and his selection of a smaller hearing room support the conclusion that the member was attentive to the need to hear the evidence. That, together with his active and appropriate participation in the hearing, leads me to conclude that Mr. Bamengzut has failed to establish that the member could not, and did not, hear the evidence. It follows that there was no breach of procedural fairness on this ground.

(b) The alleged undertakings

[21] I have found that no such undertakings were made. Therefore, no issue of procedural fairness arises on this ground.

Did the RPD misconstrue the evidence or draw patently unreasonable inferences?

[22] Mr. Bamengzut argues that five findings of the Board were patently unreasonable. I see no merit in Mr. Bamengzut submissions for the following brief reasons:

1. It was not patently unreasonable for the Board to conclude that, contrary to his evidence, it was implausible that Mr. Bamengzut would be of any interest to the machomen. This finding was supported by Mr. Bamengzut's own evidence that he posed no threat to the machomen and that five years had passed since their alleged arrest.

2. It was not patently unreasonable for the Board to find that Mr. Bamengzut's return to Ghana from Lebanon showed a lack of subjective fear. Mr. Bamengzut's evidence was unclear and confusing with respect to where he lived in Ghana on his return from Lebanon, specifically whether he was in a secure military facility where he would be safe from his alleged persecutors.
3. It was not patently unreasonable for the Board to reject the AWOL report relating to Mr. Bamengzut's colleague Darko Sampson. Unlike other military documents, this document contains no crest or letterhead. Further, one would not expect an inquiry to be made with respect to the status of disciplinary proceedings against an individual who had been shot and killed some six months earlier.
4. It was not patently unreasonable for the Board to draw a negative inference from the fact that the machomen did not hurt Mr. Bamengzut while he was in Ghana. Mr. Bamengzut testified that he was going "from house to work and from work to the house" and that he went out with friends. This evidence is inconsistent with Mr. Bamengzut's suggestion that, at all times he was in Ghana, he was residing in the protected environment of a military barracks.
5. It was not patently unreasonable for the Board to draw an adverse inference from Mr. Bamengzut's failure to mention in his Personal Information Form any fear of persecution arising out of his desertion. The only reference to desertion in the

Personal Information Form was a reference to the fact that Mr. Bamengzut had deserted.

[23] For these reasons, the application for judicial review is dismissed. Counsel posed no question for certification, and I agree that no question arises on this record.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is dismissed.

“Eleanor R. Dawson”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-797-06

STYLE OF CAUSE: KIN-HARRY BAMENGZUT, Applicant
and
THE MINISTER OF CITIZENSHIP AND
IMMIGRATION, Respondent

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: NOVEMBER 13, 2007

**REASONS FOR JUDGMENT
AND JUDGMENT:** DAWSON, J.

DATED: NOVEMBER 30, 2007

APPEARANCES:

YEHUDA LEVINSON FOR THE APPLICANT

RHONDA MARQUIS FOR THE RESPONDENT

SOLICITORS OF RECORD:

LEVINSON & ASSOCIATES FOR THE APPLICANT
BARRISTERS AND SOLICITORS
TORONTO, ONTARIO

JOHN H. SIMS, Q.C. FOR THE RESPONDENT
DEPUTY ATTORNEY GENERAL OF CANADA