

Federal Court



Cour fédérale

Date: 20090910

Docket: IMM-4891-08

Citation: 2009 FC 607

Ottawa, Ontario, June 10, 2009

PRESENT: The Honourable Maurice E. Lagacé

BETWEEN:

ALAIN ANGE KINYOMVYI

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] Pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), the applicant is seeking a judicial review of the decision dated October 14, 2008, by the Refugee Protection Division of the Immigration and Refugee Board (panel), determining that he is neither a “refugee” nor a “person in need of protection” as defined in sections 96 and 97 of the Act. Consequently, his refugee claim was denied.

II. Facts

[2] A citizen of Burundi, the applicant alleges that he fears persecution by members of a rebel movement opposed to his work as part of a government agency fighting deforestation in Burundi.

[3] The applicant, Alain Ange Kinyomvyi, a citizen of Burundi, had, since 1998, apparently worked as a volunteer for the Organisation pour la Défense de l'Environnement au Burundi (ODEB). According to his Personal Information Form (PIF), he had started working for the ODEB as of November 2003 as a program manager, and as of April 2004 had been appointed finance manager assigned to the gathering of forestry statistics and raising environmental awareness among the Burundi people.

[4] In June 2006, the applicant apparently went to the Kayokwe region to verify the massive deforestation reported to be occurring there. After having confirmed the veracity of this report, the applicant allegedly identified the guilty party. Once back in Bujumbura, the applicant apparently reported the offence to the authorities in charge of environmental protection who, after investigating the matter, were eventually able to arrest those responsible for the illegal tree cutting.

[5] Two weeks later, the applicant purportedly began to receive anonymous threatening telephone calls and informed police of this in order to seek their protection. Nonetheless, the applicant apparently continued to receive subsequent threats up until he left for the United States on February 25, 2007, to attend a conference organized by the United Nations' Economic and Social Council in New York.

[6] After the conference on March 2, 2007, the applicant allegedly made his way to the border, where he remained without seeking refugee protection in the country hosting the conference, preferring instead to come to Canada on April 2, 2007, to claim refugee status.

III. Impugned decision

[7] The panel did not believe the applicant's claims of persecution because it did not find him to be credible. This credibility finding is essentially based on a contradiction regarding the date on which the applicant started work and his inability to clearly explain the exact nature of his work with the ODEB and the statistical methods implemented.

IV. Issue

[8] The Court is addressing only one issue:

Did the panel make an unreasonable error in basing its negative credibility finding on a minor contradiction in the reasons cited by the applicant in his claim, without giving him the slightest chance to explain this?

V. Analysis

Judicial standard of review

[9] The panel's decision is based on the applicant's lack of credibility. It is well established that the assessment of witnesses' credibility falls within the panel's jurisdiction and that it has the necessary expertise to analyze and weigh the questions of fact allowing it to assess both the credibility and the subjective fear of persecution of a refugee claimant (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425 (T.D.) (QL), at paragraph 14).

[10] In the context of an application for judicial review addressing credibility issues, the appropriate standard to be applied is that of reasonableness as articulated in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. Accordingly, the Court must show considerable deference since it is incumbent on the panel to weigh the testimony of a claimant and assess his or her credibility. If the panel's findings are reasonable, no intervention is warranted. However, its decision must be supported by the evidence; it should not be made capriciously on the basis of erroneous findings of fact or of peripheral details or without regard for the material before the panel (*Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100, at paragraph 38).

Unreasonable decision

[11] The applicant is right to complain of the principal ground given for impugning his credibility, prompting the Panel to say that it [TRANSLATION] “goes to the very heart of the [refugee] claim and undermines his credibility”. The exact date on which the applicant started work has no bearing on the applicant’s reasons for claiming refugee protection to the point of irreparably undermining his credibility. Rather, it seems the panel is using a false pretext to jump to a hasty conclusion which a more careful analysis of the evidence would have avoided.

[12] Furthermore, the Court is of the opinion that the contradiction noted by the panel is not as clear as is claimed when care is taken to properly examine the evidence on record. If the panel saw such a substantial discrepancy in the applicant’s employment dates, why then did it not give him the opportunity to explain the information already in the record and, more specifically, in the applicant’s PIF narrative: in 1998, volunteer work for the ODEB; end of November 2003 until February 24, 2007, program manager.

[13] And what does the ODEB employment certification (D-3) say which would contradict the PIF? It merely says that [TRANSLATION] “from April 2004 up until this day (23/02/2007)” the applicant worked for the ODEB [TRANSLATION] “as finance manager, but also in the gathering of forestry statistics and raising environmental awareness among the people of Burundi”. The Court finds it difficult to understand how the ODEB employment certification, which confirms that from a certain date onwards the applicant held a different position within the organization than that which he had previously held and which he had stated in his PIF, could constitute a significant

contradiction, given that the ODEB certification and the information in the PIF do not refer to the same periods of employment. At the very least, if the panel doubted or misunderstood the two information sources, it should have given the applicant the chance to explain himself before drawing a significant negative inference as to the applicant's credibility. The panel might then have been able to correct its misunderstanding of the evidence on this point.

[14] With all due deference to the panel's decision, the Court cannot do otherwise than to find that in this case it was unreasonable for it to have put such great emphasis on the perceived contradiction without giving the applicant the opportunity of addressing the issue. Furthermore, the Court sees no contradiction between the evidence offered by the applicant concerning both the dates of his employment and positions he held. This evidence did not support the panel's finding, in its unreasonable decision, that [TRANSLATION] "such inconsistency . . . goes to the very heart of the claim".

[15] In its decision, the panel referred to the applicant's inability to clearly describe the nature of the work he performed for the ODEB and the statistical methods that he was using.

[16] The applicant does not offer the most eloquent description regarding his work in relation to meeting people from various villages and his efforts to make them more aware of environmental issues. However, the Court is of the view that the panel clearly exaggerated the import of a few apparent contradictions, hesitations or vague statements that it noted in the comments of the applicant. The panel appears to have overlooked the fact that the applicant's work in the field took

place in an unusual environment where eloquence was not everyone's lot in life. Sometimes people who are well informed have trouble expressing their store of knowledge and experience, which does not preclude them from being qualified for the work they are asked to carry out. The applicant may not have been very expressive on the subject of the ODEB, but the panel could not from this fact conclude [TRANSLATION] "that he could not have experienced the incidents he alleges" and in the same breath and without valid reason dismiss all of the documentary evidence that corroborates the applicant as to these incidents.

[17] The fact remains that the panel relied on peripheral and insufficient details to reach its negative credibility finding. In focusing on details of no real consequence to the subject matter of the claim, the panel seems to have forgotten the substance of the facts on which the applicant based his claim, which it should not have done (*Afonso v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 51 quoting *Asad Javed Sheikh v. Minister of Citizenship and Immigration*, (IMM-315-99, April 25, 2000).

[18] Nothing justifies the panel's disregarding of the letter dated August 28, 2006, from the Department of Justice of Mwaro submitted as corroborating evidence, which confirms the threats to the applicant at the time of the above-mentioned incident and the complaint filed against the person who issued the threats. Additionally, nothing justifies the panel in dismissing out of hand the ODEB report which mentions attacks against the applicant.

[19] Even if the Court were to accept the panel's credibility finding as being correct, which it does not, this would in no way exempt the panel from having to analyze and assess evidence that could support the applicant's claim for protection. In fact, it is trite law that a negative credibility determination under s. 96 of the Act is not necessarily dispositive of considerations arising under s. 97 of the Act: *Ozdemir v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 1242 (QL); *Kandiah v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 275 (QL); *Bouaouni v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1540 (QL).

[20] In other words, a claimant may not be entirely credible in his or her testimony yet still face a risk to his or her life or a risk of torture, having regard to country conditions and other objective criteria. In its haste to find the applicant not credible on grounds that the Court finds inadequate and unreasonable, the panel did not exercise fair judgment and made an unreasonable error.

VI. Conclusion

[21] For these reasons, the application for judicial review will be allowed, and since no questions of general importance were proposed or deserve to be, none will be certified.

JUDGMENT

FOR THESE REASONS, THE COURT:

ALLOWS the application for judicial review;

SETS ASIDE the decision dated October 14, 2008; and

REFERS the matter back to the Board for redetermination by a differently constituted panel.

“Maurice E. Lagacé”

Deputy Judge

Certified true translation
Sebastian Desbarats, Translator

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4891-08

STYLE OF CAUSE: ALAIN ANGE KINYOMVYI v. THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: May 5, 2009

**REASONS FOR JUDGMENT
AND JUDGMENT:** LAGACÉ D.J.

DATED: June 10, 2009

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