Federal Court  Cour fédérale

Date: 20121029

Docket: IMM-765-12

Citation: 2012 FC 1237

Ottawa, Ontario, this 29th day of October 2012

Present: The Honourable Mr. Justice Pinard

BETWEEN:

Audace CISHAHAYO

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Audace Cishahayo (the "applicant") seeks judicial review of a decision made by Canada Border Services Agency ("CBSA") Officer L. Savage (the "officer") pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act"). In the decision, the officer reconsidered the negative eligibility decision regarding the applicant's refugee claim under the Safe Third Country Agreement (the "STCA") and decided that the negative eligibility decision would stand.

[2] The applicant is a citizen of Burundi. He claims he left Burundi on November 1, 2011 and that he arrived in Washington, DC on November 2, 2011.

[3] On November 14, 2011, the applicant made a claim for refugee protection at the Saint-Bernard-de-Lacolle port of entry. He claimed he had two sisters in Canada: Ms. Pascaline Uwamahoro, a Canadian citizen, as well as Ms. Françoise Kwizera, who was recognized as a Convention refugee in Canada and was in the process of applying for permanent residence status.

[4] That same day, the applicant was interviewed by a CBSA officer. The officer also interviewed Ms. Pascaline Uwamahoro, one of the applicant's alleged sisters in Canada, over the telephone. The officer found that he doubted the authenticity of the applicant's identity documents and was not satisfied that the applicant had sisters in Canada.

[5] Also on November 14, 2011, a Minister's delegate found that because the applicant had not satisfied the immigration officer that he qualified under one of the exceptions stated in sections 159.5 and 159.6 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the "Regulations"), the applicant fell under the STCA and he was ineligible to make a refugee claim in Canada. This decision is not challenged by the applicant.

[6] The applicant wrote a letter to the Chief Supervisory Customs and Border Protection Officer in Champlain, New York on December 27, 2011 requesting that he ask the Saint-Bernard-de-Lacolle port of entry to reconsider the negative eligibility decision regarding his refugee claim in

Canada. The applicant enclosed six identity documents supplementary to the documents he had presented to the CBSA on November 14, 2011.

[7] The Chief Supervisory Officer in Champlain, New York sent the request for reconsideration to the Saint-Bernard-de-Lacolle port of entry on January 5, 2012. The Acting Chief of Operations for the CBSA at the Saint-Bernard-de-Lacolle port of entry tasked an officer with the reconsideration. This officer was not involved in the original negative eligibility decision concerning the applicant.

[8] The officer tasked with the reconsideration examined the supplementary identity documents provided by the applicant in his letter dated December 27, 2011: a birth certificate, proof of residence, marriage certificate, baptismal certificate, and copy of the biographic page of a previous Burundian passport. The officer concluded that the documents did not bring any new information to light that was not available to the officers at the time the initial negative decision was rendered. The officer also stated that the applicant had demonstrated "he has the ability and the means to obtain documents through a third party and that he may circumvent normal exit procedures" with regards to his identity and travel.

[9] The officer recommended that the negative eligibility decision regarding the applicant's refugee claim should stand. It is this decision that is the subject of the present judicial review.

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[10] The only issue in the present application for judicial review is whether the officer breached the duty of procedural fairness.

[11] Correctness is the standard of review which applies to issues of procedural fairness (*C.U.P.E. v. Ontario (Minister of Labour*), 2003 SCC 29, [2003] 1 S.C.R. 539 at para 100; *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2006] 3 F.C.R. 392 at para 53).

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[12] The applicant submits that the officer's comments regarding his ability to obtain travel documents through a third party and circumvent normal exit procedures indicates that the officer was concerned about fraudulent behaviour. The applicant argues that the officer violated principles of natural justice by not giving him the opportunity to address these concerns.

[13] The applicant cites several sections of the Citizenship and Immigration Canada policy manual *PP 1 - Processing claims for refugee protection in Canada* (the "manual").

[14] The respondent argues that the applicant was already given an opportunity in his interview on November 14, 2011 to respond to concerns regarding the accuracy of the information he provided the officer. The respondent submits that in any event, the officer had no obligation to confront the applicant with information the applicant himself had provided (*Quijano v. The Minister of Citizenship and Immigration*, 2009 FC 1232 at para 30 [*Quijano*]).

[15] In reply, the applicant argues there is no indication in the officer's notes of November 14, 2011 that the applicant was given an opportunity to respond to concerns regarding the genuine nature of the information he provided.

[16] Under the STCA, refugee claimants arriving from the United States at the land border with Canada are only allowed to pursue refugee claims in Canada if they fall within an exception. One exception is if the claimant has a family member in Canada pursuant to article 159.5 of the Regulations. The onus is on the claimant to show on a balance of probabilities that he or she qualifies for the exception (STCA: Statement of Principles, section 3).

[17] I agree with the respondent that the Citizenship and Immigration Canada manual cited by the applicant is not binding, but I note that the jurisprudence cited by the respondent states that the manuals offer useful insight on the purpose and meaning of the Act and the Regulations (*Cha v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126, [2007] 1 F.C.R. 409 at para 15; *Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] 4 F.C. 358 at para 20; *Canada (Information Commissioner) v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 270, [2003] 1 F.C. 219 at para 37).

[18] Nevertheless, the only reference I see in the manual to the appropriate process for the reconsideration of a negative eligibility determination based on the STCA is in Appendix A. Appendix A reproduces the STCA Statement of Principles. Section 6 of the Statement of Principles states that each party (the United States and Canada) has the discretion to request that the other party

reconsider an ineligibility decision should new information, or information that has not previously been considered, come to light.

[19] The Supreme Court of Canada's guidance in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 [*Baker*] regarding the content of the duty of procedural fairness in a particular context is relevant to the present case because the content of procedural fairness is variable and must be determined in the specific circumstances of each case (at paragraph 21).

[20] I evaluate the five non-exhaustive factors from *Baker* in the context of a reconsideration of a negative eligibility decision under the STCA as follows (*Baker*, paras 21 to 28):

1. The nature of the reconsideration and the process followed in making it are much closer to the administrative process than the judicial process. This factor points to a weaker level of procedural protection.

2. The statutory scheme provides no legislative guidance concerning the general process for a reconsideration of a negative eligibility decision under the STCA and a judicial review of the reconsideration is a possibility. However, the reconsideration of ineligibility to claim refugee protection under the STCA is a crucial step in the refugee protection regime. As this factor provides contrary direction, it militates toward neither strong nor weak levels of procedural protection.

3. The reconsideration of a negative eligibility decision under the STCA is very significant to a refugee claimant. The decision-maker reconsiders whether the claimant should be denied the right to claim refugee protection in Canada. This factor therefore points to a higher level of procedural protection.

4. I do not believe a person whose negative eligibility decision under the STCA is being reconsidered would legitimately expect that the reconsideration process would feature a high degree of procedural safeguard. The CBSA made no representations that a certain procedure would be followed. This factor points to a lower level of procedural protection.

> 5. The Act and the Regulations are silent on the procedures to be followed for the reconsideration of a negative eligibility decision under the STCA. This militates towards respecting the choice of procedure made by the CBSA in the circumstances. This factor therefore points to a weaker level of procedural protection.

[21] Weighing the *Baker* factors, I believe the content of the duty of fairness in the present context is on the low end of the spectrum.

[22] In the absence of relevant case law regarding the content of this duty in the present context, I have considered the content of the duty of fairness in other contexts. Writing in the context of a federal skilled worker application, Justice Yves de Montigny states in *Talpur v. The Minister of Citizenship and Immigration*, 2012 FC 25 [*Talpur*] at para 21, that the duty of fairness often requires that the officer provide an opportunity for the applicant to disabuse the officer of any concerns about the credibility, accuracy or genuine nature of information submitted by the applicant in support of their application. Justice de Montigny relies on Justice Richard G. Mosley's summary of the law on this issue in *Hassani v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283, [2007] 3 F.C.R. 501:

> [24] Having reviewed the factual context of the cases cited above, it is clear that where a concern arises directly from the requirements of the legislation or related regulations, a visa officer will not be under a duty to provide an opportunity for the applicant to address his or her concerns. Where however the issue is not one that arises in this context, such a duty may arise. This is often the case where the credibility, accuracy or genuine nature of information submitted by the applicant in support of their application is the basis of the visa officer's concern, as was the case in *Rukmangathan* [*Rukmangathan v. Canada (Minister of Citizenship and Immigration)* (2004), 247 F.T.R. 147 (F.C.)], and in *John* [*John v. Canada (Minister of Citizenship and Immigration)* (2003), 26 Imm.L.R. (3d) 221 (F.C.T.D.)] and *Cornea* [*Cornea v. Canada (Minister of Citizenship*

> *and Immigration)* (2003), 30 Imm.L.R. (3d) 38 (F.C.)] cited by the Court in *Rukmangathan*, above.

[23] Although *Talpur* examines a federal skilled worker class application, I find that *Talpur* is the most relevant case advanced by the parties. I am persuaded by *Talpur* for two reasons. First, *Talpur* deals specifically with the question of the officer's duty of fairness when the applicant provides information the officer believes is not authentic. Second, both the process at issue in *Talpur* and the process in the present case are subject to the lower end of the spectrum for the content of the duty of procedural fairness (*Talpur* at paragraph 21).

[24] In *Quijano*, above, this Court examined the officer's duty of procedural fairness regarding a humanitarian and compassionate application and a pre-removal risk assessment application, which are also processes distinct from the one at issue in the present case. The officer in that case was concerned about contradictions, omissions, and implausibilities in information the applicant herself had provided with respect to various elements of her narrative, including the discovery of compromising documents and the names of the applicant's persecutors. However, I am not convinced that *Quijano* applies to the case at hand because, in contrast to *Talpur*, that decision does not address the duty of an officer who is concerned specifically with whether the evidence submitted by an applicant is fraudulent.

[25] I conclude therefore that an officer reconsidering a negative eligibility decision under the STCA has the duty to give the applicant an opportunity to disabuse the officer of any concern over the authenticity of the applicant's documents. I agree with the applicant that there is no indication in

the officer's notes from the initial screening on November 14, 2011 that the applicant was given such an opportunity. I am of the opinion that the officer in the present case breached the duty of procedural fairness by not giving the applicant this opportunity before drawing an adverse inference from the officer's concern over document forgery.

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[26] For the above-mentioned reasons, the application for judicial review is allowed and the matter is sent back for redetermination by a different Border Services Officer.

[27] I agree with counsel for the parties that this is not a matter for certification.

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JUDGMENT

The applicant's application for judicial review is allowed. The decision of Canada Border Services Agency Officer L. Savage, in which he reconsidered the negative eligibility decision regarding the applicant's refugee claim under the Safe Third Country Agreement and decided that the negative eligibility decision would stand, is set aside and the matter is sent back for redetermination by a different Canada Border Services Agency Officer.

"Yvon Pinard"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-765-12
STYLE OF CAUSE:	Audace CISHAHAYO v. THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	October 1st, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	Pinard J.
DATED:	October 29, 2012

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