

Federal Court



Cour fédérale

Date: 20160209

Docket: IMM-2253-15

Citation: 2016 FC 173

Toronto, Ontario, February 9, 2016

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

CHANCELVIE DE GRACE YOBATH NTATOULOU

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION
AND
THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Respondents

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant seeks judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of a decision by the Refugee Protection Division

[RPD] of the Immigration and Refugee Board, wherein the RPD rejected the Applicant's claim for refugee protection under sections 96 and 97 of the IRPA.

II. Background

[2] The Applicant, Chancelvie de Grace Yobath Ntatoulou (age 31), is a citizen of the Republic of Congo.

[3] The Applicant alleges witnessing, on April 5, 2014, the beating of a friend, citizen of the Democratic Republic of Congo, by the Congolese "Direction de la surveillance du territoire" [DST].

[4] Then, on May 17, 2014, while at a restaurant with work colleagues, the Applicant expressed political opinions against the president of the Republic of Congo (Denis Sassou Nguesso). She was accused by three work colleagues, as well as other patrons in the restaurant, of supporting the opposition party. Later in the evening, the Applicant was informed, by an elder man living in the same neighbourhood, that the DST was looking for her. Fearing for her security, she packed her belongings; and, using a visitor's visa for the United States, previously obtained for tourism purposes, she fled to the United States on May 18, 2014.

[5] While living in Washington, D.C., with a friend, the Applicant tried to contact her husband, a Canadian citizen. Four months after her arrival in the United States, her husband

brought her from Washington to the Canadian border on September 17, 2014. The Applicant sought refugee status at the Canadian border.

[6] In a decision, dated April 16, 2015, the RPD determined that the Applicant is neither a Convention refugee nor a person in need of protection. Specifically, the RPD held that the Applicant lacks credibility due to her behaviour following the alleged incidents of persecution; as a result of her four month delay in making a claim; and, due to her failure to claim asylum in the United States. The RPD held that the behaviour is not compatible with that of an individual with a subjective fear of persecution.

III. Issue

[7] The central issue to be determined by this application for judicial review is:
Did the RPD err in its finding that the Applicant lacked credibility?

IV. Legislation

[8] The following are the relevant legislative provisions:

Convention refugee

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

Définition de « réfugié »

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

Person in need of protection

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Personne à protéger

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

V. Position of the Parties

[9] The Applicant's main argument is that the RPD erred in rejecting her refugee claim on the sole basis that she failed to make an asylum claim in the United States; and, delayed her claim until she arrived to Canada, four months after her arrival to the United States. The Applicant firstly submits that a lack of subjective fear is not a determinative issue on a section 97 of the IRPA analysis (*Mamak v Canada (Minister of Citizenship and Immigration)*, 2014 FC 730 at para 6). Secondly, it was unreasonable, under a section 96 of the IRPA analysis, for the RPD to find that the Applicant lacked a subjective fear due to a failure to make a claim elsewhere or delay in making a claim that cannot be the only basis on which a decision-maker can rely to make a finding that an applicant lacked subjective fear – there must be other supporting elements. Thirdly, the RPD did not assess the merits of the claim, with regard to the events that

allegedly happened in the Republic of Congo; rather, the RPD only based its decision on the behavior of the Applicant in the United States.

[10] Conversely, the Respondent submits that the RPD's negative credibility findings are reasonable given the Applicant's behavior and her failure to seek asylum in the United States which undermined her claim of subjective fear. Firstly, a delay in making a claim and a failure to make a claim at the first opportunity are relevant factors in the assessment of an applicant's credibility (*Durmus v Canada (Minister of Citizenship and Immigration)*, 2015 FC 330 at para 52; *Gavryushenko v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 1209 (QL), 194 FTR 161 at para 11). Secondly, a delay in making a claim can be determinative in the absence of satisfactory explanation, even where the credibility of an applicant's claim is not otherwise challenged (*Chikerema v Canada (Minister of Citizenship and Immigration)*, 2012 FC 616 at para 21). Thirdly, it was due to the finding of a lack of subjective fear that the RPD held the Applicant was not credible. Claims under sections 96 and 97 of the IRPA may be rejected on the basis of an applicant's lack of credibility (*Canada (Minister of Citizenship and Immigration) v Sellan*, 2008 FCA 381 at para 3).

VI. Standard of Review

[11] The RPD's determinations of credibility and weighing of evidence are to be reviewed under the standard of review of reasonableness (*Iqbal v Canada (Minister of Citizenship and Immigration)*, 2014 FC 415 at para 15). This Court owes the highest degree of deference to credibility findings of the RPD unless such findings are capricious or without supporting

evidence; or, if the RPD does not provide sufficient reasons as to how it arrived at its conclusions (*Elhassan v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1247 at para 25; *Odetoyinbo v Canada (Minister of Citizenship and Immigration)*, 2009 FC 501 at para 3).

VII. Analysis

[12] The Applicant explained during her testimony before the RPD that she did not seek asylum in the United States because her spouse, a Canadian citizen, lives in Canada; and, she was attempting to contact him. Effectively, after four months of research, the Applicant left the United States and crossed the Canadian border with the assistance of her husband.

[13] The RPD rejected the Applicant's explanations for her delay in making her claim based on the fact that the Applicant previously traveled by herself; had met French speaking individuals in Washington; and, because she has advanced level of education (accounting and marketing); and it was considered that she should have done otherwise.

[14] The Court finds that the RPD erred in its determination that the Applicant lacked credibility because of her alleged lack of subjective fear. Neither failure to make a claim elsewhere, nor, delay in making a claim are, in and of themselves, determinative (*Pena v Canada (Minister of Citizenship and Immigration)*, 2011 FC 326 at para 4 [*Pena*]; *Hue v Canada (Minister of Citizenship and Immigration)*, [1988] FCJ No 283; *Wamahoro v Canada (Minister of Citizenship and Immigration)*, 2015 FC 889 at para 32):

[T]he long delay in making a claim must not be a pretext and is not in itself sufficient to reject a refugee claim without reviewing the other facts in the record.

(Malaba v Canada (Minister of Citizenship and Immigration), 2013 FC 84 at para 11)

[15] Unfortunately, this is exactly what the RPD did. The RPD had a duty to carefully consider the explanations provided by the Applicant, but, failed to do so (*Pena*, above at para 4). The Applicant has a spouse in Canada, with whom she had a child; and, she preferred to claim refugee status in Canada for the very purpose of family reunification. This Court has previously held this to be a valid reason:

[65] The only basis for a negative credibility finding is the Board's consideration of the Applicants' delay in claiming protection while residing in the United States. It is true that delay or a failure to claim can ground an adverse credibility finding (*Goltsberg*, above, at para 28). However, the Board cannot draw an adverse inference if there is a valid reason for not claiming asylum in a foreign country (*Ortiz Garzon*, above at para 30). The fact that the Applicants' sister and brother reside in Canada is, in my view, a valid reason to transit through the United States and then file a claim in Canada. The IRPA promotes the reunification of refugees with their family members (subsection 3(2)(f)). Further, the Safe Third Country Agreement between Canada and the United States includes a specific exception for family members. For the Board to not even consider this potential "valid reason" renders its analysis of the Applicants' delay in claiming protection unreasonable.

(Rajadurai v Canada (Minister of Citizenship and Immigration), 2013 FC 532 at para 65 [Rajadurai])

[16] In *Rajadurai*, above, the Applicants had spent two and a half months in the United States before applying for refugee protection. In *Al Ismaili v Canada (Minister of Citizenship and Immigration)*, 2014 FC 84, the Applicants came to Canada to make a claim after spending three months in the United States. In both cases, the Court did set aside the RPD's decisions as the

RPD had drawn an adverse inference due to the Applicants delay in making a refugee claim. In the present case, the Applicant stayed four months in the United States before reaching Canada, in an attempt to reunite with her spouse. The Court finds that a four-month delay, in comparison to the aforementioned decision is not an excessive delay warranting an adverse inference of lack of subjective fear.

[17] Given the foregoing, the RPD erred in finding that the Applicant lacked credibility by relying on an unreasonable finding of lack of subjective fear. The Applicant did provide exceptionally reasonable explanations as to why she did not claim asylum in the United States and delay her refugee status claim for four months. She did so because of a desire to reunite with her husband and her child.

VIII. Conclusion

[18] Consequently, the application for judicial review is granted.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be granted; and, the file be sent back to the RPD for assessment anew by a different panel. There is no serious question of general importance to be certified.

"Michel M.J. Shore"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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