

Federal Court



Cour fédérale

Date: 20170201

Docket: IMM-2254-16

Citation: 2017 FC 125

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, February 1, 2017

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

NANOUCHE MOKILI ANTO

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision made by the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada on May 16, 2016, affirming a

decision rendered by the Refugee Protection Division [RPD] concluding that the applicant is not a Convention refugee or a person in need of protection.

[2] For the reasons that follow, I do not agree with the applicant's arguments, and this application will be dismissed.

II. Facts

[3] The applicant states that she is a citizen of the Democratic Republic of the Congo [DRC]. She alleges that she was arrested during a peaceful political protest organized by the Union for Democracy and Social Progress (Union pour la démocratie et le progrès sociale) [UDPS] and was imprisoned for two days. She reports that she was subsequently taken to a private residence belonging to the governor of the city of Kinshasa, who allegedly forcibly confined her and repeatedly raped her over three days. The governor allegedly also threatened her with death several times during that same period. The applicant alleges that she was able to escape with the help of one of the governor's security guards whom a friend of her mother knew. She allegedly fled to Canada with a fake Belgian passport and was accompanied by a Canadian of Congolese origin. Upon arriving in Canada, the applicant claimed refugee protection.

III. Decision under judicial review

A. *The RPD's decision*

[4] The RPD found that, although it is possible that the applicant is of Congolese origin, she failed to establish her identity in a satisfactory manner. That is why the RPD did not examine the

merits of her refugee claim. In its reasons, the RPD made certain findings regarding the documents the applicant filed to establish her identity, namely: a passport from the DRC, a voter's card, a birth certificate, an individual record of civil status, and a certificate of nationality. Given that those documents play a critical role in the issues raised by the applicant, I will briefly review the RPD's reasons regarding each of them:

- 1. The passport and the voter's card:** The RPD noted the analysis reports prepared by an expert from the Canada Border Services Agency [CBSA] finding that the material of the applicant's passport was authentic, but that there was evidence that the passport had undergone significant alterations, including: (a) dirt and debris under the lamination; (b) duplicated letters; (c) the fragmented blue coats of arms; and (d) the name, surname and readable zone that were allegedly cut from other documents and affixed to the biographical data page. In light of these observations, the expert found that the passport had been falsified.
- 2. The voter's card:** The applicant alleges that she used this card to obtain her Congolese passport. The RPD noted the reports from the CBSA expert finding that the voter's card was counterfeit for the following reasons: (a) the corners of the material, including the sleeve, were cut by hand; (b) the wrong background printing technique was used; (c) the microprint was either non-existent or of poor quality; and (d) the material reacted strongly to ultraviolet light.
- 3. The birth certificate:** According to the applicant's testimony, her mother allegedly obtained this document in the municipality of Ngaliema while the applicant was in Canada. However, the RPD noted that her written account described her confinement during that same period at the residence of the governor of Kinshasa, but not her presence in Canada. The RPD was not satisfied that the certificate was authentic because the stamp number at the bottom of the document did not match the one at the top, whereas the stamp numbers at the top and bottom of the individual record of civil status were identical. Thus, the RPD found that the applicant's credibility was undermined by those inconsistencies.
- 4. The individual record of civil status:** According to the applicant's testimony, her mother apparently also obtained this document using a copy of her birth certificate. The RPD noted that neither the birth certificate nor the individual record of civil status had security features or a photograph that could link them to the applicant. The RPD also noted that the addresses that appear on the birth certificate and the individual record of civil status are different. The applicant explained this discrepancy by the fact that her mother owned two houses. The RPD did not accept this explanation because it did not match her written statement. Therefore, the RPD found that the applicant's testimony was not credible in this regard.
- 5. Certificate of nationality:** This document was allegedly obtained by the applicant's mother using a copy of her birth certificate. The RPD noted that the certificate of

nationality shows a different address than the one that appears on the birth certificate. The RPD also noted the documentary evidence explaining that certificates of nationality from the DRC normally list the documents that were used to establish the nationality of applicants, which was not the case with the applicant's certificate.

[5] Therefore, the RPD gave no probative value to those five documents.

[6] The RPD also noted that the applicant was no longer in possession of the fake Belgian passport used to travel to Canada. The RPD also stated that it was implausible that the applicant did not know certain details about the man who allegedly helped her travel to Canada.

[7] For all those reasons, the RPD dismissed the applicant's testimony, as it was deemed not to be credible.

B. *The RAD's decision*

[8] The RAD first reviewed the issues as to (i) the admissibility into evidence of two documents that were not submitted before the RPD and (ii) the holding of a hearing. The RAD found that the documents were inadmissible because they did not meet any of the admissibility criteria under subsection 110(4) of the IRPA and, as a result, it decided that there was no need to hold a hearing under subsection 110(6) of the IRPA.

[9] The RAD subsequently reviewed the evidence on record and, stating essentially the same reasons as those of the RPD, found that the applicant had not established her identity, thus undermining her credibility. Since her identity could not be established, the RAD did not analyze the merits of her refugee claim.

IV. Issues

[10] The applicant argues that (a) the rejection of the additional evidence and the refusal to hold a hearing; (b) the panel's finding regarding her identity; and (c) the panel's refusal to examine the merits of her claim were all unreasonable.

V. Standard of review

[11] The standard of review that applies to RAD decisions for questions of fact and questions of mixed fact and law is that of reasonableness (*Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93, at paragraphs 32 and 35; *Yeboah v. Canada (Citizenship and Immigration)*, 2016 FC 780, at paragraph 19). The standard of review that applies to the rejection of additional evidence is also that of reasonableness (*Canada (Citizenship and Immigration) v. Singh*, 2016 FCA 96, at paragraph 29 [*Singh*]).

VI. Analysis

A. *Rejection of the additional evidence and the holding of a hearing*

[12] Subsection 110(4) of the IRPA provides that, for appeals before the RAD, only the following new evidence is admissible: (a) evidence that arose after the RPD's rejection of the claim; (b) evidence that was not reasonably available at the time of the claim before the RPD; or (c) evidence that was available at the time of the claim before the RPD, but that the person could not reasonably have been expected in the circumstances to have presented at the time of the rejection. The Court of Appeal recently established that the conditions for admissibility under

subsection 110(4) of the IRPA are inescapable and leave no room for discretion on the part of the RAD (*Singh*, at paragraph 35).

[13] Considering that the clearance certificate was issued on March 16, 2015, that the applicant had filed into evidence other documents that were obtained on approximately the same date, that the RPD's decision rejecting the applicant's claim was made in August 2015, and that before, during and after the hearing before the RPD, the applicant could not have been unaware of the importance of establishing her identity, the RAD reasonably found that the certificate was not admissible in accordance with subsection 110(4) of the IRPA.

[14] In addition, in accordance with subsection 110(6) of the IRPA, having no additional evidence to consider, the RAD reasonably found that there was no need to hold a hearing.

B. *Was the finding regarding the applicant's identity reasonable?*

[15] In accordance with section 11 of the *Refugee Protection Division Rules*, SOR/2012-256 [Rules], the "claimant must provide acceptable documents establishing their identity." In addition, pursuant to section 106 of the IRPA, if the refugee claimant is unable to provide acceptable documents to establish their identity, has not provided a reasonable explanation for the lack of documentation and has not taken reasonable steps to obtain it, the RPD must take this into account in its analysis of the claimant's credibility.

[16] The applicant submits that the word "acceptable" in section 11 of the Rules, although not defined, cannot mean that the documents submitted must be [TRANSLATION] "perfect."

According to her, the problems identified by the CBSA are merely the result of administrative shortcomings in the DRC and should not serve as the basis for refuting the presumptions of validity and authenticity of the documents. Similarly, the applicant finds that the RPD erred by assessing the identity-related documents based solely on Canadian standards, thus disregarding the administrative difficulties and realities in the DRC. According to the applicant, such an approach shows a lack of flexibility and sensitivity to the realities of certain developing countries, particularly the DRC.

[17] I reject the applicant's arguments alleging that the RAD's and RPD's analyses of the identity-related documents are unreasonable. It is well established that the issue of identity is central to the RPD's expertise and that the Court should therefore show deference to RPD decisions on this issue (*Dai v. Canada (Citizenship and Immigration)*, 2015 FC 723, at paragraph 20).

[18] Identity is a question of fact that is subject to the balance of probabilities standard of evidence. The burden on refugee claimants to submit acceptable documents that establish their identity is heavy (*Malambu v. Canada (Citizenship and Immigration)*, 2015 FC 763, at paragraph 41). In this case, the RAD applied the appropriate standard of proof. Contrary to the applicant's submissions, nothing indicates that either the RPD or the RAD was looking for evidence that was [TRANSLATION] "perfect" or "beyond all doubt." In addition, the RAD's reasoning is supported by certain evidence that was relevant to the applicant's identity, including the expert analysis reports, while still taking into account the applicant's oral testimony.

Contrary to the applicant's argument, the findings are entirely reasonable in light of all the evidence.

[19] The applicant correctly notes that there is a presumption of authenticity that, in principle, applies to any document issued by a state authority. However, that presumption can be refuted when there when there is a valid reason to doubt the authenticity of the documents (*Gulamsakhi v. Canada (Citizenship and Immigration)*, 2015 FC 105, at paragraph 7), and there were many in this case. In fact, the case law recognizes several valid and legitimate reasons for doubting the authenticity of documents, thus undermining their credibility and plausibility (see, for example, *Bagire v. Canada (Citizenship and Immigration)*, 2013 FC 816; *Jackson v. Canada (Citizenship and Immigration)*, 2012 FC 1098).

C. *Was it reasonable for the RAD to decide not to examine the merits of the claim?*

[20] When a refugee claimant is unable to establish their identity, a negative conclusion as to credibility “will almost inevitably be drawn” and thus be “fatal” to the claim (*Barry v. Canada (Citizenship and Immigration)*, 2014 FC 8, at paragraphs 21–22). The Court has consistently held that identity is a determinative issue and that no analysis of the merits of a claim is required if a refugee claimant's identity is not proven (*Daniel v. Canada (Citizenship and Immigration)*, 2016 FC 1049, at paragraph 28).

[21] In short, the ability to establish identity is an important facet of Canadian immigration law. This is an issue that can be fatal to a refugee claim.

[22] Naturally, there may be circumstances under which a claimant is unable to establish identity, such as for reasons related to health, age, statelessness, difficulties encountered in a failed state or childhood trauma (this list is not exhaustive). If the RPD is satisfied that the evidence supports such facts, identity can certainly be assessed and considered from another angle. That was the case in *Abdullahi v. Canada (Citizenship and Immigration)*, 2015 FC 1164, at paragraph 9, in which Justice Hughes found that the administrative decision regarding identity was unreasonable, given that the documentary evidence and case law confirmed that it was practically impossible to obtain documents from the state authorities in Somalia to confirm identity. Here, there is no evidence indicating that this was the case.

[23] Regardless, the fact remains that findings on identity are factual in nature and subject to some deference from the Court. Thus, given the applicant's failure to establish her identity, it was reasonable for the RPD and the RAD to refuse to examine the merits of her claim.

VII. Question for certification

[24] During the hearing, counsel for the applicant raised the following question: Does the RAD have jurisdiction to call into question how foreign authorities issue administrative documents to their citizens in the case of a refugee claim in Canada?

[25] The criteria for certification were set forth by the Federal Court of Appeal in *Zhang v. Canada (Citizenship and Immigration)*, 2013 FCA 168, at paragraph 9. To be certified, a question must (i) be dispositive of the appeal and (ii) transcend the interests of the immediate parties to the litigation, as well as contemplate issues of broad significance or general

importance. In my view, the question proposed by the applicant does not meet either of those criteria. For that reason, the question will not be certified.

VIII. Conclusion

[26] Consequently, the application for judicial review is dismissed. No question is certified, and no costs are awarded.

JUDGMENT

THE COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;
2. No question is certified;
3. No costs are awarded.

“Alan S. Diner”

Judge

Certified true translation
This 10th day of October 2019

Lionbridge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2254-16

STYLE OF CAUSE: NANOUCHE MOKILI ANTO v. THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: JANUARY 23, 2017

JUDGMENT AND REASONS: DINER J.

DATED: FEBRUARY 1, 2017

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Appendix A: Relevant provisions

Immigration and Refugee Protection Act, SC 2001, c 27	Loi sur l'immigration et la protection des réfugiés, LC 2001, ch 27
Credibility	Crédibilité
106 The Refugee Protection Division must take into account, with respect to the credibility of a claimant, whether the claimant possesses acceptable documentation establishing identity, and if not, whether they have provided a reasonable explanation for the lack of documentation or have taken reasonable steps to obtain the documentation.	106 La Section de la protection des réfugiés prend en compte, s'agissant de crédibilité, le fait que, n'étant pas muni de papiers d'identité acceptables, le demandeur ne peut raisonnablement en justifier la raison et n'a pas pris les mesures voulues pour s'en procurer.
Appeal to Refugee Appeal Division	Appel devant la Section d'appel des réfugiés
110 [...]	110 [...]
Evidence that may be presented	Éléments de preuve admissibles
(4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.	(4) Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet.
Hearing	Audience
(6) The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred	(6) La section peut tenir une audience si elle estime qu'il existe des éléments de preuve documentaire visés au

to in subsection (3)

(a) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal;

(b) that is central to the decision with respect to the refugee protection claim; and

(c) that, if accepted, would justify allowing or rejecting the refugee protection claim.

Refugee Protection Division
Rules, SOR/2012-256

Documents

11 The claimant must provide acceptable documents establishing their identity and other elements of the claim. A claimant who does not provide acceptable documents must explain why they did not provide the documents and what steps they took to obtain them.

paragraphe (3) qui, à la fois :

a) soulèvent une question importante en ce qui concerne la crédibilité de la personne en cause;

b) sont essentiels pour la prise de la décision relative à la demande d'asile;

c) à supposer qu'ils soient admis, justifieraient que la demande d'asile soit accordée ou refusée, selon le cas.

*Règles de la section de la
protection des réfugiés,
DORS/2012-256*

Documents

11 Le demandeur d'asile transmet des documents acceptables qui permettent d'établir son identité et les autres éléments de sa demande d'asile. S'il ne peut le faire, il en donne la raison et indique quelles mesures il a prises pour se procurer de tels documents.