

Federal Court



Cour fédérale

Date: 20181024

Docket: IMM-5309-17

Citation: 2018 FC 1071

Toronto, Ontario, October 24, 2018

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

**LEAYAH-ROXANE ELIKYAH BAHATI
DANIEL MATHIEW JONATHAN JACOBSON
INAYAH YODAH QETSIYAH JACOBSON
TYRONE DAVID EMMANUEL JACOBSON
MIKAEL LUCAS JAN JACOBSON
JAYDEN NOLHAN TIMOTHEY JACOBSON
DAREN ELIJAH NOAH JACOBSON
YLHAN ISAIYAH ELHIAN JACOBSON**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] In this judicial review, the Principal Applicant and her seven children [the Minor Applicants] challenge the November 20, 2017 refusal of their claim [the Decision] brought before the Refugee Protection Division [RPD or the Board]. The Board determined that the Applicants had not established their identities on a balance of probabilities, citing credibility concerns. The Board further concluded that the refugee claim was “manifestly unfounded”. For the reasons that follow, the application for judicial review is allowed.

II. Background

[2] The Applicants claim to be citizens of the Democratic Republic of Congo [DRC]. The Principal Applicant states that she is married to Mr. Jacques Jacobson, a former South African citizen who acquired Congolese citizenship. Mr. Jacobson is the biological father of five of the seven Minor Applicants, three that were born to the Principal Applicant, and two to a previous spouse. The other two Minor Applicants are the Principal Applicant’s children from a previous relationship. The Principal Applicant was appointed as the designated representative for all seven Minor Applicants.

[3] The Applicants fear persecution on the basis of political opinion, claiming that the authorities view the Principal Applicant as a political opponent. The Principal Applicant cites her father’s affiliation with an opposition party, the Union for Democracy and Social Progress,

and her involvement in political protest against the government, as the roots of her problems in the DRC. There, she claims that she was arrested, detained, raped and tortured by the Agence nationale de renseignement on three separate occasions – first in January 2015, then from July 2015 until December 2015, and lastly in March 2017.

[4] The Principal Applicant alleges that her husband paid bribes for her release and continued to be extorted until December 2016. In March 2017, both were arrested. She states, based on reports from family members, that her husband has been killed as a result of political violence in the DRC, as have her uncle and cousin.

III. The Decision

[5] In a detailed, 74-paragraph decision, the Board methodically dealt with the Applicants' identity documents, finding issues with many of them. As a result, the Board either rejected their authenticity or gave them little weight due to credibility concerns arising out of the integrity of the documents, or the explanations about them provided by the Principal Applicant. The Board noted problems with the following documents:

- Electoral card: contained words in a different font from a sample electoral card, as well as a repeat photograph used on various identity documents;
- Driver's licence: also had the repeat photograph, along with the Principal Applicant's last name printed in block letters, unlike her signature on other documents;
- State diploma: the Board found to be a photocopy purporting to be an original, and once again containing the impugned repeat photograph;

- Birth certificates: these were issued following an adoption judgment for two of the children, but all seven certificates were signed by the same city official, the Bourgmestre, on two different dates, and all inaccurately listed the father as a South African citizen;
- Court judgments: these related to two Minor Applicants and stated that the Principal Applicant appeared in person at the public court hearings in the DRC, a fact that was contradicted by her testimony;
- Baptism cards: these belonged to the Minor Applicants, but were found to be photocopies containing a stamp from the church with the signature of an “unknown person”, and lacked photographs or biometric data;
- Photocopies of school documents: were presented in support of the Minor Applicants, which also lacked photographs or biometric data;
- Family composition certificate: was signed by the Bourgmestre, and contained two changes in black pen, and stated that the Principal Applicant’s husband was South African, a mistake the Bourgmestre should have caught.

[6] The Board also impugned identity-related documents submitted post-hearing including:

- Two handwritten letters, one from a cousin (who the Principal Applicant maintained obtained the documentation after the Applicants fled), and the other from a neighbour, with neither letter containing security features, nor sworn affirmation;
- Additional education documents for five of the Minor Applicants, all issued in Kinshasa in 2017 and impugned for inconsistencies, including in spelling, signatures, and school authenticity.

[7] While the Board noted that it was sympathetic to the difficulties and stresses facing the Principal Applicant during the hearing, and aware of her diagnoses of Post-Traumatic Stress Disorder and major depressive disorder, it did not feel this explained the issues with respect to the identity documents and oral evidence. The Board made no finding on the merits of the claim, for which the Primary Applicant presented other supporting evidence including a detailed medical report with a diagram depicting the injuries suffered by the Principal Applicant consistent with torture, and a psychiatric report speaking to the Principal Applicant's psychiatric state after the various alleged incidents of rape and torture.

IV. Issues

[8] The Applicants raises two issues:

- A. Were the Board's credibility findings regarding identity reasonable?
- B. Was the Board's "manifestly unfounded" conclusion reasonable and/or procedurally unfair?

[9] The standard of review for credibility is reasonableness. The same is true of "manifestly unfounded" findings (*Nanyongo v Canada (Citizenship and Immigration)*, 2018 FC 105 at para 8). The standard of review for violations of natural justice breaches is correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79).

V. Analysis

A. *Were the Board's credibility findings regarding identity reasonable?*

[10] The Applicants cite issues with the key identity findings bulleted above, which I will enumerate as follows: (a) official documents were rejected on a microscopic analysis; (b) the impugned documents were neither flagged by Canada Border Services Agency [CBSA], nor sent for independent authentication; (c) the Applicants provided the Board with various identity documents containing biometrics and security features, and there was no evidence suggesting that they had any other identity; (d) the Board made unreasonable findings of implausibility relating to identity; (e) the Board wrongly found it only received a photocopy of the Principal Applicant's state diploma; and (f) the Board disregarded the Principal Applicant's psychiatric state in its zeal to discount identity evidence. Ultimately, the Applicants argue that their identity could have been established on testimony alone, or with other corroborative evidence that the Board did not address.

[11] The Respondent counters that the Board may discount documents where there is a sufficient evidentiary basis for doubting authenticity (*Arubi v Canada (Citizenship and Immigration)*, 2012 FC 36 at para 34). Therefore, significant deference is owed to the Board's conclusions that the Applicants' documents were fraudulent and/or of little probative value, and that many of the conclusions were based on inconsistencies in the evidence; identity findings are at the core of the Board's expertise (*Salajova v Canada (Citizenship and Immigration)*, 2018 FC 823 [*Salajova*] at para 12). Further, the Respondent submits that the reviewing Court is to approach the reasons and outcome as an "organic whole" (*Communications, Energy and*

Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd 2013 SCC 34 at para 54).

Overall, the Respondent argues that the Board's Decision is reasonable, and includes a sound basis upon which it made its various credibility findings on identity, and without identity being established, the Board had no reason to examine the merits of the claim (*Salajova* at para 22).

[12] After a review of the record and the evidence it contains, I find several flaws with the Board's findings regarding identity which render the Decision unreasonable. I will examine these flaws in the order enumerated by the Applicants, from *a*) through *f*).

a) Microscopic analysis of documents

[13] Overall, I agree with the Applicants that the Board was microscopic in what appeared to be a search for errors and inconsistencies, or implausibilities, in order to impeach evidence. For instance, once the repeat photograph problem was identified on one document, the Board imported its findings to all other documents containing the photograph, despite the Principal Applicant's explanations that the same photographs were provided to obtain her identity documents in the DRC. The law is clear that disqualifying, or finding one document fraudulent, does not taint all other documents (*Hohol v Canada (Citizenship and Immigration)*, 2017 FC 870 [Hohol] at para 22).

[14] Moreover, the Board took issue with the fact that the Principal Applicant's last name was printed in block letters on her driver's licence. In making this finding, the Board failed to address the Principal Applicant's explanation that her hand had been injured after torture.

The Principal Applicant's medical report documented serious injuries to her hand and arms. The Board never referred to this medical evidence.

[15] The Board also took issue with the very small font differential on the Principal Applicant's electoral card. If there was some doubt about the integrity of the document due to the question of font details, the Board could have sent it for authentication, as I will explain next.

b) Lack of authentication after no "red flags"

[16] While recognizing there is no obligation for the Board to send identity documents for authentication, other factors in this case signal that it was unreasonable not to do so.

[17] First, no red flags were raised by CBSA, which seized the Applicants' identity documentation at the time of their claim. Nor was there any request for participation by a representative of the Minister at the refugee hearing, as can occur when there are concerns regarding the integrity of a claim, including due to issues of document integrity (see Rule 27 of the *Refugee Protection Division Rules*, SOR/2012-256).

[18] Second, in addition to a detailed report from a psychiatrist at the Canadian Centre for Victims of Torture, the Principal Applicant also submitted a detailed medical report from a family physician (who is also a lecturer at the University of Toronto's Faculty of Medicine). The doctor's report addresses extensive physical scarring consistent with torture, including a description of each of the Principal Applicant's 24 scars, from head to toe, along with a diagram depicting the front and back of her body showing the exact location of each scar. The doctor

concluded that these injuries and other ongoing symptoms are consistent with a history of torture.

[19] Third, according to Response to Information Requests before the Board, both the electoral card and driver's licence are issued by a national authority and have biometric data (National Documentation Package [NDP] Items 3.11, 3.14). Other documents issued by the DRC do not have biometric data (NDP, Item 3.15). While there used to be a national identity document, there is no longer one. The electoral card serves as proof of identity in the country, being one of the few DRC documents with biometrics. The Board should have thus sent it for verification, given its perceived minor imperfections, being one of the few DRC identity documents, and in light of my first two observations.

[20] I note that the Board avails itself of documentation authentication expertise from time to time, and is supported in doing so by the jurisprudence (see *Agyemang v Canada (Minister of Citizenship and Immigration)*, 2016 FC 265 [*Agyemang*] at para 14). Justice Grammond recently relied on *Agyemang* at paragraph 9 of *Mohamud v Canada (Citizenship and Immigration)*, 2018 FC 170 [*Mohamud*], where a negative identity finding was also based on allegedly fraudulent documentation, as explained in this excerpt:

[6] Mr. Mohamud argues that a minor typographical error in Ms. Alasow's statement cannot, on its own, reasonably ground a finding that the document is fraudulent. I agree. The RPD cannot find a document to be inauthentic on the basis of speculation: it must do so on the evidence (*Jacques v Canada (Citizenship and Immigration)*, 2010 FC 423 at para 16 [*Jacques*]). In some cases, sufficient evidence will be on the face of the document itself (*Jacques* at para 16). In this case, however, the RPD's conclusion that Ms. Alasow's affidavit was fraudulent was unreasonable

(*Jacques* at para 17; *Ali v Canada (Citizenship and Immigration)*, 2015 FC 814 at para 31 [*Ali*]).

[7] In the RPD's view, it was implausible that a document prepared by professionals would contain such an error. But clerical errors are not necessarily determinative of authenticity (see *Arubi v Canada (Citizenship and Immigration)*, 2012 FC 36 at para 35). They occur even in decisions of this Court (*Ali* at para 31). The RPD also failed to refer to those aspects of Ms. Alasow's statement which enhance its trustworthiness (*Jacques* at para 18): the document identifies the Somali interpreter who assisted in its preparation and it contains the stamp of the notary public who commissioned it. In these ways, the document conformed to what is reasonably expected of a sworn statement (see *XY v Canada (Citizenship and Immigration)*, 2016 FC 1325 at para 13).

[8] Implausibility findings should only be made in the clearest cases, and must be sensitive to the realities of a claimant's cultural context (*Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 at para 7; *Duroshola v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 518 at paras 24-26). I agree with Mr. Mohamud that the RPD failed to account for Ms. Alasow's lack of sophistication and reliance upon third parties for assistance. Further, it was not reasonable for the RPD to expect Mr. Mohamud to explain the error in Ms. Alasow's affidavit, since he did not prepare that document (*Sitoo v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1513 at para 13).

[9] Lastly, a finding that a false or irregular document detracts from a claimant's overall credibility must be "cautiously approached" (*Guo v Canada (Citizenship and Immigration)*, 2013 FC 400 at para 7). Such implications are serious (*Agyemang v Canada (Citizenship and Immigration)*, 2016 FC 265 at paras 13-14). The RPD's unreasonable conclusion was thus compounded by the negative inference it then drew against Mr. Mohamud's general credibility for tendering a fraudulent document.

c) *Biometrics and security features*

[21] Another common thread the Board used to impeach the reliability of some of the Applicants' identity documents (e.g. school and baptismal documents) was the fact that they lacked a photograph, biometric data or security features. Equally, the Board impeached the

reliability of the two letters speaking to the Principal Applicant's identity and rejected them on the basis that they were neither sworn, nor had any security features. I make four observations in regard to these particular conclusions.

[22] First, the Applicants did not control how the schools and church issued their documents, or whether they included photographs or other biometric data. Second, where photographs were affixed to identity documents, the Board made a point of rejecting those documents because they were repeat photographs. Third, it is not hard to imagine that, when attempting to have someone obtain duplicate documents for a refugee claim when one has left their country, the same photograph could be used to apply for different documents. Fourth, as the Applicants note, there was no evidence or allegation of another identity belonging to family members, or any concerns raised by CBSA. Again, these documents could have been independently authenticated for fraud.

d) Signatures and implausibility

[23] The Board took issue with the signatures on certain identity documents. For instance, the Board was concerned that the baptism cards for various Minor Applicants were signed by "some unknown person". I note, however, that both the name of the official and the name of the church in Kinshasa are provided directly on the documents.

[24] The Board also impugned the reliability of birth certificates, this time because the same person signed them. However, the Board disqualified other documents when different people signed them (e.g. the additional education documents).

[25] These findings merit two comments. As mentioned above, one ordinarily cannot control which officials sign off on identity documents. Also, the criticisms, when contrasted, are unreasonable, putting the Applicants in a “catch-22”: on the one hand, the Board criticized certain documents signed by the same official, but on the other hand, criticized certain documents signed by different individuals.

[26] The Board also doubted the reliability of the family composition form that was signed by the Bourgmestre, because it listed Mr. Jacobson as a South African citizen. The Board found that if the Bourgmestre knew the family, he would have indicated that Mr. Jacobson was a Congolese citizen.

[27] In my view, it was unreasonable for the Board to draw a conclusion that just because the Bourgmestre knew the family, it was thus implausible he would sign a document indicating that Mr. Jacobson was South African, when the latter had at some point obtained Congolese citizenship. Mr. Jacobson was a white South African. It is quite plausible that a government official might not know, or notice, that a document listed him as a South African, whether or not that official knew him. As noted in *Mohamud* at paragraph 8, implausibility findings should only be made in the clearest of cases.

e) *State Diploma*

[28] The Board faulted the Principal Applicant for producing a photocopy of her state diploma purporting to be an original, which she denies. Indeed, the transcript does not reflect that a

photocopy was handed up to the Board, or that the member had any issue with the document (see Certified Tribunal Record, page 446).

[29] A similar issue arose in *Agyemang* when the Board expressed concerns with the authenticity of a newspaper, claiming it to be a photocopy. Unusually, Justice Annis was presented with the original of the impugned newspaper in the judicial review application materials, which he found was “clearly an original document”. His observations are equally applicable here:

[14] It is obviously not for the Court to substitute its opinion for that of the RAD, but nevertheless I am concerned that the implication that the Applicant tendered a fraudulent document is serious enough that the appropriate response may have been to require proper authentication, as any opinion based on the document itself would normally require the assessment of an expert in document verification.

f) Psychiatric state of the Principal Applicant

[30] Finally, I note that the Board found fault with the first document, the electoral card, which led to concerns with other documents, in part based on its issuance date in December 2014. The Board noted that Principal Applicant testified that she wasn’t sure when she had received the original, but thought that it was in 2013, and that her cousin had obtained this duplicate document for her in 2015.

[31] The Principal Applicant takes issue with the Board’s finding that she provided illogical testimony about the issuance of her electoral card. The Principal Applicant noted in her post-

hearing submissions to the Board that she confused details regarding dates due to her psychiatric state.

[32] As the flaws in items *a) to e)* above are significant and central to the credibility finding, such that they render the Board's decision unreasonable, I make no finding on this point.

Conclusion on identity findings

[33] The Board's summation on the identity document component of the claim states:

[66] In light of the above, the panel finds that the claimants have not met the burden of, on a balance of probabilities, establishing their personal identities or nationalities.

[34] I recognize that the Board is entitled to determine that documents are fraudulent, and thus have little or no probative value. The Board is also entitled to find that that an applicant's explanations simply do not add up (*Hohol* at para 19). I nonetheless agree with the Applicants' concerns with several of the Board's key identity findings. This Court has stated that "the finding that identity documents found to be false or irregular can have an effect on a claimant's overall credibility must be cautiously approached" (*Guo v Canada (Minister of Citizenship and Immigration)*, 2013 FC 400 at para 7; see also *Mohamud* at para 9).

[35] Here, the consequences of the credibility determination related to identity documents could have grave consequences, in that the Board did not look to the merits of the claim that concerns a country riddled by violent political, social, ethnic and regional conflicts, in which

government inefficiencies are well documented in the tribunal record, and in which the Principal Applicant submitted significant medical evidence explaining her scarring consistent with torture.

[36] Ultimately, the Board's decision must be justified, transparent and intelligible, and fall within a range of acceptable outcomes defensible in fact and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). The role of the Court on judicial review is not to reweigh the evidence (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 61). Indeed, while I make no findings on the Applicants' identities, the Board's analysis does not allow me to conclude its Decision was reasonable, because I cannot tell whether the RPD's overall identity determination in this case would have been different without the flaws reviewed above.

B. *Was the Board's "manifestly unfounded" conclusion reasonable and/or procedurally unfair?*

[37] As I have found that the identity finding was unreasonable based on the rationale provided by the Board, there is no need to comment on this second issue.

VI. Certified Question

[38] The Applicants propose the following questions for certification:

A. Must the allegation that a claim to Convention refugee status is manifestly unfounded be expressly raised at the hearing by the Board and the claimant afforded the opportunity to address it with evidence and argument?

- B. Does a finding that a claim to Convention refugee status is manifestly unfounded require that all testimony, corroborative evidence in support of the claim and allegations of potential risk be established to be clearly fraudulent, and not merely incredible on a balance of probabilities?
- C. Is prohibition of appeal against the determination of a claim to Convention refugee status when it has been found to be manifestly unfounded contrary to Canada's international human rights law obligations?

[39] The Respondent opposes certification. Given my findings above, I agree with that view and will decline to certify the proposed questions, because they all target the Board's "manifestly unfounded" finding, and therefore none of them would be dispositive of the appeal (*Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at para 46).

VII. Conclusion

[40] The application for judicial review is granted.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. This application for judicial review is granted.
2. The Refugee Protection Division's November 20, 2017 Decision is set aside, and the matter is remitted for redetermination by a different board.
3. No questions will be certified.
4. There is no award as to costs.

"Alan S. Diner"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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MINISTER OF CITIZENSHIP AND IMMIGRATION

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APPEARANCES:

Raoul Boulakia FOR THE APPLICANTS

Leila Jawando FOR THE RESPONDENT

SOLICITORS OF RECORD:

Raoul Boulakia FOR THE APPLICANTS
Barrister and Solicitor
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT
Toronto, Ontario