

Federal Court



Cour fédérale

Date: 20190117

Docket: IMM-720-18

Citation: 2019 FC 68

Ottawa, Ontario, January 17, 2019

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

HECTOR NSUE MBANG

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Hector Nsue Mbang, is a 19 year old citizen of Equatorial Guinea. He fled to Canada after his extended family beat him due to his sexual orientation. On October 31, 2016, he made a claim for refugee protection fearing that his family will kill him if he is returned.

[2] The Refugee Protection Division of the Immigration and Refugee Board (the “RPD”) found that the Applicant failed to establish his identity and dismissed his claim. On May 31, 2017, the Applicant appealed to the Refugee Appeal Division (the “RAD”) and submitted more evidence. The RAD rejected this evidence and dismissed the appeal.

[3] On February 14, 2018, the Applicant applied for judicial review. For the reasons that follow, I find the RAD decision is unreasonable and I will set it aside.

II. **Facts**

[4] The Applicant is a 19 year old citizen of Equatorial Guinea who was beaten by his extended family when they found out that he is homosexual. His mother, herself a refugee who has lived in Canada since 2013, obtained a passport for him to travel to Canada. On September 5, 2016, the Applicant (then 17 years old) arrived in Canada. Fearing that his family in Equatorial Guinea will kill him for being homosexual should he return, he filed a claim for refugee protection on October 31, 2016. At that time he was a minor, so a designated representative (“DR”) was assigned in his case.

A. *RPD Hearing*

[5] On March 24, 2017 the RPD hearing took place. The Applicant provided evidence to establish his identity including: a passport issued on August 17, 2015; a birth certificate issued on October 21, 2016; an untranslated school document; a letter from the Embassy of the Republic of Equatorial Guinea (the “Embassy”) dated February 6, 2017; and his mother’s testimony as a witness at the RPD hearing.

[6] On May 5, 2017, the RPD decided the Applicant failed to prove his identity on a balance of probabilities. In coming to its decision, the RPD cited many problems with the Applicant's evidence. For example, the date of birth on his passport is incorrect (it states April 21, 2009 instead of April 29, 1999), and its laminate was falling off. And although the Applicant had provided a letter from the Embassy to explain the date of birth was an error, the RPD questioned how the Embassy could determine this after receiving only duplicates, not the original.

[7] Further evidence included a birth certificate which misspelled the city Malabo (it says Manlabo) and an untranslated school document stating the Applicant's name and date of birth, but had no security features or photographs. The RPD gave this school document no weight towards establishing the Applicant's identity.

[8] The Applicant's mother also testified. The RPD found her testimony to be vague, confusing, evasive, and overall not credible. In addition, the RPD asked the Applicant's mother why she did not submit her refugee documents, which she said names the Applicant as her son. The RPD noted that even after the hearing neither counsel nor the DR submitted her refugee claim documents.

[9] Having found the Applicant did not establish his identity on a balance of probabilities, the RPD dismissed his refugee claim.

B. *The RAD Appeal*

[10] On May 31, 2017, the Applicant appealed the RPD's decision to the RAD. In support of his appeal, the Applicant filed two further pieces of evidence, both dated after the RPD hearing:

1) a letter written by his DR dated June 6, 2017; and 2) another letter from the Embassy explaining the date of birth was an error (dated June 8, 2017).

[11] The RAD explained that new evidence must satisfy the requirements of section 110(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the “IRPA”) as well as the factors in the Federal Court of Appeal’s decision *Raza v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385 [*Raza*] (which are applied to RAD decisions according to *Canada (Minister of Citizenship and Immigration) v Singh*, 2016 FCA 96 [*Singh*]).

[12] The RAD rejected both pieces of evidence finding neither qualified as “new” under section 110(4) of the IRPA. In addition to not satisfying section 110(4), the RAD doubted the authenticity of the new Embassy letter for numerous reasons: the letterhead was different than the first letter’s letterhead, it was not clear who the second Embassy letter was addressed to, and although the two letters were signed by the same individual the signatures were different. Based on these discrepancies, the RAD additionally found the second letter from the Embassy was not new evidence based in *Raza* and *Singh*.

[13] Although the Applicant submitted that the RPD erred by finding his mother’s testimony about his passport was evasive and confusing, the RAD said that this argument sidestepped the issue of why his passport contained the wrong birthdate. As for the poor quality of the passport, the RAD deferred to the RPD’s meaningful advantaged (the RPD had observed the original), and upheld its credibility findings on this document.

[14] However, the RAD disagreed with the RPD’s finding that the Applicant could have travelled with multiple passports. Namely, the RAD noted that the Applicant’s birth certificate

was issued *after* his passport, which meant he could not have used his birth certificate to *obtain* the passport as initially alleged. When the RPD asked questions about this chronological problem at the RPD hearing, the explanation given was that another passport existed. The RAD determined the inconsistent statement meant the RPD was incorrect and, as a result, the inconsistent testimony further compromised the witness's testimony and the Applicant's credibility.

[15] Although the Applicant argued the RPD should have accepted the first Embassy letter at face value, the RAD explained that the RPD is entitled to make findings on documents. The RAD also found the RPD properly weighed the school document, which had no photograph or security features. Without these features, it was of limited value of establishing identity in this case. Finally, the RAD disagreed with the Applicant's argument that his own testimony should have been assessed. In its decision dated January 15, 2018, the RAD dismissed the appeal.

III. Issue

[16] The sole issue is whether the RAD's treatment of the evidence unreasonable?

IV. Standard of Review

[17] The reasonableness standard of review applies to the RAD's decision about whether an applicant established identity (*Poudel v Canada (Citizenship and Immigration)*, 2016 FC 978 at para 5).

V. **Analysis**

A. *Is the RAD's treatment of the evidence unreasonable?*

(1) Documentary evidence

[18] The Applicant submits the RAD erred by applying Canadian standards to his documents. For example, he submits the RAD's expectation that his school documents contain security features such as watermarks or encryptions is too high of a standard. He submits that when assessing his documents, the RAD should have considered the Equatorial Guinea's country conditions and the fact that it is a developing African nation. At the hearing, the Applicant also addressed the spelling mistake on the birth certificate, arguing that before rejecting this evidence on the basis of a typo it is important to consider the country condition evidence including the level of training given to the staff members preparing these documents.

[19] The Respondent argues that the RAD had reasonable concerns about the evidence. For example: the passport's date of birth is incorrect; the passport's laminate is falling off; the Applicant incorrectly stated how the passport was issued; the Applicant's birth certificate was not issued until after the passport's date of issuance; and the birth certificate incorrectly spells the issuing city's name. In regards to the letter from the Embassy and school documents, the Respondent submits the RAD reasonably gave them little weight.

[20] A decision about whether or not an applicant has failed to establish identity must be based on the record before the decision maker. In this case, the record consisted of country condition evidence that these documents, rejected for their poor quality laminate and typos, were

produced in a developing nation. Yet the RAD does not consider this context when considering the quality of the passport or other documents:

[23] The [Applicant] submits that the RPD erred in finding the witness' testimony about the passport evasive and confusing. The [Applicant] argues that the witness was forced to guess on how her cousin obtained her passport. I find this argument by the [Applicant] sidesteps that important issue here which is why there would be such a discrepancy in the birthdate as reported on the [applicant's] passport. It is simply insufficient to state that it was just not "done well." No other evidence was provided to explain how a birthdate could be reported wrongly.

...

Both credibility findings made by the RPD regarding the passport, namely the wrong date of birth recorded for the [Applicant] and the quality of the documents itself, are correct in my view.

[21] At the judicial review hearing, I asked the Respondent about the wrong birthdate on the birth certificate. If the birthdate had been correct, then the Applicant would have been only 8 years old at the time of the RPD hearing. Of course, the Applicant attended his own refugee hearing and was clearly not 8 years old, nor did he pretend to be. This is because the Applicant submitted this birth certificate as a genuine document with a typographical error. I note that the RPD decision quotes documentary evidence illustrating that these documents are not provided the same level of care as one might expect:

[42]The documentary evidence on point makes the following comments concerning documents issued in Equatorial Guinea:

The civil registries make no attempt to independently verify the testimony of informants and witnesses. Therefore, civil documents should be given no more weight than affidavits if presented in support of a relationship claim. Documents that were issued soon after the event are considered more reliable than so called delayed certificates.

[Emphasis in original]

[22] The RAD also found the RPD did not err when it gave no weight to the Applicant's school documents on the basis that they do not have watermarks or encryptions:

[40] The [Applicant] argues that the RPD erred in not considering the school document separately and assigning weight based upon the other problematic documents. I cannot agree with this submission. The RPD recognized that the document bears the [Applicant's] name and date of birth but given it does not bear his photograph, nor does it have any security features, it is of limited value. It is open for the RPD to weigh the document in relation to the other documents to find that the document is afforded no weight in establishing the [Applicant's] national and personal identity.

[23] Again, it is unreasonable to use Canadian standards to reject the Applicant's documents. A reasonable decision would consider the objective country condition evidence, not reject it for failing to conform to Canadian expectations. I find that the RAD, by rejecting the Applicant's credibility on the basis of typographical errors, the quality of materials, and unreasonably high expectations for security features, has failed to provide a cogent decision considering that these documents were produced in a developing nation.

(a) *Sworn testimony*

[24] The Applicant also submits the RAD erred by rejecting his mother's testimony about his identity. Even if other documentary evidence raises reliability concerns, the Applicant submits the general rule is that sworn testimony must be accepted unless it is contradicted (*Tran v Canada*, 2013 FC 1080 at paras 3-5 [*Tran*]).

[25] The Respondent argues the Applicant's argument is really a disagreement over the weight given to his mother's evidence.

[26] The Applicant is correct that sworn testimony about identity is not affected by irregular identity documentation. As explained by Justice Campbell in *Tran* at paragraphs 3-5, the rejection of the Applicant's documents (which I have already found unreasonable) does not mean that his mother's testimony on the issue of identity can be rejected outright:

[3] In my opinion reading the decision as a whole it is readily apparent that the RPD Member was preoccupied with the expectation that an applicant for refugee protection must present "acceptable" documentation to prove his or her identity (Decision, para. 7). Indeed, the RPD rejected the Applicants' identity documents on the basis that they were copies, have no security features other than stamps, are faxes with no evidence as to when and how they were faxed, and "were old" (Decision, para. 12). It is also readily apparent that, based on the RPD's documentation expectations which were not met, the Applicant's sworn evidence was rejected as unbelievable on virtually every critical factual issue of the claim:

The panel assigned a significant negative inference to the claimants' failure to provide sufficient credible or trustworthy documents in support of their identities and nationalities, and to her provision of a Family Register and Birth Certificate whose authenticity was questionable at best.
[Emphasis added] (Decision, para.14)

[4] In my opinion the process of decision-making engaged by the RPD Member concerned is fundamentally flawed and contrary to law. In reaching a conclusion on the identity of an applicant who claims refugee protection, the Applicant's sworn evidence is presumed to be true unless there are reasons to doubt its truthfulness (*Maldonado v. M.E.I.*, [1980] 2 F.C. 302 (C.A.), p. 305) and the quality of the decision-making in reaching a credibility finding must be high:

In my view, the board was under a duty to give its reasons for casting doubt upon the [applicant's] credibility in clear and unmistakable terms. The

board's credibility assessment, quoted supra, is defective because it is couched in vague and general terms (*Hilo v. Canada (Minister of Employment & Immigration)* (1991), 15 Imm. L.R. (2d) 199 at para.6) (C.A.).

[5] Except in the case of a clear and substantiated finding of fraud that casts a shadow over the entirety of an applicant's evidence, the rejection of irregular identity documentation, nevertheless, leaves sworn testimony on the issue of identity un-assailed. In the decision under review there are no clear reasons provided for not accepting the Applicant's sworn evidence in support of the claim, including a finding that the Applicants tendered a fraudulent claim, which in my opinion is apparently what was in the RPD Member's mind throughout.

[27] In sum, I find that the RAD's decision unreasonably dealt with the evidence and I will order this decision to be set aside.

VI. **Certified Question**

[28] Counsel for both parties was asked if there were questions requiring certification, they each stated that there were no questions arising for certification and I concur.

VII. **Conclusion**

[29] I find that the RAD's treatment of the evidence was unreasonable, and this application for judicial review is allowed.

JUDGMENT in IMM-720-18

THIS COURT'S JUDGMENT is that:

1. The decision under review is set aside and the matter referred back for redetermination by a differently constituted panel.
2. No question is certified.

"Shirzad A."

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-720-18

STYLE OF CAUSE: HECTOR NSUE MBANG v THE MINISTER OF
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