

Federal Court



Cour fédérale

Date: 20190129

Docket: IMM-3916-18

Citation: 2019 FC 126

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Montréal, Quebec, January 29, 2019

PRESENT: The Honourable Madam Justice Roussel

BETWEEN :

VALERY KINDU LUKOMBO

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Context

[1] The applicant, Valery Kindu Lukombo, is a citizen of the Democratic Republic of Congo [DRC]. He arrived from the United States in Canada on July 10, 2015, and claimed refugee protection a few weeks later. He alleges that he was arrested by police in the night of November 18, 2013, as part of Operation Likofi, an operation led by the DRC National Police to

put a stop to crimes committed by members of organized crime gangs called the “*kulunas*”. The applicant alleges that he was wrongly described as a “kuluna” despite only being a [TRANSLATION] “mere shopkeeper” and that he was tortured while he was incarcerated.

[2] On December 6, 2016, the Refugee Protection Division [RPD] rejected his claim because it lacked credibility. It also found that there was a lack of subjective fear and that the applicant’s conduct was not compatible with that of a person truly afraid for their life.

[3] On July 18, 2018, the Refugee Appeal Division [RAD] dismissed the applicant’s appeal on essentially the same grounds.

[4] The applicant is seeking a judicial review of that decision. Even though the applicant raises a number of issues in his application for judicial review, the Court is of the opinion that some of the RAD’s findings are erroneous and require the Court’s intervention.

II. Analysis

[5] The RAD’s decision, including its credibility findings and assessment of the evidence, is reviewable against a standard of reasonableness (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35). The Court will not intervene if the decision falls within “a range of possible, acceptable outcomes which are defensible in respect of the facts and law” and as long as “the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility” (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59).

[6] In its decision, the RAD found that a wrong date undermined the applicant's credibility. The RAD criticized the applicant for writing in his Basis of Claim [BOC] form that he first left the DRC on April 22, 2013, while in the accompanying written account, he stated that he left the DRC on November 23, 2013. According to the RAD, the applicant only noticed the error in his written account at the hearing.

[7] A review of the file shows that this finding is wrong. First, the applicant's written account does not say that he left the DRC on November 23, 2013, but rather November 22, 2013. November 22, 2013, is noted twice in the applicant's written account. It also appears in a number of places in the documents completed by the applicant in support of his refugee protection claim. Furthermore, it is wrong to claim that the applicant realized the error at the hearing. The hearing before the RPD began on December 8, 2015. On September 4, 2015, the applicant faxed the RPD a corrected BOC form, replacing the wrong date of April 22, 2013, with November 22, 2013.

[8] The respondent recognizes that the RAD's analysis of this issue is wrong. However, he submits that the error is not determinative in the RAD's overall assessment of the applicant's credibility.

[9] The Court cannot agree with the respondent's argument. In its reasons, the RAD writes as follows:

It must be noted that at the beginning of the hearing [the applicant] stated that he would tell nothing but the truth and that his form was true and correct. It must also be noted that it was only during the hearing that he noticed the big mistake at the beginning of the written account. The RAD is unable to accept such an egregious error, or the explanation given for it, that it was a transcription

error made by his lawyer. The RAD sees a significant error in the dates, which undermines the appellant's credibility.

[Emphasis added.]

[10] Given the vocabulary used by the RAD to describe the alleged error, the impact the error had on the RAD's overall assessment of the applicant's credibility must be questioned.

[11] The Court also notes that the RAD criticized the applicant for not mentioning the three notices to appear from the DRC National Police in the written account accompanying his BOC form. Before the RPD, the applicant testified having been informed of the notices of appear through his brother, who had gone to see his landlord. Even though he cannot remember the exact date, the applicant explained that he had not mentioned them in his BOC Form because he received them after completing and submitting this form. The RAD rejected the applicant's explanation on the ground that "on numerous occasions, written accounts submitted are amended and sometimes amended again, even at the beginning of the hearing, which [the applicant] did not see fit to do even though he claims that the authorities of his country are looking for him. Furthermore, [the applicant] stated during the hearing that he had learned this information in late 2015 and was informed about it twice".

[12] The Court believes that the RAD's analysis of this issue lacks intelligibility and justification because the notices to appear were filed in the applicant's record before the hearing before the RPD. The record does indeed show that the notices to appear were received by the RPD on November 27, 2015, that is, a few weeks before the first day of the hearing. Moreover, the RAD had no evidence to show that the applicant had personally received the notices to

appear in 2013 or 2014. The evidence on file establishes rather that the applicant was in Angola when the notices to appear were issued. It is hard to understand how the RAD can reproach the applicant for not amending his written account before the hearing when the notices to appear were properly disclosed to the RPD before the hearing on the one hand, and on the other hand what it has in mind when it writes that “[t]his addition is substantial in this case”. Even though the respondent acknowledges that the notices to appear were sent to the RPD before the hearing, he was unable to establish before the Court that the applicant had the additional duty of amending his BOC Form, or risk having his credibility undermined.

[13] The Court recognizes that significant deference is owed to credibility determinations made by the RAD (*Odia v Canada (Citizenship and Immigration)*, 2018 FC 363 at para 6). The record also shows that other factors allowed the RAD to draw negative inferences regarding the applicant’s credibility. However, since the RAD’s entire decision is based on the fact that the applicant was not found to be credible and given that at least one of the things the RAD criticized him for is characterized as a *big, significant* and *egregious* error, the Court is not in a position to determine the impact of the RAD’s errors on its final determination. For these reasons, the Court concludes that the decision was unreasonable.

[14] Consequently, the application for judicial review is allowed, the decision is set aside and the matter is referred back for redetermination by a differently constituted panel of the RAD.

[15] No question of general importance was submitted for certification, and the Court finds that this case does not raise any such questions.

JUDGMENT in docket IMM-3916-18

THE COURTS ORDERS AND ADJUDGES that:

1. The application for judicial review is allowed;
2. The Refugee Appeal Division's decision dated July 18, 2018, is set aside;
3. The matter is referred back for reconsideration by a differently constituted panel of the Refugee Appeal Division;
4. No question of general importance is certified.

“Sylvie E. Roussel”

Judge

Certified true translation
This 7th day of February, 2019.

Johanna Kratz, Translator

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3916-18

STYLE OF CAUSE: VALERY KINDU LUKOMBO v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: MONTRÉAL, QUEBEC

DATE OF HEARING: JANUARY 28, 2019

JUDGMENT AND REASONS: ROUSSEL J.

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