

Federal Court



Cour fédérale

Date: 20220419

Docket: IMM-1019-18

Citation: 2022 FC 556

Ottawa, Ontario, April 19, 2022

PRESENT: Madam Justice Walker

BETWEEN:

MAX MWANA KASON KAMWANGA

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Mr. Kamwanga, is a citizen of the Democratic Republic of the Congo (the DRC). He seeks judicial review of a decision of the Refugee Protection Division (the RPD) dated February 1, 2018 dismissing his claim for refugee protection (the Decision). The RPD rejected the Applicant's testimony based on adverse credibility findings and concluded that the Applicant is neither a Convention refugee nor a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

[2] As explained below, the application will be allowed. While I have found no breach of procedural fairness on the part of the RPD, I agree with the Applicant that the member failed to justify their credibility conclusions with reasons that respond to the review framework established in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (*Vavilov*).

I. Background

[3] The Applicant fears being imprisoned and killed by governmental authorities in the DRC because he has been a member of the *Église Ministère de la Restauration à partir de l'Afrique Noire* (the Church) since 2005. The Church's leader, Paul Joseph Mukungubila Mutombo is a politician who denounced the regime of President Kabila. The Church was targeted by the government's intelligence authorities, culminating in events in late December 2013 when the authorities began arresting members of the Church. During the authorities' search for Mr. Mukungubila, one member of the Church was killed. In response, Church members held a protest against the government on December 30, 2013. The Applicant alleges that the government then staged a number of violent incidents in the country and blamed the Church for the violence, forcing Mr. Mukungubila to flee to South Africa.

[4] The Applicant states that the government initially arrested senior Church members but, by February 2014, had broadened its operations to target other, regular members of the Church. At this point, the Applicant became afraid for his own safety in Lubumbashi where he lived and went to stay with his older brother in Likasi in the DRC.

[5] The timeline of critical events as recounted in the Applicant's Basis of Claim form (BOC) is as follows:

December 28, 2013: Government authorities arrested Church members for distributing a letter written by Mr. Mukungubila.

December 29, 2013: One Church member died during a confrontation with government authorities at the Church. The Applicant was not present at the Church that day.

December 30, 2013: Church members protested and the government responded by staging attacks at prominent state buildings and facilities around the country. The government blamed the Church for the attacks and resulting chaos and began a campaign of arresting senior Church members.

February 2014 (approx.): The Applicant learned that the government had begun to target regular members of the Church, left Lubumbashi, and went to live with his brother in Likasi.

March 2014: The Applicant feared staying too long in one place and moved to his parent's home in Lubumbashi. There, he was arrested by members of the DRC's intelligence authority, deprived of food and toilet facilities, beaten and threatened with death, all while being pressured for information concerning the Church.

July 1, 2014: The Applicant escaped his captors with the assistance of his uncle, a former intelligence agent. The Applicant returned to his brother's house in Likasi and remained hidden in the house.

December 2, 2014: The Applicant was again arrested and detained by the security authorities who continued the government's operations against Church members.

July 28, 2015: The Applicant escaped captivity with the assistance of his uncle. The uncle informed the Applicant he could not stay at his home and the Applicant moved to a remote northern village.

March 2, 2016: The Applicant traveled to Zambia for an interview to obtain a U.S. visa to attend a religious conference in the United States. He then returned to the DRC.

March 21, 2016: The Applicant left the DRC for the United States.

April 2016: The Applicant traveled to the Canadian border and made a refugee claim.

[6] The RPD heard the Applicant's claim on October 26, 2017 and issued the Decision on February 1, 2018. This application for judicial review was held in abeyance pending the Federal Court of Appeal decision in *Kreishan v Canada (Citizenship and Immigration)*, 2019 FCA 223, and the appeal of that decision to the Supreme Court of Canada (leave to appeal dismissed on March 5, 2020).

II. Decision under review

[7] The RPD found that the Applicant's testimony was not credible and concluded that he had not established the allegations that formed the basis of his fear of persecution and serious harm in the DRC. The RPD identified three issues in the Applicant's testimony.

[8] The RPD questioned why the Applicant: did not flee to his brother's home in Likasi immediately after the December 30, 2013 incidents at the Church; returned to his brother's house after his first escape from jail in July 2014; travelled back to the DRC after his interview in early March 2016 at the U.S. embassy in Zambia. The RPD found that the Applicant had not provided reasonable explanations to their questions and that his failure to explain his conduct damaged his credibility.

[9] The RPD then considered the Applicant's documentary evidence: a letter from the *Centre international de formation en droits humain et développement* dated July 25, 2015 (the Letter); various documents pertaining to his brother's successful refugee claim in South Africa; and, a series of emails between himself and family members. The RPD found that the documents lacked sufficient probative value to re-establish the Applicant's credibility.

III. Analysis

Procedural Fairness

[10] The Applicant submits that the RPD breached his right to procedural fairness because he was not provided an opportunity to respond during the hearing to the tribunal's concerns with his documentary evidence. Those concerns were only identified in the Decision. Having failed to raise any issues it had with his supporting documents at the hearing, the Applicant states that the RPD was required to assess the documents on what they say and, in the absence of authenticity concerns, could not ascribe them little probative value.

[11] Allegations of breach of procedural fairness do not necessarily lend themselves to a standard of review analysis, although the Court's approach to such allegations resembles that of correctness (*Canadian Pacific Railway v Canada (Attorney General)*, 2018 FCA 69 (*Canadian Pacific*)). The role of the Court is to determine whether the procedure is fair in all the circumstances (*Canadian Pacific* at paras 54–56; *Alkhoury v Canada (Citizenship and Immigration)*, 2020 FC 153 at para 10).

[12] I am not persuaded by the Applicant's arguments and find that the RPD committed no breach of procedural fairness in assessing the documents submitted for its consideration by the Applicant. I agree with the Respondent that the RPD is required to consider the evidence provided by a refugee claimant and to weigh that evidence in relation to the claim under scrutiny. I note that the Applicant's counsel invited the RPD to review the documents in question during the hearing and argued that they support the Applicant's credibility. The Applicant cannot now be surprised that the RPD reviewed the documents in its assessment of his refugee claim.

[13] In the Decision, the RPD set out its reasons for rejecting the Applicant's testimony based on lack of credibility and turned to the supporting documents. As the Applicant notes, the RPD raised no concern as to the authenticity of the documents. Where relevant to the individual document, the RPD considered their probative value, whether the facts set out were sufficient to establish one or more elements of the Applicant's claim, the weight or persuasiveness of the documents, and their sufficiency in re-establishing the Applicant's allegations (see, *Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14 at paras 21-35; *Canada (Citizenship and Immigration) v Sellan*, 2008 FCA 381 at para 3). In so doing, the RPD committed no procedural error. The Applicant's arguments regarding the member's analysis of his documents and the country documentation are better viewed as arguments contesting the reasonableness of that analysis and not the fairness of the RPD's process.

Is the Decision reasonable?

[14] The determinative issue in this application is whether the RPD's reasons and negative conclusions regarding the Applicant's credibility are reasonable. The parties submit, and I agree, that this issue challenges the merits of the Decision and must be reviewed for reasonableness (*Vavilov* at paras 10, 25).

[15] The Applicant argues that (1) the RPD's conclusion that his testimony was not credible is not reasonable and reflects an over-zealous assessment of his evidence against the central elements of his claim; and (2) the RPD erred in failing to conduct a separate analysis of his claim under section 97.

Credibility

[16] The parties disagree as to whether the RPD accepted the Applicant's identity as a member of the Church. The Respondent's contention is that the RPD's general statement that the Applicant had not credibly established his allegations must be read to mean that the tribunal did not believe he was a Church member.

[17] The RPD makes no finding in the Decision regarding the Applicant's membership in the Church. In response to a question from counsel during the hearing, the RPD indicated that its credibility concerns included the issue of membership. Nevertheless, I find that this statement, in the absence of specific reference to the issue, is not sufficient to read the RPD's rejection of the Applicant's "allegations" as a finding that he was not a member of the Church. The RPD centred its analysis of credibility on specific findings and the introductory and closing references in the Decision to the Applicant's allegations are properly read in the context of the findings made. Indeed, if the Decision is read as premised on a conclusion that the Applicant was not a Church member, there is little doubt that such conclusion was not made transparently or intelligibly.

[18] The Applicant challenges each of the RPD's three adverse credibility findings. He argues that those findings are in fact implausibility findings but I do not agree. There is a distinction between a negative credibility finding and a finding that a claimant's narrative of one or more events is implausible. The RPD made no reference in the Decision to implausibility and the Applicant has not persuaded me that the way in which the adverse findings were made denotes a conclusion that his version of events was not plausible.

[19] I do, however, agree with the Applicant that the RPD's reasons for rejecting the Applicant's testimony are not transparent when viewed against the record and do not reflect a coherent chain of reasoning that justifies its conclusions (*Vavilov* at para 85). I base my conclusion primarily on two of the RPD's credibility findings.

[20] The RPD noted that the Applicant returned to his brother's house after his escape from jail in July 2014 and asked why he thought government authorities could not find him in Likasi. The member did not accept the Applicant's explanation that he had been arrested from his parents' home in Lubumbashi in March 2014, and not in Likasi. The RPD stated that it would have expected the Applicant to make other arrangements and that his failure to do so damaged the credibility of his alleged arrest in March 2014.

[21] I find that the RPD's reasoning is not intelligible. The RPD stated that "[i]n light of his other allegations", the Applicant had not provided a reasonable explanation for returning to his brother's house. The statement is vague and does not explain the finding. The RPD relied on the Applicant's testimony that he returned to Lubumbashi because he was afraid of staying too long in one place to conclude that he was aware of the risk of staying at his brother's home. The conclusion ignores the substance of the Applicant's evidence. The Applicant was arrested at his parents' home in Lubumbashi on March 1, 2014. There is no evidence in the record that the security authorities had knowledge of his older brother's home in Likasi or that they had tracked the Applicant to Likasi. In addition, the Applicant remained hidden in the house after his initial arrest because he was aware of the heightened risk. In my view, the RPD provided no convincing argument for its conclusion that it would have expected the Applicant to make alternate

arrangements. The Respondent's argument that the RPD based its conclusion on the fact that the Applicant had been arrested at one family home and could not reasonably expect to remain hidden at the home of another family member is not reflected in the Decision.

[22] The RPD asked the Applicant to explain why he returned to the DRC after his interview in early March 2016 at the U.S. embassy in Zambia. The Applicant explained that he was planning to travel to the United States with a group and that he had had no choice but to return to the DRC pending the group's departure later the same month. He also stated that his uncle had instructed him to return because the uncle could provide security in Lubumbashi. The RPD found that the Applicant had not provided a reasonable explanation for his reavilment to the DRC. In its view, the Applicant's return further damaged his credibility with regard to whether he was being sought by the government.

[23] The RPD discounts the Applicant's explanation for his return to the DRC with little consideration of his need to travel with the group. The RPD's reliance on the fact that the country documentation indicated that many members of the Church had fled to Zambia at the time fails to engage with the Applicant's specific reason for his course of action. The RPD also failed to consider the short duration of the reavilment. The Applicant did not intend to return to the DRC and remain there for any appreciable period of time (*Abawaji v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1065 at para 15). The absence of an intention to remain in the DRC coupled with the Applicant's departure from the country soon after his return were material factual aspects that should reasonably have formed part of the RPD's analysis. As a

result, I find that there are material omissions in the RPD's assessment of the Applicant's brief return to the DRC pending his departure for the United States.

[24] The foregoing errors in the RPD's assessment of the Applicant's credibility are significant shortcomings in the Decision and require redetermination of his refugee claim (*Vavilov* at para 100). I note that the RPD's first credibility concern centred on the Applicant's delay in fleeing to his brother's home in Likasi after the December 30, 2013 incidents at the Church and I find no reviewable error in this aspect of the RPD's analysis. However, the overall assessment of the Applicant's credibility by the RPD is undermined by the errors discussed in this judgment. It is evident from the Decision that the member's ultimate conclusion that the Applicant had not established his allegations rests on their cumulative reasons for rejecting his testimony.

[25] Briefly, I find that the RPD could reasonably conclude that the documentary evidence submitted by the Applicant was not sufficient to overcome its credibility concerns. Moreover, a lack of credibility with respect to the central elements of a refugee claim may apply to documentary evidence adduced to corroborate a version of the facts (*Abdelgadir v Canada (Citizenship and Immigration)*, 2020 FC 721 para 18).

Section 97

[26] Finally, although I have concluded that the RPD's credibility analysis is neither transparent nor justified, the RPD did not err in failing to undertake a separate section 97 analysis of the Applicant's evidence. A finding that an applicant lacks credibility is sufficient to

justify the rejection of a refugee claim under both sections 96 and 97 of the IRPA unless there is independent and credible documentary evidence in the record to support a section 97 decision (*Qahramanloei v Canada (Citizenship and Immigration)*, 2021 FC 422 at para 28; *Zamor v Canada (Citizenship and Immigration)*, 2021 FC 672 at para 8). In this case, the Applicant relied on the same facts and evidence in respect of his section 96 and section 97 claims.

IV. Conclusion

[27] The application is allowed and the Applicant's refugee claim returned to an independent panel of the RPD for redetermination.

[28] No question for certification was proposed by the parties and none arises in this case.

JUDGMENT IN IMM-1019-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.
2. No question of general importance is certified.

"Elizabeth Walker"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1019-18

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