Federal Court  Cour fédérale

Date: 20220727

Docket: IMM-6446-21

Citation: 2022 FC 1119

[ENGLISH TRANSLATION]

Ottawa, Ontario, July 27, 2022

PRESENT: Madam Justice Walker

BETWEEN:

JOSEPHINE EBOU NEE DAFONSEGA TCHIIANIKA
SAMETON BIFANE EBOU-NGOUAMI

Applicants

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

I. Background

[1] The applicant, Josephine Tchiianika, and her son (the associate applicant) are citizens of the Republic of the Congo (the Congo). Together, the applicants are seeking judicial review of a decision by the Refugee Appeal Division (RAD) dated August 24, 2021. In the RAD's decision, the RAD rejected the appeal and confirmed the decision of the Refugee Protection Division

(RPD), which determined that the applicants were neither Convention refugees nor persons in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

[2] The applicant arrived in Canada on January 4, 2019, and claimed refugee protection. She states that the applicants face a risk of persecution by the Congolese authorities because of their relationship with Denis Ebou, the applicant's husband and the associate applicant's father. The applicants claim that Mr. Ebou was the secretary general of Union pour le Progrès (UP) [*union for progress*], an opposition political party. They add that Mr. Ebou was a close friend of General Dabira, a former high-ranking soldier who was arrested on December 7, 2017, for participating in an alleged coup d'état. On December 9, 2017, soldiers went to the applicants' home to arrest and abduct Mr. Ebou. The applicant alleges that the military raped her during the kidnapping to intimidate and torture her. Fearing further violence, she fled to Angola and stayed there for a year before traveling to Canada.

[3] The associate applicant came to Canada as an international student on September 20, 2017, at the age of 15. He claimed refugee protection on January 17, 2018, after learning about what had happened with his father in the Congo in December 2017.

[4] The Minister intervened before the RPD to raise doubts or issues regarding the credibility of the applicants' refugee claims. According to the Minister, the applicants submitted fraudulent newspaper articles concerning Mr. Ebou's engagement, role and arrest. In support of his allegation, the Minister filed in evidence the original version of the newspaper *Le Courrier de*

Kinshasa dated December 12, 2017, to show the differences with the version of the same daily newspaper filed by the applicants, which included two articles about Mr. Ebou's disappearance. The Minister also noted that the associate applicant's birth certificate states that Mr. Ebou's occupation was a fisherman (or sailor), but the associate applicant's application for a study permit states that his father was [TRANSLATION] "retired". The Minister therefore argued that this documentation did not coincide with the applicants' statement that Mr. Ebou was the secretary general of the UP.

[5] In February 2021, the RPD rejected the applicants' refugee protection claims, having determined that the applicants were not at risk in the Congo. The RPD found that the applicants had not established that Mr. Ebou was the target of the authorities, but acknowledged that the applicant had been raped. However, the RPD found that the applicant had not demonstrated that she was at serious risk of persecution in the Congo as a woman.

[6] The applicants appealed the RPD decision.

II. RAD decision

[7] The RAD first admitted three documents the applicants submitted as new evidence. The documents all concern the death of the applicant's brother and relate to their allegations regarding the basis of the refugee protection claims.

[8] The RAD then reviewed the RPD decision, the applicants' appeal arguments, and the evidence on the record. The RAD concluded that the RPD did not err in assessing the applicants'

credibility and confirmed the rejection of the refugee claims. The RAD's determinative findings are as follows:

1. The article in the newspaper *Le Courrier de Kinshasa* presented by the associate applicant is fraudulent, and the RPD did not err in refusing the applicants' request to remove the newspaper from the file. The applicants are responsible for the evidence they submit to corroborate their refugee claims. The RAD does not accept their explanations that they acted in good faith and that they did not know whether the newspaper was genuine.

2. The fraudulent newspaper brings into question the allegations that Mr. Ebou was the secretary general of the UP and that the Congo authorities wanted to kidnap him because of his affiliation with General Dabira or for his political opinions. In addition, the applicant's testimony on Mr. Ebou and his involvement in the activities of the UP was very limited.

3. In reaching its conclusion regarding Mr. Ebou, the RAD considered other evidence on file, including Mr. Ebou's UP membership card. However, the membership card does not support the claim that Mr. Ebou was the secretary general of the UP or that he was subject to persecution because of his political opinion.

4. The documents concerning the death of the applicant's brother do not establish that the brother was targeted because of Mr. Ebou's political opinion and his affiliation with General Dabira. There is nothing in these documents to support a conclusion that the brother was killed by the authorities or otherwise targeted because of Mr. Ebou.

5. The RAD admits that the applicant was raped. However, the RAD finds that the applicant has not established that she is at serious risk of persecution or that she is personally at risk in the Congo because of her gender. Regarding gender-based sexual violence in armed conflicts, the RAD noted that there was no armed conflict in Pointe-Noire, where the applicant lived in the Congo. In addition, the applicant's personal situation differs from what is mentioned in the documentary evidence regarding sexual violence in the Congo outside armed conflict.

III. Analysis

1. The RAD's assessment of the applicants' credibility

[9] The determinative issue in this application is whether the RAD's findings regarding its assessment of the applicants' credibility are reasonable. Although worded differently in their

written and oral arguments, the applicants raise two main issues: Did the RAD consider all of the evidence in arriving at its negative determination regarding the applicants' credibility, and did it address the applicant's rape in a coherent and intelligible manner?

[10] The parties agree that the applicable standard of review is reasonableness. The Court agrees (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–10, 23–25; *Labana v Canada (Citizenship and Immigration)*, 2022 FC 414 at para 8).

[11] The applicants argue that the RAD did not consider all of the evidence in its analysis of their submissions regarding Mr. Ebou. According to the applicants, the RAD's failure to mention major evidence in their claim undermines the reasoning and coherence of its analysis, thus rendering its findings of fact unreasonable.

[12] In particular, the applicants argue that the RAD omitted any reference to the following evidence on the record:

1. The written testimony of Mr. Ntsoumou-Pankima, who held the position of computer scientist and communications officer in the UP, of which he had been a member until 2017. Mr. Ntsoumou-Pankima was responsible for issuing the UP membership cards and refers to Mr. Ebou as [TRANSLATION] "Comrade Ebou". In addition, he states that Mr. Ebou had participated in several political meetings organized by General Dabira and that Mr. Ebou had become a potential target, which justified his abduction.

2. The written testimony of Mr. Bavouezoka Mshampoya, a neighbour of the Ebou family in Pointe-Noire, Congo. Mr. Bavouezoka Mshampoya states that he was sitting in a telephone booth located diagonally across from the applicant's home on December 7, 2017, when the area was surrounded by soldiers in a truck. He heard screams, and then the police came out of the house with Mr. Ebou. He was handcuffed, and the police took him away [TRANSLATION] "like a small child". The next day, Mr. Bavouezoka Mshampoya learned that the applicant and her children had fled the house.

3. Two summons from the Congolese national gendarmerie addressed to Mr. Ebou, summoning him for September 27, 2017, and December 2, 2017, respectively.

[13] The applicants submitted that this evidence corroborates their allegations regarding Mr. Ebou's involvement in the UP and his role and friendship with General Dabira. The applicants submit that a blanket statement that the RAD has considered all of the evidence will not suffice when the evidence omitted from any discussion related directly to the applicants' claim and "appears squarely to contradict" its finding of fact (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration*), 1998 CanLII 8667 (FC) (*Cepeda-Gutierrez*)).

[14] I agree with the applicants. Despite the proposition that the panel is presumed to have considered all of the evidence before it (*Basanti v Canada (Citizenship and Immigration)*, 2019 FC 1068 at para 24), the Court may intervene and infer that the panel did in fact overlook certain aspects of the evidence when the panel is silent on important evidence pointing to an opposite conclusion. In this case, the testimony and documents described above directly concern Mr. Ebou's political role, his relationship with General Dabira, and his abduction by the military authorities of the Congo.

[15] The RAD's rejection of the applicants' refugee protection claims is largely based on its conclusion that the article in the newspaper *Le Courrier de Kinshasa*, which the associate applicant submitted, is fraudulent. The RAD stated that it considered other evidence on the record to make its finding that, on a balance of probabilities, Mr. Ebou was not secretary general of the UP and that the Congolese authorities had not kidnapped him because of his affiliation with General Dabira. The RAD also noted that the applicant's testimony regarding Mr. Ebou was

very limited and that the other evidence, including Mr. Ebou's UP membership card and the new documents filed by the applicants, did not establish their allegations. However, there is no reference in the RAD's reasons to an explanation of its assessment of the testimonies of Mr. Ntsoumou-Pankima and Mr. Bavouezoka Mshampoya, or the two summons issued to Mr. Ebou in December 2017. This omission is a sufficiently material error to render the RAD's findings regarding Mr. Ebou and his political activities in the Congo unreasonable.

[16] The applicants also submit that the RAD erred in not accepting their explanations regarding the *Le courrier de Kinshasa* newspaper, but their arguments in this regard are not persuasive The RAD dealt at length with the newspaper article filed by the associate applicant and the major differences between this article and the copy of the newspaper submitted by the Minister in his intervention. In particular, the Minister's copy is missing the two articles concerning Mr. Ebou. In addition, the RAD rejected the applicants' explanations regarding their situation and the circumstances related to the filing of the article, which, according to the panel, "do not reasonably explain the deficiencies in the newspaper regardless of whether or not the Appellants knew the article was fraudulent".

[17] The RAD considered all of the applicants' explanations, which were largely repeated before the Court. In fact, the applicants are seeking a new assessment of this evidence, and it is well established that reviewing courts must refrain from "reweighing and reassessing the evidence considered by the decision maker" (*Vavilov* at para 125, citing *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 55). After

considering the RAD's reasons, I find that it was open to the panel to reject the applicants' explanations.

[18] I accept the respondent's argument that the production of false documents by a refugee claimant can affect his or her entire claim (*Noha v Canada (Citizenship and Immigration)*, 2009 FC 683 at paras 88–90), but the panel remains obliged to consider and analyze all relevant and important evidence in reaching its credibility findings.

[19] Regarding the applicants' second argument, the applicant argues that the RAD erred in finding that her rape by the military had no connection to her husband's political opinions. According to the applicants, it is unreasonable for the RAD to admit the rape on the basis of the applicant's testimony and at the same time doubt the same testimony when it comes to Mr. Ebou's political profile. The applicants submit that the two issues are inextricably linked. Again, I agree with the applicants.

[20] The RAD admitted that the applicant was raped because "[h]er testimony was personalized, detailed and consistent with her written statements". However, the applicant stated that soldiers raped her when Mr. Ebou was kidnapped. According to the applicant, the rape is a consequence of her husband's political activities.

[21] The RAD does not explain its recognition of the rape in the face of its rejection of the applicants' arguments and evidence concerning Mr. Ebou. I conclude that the failure to explain this obvious contradiction significantly undermines the decision's coherence. Neither the

applicants nor the Court can follow the RAD's analysis. The rape appears to have occurred in a factual vacuum.

[22] In summary, I find that the reasons supporting the RAD's rejection of the applicants' refugee claims suffer from two significant deficiencies. As a result, the decision under review must be set aside and the case sent back for redetermination.

2. The applicants' language rights

[23] The applicants submit that the RAD did not respect their language rights because their appeal was not assessed in the language of their choice. They note that the RAD's decision was originally made in English and that, because of an administrative error, the applicant was sent the reasons only in English. Following a complaint by the applicants a few weeks later, they were sent the reasons in French. According to the applicants, the mere fact of the decision being written in English results in a violation of their language rights and their rights to procedural fairness. They argue that they must ask themselves whether the RAD understood their submissions and that they cannot determine whether they were heard.

[24] The applicants have not alleged any prejudice and do not explain how the translation of the decision is problematic. In the absence of alleged prejudice, the respondent submits that the applicants' language rights were not infringed and that the RAD did not breach procedural fairness (*Thompson v Canada (Citizenship and Immigration)*, 2009 FC 866 at paras 8–9).

[25] In light of my conclusion above, it is not necessary for me to address this argument. However, subsection 16(1) of *the Official Languages Act*, RSC 1985, c 31 (4th Supp) (OLA), it is the responsibility of the RAD, a federal court, to ensure that, "if French is the language chosen by the parties for proceedings conducted before it in any particular case, every judge or other officer who hears those proceedings is able to understand French without the assistance of an interpreter". In addition, under subsection 22(1) of the *Refugee Appeal Division Rules*, SOR/2012-257, applicants are required to choose English or French as the language of the appeal. In this case, the applicants requested that their appeal be conducted in French, and they filed their written submissions in French. Therefore, the RAD was required to ensure that all aspects of the appeal were conducted in French.

[26] At the hearing of this application, the Court raised the relevance of the recent decision, *AB v Canada (Citizenship and Immigration)*, 2021 FC 714 (*AB*), in which my colleague Justice Lafrenière expressed his strong disagreement "with a practice that allowed IRCC officers to write their reasons for decision in an official language other than the preferred correspondence language" of an applicant. The parties provided additional submissions on this subject after the hearing.

[27] In *AB*, the Court found that an immigration officer made several material errors in rejecting an application for an exemption from the applicants' requirement to obtain an immigration visa abroad on humanitarian and compassionate grounds. These errors led the Court to doubt the officer's language abilities. That is not the case here. My conclusion that the RAD's decision does not meet the standard of reasonableness set out in *Vavilov* is not based on apparent

errors of understanding, but rather on errors of omission. There is nothing in the RAD's decision that suggests that the RAD did not understand the applicants' arguments and evidence.

[28] Nevertheless, I share my colleague's serious concern. Writing a decision in a language other than the official language of the trial chosen by an applicant can create uncertainty and doubts about the decision maker's language abilities. At the very least, that the RAD sent such a decision to the applicant is a significant error that could call into question the panel's procedural fairness and undermine confidence in the administration of justice.

IV. Proposed question for certification

[29] The applicants propose the following question for certification:

> Is the language of appeal right limited to use and transmission, or does it include the fact that the substance of the case, that is, the merits of the proceeding at issue, should also be assessed in the language chosen?

[30] In *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at para 46, the Federal Court of Appeal summarized the criteria for certifying a question under paragraph 74(d) of the IRPA: The question "must be a serious question that is dispositive of the appeal, transcends the interests of the parties and raises an issue of broad significance or general importance".

[31] I conclude that the question proposed for certification does not meet the criteria set out in *Lunyamila* because it is not determinative of this application. Therefore, no question is certified.

JUDGMENT in IMM-6446-21

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is allowed; and

2. No question of general importance is certified;

"Elizabeth Walker "
Judge

Certified true translation
Janna Balkwill

FEDERAL COURT

SOLICITORS OF RECORD

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