

Federal Court



Cour fédérale

Date: 20240129

Docket: IMM-7501-22

Citation: 2024 FC 138

[ENGLISH TRANSLATION]

Ottawa, Ontario, January 29, 2024

PRESENT: The Honourable Mr. Justice Régimbald

BETWEEN:

BEL BORIS MOUASSA TSATY

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant is a citizen of the Republic of the Congo. He is seeking for judicial review of a Refugee Appeal Division (RAD) decision dated July 15, 2022, rejecting his appeal and confirming the decision of the Refugee Protection Division (RPD) dated March 4, 2022, rejecting his refugee protection claim. The RAD concluded that the applicant did not establish a well-founded fear of persecution under section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), or that he was subjected to a risk under section 97 of the IRPA.

[2] For the following reasons, the application for judicial review is allowed. The RAD failed to consider key evidence. Therefore, its decision is not clear, justified or intelligible in relation to the evidence submitted (*Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 (*Mason*) at para 8; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (*Vavilov*) at para 99).

I. Background

[3] The applicant, Bel Boris Mouassa Tsaty [applicant], has claimed refugee protection in Canada because he fears being arrested by the police, the authorities and the party in power in the Republic of the Congo for refusing to join the Parti Congolais du Travail (PCT) [Congolese labour party].

[4] The applicant's written account in his Basis of Claim Form [BOC Form] begins in 2015, following his appointment to a management position at CLDES Congo, a company owned by the son of the president of the Republic of the Congo. While in that position, the applicant was approached by a CLDES Congo colleague and asked to join the governing party, the PCT. The applicant did not do so and instead joined an opposition party, the Mouvement pour l'Unité, la Solidarité et le Travail (MUST) [movement for unity, solidarity and labour]. As a MUST member, the applicant quickly became involved in recruiting new members.

[5] The same colleague later criticized the applicant for being too active within MUST and, said that, because he worked for a company owned by the current president's son, he should

seriously consider leaving MUST and joining the party in power, the PCT. The applicant did not take his advice and continued to participate in MUST affairs.

[6] In October 2015, the applicant was summoned to the national police station in the city of Pointe-Noire. He was questioned for approximately two hours and was accused of [TRANSLATION] “disturbing the peace and withholding relevant information”. Following that incident, the applicant became less involved in MUST’s political activities to ensure his safety as well as that of his family.

[7] In early 2016, he resumed his political involvement by joining a coalition of opposition parties. The day before the presidential elections, on March 18, 2016, the applicant and a few friends and colleagues were abducted and detained; they were questioned and tortured by police for several hours.

[8] The PCT was ultimately re-elected on March 20, 2016, and the crackdown on political opponents only intensified following their victory.

[9] Between March 2016 and December 2018, the applicant travelled extensively for work and, on returning, was subjected to repeated interrogations at the airport, which increased his concern for his safety.

[10] In December 2017, his employer sent him for training in Canada. The employer took the opportunity to tell the applicant that he would have to join the PCT when he returned and that this was the last time his employer would ask him to do so. It became clear to the applicant that his employer would insist, and he realized that it must have been his employer who had informed the authorities of his actions. The applicant therefore decided that he would claim refugee protection during his trip to Canada, but the trip was cancelled because his visa was denied.

[11] On February 1, 2018, the applicant left the Republic of the Congo for the United States, as part of a new job. On February 20, 2018, he entered Canada and claimed refugee protection.

[12] On February 5, 2018, the militia went to his home in Pointe-Noire, seized his car and left a summons with his wife, ordering the applicant to report to the police station.

II. The RAD's decision

[13] The RAD concluded that the applicant was credible, but that there was no serious possibility of persecution under section 96 of the IRPA, or risks or dangers under subsection 97(1) of the IRPA if he were to return to the Republic of the Congo.

[14] The RAD first relied on the fact that the applicant had travelled abroad several times and did not claim refugee protection, which is inconsistent with someone fearing persecution.

[15] The RAD then confirmed the RPD's determination that, even though from 2016 to 2018 the applicant was pressured to join the PCT, he did not do so and that he did not experience [TRANSLATION] "concrete or practical problems" with his employer, the PCT or the authorities. The RAD then rejected both the documents submitted about the events that occurred in 2015 and the police summons received after he left the Republic of the Congo on the grounds that they did not establish the existence of a fear of persecution.

[16] Finally, the RAD identified a contradiction in the applicant's BOC Form, which indicated that the applicant was a member of a political party when, in fact, it was a political platform bringing together the political opposition parties.

III. Standard of review and issue in dispute

[17] The sole issue in dispute before the Court is whether the RAD's decision that the applicant did not demonstrate that he would be subject to a prospective risk of persecution should he return to the Republic of the Congo is reasonable.

[18] The applicable standard of review is reasonableness. The decision is reasonable if it is justified, transparent and intelligible and falls within a range of possible outcomes in respect of the facts and law (*Mason*, at para 8; *Vavilov*, at para 99).

IV. Analysis

[19] The applicant submits that the RAD erred in its analysis of prospective risk.

[20] First, the applicant argues that the RAD erred on the matter of his failure to claim refugee status sooner when he had the opportunity to do so. Failure to claim refugee protection at the first opportunity is not in and of itself determinative of on the alleged subjective fear (*Ntatoulou v Canada (Citizenship and Immigration)*, 2016 FC 173 at para 14; *Zeah v Canada (Citizenship and Immigration)*, 2020 FC 711 (*Zeah*) at para 61). The applicant submits that, in reality, his subjective fear only crystallized in December 2017 when his employer gave him a final warning to join the PCT, and his BOC Form demonstrates this. The applicant then decided to leave the country and claim refugee protection abroad, which he did two months later. Given that his fear had not materialized before December 2017, he did not claim refugee status during his previous travels.

[21] The applicant then claims that the RAD erred in concluding that the applicant did not experience [TRANSLATION] "concrete or practical problems" between 2016 and 2018. The RAD failed to discuss the evidence that the applicant had been questioned by police and accused of [TRANSLATION] "disturbing the peace" in connection with his political activities in 2015, and then tortured in 2016, and that he was therefore persecuted for his political opinion. The applicant also submits that he was pressured by his employer about his political position in 2017 and that he and his family were targeted by the militia in 2018, forcing him to move his family members from Pointe-Noire to Brazzaville for their safety, where they remain in hiding.

[22] The applicant also submits that, based on the presumption of truth afforded to refugee protection claimants, the RAD should have given him the benefit of the doubt when analyzing his case, in accordance with the *Handbook on Procedures and Criteria for Determining Refugee Status* and *Maldonado v Minister of Employment and Immigration*, 1979 CanLII 4098 (FCA) (*Maldonado*). The applicant's testimony on the incidents between 2015 and 2018 should therefore have been presumed to be true, unless there was a reason to doubt their truthfulness.

[23] Finally, the applicant submits that the RAD erred in considering a contradiction in his BOC Form, that is, his being a member of a political party even though this party was simply a platform. The applicant submits that this is not a contradiction because he himself corrected the distinction in his BOC Form.

[24] In my opinion, the RAD's analysis leading to its conclusion that the applicant would not be subjected to a prospective risk should he return to the Republic of the Congo is unreasonable.

[25] First, regarding the RAD's conclusion that the applicant's behaviour was inconsistent with that of someone fearing persecution because he did not seek asylum in another country as soon as he could, the RAD simply noted the applicant's trips rather than analyzing the evidence before it to determine when the applicant first realized that he was subjected to a reasonable possibility of persecution in the future. According to the applicant, although he had been persecuted in the past, until December 2017, when his employer told him that this was the last time he would be told to join the PCT and that he had to do so upon his return, he had believed he was safe. The applicant

explains that it was at that moment that he realized his employer would never leave him alone and that it must have been his employer who had been informing the authorities of his slightest actions, which explained why he had been bothered in previous years.

[26] Although it was open to the RAD to take into account previous travel and his failure to claim refugee status as soon as possible can demonstrate a lack of subjective fear, a delay is not in and of itself determinative of a claim. It is true that a delay can affect the assessment of a claim's credibility, but whether there has been delay must be determined with regard to the time of inception of the claimant's fear as determined from the BOC Form (*Zeah* at para 61).

[27] In this case, the RAD simply stated that the applicant had made several trips abroad without claiming refugee protection, and that as a result, he had no fear of returning to the Republic of the Congo. In so doing, the RAD failed to consider the evidence before it, namely that the applicant's fear increased as time went on; that when he returned from his trips, he was questioned by the authorities; and that that fear came to a head in December 2017, when his employer gave him a final warning that he had to join the PCT. The RAD failed to consider this evidence and explain why it was nonetheless of the opinion that the applicant's behaviour was inconsistent with that of someone fearing persecution.

[28] Regarding the RAD's conclusion that the applicant did not experience [TRANSLATION] "concrete problems" with his employer, the PCT or the authorities, the RAD's decision does not transparently and intelligibly explain why it rejected evidence that, in my opinion, is relevant to

the prospective risk analysis. For example, in his BOC Form, the applicant submits the following events as evidence:

- A. On October 20, 2015, he received an official police summons ordering him to report to the police station within 48 hours. He was questioned for two hours before being released.
- B. On March 18, 2016, the applicant and some colleagues were abducted by police and violently tortured, to the point that he had to be hospitalized. The applicant submitted a medical certificate and photographs associated with that incident.
- C. On February 5, 2018, barely five days after he had left the Republic of the Congo, militia went to his home, seized his car and left a summons with his wife for the applicant to report to the police station. Following that meeting, he moved his wife and children from Pointe-Noire to Brazzaville, where they remain in hiding.

[29] The case law dictates that, although not determinative in and of themselves, prior events are important to consider when assessing prospective risk (*Fernandopulle v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 91 at para 18; *Sanchez v Canada (Citizenship and Immigration)*, 2007 FCA 99 at para 15).

[30] In this case, the applicant provided information in his BOC Form supporting his position that he had been persecuted because of his political opinion and that he fears for his and his family's safety should he return to the Republic of the Congo. The RAD found him credible but did not comment on the previous events described in the applicant's record. Conversely, in

paragraph 15 of its decision, the RAD concluded that he would not be subjected to any risk or danger because he had not had [TRANSLATION] “any concrete or practical problems with his employer, the party itself or the authorities” between 2016 and 2018 [emphasis added].

[31] This conclusion is unreasonable for the following two reasons. First, the fact that a refugee claimant was not previously persecuted does not in and of itself mean that there is no prospective risk (*Al Bardan v Canada (Immigration, Refugees and Citizenship)*, 2020 FC 733 at para 26). In contrast to this proposition, the RAD stated that the fact that the claimant had not had any concrete or practical problems despite not joining the PCT demonstrated an absence of a risk of persecution should he return to the Republic of the Congo. This conclusion is based on a false premise.

[32] Second, the RAD’s decision is unreasonable because it did not consider the information in the applicant’s BOC Form about the previous persecution he had experienced at the hands of the police authorities. The testimony includes key evidence that contradicts the RAD’s conclusion that the applicant did not sustain any harm between 2016 and 2018 (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC) at paras 16–17). In particular, the RAD does not explain how the evidence for his arrest for [TRANSLATION] ”disturbing the peace and withholding important information” in 2015, the fact that he was tortured by police in 2016, and the fact that he was interrogated at the airport on his returns to the Republic of the Congo are irrelevant to the prospective risk. The applicant also indicated that his employer was probably the source of information the police authorities relied

on to arrest him—thereby crystalizing his fear in December 2017. Unless proven otherwise, the claimant’s testimony is presumed true (*Maldonado*).

[33] In his BOC Form, the applicant also testified about the fact that the militia went to his home on February 5, 2018, after he had left, and that they seized his car and left a summons with his spouse for him to report to the police station. The RAD shared the RPD’s opinion that the summons did not justify a fear of persecution because it did not indicate the reason why the applicant was called to the station. This conclusion is unreasonable. First, it is unreasonable to expect that the summons would explicitly contain a reason or threats to his person. It is also unreasonable to read the summons narrowly and out of context because the applicant testified that he was similarly summoned in 2015, at which time he was questioned for two hours about his political affiliation; that he was abducted by police and tortured in 2016; and that, following the February 5, 2018, incident, he moved his family from Pointe-Noire in Brazzaville because he was afraid.

[34] In short, the RAD should have explained why the evidence in the record was insufficient to permit the applicant to satisfy his burden. The RAD’s failure to discuss certain key pieces of evidence that contradict its conclusion that the applicant would not be subjected to a prospective risk of persecution if he returns makes the decision unjustified in light of the facts and the evidence in the record (*Mason*, at paras 60, 74, 97; *Vavilov*, at para 126).

[35] Finally, regarding the reason why the applicant contradicted himself in his BOC form, by stating that he is a member of a political party when he was actually a member of a platform

bringing together several opposition parties, the RAD itself recognized in its reasons that the applicant had made the necessary correction in his BOC Form. Therefore, it seems unreasonable to rely on that piece of evidence to conclude that the applicant did not establish a well-founded fear of persecution for reasons of his political opinion under section 96 of the IRPA.

V. Conclusion

[36] I find that the RAD's decision is not justified in relation to the factual and legal constraints bearing on the case (*Mason*, at para 8; *Vavilov*, at para 99).

[37] For these reasons, the application for judicial review is allowed.

[38] No question of general importance was submitted for certification, and the Court is of the opinion that none arise.

JUDGMENT in IMM-7501-22

THE COURT'S JUDGMENT IS AS FOLLOWS:

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

“Guy Régimbald”

Judge

Certified true translation
Johanna Kratz

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-7501-22

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