Date: 20100224

Docket: IMM-3187-09

Citation: 2010 FC 208

Ottawa, Ontario, February 24, 2010

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

KASONGO MARCEL EMAMGONGO
DJUNGA PAULINE NENDE
CEDRIC KASONGO
FABRICE LUMA

Applicants

and

THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the RPD) dated June 2, 2009 concluding that the applicants, citizens of the Democratic Republic of Congo (the DRC), are not Convention refugees or persons in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA).

FACTS

Background

[2] The applicants are citizens of the Democratic Republic of Congo. They are a husband, wife, and their adult son and daughter. Forty-two (42) year old Kasongo Marcel Emamgongo is the husband applicant, forty-five (45) year old Djunga Pauline Nende is the wife applicant, eighteen (18) year old Cedric Kasongo is the son applicant, and twenty-two (22) year old Fabrice Luma is the daughter applicant.

[3] The applicant family entered Canada on September 25, 2006 and claimed refugee protection at the port of entry. The applicants had been in the United States for 15 years before coming to Canada.

[4] The applicants alleged that Mr. Emamgongo has a well founded fear of persecution by virtue of his political activities on behalf of the *Union pour la démocratie et le progrés social* (the UDPS) of which he was member since 1989. Mr. Emamgongo was a student at the University of Kinshasa until it was shut down on May 17, 1990 following a deadly student march in which he participated. He then took up employment in the hospital morgue. On January 7, 1991 Mr. Emamgongo allegedly found the body of his uncle among the tortured corpses that the Mbotu regime periodically sent to the morgue. The applicant informed the leader of the UDPS of his discovery which led to his dismissal on January 16, 1991 and to his arrest and imprisonment. Mr. Emamgongo was beaten during his 6 month imprisonment but escaped after he was referred to the

hospital for treatment. The applicants fled to the United States on August 7, 1991, 18 years ago, and made an unsuccessful asylum claim. They came to Canada in 2006.

Decision under review

[5] The applicants' refugee claim was originally heard as an expedited hearing. The Refugee Protection Officer (the RPO) recommended that the applicants' claim be assessed in a full hearing as a result of the following inconsistencies which arose:

1. Mr. Emamgongo testified that his uncle died on January 7, 1991, but the death certificate lists July 7, 1991 as the date of death; and
2. Mr. Emamgongo testified that he was detained from January 17, 1991 to July 22, 1991, after which he went to the hospital for treatment, but the hospital report states that the Mr. Emamgongo was examined August 7, 1991 purportedly after he fled the DRC.

[6] At the full hearing before the RPD panel Mr. Emamgongo provided corrected documentation that matched his oral testimony. However, he also provided an "*Act déclarative d'évasion*" dating his escape from the hospital to May 25, 1991 which contradicted his testimony where he stated that he was admitted to the hospital on July 22, 1991. The RPD determined that the inconsistencies between Mr. Emamgongo's testimony and the earlier versions of the official documentation cast doubt on the probative value of the corrected documents.

[7] The RPD identified an inconsistency in Mr. Emamgongo's testimony before the RPD and his statements at the port of entry where he stated that he found the body of his cousin in the

morgue, as opposed to his uncle's body (as he later claimed). The RPD determined at page 4 of its decision that the credibility of the central elements of the applicants' refugee claim lacked credibility:

> Having considered the evidence as a whole, the panel finds these inconsistencies affect the claimant's credibility that lead it to question the veracity of the central elements of his refugee claim, particularly, his alleged problems at the hands of the government, because he denounced wrongdoings at the hospital.

[8] The panel noted the risk facing UDPS members in the DRC at page 4 of its decision:

> The claimant testified that he is a member of the UDPS, testifying he has been a member since 1989. Counsel for the claimant provided documentary evidence indicating that "historically ill-treatment of UDPS ... members has been common" and that a "news report in February 2005 highlights the complaint by several opposition groups, including the UDPS, of the 'resurgence of political violence perpetrated by the current leadership against opposition leaders and activists.' The report quotes the UDPS as stating that, 'January [2005] was marked by several incidents of harassment against its activists."

[9] Mr. Emamgongo's lack of credibility led the RPD to determine that he has not met the subjective fear element as a result of his membership in the UDSP. The RPD also held that there was no evidence that Mr. Emamgongo or his family are persons in need of protection at page 5 of its decision:

> The panel, having found the claimant not credible and having found that he has not met the subjective fear element as a result of his membership in UDSP, concludes that the claimant is not a convention refugee, nor is there any evidence to conclude that he is a person in need of protection.

The applicants' refugee claim was therefore dismissed.

LEGISLATION

[10] Section 96 of IRPA grants protection to Convention refugees:

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	*a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	*b*) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

[11] Section 97 of IRPA grants to protection to certain categories of persons:

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(*a*) to a danger, believed on substantial grounds to exist, of	*a*) soit au risque, s'il y a des motifs sérieux de le croire,

torture within the meaning of Article 1 of the Convention Against Torture; or	d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if (i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country, (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country, (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and (iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	*b*) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant : (i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays, (ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas, (iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles, (iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

ISSUE:

[12] The applicants raise the following issue:

1. Did the RPD err by not providing an analysis of the Applicants' claim under section 97 of the *Immigration and Refugee Protection Act*, separate and distinct from his analysis of the claim under 96 of the said *Act*?

STANDARD OF REVIEW

[13] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, 372 N.R. 1, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of (deference) to be accorded with regard to a particular category of question": see also *Khosa v. Canada (MCI)*, 2009 SCC 12, per Justice Binnie at paragraph 53.

[14] Whether the RPD failed to undertake a separate analysis under section 97 of IRPA touches upon the adequacy of the decision under review and as such is reviewable under a standard of correctness: see my decision in *Jabari v. Canada (MCI)*, 2008 FC 225, at paragraph 12; *Via Rail Canada Inc. v. Canada (National Transportation Agency)*, [2001] 2 F.C. 25 (C.A.).

ANALYSIS

<u>Issue</u>: **Did the RPD err by not providing an analysis of the Applicants' claim under section 97 of the *Immigration and Refugee Protection Act*, separate and distinct from his analysis of the claim under 96 of the said *Act*?**

[15] The applicants submits that the RPD erred by failing to conduct a separate analysis pursuant to section 97 of IRPA.

[16] Justice de Montigny addressed this very question in *Ayaichia v. Canada (MCI)*, 2007 FC 239 at paragraphs 19-20:

> ¶19 This case has been repeatedly followed by other members of this Court. While it is always better to analyze both sections 96 and 97 where an applicant has invoked the two grounds in support

> of his or her claim, failing to do so will not always be fatal to an otherwise sound decision. If the evidentiary basis for both claims is the same and the applicant's story is not believed, there will be no need to proceed to a separate 97 analysis, as there will be no evidence to ground the applicant's claim that he or she is in need of protection: see, for example…
>
> ¶20 Of course, if the underlying facts offer a separate basis for finding the applicant a person in need of protection, then concluding he is not credible for the purposes of section 96 or that there is no nexus to a Convention ground will not excuse the Board from going through a separate section 97 analysis. This was precisely the situation in *Kilic v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 84, 2004 FC 84, on which the applicant relies. In that case, the Board did not find Mr. Kilic credible on many points, but nevertheless accepted he had evaded the military because he had documentary proof to support his claim. The Board rejected his claim under section 96, finding he had no nexus to a Convention ground, and failed to perform a section 97 analysis. Sitting on the judicial review of that decision, Justice Richard Mosley found the Board should have analyzed whether the Turkish applicant was at risk because of his military evasion.

[17] A negative credibility finding in relation to section 96 will often obviate the need to consider section 97: *Smoudi v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1139, per Justice O'Reilly at paragraph 7. Whether the omission of a section 97 analysis is reviewable will depend on the particular evidence before the RPD: *Kandiah v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 181, per Justice Martineau at paragraph 16. In *Jabari*, *supra*, at paragraphs 25-26 I held that the RPD erred in omitting to engage in a section 97 analysis in the case of an applicant who raised two separate reasons for fearing return to Iraq when the objective country condition documentation showed that inter-ethnic violence was widespread.

[18] The RPD surveyed the objective country condition documentation:

> The claimant testified that he is a member of the UDPS, testifying he has been a member since 1989. Counsel for the claimant provided documentary evidence indicating that "historically ill-treatment of UDPS ... members has been common" and that a "news report in February 2005 highlights the complaint by several opposition groups, including the UDPS, of the 'resurgence of political violence perpetrated by the current leadership against opposition leaders and activists.' The report quotes the UDPS as stating that, 'January [2005] was marked by several incidents of harassment against its activists."

While acknowledging the adverse treatment some UDPS members may face, the RPD noted that the applicant did not testify that he would be subject to persecution by virtue of his UDPS membership alone:

> The panel does not refute the claimant's objective evidence; nevertheless, the claimant did not testify that he has a subjective fear of returning to the DRC because of his membership in the UDPS…

[19] While the principal applicant "checked-off" the two boxes in the PIF claiming a need of protection, the applicant did not testify to this effect. He did not say that returning to the Congo as a UDPS member will put him at risk. If the claimant does not advance the claim at the hearing, the RPD cannot be faulted for not dealing with it in more detail than the RPD did in this case.

[20] Moreover, the applicant left the Congo in 1991, which is 18 years ago. The objective documentary evidence clearly shows that only UDPS activists are at risk of persecution. The applicant is not in this category. For these reasons, this ground of review cannot be accepted by the Court.

CERTIFIED QUESTION

[21] Both parties advised the Court that this case does not raise a serious question of general importance which ought to be certified for an appeal. The Court agrees.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

The application for judicial review is dismissed.

"Michael A. Kelen"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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