

Federal Court



Cour fédérale

Date: 20150203

Docket: IMM-3895-14

Citation: 2015 FC 129

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, February 3, 2015

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

NADEGE YAMDI GENU

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of a decision of the Refugee Protection Division [RPD] that was appealed to the Refugee Appeal Division [RAD].

II. Facts

[2] The applicant is a citizen of Cameroon who alleges a fear of persecution by her husband, Isaac Fokou [Mr. Fokou], by reason of her membership in a particular social group, namely, women who are victims of domestic violence.

[3] To begin with, the Court notes that the parties have very different versions of the facts surrounding the application.

[4] On the one hand, the applicant claims to be a merchant with two children, Louise Angéline Yamdjeu and Dylan Giovanni Biabo, born on February 14, 2011, and May 8, 2012, whose father is Jules Nutelly Kemtcheu [Mr. Kemtcheu]. Mr. Kemtcheu allegedly abandoned the applicant and her children because he was no longer able to pay the dowry and support his family.

[5] Ashamed that the applicant had two children out of wedlock, the applicant's father allegedly forced her to marry a rich man in his seventies, Mr. Fokou, on November 5, 2012.

[6] The applicant alleges that Mr. Fokou regularly abused her physically and sexually from the moment they began living together. For example, Mr. Fokou allegedly beat the applicant severely enough to cause her permanent hearing loss in her left ear and sexually assaulted her. The applicant testified that Mr. Fokou regarded her as [TRANSLATION] "merchandise".

[7] The applicant states that she left her home to take refuge at the home of a female friend who helped her obtain a temporary visa from the Canadian authorities in Dakar. The applicant claims that the documents submitted in support of her visa application were falsified and that she had no knowledge of the procedures that led to her visa being issued.

[8] The applicant claims that she travelled to Addis Ababa, in Ethiopia, before finally arriving in Canada on October 19, 2013. The applicant claimed refugee protection on November 6, 2013.

[9] On December 27, 2013, the Minister intervened to contest the credibility of the applicant. The Minister submitted to the RPD the applicant's visa application file and the visa officer's notes from the Field Operations Support System. These documents present a version of events that is very different from the facts alleged by the applicant.

[10] For example, the visa file indicates that the applicant was instead married to Clément Ebong Ngole [Mr. Ngole]. He is also alleged to be the father of her two children, Louise Angéline Ebong Yamdjeu and Clément Ebong Ngole, born on December 18, 2005, and February 14, 2011.

[11] The visa application file also contains proof of employment, an annual leave authorization and a contract of employment showing that the applicant worked as Director, Logistics and Transportation, for Eleh Maritime & Services, S.A.

[12] The documents indicate that the applicant and Mr. Ngole arrived in Canada by way of Paris, France. Furthermore, the applicant and Mr. Ngole allegedly tried to stay in Canada under the guise of a honeymoon trip.

[13] After a hearing before the RPD, the applicant's claim for refugee protection was rejected on January 29, 2014, on the basis of her lack of credibility.

III. Impugned decision

[14] On April 23, 2014, the RAD dismissed the appeal and confirmed the RPD's decision. The RAD concluded that the story presented in the applicant's visa application reflected the actual facts. The RAD found that the applicant's refugee protection claim and oral testimony had been fabricated.

[15] The RAD began by dealing with the preliminary issues related to its jurisdiction and the scope of the appeal before it. Relying on case law addressing the jurisdiction of appellate administrative tribunals, the RAD stated that its role was not to reassess the evidence, but to defer to the credibility findings of the RPD.

[16] By analogy with the judicial review regime as applied by the Federal Court to RPD decisions, the RAD concluded that the applicable standard is reasonableness (*Dunsmuir v New Brunswick*, [2008] 1 SCR 9 [*Dunsmuir*]; *Ndam v Canada (Minister of Citizenship and Immigration)*, 2010 FC 513; *Ferencova v Canada (Minister of Citizenship and Immigration)*, 2011 FC 443).

[17] Regarding the merits of the appeal, the RAD concluded that the RPD had not erred in its assessment of the evidence and that the RPD had given sufficient reasons to dispose of the application.

IV. Issue

[18] Did the RAD err in confirming the RPD's findings regarding the applicant's lack of credibility?

V. Legislation

[19] Sections 96 and 97 of the IRPA state the law applicable to the determination of refugee status in Canada:

Convention refugee

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,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is

Définition de "réfugié"

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) 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) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut

unable or, by reason of that fear, unwilling to return to that country.

Person in need of protection

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

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(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 themselves 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.

ni, du fait de cette crainte, ne veut y retourner.

Personne à protéger

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) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

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.

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

[20] The following sections of the IRPA set out the applicable tests regarding the role of the RAD, the admissibility of evidence on appeal and hearing procedure:

Appeal

110. (1) Subject to subsections (1.1) and (2), a person or the Minister may appeal, in accordance with the rules of the Board, on a question of law, of fact or of mixed law and fact, to the Refugee Appeal Division against a decision of the Refugee Protection Division to allow or reject the person's claim for refugee protection.

...

Procedure

(3) Subject to subsections (3.1), (4) and (6), the Refugee Appeal Division must proceed without a hearing, on the basis of the record of the proceedings of the Refugee Protection Division, and may accept documentary evidence and written submissions from the Minister and the person who is the subject of the appeal and, in the case of a matter that is conducted before a panel of three members,

Appel

110. (1) Sous réserve des paragraphes (1.1) et (2), la personne en cause et le ministre peuvent, conformément aux règles de la Commission, porter en appel — relativement à une question de droit, de fait ou mixte — auprès de la Section d'appel des réfugiés la décision de la Section de la protection des réfugiés accordant ou rejetant la demande d'asile.

[...]

Fonctionnement

(3) Sous réserve des paragraphes (3.1), (4) et (6), la section procède sans tenir d'audience en se fondant sur le dossier de la Section de la protection des réfugiés, mais peut recevoir des éléments de preuve documentaire et des observations écrites du ministre et de la personne en cause ainsi que, s'agissant d'une affaire tenue devant un tribunal constitué de trois commissaires, des observations

written submissions from a representative or agent of the United Nations High Commissioner for Refugees and any other person described in the rules of the Board.

...

Evidence that may be presented

(4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.

...

Hearing

(6) The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3)

(a) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal;

(b) that is central to the decision with respect to the refugee protection claim; and

(c) that, if accepted, would justify allowing or rejecting the refugee protection claim.

Decision

111. (1) After considering the appeal, the Refugee Appeal Division shall make one of the

écrites du représentant ou mandataire du Haut-Commissariat des Nations Unies pour les réfugiés et de toute autre personne visée par les règles de la Commission.

[...]

Éléments de preuve admissibles

(4) Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet.

[...]

Audience

(6) La section peut tenir une audience si elle estime qu'il existe des éléments de preuve documentaire visés au paragraphe (3) qui, à la fois :

a) soulèvent une question importante en ce qui concerne la crédibilité de la personne en cause;

b) sont essentiels pour la prise de la décision relative à la demande d'asile;

c) à supposer qu'ils soient admis, justifieraient que la demande d'asile soit accordée ou refusée, selon le cas.

Décision

111. (1) La Section d'appel des réfugiés confirme la décision attaquée, casse la décision et y

following decisions:

(a) confirm the determination of the Refugee Protection Division;

(b) set aside the determination and substitute a determination that, in its opinion, should have been made; or

(c) refer the matter to the Refugee Protection Division for re-determination, giving the directions to the Refugee Protection Division that it considers appropriate.

substitue la décision qui aurait dû être rendue ou renvoie, conformément à ses instructions, l'affaire à la Section de la protection des réfugiés.

VI. Positions of the parties

[21] On the one hand, the applicant submits that the RAD's findings are unreasonable. The applicant claims that she falsified her entire visa file to flee persecution in Cameroon. According to the applicant, the RAD and the RPD erred in ignoring the evidence submitted in support of her refugee protection claim and her explanations regarding the discrepancies between her visa application and her refugee protection claim.

[22] The applicant further submits that the RAD's refusal to reassess the evidence in the RPD record was unreasonable (*Iyamuremye v Canada (Minister of Citizenship and Immigration)*, 2014 FC 494).

[23] On the other hand, the respondent submits that the evidence indicates that the applicant gave contradictory versions of events with regard to the circumstances that led her to leave Cameroon so that she could obtain refugee protection. The respondent claims that the RAD

considered the grounds of appeal raised by the applicant and all the evidence in confirming the RPD's decision. According to the respondent, the Court's intervention is unwarranted.

VII. Standard of review

[24] Relying on case law from provincial courts of appeal, the Federal Court and the Supreme Court, the applicant submits that the RAD erred in assessing its own jurisdiction (*Parizeau c Barreau du Québec*, 2011 QCCA 1498; *Dunsmuir*, above; *Newton v Criminal Trial Lawyers' Assn.*, 2010 ABCA 399; *Halifax (Regional Municipality) v Anglican Diocesan Centre Corp.*, 2010 NSCA 38). According to the applicant, this is an error in law that calls for applying the correctness standard (*Dunsmuir*, above at para 50).

[25] The respondent submits that the Court must defer to the RAD's conclusions regarding the standard applied to the RPD (*Budhai v Canada (Attorney General)*, 2002 FCA 298 at para 22; *Edmonton Police Service (Chief of Police) v Furlong*, 2013 ABCA 121 at para 20 [*Edmonton Police Service*]). Moreover, findings of mixed fact and law must be reviewed on the reasonableness standard (*Edmonton Police Service*, above at para 20; *Canada (Attorney General) v Hunter*, 2013 FCA 12 at para 4).

[26] The Court relies on the recent decisions of this Court on the scope of the RAD's mandate to conclude that the RAD's interpretation of its home statute, as well as its findings of fact and of mixed fact and law, attract the reasonableness standard (*Akuffo v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1063 at paras 26 and 27 [*Akuffo*]; *Bui v Canada*

(Minister of Citizenship and Immigration), 2014 FC 1145 at para 17; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61).

VIII. Analysis

[27] The decisive issue raised on appeal before the RAD is the applicant's credibility.

[28] The recent case law of this Court demonstrates that the RPD's credibility findings are owed a certain degree of deference on appeal to the RAD (*G.L.N.N. v Canada (Minister of Citizenship and Immigration)*, 2014 FC 859 at para 18; *Akuffo*, above at para 39; *Huruglica v Canada (Minister of Citizenship and Immigration)*, 2014 FC 799 at para 55 [*Huruglica*]; *Allalou v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1084 at para 20; *Sajad v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1107 at para 20).

[29] As an appeal tribunal, the RAD must assess the evidence filed with the RPD to draw its conclusions regarding the grounds of appeal raised by the parties. This principle holds true even if no hearing is held before the RAD and no new evidence has been presented (*Yin v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1209 at para 39; see also *Huruglica*, above at para 3). Deference is also required where the RPD has a special advantage in making its findings. This observation is based on the appreciation of the fact that the RPD has a special advantage, as the first-instance decision-maker that hears the witnesses' oral testimony.

[30] It should be noted that the rationale of the judicial review regime does not apply to the RAD's analysis (*Akuffo*, above at paras 33-34; *Huruglica*, above at para 34; *Alyafi v Canada (Minister of Citizenship and Immigration)*, 2014 FC 952 at para 10 [*Alyafi*]).

[31] The RAD erred in finding that the applicable standard was reasonableness. However, the Court is of the opinion that this error is not a fatal one, *per se*. Rather, the Court must determine whether the RAD's findings on appeal from the RPD decision, as reflected in its reasons, are reasonable.

[32] In its decision, the RAD states that it read all the RPD's reasons and the applicant's arguments and concluded that the RPD's decision was reasonable. An excerpt from the RAD's decision is reproduced below:

[TRANSLATION]

[50] I have read all the reasons for the decision of the RPD. I have also read the appellant's arguments in her memorandum. I conclude that the RPD considered all the evidence, as well as the explanations provided by the appellant. The RPD amply justified the reasons for its conclusion casting doubt on the appellant's credibility, which reasons were sufficient to dispose of her claim for refugee protection as it did.

[51] Acting as the RPD did in this case is, in my opinion, entirely consistent with one of the objectives of the IRPA, namely, to establish fair and efficient procedures that will maintain the integrity of this system, while upholding Canada's respect for the human rights and fundamental freedoms of all human beings.

(RAD Decision, at paras 50 and 51).

[33] However, the Court notes that the RAD did not conduct any analysis beyond merely repeating the RPD's findings. While recognizing the deference owed by the RAD to the

credibility findings of the RPD, the RAD's reasons suggest that it simply relied on the RPD's credibility findings without conducting its own assessment of the evidence.

[34] The RAD erred in failing to assess the RPD's findings in light of the evidence in the record.

[35] The Court adopts the reasoning of Justice J. Gagné in her recent decision in *Kurtzmalaj v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1072 [*Kurtzmalaj*] at paras 37 and 38:

[37] The RAD ignored this evidence in upholding the RPD's finding. Instead, the RAD merely repeated the RPD's analysis on this issue. The RAD provided no explanation why it was reasonable for the RPD to ignore evidence which suggested the applicant potentially faced undue hardship if he were forced to relocate to Tirana.

[38] It was unreasonable for the RAD to accept the RPD's decision at face value and ignore what could be relevant evidence regarding the minor applicant's personal circumstances. The failure to properly assess the IFA analysis is a reviewable error.

IX. Conclusion

[36] The Court concludes that the applicant was denied a true appeal (*Alyafi*, above at para 53; *Djossou v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1080 at para 44; *Meilina v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1233 at para 12; *Kurtzmalaj*, above at para 40).

[37] The application for judicial review is therefore allowed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review be allowed and that the matter be referred back to a differently constituted panel for redetermination. No question is certified.

“Michel M.J. Shore”

Judge

Certified true translation
Michael Palles

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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