

Federal Court



Cour fédérale

**Date: 20151022**

**Docket: IMM-7844-14**

**Citation: 2015 FC 1188**

**Ottawa, Ontario, October 22, 2015**

**PRESENT: The Honourable Mr. Justice Annis**

**BETWEEN:**

**MAHO SIMANZONDO MAZINGA  
DJODJO BINTI MOUSSA**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Introduction

[1] This is an application for judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA or the Act] of a decision by a Refugee Protection Division [RPD or the Board] that the Applicants are not Convention refugees nor persons in need of protection in the meaning of sections 96 and 97(1) of the Act. The Applicants are seeking an

order quashing the decision of the Board and referring the matter back for redetermination with the right to make further updated submissions.

[1] For the reasons that follow, the application is dismissed.

## II. Background

[2] The principal Applicant, Mr. Maho Simanzondo Mazinga [the Applicant] and his spouse, Mrs. Djodjo Binti Moussa [the Co-applicant], are citizens of the Democratic Republic of Congo [Congo].

[3] The Applicant alleged that he worked as a driver for Eugène Diomi Ndongala, President of Démocratie Chrétienne [D.C.], an opposition party. Eugène Diomi Ndongala was close to Étienne Tshisekedi, was the designated spokesperson of the Majorité Présidentielle Populaire [M.P.P.] during the November 2011 elections.

[4] The Applicant alleged that on June 24, 2012, Eugène Diomi Ndongala was accused of rape and that on June 25, 2012, Mr. Ndongala and the Applicant were arrested and brought to different locations.

[5] The Applicant alleged that he was driven to an unknown location and confined in a cell. He claimed that he was advised that, in order to gain his freedom, he would have to testify

against Mr. Ndongala during his trial for raping a minor. The Applicant claimed that he was moved from one location to another and confined in cells until he agreed to testify.

[6] A press conference was allegedly held by Mr. Ndongala's spouse, at which the Co-applicant was present. The Applicant claimed that she answered questions from reporters regarding the principal Applicant's disappearance.

[7] The Applicant alleged that on the evening of the press conference, the *Agence nationale de renseignement* [ANR] arrested the Co-applicant and the Applicants' adopted daughter. He alleged that the Co-applicant and their daughter were confined, tortured and raped by ANR agents. On June 30, 2012, the Co-applicant was found at night abandoned on a road in Matadi. Passers-by drove her to the hospital where she remained until October 20, 2012. Their adoptive daughter was never found.

[8] On October 7, 2012, on the eve of the *Sommet de la francophonie*, the Applicant was released. On October 11, 2012, Mr. Ndongala was allegedly found abandoned on the street.

[9] After his release, the Applicant received calls advising him to keep his promise to testify against Mr. Ndongala.

[10] Given the threats faced by the Applicants, a member of the party, who wished to remain anonymous, used his connections in order to help them flee the Congo.

[11] The Applicants disguised themselves to travel from their home to the United-States [U.S.] Embassy where they obtained their visas in order to travel to the U.S.

[12] The Applicants left Kinshasa on November 3, 2012 and arrived in the U.S. on November 4, 2012. They then traveled to the Canadian border on December 5, 2012 and claimed refugee status.

### III. Impugned Decision

[13] The Applicants' refugee claim was refused by the Board on October 30, 2014. The Board concluded that the Applicants were not credible and their return to the Congo would not expose them to a risk to their life, torture, or cruel and unusual treatment that is not usually felt by all Congolese.

[14] The Board concluded that the Applicants were not credible based on a series of inconsistencies between their oral testimony and documentary evidence.

### IV. Issues

[15] The following issues arise in this application:

1. Are the Board's credibility findings reasonable?
2. Did the Board err by failing to assess the claim under section 97?

3. Did the Board breach the principles of procedural fairness?

V. Standard of Review

[16] In the case at bar, the first issue concerning the Board's credibility findings should be examined on a standard of reasonableness, per *Dunsmuir v New Brunswick*, 2008 SCC 9. The second issue is whether there was a factual determination by the Member which would have necessitated an assessment under section 97, which is also assessed on a standard of reasonableness. The third issue involves the manner of use of information obtained by the member's research efforts during the hearing. This issue should be assessed on a standard of correctness, with respectful consideration given to the tribunal's procedural arrangements and context of the process, per *Sound v Fitness Industry Council of Canada*, 2014 FCA 48 at paras 34-42.

VI. Analysis

A. *Board's Credibility*

[17] The Applicants do not attempt to challenge the Board's numerous adverse credibility findings of inconsistencies and implausibilities arising out of their testimony and in relation to the other documentary evidence. These include fundamental facts such as the date of the alleged kidnappings, the individuals accompanying the Applicant and Mr. Ndongala when kidnapped, whether the Co-applicant was kidnapped, and if so, for what dates and whether she was detained, among other alleged facts.

[18] Rather, the Applicants focused on the Board's rejection of the letters from the Applicants' lawyer and uncle, medical reports and in particular, the Applicants' membership cards. These criticisms of the Board's decision would appear to align with the Applicants' submissions that no specific finding was made by the Board that they were not members of D.C. in support of their argument that a section 97 analysis should have been made of their claim.

[19] The Court finds that there is sufficient evidence to support the Board's rejection of the documents' authenticity. In many cases the inconsistencies arise out of the Applicants' evidence, such as the date of kidnapping which was not supported by the objective documentary evidence. The letters repeated the same incorrect date. The testimony surrounding the lawyer's letter revealed inconsistencies with respect to when the solicitor-client relationship was initiated, whether the lawyer was a member of a law firm, and ultimately whether it was provided on a personal basis. Like the uncle's letter, allegedly a university professor, it contained serious grammatical and spelling errors, raising concerns about the level of education of the authors. The uncle's letter also contained an inconsistency indicating that he was responsible for obtaining the Applicant's release, as did the Applicant's brother. This was inconsistent with the Applicant's testimony and Personal Information Form.

[20] The Board also gave little weight to the doctors' letters as it concluded that they were likely forgeries. There were inconsistencies with the letters regarding the detention dates of the Co-applicant. The first letter was incomprehensible, and required a second letter to explain the alleged medical treatment. As the hearing was conducted over three separate dates and having pointed out these problems, the Board requested further documentation from the hospital

authenticating facts, particularly regarding the Co-applicant who was apparently in the hospital over a long period of time. None was forthcoming. The Applicant's doctor also refused to confirm certain medical effects contended by the Congolese doctors.

[21] The Board also concluded that the Applicant's D.C. membership card was a forgery. The Court accepts the Applicants' argument that the second membership card, mistakenly included in the Application Record, which contains small differences from the membership card in evidence before the Board, should not be considered. Nevertheless, the Board's rejection of the authenticity of the cards was based upon a number of factors, including inconsistencies in dates with respect to the Applicant's timing as a driver for the party and differences observed on the stamp (on the card over the photos) of the originals.

[22] The Court concludes that the Board's credibility findings were reasonable and well-supported by the evidence, including passages of the transcript. They demonstrated that the Applicant varied his story on numerous occasions when confronted with inconsistent facts. These conclusions extend to its findings that the Applicants failed to establish a serious possibility that they would be persecuted, or that they would likely face a risk of death, torture or inhumane treatment upon their return to the Congo.

B. *A Requirement to Conduct a Section 97 Assessment*

[23] The Applicants submit that the Board erred in failing to conduct a section 97 assessment. The Applicants cite the Board's conclusions with respect to the dismissal of the persecution claim at paragraph 36 of the Applicants' Memorandum of Fact and Law. However, the Board

specifically found that the Applicants had not established on a balance of probabilities that they faced a danger of torture, risk of life and or risk of a cruel and unusual treatment not usually experienced by all Congolese.

[24] The Court is satisfied that the foregoing passage is sufficiently specific in its conclusion that the evidence did not support a finding that the Applicant was a member of the D.C., thereby obviating the requirement for a separate section 97 assessment.

C. *Breach of Procedural Fairness*

[25] The Applicants submit that the Board Member improperly engaged in an independent research of a refugee claim and then unfairly presented it to the Applicant without an opportunity to properly respond. The Board Member produced a newspaper article which explained that the President of D.C., Mr. Ndongala, had been tried and sentenced to 10 years in prison for the rape of two minors. After providing the article to counsel, the Board asked why authorities would still be interested in the Applicants if Mr. Ndongala had been imprisoned.

[26] The complete answer to this claim is that the Board did not refer to it in its decision which contained ample reasons to support the adverse credibility findings against the Applicants. Moreover, the Respondent points out that section 170(a) of the Act specifically gives the RPD authority to “inquire into any matter that it considers relevant to establishing whether a claim is well-founded.” It is also well established that the RPD is inquisitorial by nature and that fact-



finding is at the heart of its specialized expertise: *Benitez v Canada (Citizenship and Immigration)*, 2007 FCA 199 at paras 15, 16 and 28.

[27] The additional evidence was raised at the October 1, 2014 hearing. There was ample time to conduct research and challenge the documentation at the October 16, 2014 continuation of the hearing, if it were necessary to do so. The Applicants do not indicate that they were unaware of this fact. I reject the argument that there was any failure of natural justice in the proceeding.

## VII. Conclusion

[28] For the reasons provided, the application is dismissed. No questions are certified for appeal.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application for judicial review is dismissed  
and no question is certified for appeal.

"Peter Annis"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-7844-14

**STYLE OF CAUSE:** MAHO SIMANZONDO MAZINGA, DJODJO MOUSSA  
v MINISTER OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** AUGUST 27, 2015

**JUDGMENT AND REASONS:** ANNIS J.

**DATED:** OCTOBER 22, 2015

**APPEARANCES:**

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