Federal Court  Cour fédérale

20190321

Docket: IMM-3141-18

Citation: 2019 FC 344

Ottawa, Ontario, March 21, 2019

PRESENT: The Honourable Mr. Justice Bell

BETWEEN:

NELLY NSEKELE TSHIENDELA, MARIE-ANGE KALUBI TSHIENDELA, NAOMI BUBANJI TSHIENDELA, SHEKINA NSEKELE TSHIENDELA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application under subsection 72 (1) of the *Immigration and Refugee Protection Act, SC 2001, c. 27* [the *IRPA*] for judicial review of a decision dated June 1, 2018 [the Decision]

by the Refugee Protection Division [the RPD] in which it determined, following two (2) days of hearings, that Nelly Nsekele Tshiendela [Ms. Tshiendela] is excluded from Convention refugee status pursuant to Article 1E of the *United Nations Convention Relating to the Status of Refugees*, 189 UNTS 150 [the *Refugee Convention*] and that Ms. Tshiendela's three (3) daugthers, Marie-Ange Kalubi Tshiendela, Naomi Bubanji Tshiendela and Shekina Nsekele Tshiendela [the Minor Applicants], are not Convention refugees under section 96 of the *IRPA* or persons in need of protection under subsection 97 (1) of the *IRPA*. For the reasons set out below I dismiss the application for judicial review.

II. Facts concerning the Principal Applicant

[2] Ms. Tshiendela was born in, and is a citizen of, the Democratic Republic of Congo [the Congo]. On and around August 25, 2001, she fled the Congo and moved to South Africa where she obtained refugee status. In 2005, Ms. Tshiendela obtained a study permit in South Africa, which effectively replaced her refugee status.

[3] On August 13, 2009, she married her husband, Jean-Paul Tshiendela, a South African citizen of Congolese descent. The latter is currently working in the Congo on a work permit. He is also the father of the Minor Applicants. Following her marriage, Ms. Tshiendela's immigration status in South Africa improved. Because her husband is a South African citizen, she was able to obtain a Relative Visa. Her latest Relative Visa was granted in 2016 and was valid until April 30, 2018.

[4] The RPD succinctly describes the events that led to Ms. Tshiendela's fear of persecution in South Africa:

> [5] The principal claimant alleges that she had her own little shop in the Yeoville district of Johannesburg, and she also worked for an organization called African Marketing Global Empowerment and Projects (AMAGEP). She alleges that her family were victims of xenophobic attacks in South Africa because the claimant is a foreigner and her husband is originally from the DRC. She alleges that she received threats by telephone because of her work on a documentary regarding xenophobia.
>
> [6] She also alleges that their house was broken into several times by unknown people. Her shop was in the Yeoville area in Johannesburg, and she alleges that is where she was also threatened and slapped by unknown people on three separate occasions. These people told her to leave the country and on the final occasion her life was threatened. She made police reports but nothing happened as a result of them. The claimant alleges as well that the minor claimants were treated like foreigners at school because their parents are originally from the DRC.

[5] On June 15, 2017, following the third incident at her shop, Ms. Tshiendela sought refuge at her pastor's church. She remained at the church until July 10, 2017, when she, along with the Minor Applicants, fled to the United States. They eventually made their way to Canada where they filed claims for asylum.

III. Facts concerning the Minor Applicants

[6] The Minor Applicants were born in, and are citizens of, South Africa.

[7] The Minor Applicants were provided, pursuant to subsection 167(2) of the *IRPA*, with a Designated Representative [the Representative]. The Representative spoke at length about the

conversations she had with the Minor Applicants, principally the two (2) oldest daughters, Marie-Ange and Naomi.

[8] The Representative indicated that Naomi is the child most affected by discrimination against persons of Congolese descent. Naomi informed the Representative that she was the constant victim of daily harassment by an unnamed male classmate. This harassment affected her to the point that she no longer wished to attend school. Despite several interventions by Ms. Tshiendela, the teacher told Naomi there was nothing that could be done about the harassment. Ms. Tshiendela attempted, without success, to obtain a meeting with the school principal about the situation. Naomi added that she was repeatedly blamed by her teacher for acts committed by other students.

[9] Both Marie-Ange and Naomi told the Representative that, although they are South African citizens by birth, they are treated as foreigners given that their parents are of Congolese descent. If they are sent back to South Africa, Marie-Ange and Naomi fear that the bullying and intimidation will continue.

IV. Impugned Decision

[10] The RPD concluded that the determinative issues regarding Ms. Tshiendela were her exclusion under Article 1E of the *Refugee Convention* and the availability of an Internal Flight Alternative [IFA]. With respect to the Minor Applicants, the determinative issue was the availability of an IFA.

[11] With respect to the question of exclusion under Article 1E of the *Refugee Convention*, the RPD applied the principles established in *Shamlou v. Canada (Minister of Citizenship and Immigration) (1995)*, 103 FTR 241, 59 ACWS (3d) 494 [*Shamlou*] and *Canada (Citizenship and Immigration) v. Zeng*, 2010 FCA 118 [Zeng].

[12] The RPD noted that during the last decade, Ms. Tshiendela had access to permanent residency through both her status as the spouse of her husband, and also as the mother of her South African children. Despite these opportunities, Ms. Tshiendela never applied for permanent residency. After considering the criteria set out in *Shamlou* and *Zeng*, the RPD concluded that Ms. Tshiendela had access to permanent residency in South Africa, that such status is substantially similar to that of its nationals, and that she failed to acquire such status because she chose not to apply for it.

[13] The RPD then considered whether Ms. Tshiendela and the Minor Applicants had a well-founded fear of persecution under section 96 of the *IRPA* or a risk harm under subsection 97 (1) of the *IRPA* in the Article 1E country (South Africa).

[14] The RPD considered whether Ms. Tshiendela's and the Minor Applicants' allegations of risk in South Africa related to xenophobia. It considered the evidence of the alleged break-ins at the family home, threats received by telephone and the incidents at the shop owned by Ms. Tshiendela. It concluded these were not motivated by xenophobia or xenophobic related police inaction. Rather, they were, according to the RPD, the result of widespread criminality in Johannesburg.

[15] With respect to the Minor Applicants, the RPD considered the evidence pertaining to the mistreatment at school. While the RPD concluded that neither they, nor their mother, have lived peacefully in South Africa, it was of the view their problems in Johannesburg could be solved if they were to relocate to either Cape Town or Port Elizabeth. The RPD concluded this would permit the Minor Applicants to continue their education in a city located far away from their school in Johannesburg area, the Eastleigh Public School.

[16] In determining that the cities of Cape Town and Port Elizabeth were viable IFAs, the RPD applied the test established in *Rasaratnam v. Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 (CA) [*Rasaratnam*] which states that: 1. the RPD must be satisfied on a balance of probabilities that there is no serious possibility of the claimant being persecuted in the part of the country to which it finds an IFA exists; and 2. conditions in that part of the country must be such that it would not be unreasonable, in all the circumstances, for the claimant to seek refuge there.

[17] The RPD concluded that Ms. Tshiendela failed to demonstrate there was a serious possibility that she would be discovered if she were to relocate to one of the proposed IFAs. The RPD found support for its conclusion in the fact that Ms. Tshiendela never identified the perpetrators who attacked her. The RPD also noted that Ms. Tshiendela's family (brother, two sisters, mother and their respective families) all reside in Cape Town. According to the evidence, Ms. Tshiendela's family had been living in Cape Town for many years without experiencing any xenophobic incidents. Although Ms. Tshiendela led documentary evidence regarding xenophobic attacks in South Africa, including Cape Town, the RPD found it not to be persuasive. The RPD

concluded that the documentation presented, along with the testimony heard, did not establish that either Ms. Tshiendela or the Minor Applicants would face a serious possibility of xenophobic violence in the proposed IFAs of Cape Town and Port Elizabeth.

[18] The RPD observed that South Africa is a country that has no restrictions on freedom of movement and women may travel anywhere in the country. Moreover, the RPD concluded Ms. Tshiendela is a capable individual who has worked in South Africa and operated her own shop. The RPD also pointed out that she travelled on her own to Canada with the Minor Applicants. Based upon the objective evidence before it, the RPD found that there would be no undue hardship for Ms. Tshiendela and the Minor Applicants to move to either of the proposed IFAs.

V. Relevant Provisions

[19] The relevant provisions of the *IRPA* and *Refugee Convention* are set out in the Annex below.

VI. Matters at issue

[20] The only substantive issues to be determined in this application are:

1. Whether the RPD reasonably concluded that Ms. Tshiendela is excluded from refugee protection pursuant to Article 1E of the *Refugee Convention*; and
2. Whether the IFA findings, with respect to the Minor Applicants, were reasonable.

VII. Analysis

A. *Standard of Review*

[21] Whether facts give rise to exclusion under Article 1E of the *Refugee Convention* is a question that yields "substantial deference to the RPD" (*Zeng*, at para. 11). The application of the exclusion test to the facts involves a question of mixed fact and law, and thus is reviewable on the standard of reasonableness (*Omar v. Canada (Citizenship and Immigration)*, 2017 FC 458, at para. 10; *Rrotaj v. Canada (Citizenship and Immigration)*, 2016 FC 152, at para. 10 [*Rrotaj*]).

[22] Whether the RPD erred in its IFA findings is also a question of mixed fact and law and thus is reviewable on the standard of reasonableness (*Danchenko v. Canada (Citizenship and Immigration)*, 2018 FC 1099, at para. 20; *Okohue v. Canada (Citizenship and Immigration)*, 2016 FC 1305, at paras. 8-9).

[23] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process" and [and also with respect to] whether the decision falls within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v. New Brunswick*, 2008 SCC 9, at para. 47; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, at para. 59).

B. *Did the RPD unreasonably conclude that Ms. Tshiendela is excluded from protection by application of Article 1E of the Refugee Convention?*

[24] Article 1E of the *Refugee Convention* is incorporated into Canadian domestic law by application of section 98 of the *IRPA*, which states as follows:

> **98** A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.

[25] Subsection 2(1) of the *IRPA* provides the definition of Refugee Convention to which section 98 of the *IRPA* refers:

> **2 (1)** The definitions in this subsection apply in this Act.
>
> **[…]**
>
> ***Refugee Convention*** means the United Nations Convention Relating to the Status of Refugees, signed at Geneva on July 28, 1951, and the Protocol to that Convention, signed at New York on January 31, 1967. Sections E and F of Article 1 of the Refugee Convention are set out in the schedule. (*Convention sur les réfugiés*).

[26] The Schedule to the *IRPA* refers to Articles 1E and F of the *Refugee Convention* which provide as follows:

> **SCHEDULE** (Subsection 2(1))
>
> Sections E and F of Article 1 of the United Nations Convention Relating to the Status of Refugees
>
> **E** This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.
>
> **F** The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> > **(a)** he has committed a crime against peace, a war crime, or a crime against humanity, as defined in

> the international instruments drawn up to make provision in respect of such crimes;
>
> **(b)** he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> **(c)** he has been guilty of acts contrary to the purposes and principles of the United Nations.

[Emphasis added.]

[27] The purpose of Article 1E of the *Refugee Convention* it to protect the integrity of the refugee system from so-called "asylum shopping" (*Rrotaj*, at para. 13). It "precludes the conferral of refugee protection if an individual has surrogate protection in a country where the individual enjoys substantially the same rights and obligations as nationals of that country" (*Zeng*, at para. 1).

[28] In the seminal case of *Zeng*, Justice Layden-Stevenson sets out the exclusion test to be applied when considering application of Article 1E of the *Refugee Convention* (*Zeng*, at para. 12):

> Considering all relevant factors to the date of the hearing, does the claimant have status, substantially similar to that of its nationals, in the third country? If the answer is yes, the claimant is excluded. If the answer is no, the next question is whether the claimant previously had such status and lost it, or had access to such status and failed to acquire it. If the answer is no, the claimant is not excluded under Article 1E. If the answer is yes, the RPD must consider and balance various factors. These include, but are not limited to, the reason for the loss of status (voluntary or involuntary), whether the claimant could return to the third country, the risk the claimant would face in the home country, Canada's international obligations, and any other relevant facts.
>
> [Emphasis added.]

[29] In present circumstances, the RPD was faced with a situation where an applicant for protection had access to permanent residence in South Africa but voluntarily failed to acquire it. The RPD was then tasked with determining whether such status (permanent residency) is substantially similar to the rights enjoyed by South African nationals.

[30] Justice Diner's comments in *Rrotaj* are instructive. He confirms that permanent residency is the status that has been recognized by the jurisprudence as satisfying the Article 1E requirement (*Rrotaj*, at para. 22):

> [22] […] In my view, the plain text of the provision indicates that individuals will not be excluded if their status in the third country confers something less than the basic rights afforded to nationals, and I would not go so far as to state that Canadian law interprets 'nationality' in Article 1E as citizenship. Article 1E does not state that excluded claimants must become nationals in the true legal sense: rather, they need only have rights and obligations "attached to nationality". Considering all of the commentary above, this should be read to mean "analogous to" the rights and obligations of nationals, which translates, generally, to permanent residency, the status that has been recognized by the jurisprudence as satisfying Article 1E. If the drafters of the Refugee Convention intended to say that the claimant obtained actual nationality or citizenship in the third country, they would have said so in plain language.
>
> [Emphasis added.]

[31] Ms. Tshiendela had access to permanent residency as early as March 28, 2006, more than 11 years ago, when her first child was born in South Africa. Another avenue to obtain permanent residency became available when she married her South African husband on August 13, 2009.

[32] *Shamlou* holds that the rights and obligations of nationals include:

A. The right to return to the country of residence;

B. The right to work freely without restrictions;

C. The right to study; and

D. Full access to social services in the country of residence.

[33] I am of the view the RPD correctly identified the criteria adopted in *Shamlou*. I am also of the view the RPD did not err in its application of this criteria to the facts. There existed ample evidence before the RPD which confirmed that Ms. Tshiendela had access to such rights. For example, she had been employed by the African Marketing Global Empowerment and Projects [AMAGEP], ran her own shop and attended the Vaal University of Technology, and this, all while on a Relative Visa. The evidence before the RPD is that Ms. Tshiendela's access to social services would have been heightened had she sought permanent residency status. It was reasonable, if not correct, for the RPD to conclude that her rights would have increased had she sought and obtained permanent residency.

[34] As noted earlier, Ms. Tshiendela's most recent Relative Visa expired on April 30, 2018. Therefore, at the time she claimed refugee status and at the first hearing before the RPD, her Relative Visa was active and valid. Her Relative Visa expired by the time of her second hearing before the RPD. The Federal Court of Appeal recently concluded in *Majebi v. Canada (Citizenship and Immigration)*, 2016 FCA 274, at paragraph 7, that an Applicant's status should be considered as of the last day of the hearing before the RPD. However, in this case, Ms. Tshiendela deliberately caused her Relative Visa to expire by expressly failing to seek its renewal. As a result, I am of the view that the expiry of her Relative Visa cannot avail to her benefit. She was aware of its pending expiration (*Canada (Minister of Citizenship and*

Immigration) v. Choovak [*Choovak*], 2002 FCT 573, at para. 40). This Court has held on several occasions, (see for example, *Nepete v. Canada (Minister of Citizenship and Immigration)*, [2000] 195 FTR 171, and cases cited therein), that the fact that an applicant's re-entry visa or travel document was expired at the time of the hearing is not an impediment to exclusion under Article 1E of the *Refugee Convention*.

[35] In light of all of the above, there existed *prima facie* evidence before the RPD that Article 1E of the *Refugee Convention* applied in the circumstances. The onus shifted to Ms. Tshiendela to demonstrate why, having permitted her Relative Visa to expire, she could not have reapplied and obtained a new visa (*Choovak*, at para. 41). Furthermore, the onus shifted to Ms. Tshiendela to demonstrate why she could not return to South Africa (*Hassanzadeh v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1494, at para. 27). Ms. Tshiendela made no effort to meet either onus, other than to speculate about various potential scenarios.

[36] It was reasonably open to the RPD to conclude that Ms. Tshiendela failed to demonstrate that she would be denied re-entry, permanent residency or another Relative Visa if she had reapplied prior to or after the expiration of her Relative Visa.

[37] Having decided that Ms. Tshiendela may return to South Africa, the RPD went on to analyze the risk she faces in South Africa and the possibility of an IFA. This approach was consistent with the third prong of the *Zeng* test. See also, *Kroon v. Canada (Minister of Employment and Immigration)*, [1995] 89 FTR 236, where Justice MacKay observed that, if an

applicant faces a threat of persecution in the putative Article 1E country, then that country cannot be considered an Article 1E country.

[38] The RPD considered the evidence in relation to the alleged break-ins at the family home, threats received by telephone and incidents at the shop owned by Ms. Tshiendela. The RPD explained why it was not persuaded that these incidents were related to xenophobia. Ms. Tshiendela understandably disagrees with that conclusion. However, this Court has stated on numerous occasions that mere disagreements with the RPD's findings do not make those findings unreasonable (*Omorogie v. Canada (Citizenship and Immigration)*, 2015 FC 1255, at para. 58). It is not this Court's role to substitute its assessment of the evidence or to reassess the weight given by the RPD to the evidence. The weight to be assigned to the evidence is a matter for the RPD. The Court will intervene only if the RPD's findings were made in a perverse or capricious manner or without regard for the material before it (*Eker v. Canada (Citizenship and Immigration)*, 2015 FC 1226, at para. 9).

[39] Regardless, presuming Ms. Tshiendela is the victim of a Convention ground for asylum or meets the requirements of s. 97 of the *IRPA*, the RPD correctly applied the law as it relates to the determination of a IFA; namely, 1. that there is no serious possibility of the Applicant being persecuted in the IFA, and 2. that it is reasonable for the Applicant to seek refuge there (see for example: *Abdalghader v. Canada (Citizenship and Immigration)*, 2015 FC 581, at para 22, and the cases cited therein).

[40] The RPD's analysis is transparent, justifiable and intelligible. It falls within a range of range of possible, acceptable outcomes which are defensible in respect of the facts and law. The presence of many immediate family members in one of the IFA areas and no evidence of persecution of them is significant. Secondly, the fact that the threats in Johannesburg were not "personal" to Ms. Tshiendela and that no perpetrator was identified, demonstrate the perpetrator is unlikely to seek out Ms. Tshiendela in the proposed IFAs.

C. *Did the RPD unreasonably conclude that the cities of Cape Town and Port Elizabeth were viable IFAs for the Minor Applicants?*

[41] The Minor Applicants contend the RPD erred in its IFA analysis by not tailoring it to them personally. They contend the RPD focused its analysis largely on the position of Ms. Tshiendela. With respect, I disagree. The RPD addressed the change in schools, the distance from Johannesburg and the presence of family members at the IFA in Cape Town. The adequacy of reasons must be evaluated in the light of the purposes for which they are written. They must meet the standard of justification, transparency and intelligibility (*VIA Rail Canada Inc. v. National Transportation Agency*, [2001] 2 FC 25 (FCA) at para. 21). I am of the view that the RPD provided adequate reasons in support of its IFA findings of Cape Town and Port Elizabeth for the Minor Applicants as well.

VIII. Conclusion

[42] The application for judicial review is therefore dismissed without costs. No question is certified for consideration by the Federal Court of Appeal.

JUDGMENT in IMM-3141-18

THIS COURT'S JUDGMENT is that this Application for Judicial Review is hereby dismissed. No question is certified for consideration by the Federal Court of Appeal.

"B. Richard Bell"
Judge

ANNEX A

Immigration and Refugee Protection Act, S.C. 2001, c. 27	***Loi sur l'immigration et la protection des réfugiés***, L.C. 2001, ch. 27
Convention Refugee	**Définition de réfugié**
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
Person in need of protection	**Personne à protéger**
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,	**a)** soit au risque, s'il y a des motifs sérieux de le

of torture within the meaning of Article 1 of the Convention Against Torture; or	croire, 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	**b)** soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,	**(i)** elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays
(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,	**(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) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	**(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) the risk is not caused by the inability of that country to provide adequate health or medical care.	**(iv)** la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats
Person in need of protection	**Personne à protéger**
(2) A person in Canada who is a member of a class of persons prescribed by the regulations	**(2)** A également qualité de personne à protéger la personne qui se trouve au

as being in need of protection is also a person in need of protection.	Canada et fait partie d’une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	NELLY NSEKELE TSHIENDELA, MARIE-ANGE KALUBI TSHIENDELA, NAOMI BUBANJI TSHIENDELA, SHEKINA NSEKELE TSHIENDELA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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