

Federal Court



Cour fédérale

Date: 20190430

Docket: IMM-3871-18

Citation: 2019 FC 542

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, April 30, 2019

PRESENT: Justice Diner

BETWEEN:

**MONIQUE NGAMBU NSIMBA
BENEDICTE DIAZUNA DIAYELE
JESSICA KUZIMBU DIAYELE**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] Monique Ngambu Nsimba [the principal applicant] and her two minor children, Benedicte Diazuna Diayeles and Jessica Kuzimbu Diayeles [collectively, the applicants] are citizens of the Democratic Republic of the Congo. They are challenging a decision of the Refugee Appeal Division [RAD] confirming a decision of the Refugee Protection Division [RPD] denying their claim for refugee protection and determining that they are not refugees or

persons in need of protection within the meaning of sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27, on the basis that they did not credibly establish that they would be at risk in the Congo. For the reasons that follow, I am of the view that the applicants' application for judicial review must be dismissed.

I. Facts

[2] Monique Mgambu Nsimba is married to Bernard Watekedila Diaye, who resides in the Congo. In addition to their two daughters, they have a son, Emmanuel Bankazi Diaye, a Congolese citizen who, since 2014, has been a student in Canada.

[3] The applicants arrived in Canada in June 2016. On September 9, 2016, they filed a claim for refugee protection.

[4] Ms. Nsimba alleges that her husband, Mr. Diaye, worked for the national electricity company, the Société nationale d'électricité, in Congo. In 2011, he allegedly obtained employment with the World Bank as a consultant with the ministry of energy in Kinshasa, and then, from 2013 to 2015, he held the position of project coordinator of Inga-3, a hydroelectric power plant project funded by the World Bank. In 2014, a new minister of energy was appointed, and Mr. Diaye was allegedly replaced in his position as Inga-3 project coordinator by a member of the party in power. According to Ms. Nsimba, following her husband's refusal, Mr. Diaye reportedly refused to divert funds from the Inga-3 project, the president of the senate and the prime minister sought to get rid of him because of his rectitude and honesty.

[5] Consequently, on March 29, 2015, Mr. Diaye permanently left his employment. On the night of March 30, 2015, four Congolese soldiers, claiming they were investigating the Inga-3 project, reportedly seized computers and working documents from Mr. Diaye. The next day, Mr. Diaye and Ms. Nsimba allegedly filed a complaint with the police.

[6] One year later, on the night of May 22, 2016, six Congolese soldiers broke into Ms. Nsimba's residence. The soldiers allegedly took her to the living room while she was naked, threatening to kill her in front of her children. She states that she avoided being raped only because Mr. Diaye offered the soldiers \$600. Nevertheless, these soldiers reportedly took items from the house and threatened to come back, as they were still looking for documents involving the Inga-3 project. The soldiers allegedly fled after drawing the neighbourhood's attention.

[7] In August 2016, Ms. Nsimba, Mr. Diaye and their daughters came to Canada to visit their son. The applicants chose to stay in Canada to avoid further mistreatment from the Congolese government. As for Mr. Diaye, he then returned to the Congo to resume his employment with the Société nationale d'électricité.

[8] At the RPD hearing, Ms. Nsimba testified that she had been informed by her husband that individuals showed up at their residence in the Congo again during the nights of August 28 and September 18, 2016. However, Ms. Nsimba only presented this new fact to her lawyer the day before the RPD hearing.

[9] The RPD denied the applicant's claim, owing to the various contradictions, omissions and inconsistencies regarding their description the home invasions. In addition, the RPD was unable to determine the extent to which these home invasions were truly related to the Inga-3 project. The RPD also noted contradictions casting doubt on the truthfulness of Ms. Nsimba's story, in the description of the applicants' behaviour following the alleged home invasions. Finally, the RPD also noted that, while not determinative, Ms. Nsimba's laboured testimony, as well as the lack of details with respect to her exchanges with Mr. Diaye and his decision to return to the Congo, supports its finding that Ms. Nsimba lacked credibility.

[10] The RAD dismissed the applicants' appeal and concluded that the RPD did not err in its analysis of the evidence and that it correctly concluded that the applicants had not established a risk of return to the Congo.

II. Issue, standard of review and analysis

[11] The Court must determine whether or not the RAD erred in its assessment of the evidence and the applicants' credibility. I agree with the parties that the standard of review is reasonableness and the Court will not interfere as long as the decision is justified, transparent and intelligible, and that the outcome is within the range of conclusions which are defensible in respect of the facts and the law (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, at para 59; *Dunsmuir v New Brunswick*, 2008 SCC 9, at para 47). Therefore, the Court must show deference to the RAD's findings of fact (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93, at para 35), except in case of an error in the RAD's review of

credibility, as described in *Rozas del Solar v Canada (Citizenship and Immigration)*, 2018 FC 1145, at paras 60, 107).

A. *Did the RAD err in its assessment of the evidence and the applicants' credibility?*

[12] The applicants argue that the RPD and the RAD lacked sensitivity and understanding towards Ms. Nsimba, a mother who was sexually assaulted by soldiers. The applicants also contend that the RAD contradicted itself by accepting the truthfulness of the incidents alleged at the hearing, but casting doubt on it in its reasons. Moreover, the applicants criticize the RAD for not applying the *Chairperson's Guideline 3: Child Refugee Claimants: Procedural and Evidentiary Issues* and the *Chairperson's Guideline 4 on Women Refugee Claimants Fearing Gender-Related Persecution* in its analysis of the evidence. Finally, the applicants submit that the RAD attached undue importance to the fact that Ms. Nsimba failed to mention the link between the home invasion and the Inga-3 project in the complaint she filed with the police.

[13] The respondent counters that the RAD reasonably explained in its reasons why the applicants are not credible with respect to the central elements of their claim. Their lack of credibility makes it possible to deny their claim. The respondent also submits that the RAD did not commit any error in its analysis of the evidence and that the applicants are indeed asking the Court to reassess the evidence when it is not its role to do so.

[14] In its decision, the RAD raised a number of concerns that caused it to doubt the credibility of the applicants' account. The eight major ones are cited below:

- i. The applicants came to Canada in 2015 without claiming refugee protection. Ms. Nsimba decided to remain in Canada with her daughters in August 2016 rather than return to the Congo with her husband. Based on these actions, the RAD found that Ms. Nsimba had not proven that she had a subjective fear, as she had stated that she had no intention of remaining in Canada when she arrived and that she had not discussed this with her husband.
- ii. The RAD found that Ms. Nsimba provided inconsistent dates in her description of the alleged home invasions. First, when she was questioned during her hearing about the date on which her first complaint with the police was filed, she stated that the complaint had been filed on March 31, 2015, that is, the day after the home invasion. However, later during the hearing, she stated that she could not remember the date on which the complaint had been filed. When the RPD told her that the complaint was actually dated April 2, 2015, Ms. Nsimba was unable to explain this discrepancy.
- iii. The complaint filed with the police makes no reference to the bandits' demands to obtain information on the Inga-3 project, the supposed motive for the home invasion. Without that important element, the RAD concluded that the complaint reported nothing more than a random theft.
- iv. The RAD found that the applicants' behaviour after the first home invasion did not show any subjective fear of persecution. The applicants did not take any special measures to protect themselves from another similar event, even though they allege that the individuals involved threatened to come back.
- v. The RAD was not persuaded by Ms. Nsimba's assertion that she knew the same individuals were involved in the two home invasions because she recognized their voices. The RPD held that it was unlikely that Ms. Nsimba recognized the bandits' voice. However, for the RAD, even if it were true that Ms. Nsimba could have recognized the voices, it is an important element that she failed to mention prior to her testimony at the hearing, which undermines her credibility.
- vi. The RAD confirmed the RPD's decision to reject an email sent to Ms. Nsimba by her husband. No probative value was given to the email, owing to the numerous contradictions between the email's content and Ms. Nsimba's testimony.

- vii. The RAD concluded that the applicants' behaviour following the second alleged incident was not consistent with a subjective fear of persecution. Also, Ms. Nsimba's daughters contradicted her in their testimonies.
- viii. The applicants claimed that they should have been considered to be refugees despite their lack of credibility. However, the RAD concluded that they failed to establish that the Congolese government had a particular interest in them or that the level of crime in the Congo personally subjected them to an increased risk of sexual assault.

[15] In my view, it was open to the RAD to make the findings of fact mentioned above. For the RAD, as well as for the RPD, credibility was a determining factor. A finding of this type is under the purview of these two administrative tribunals. The omissions, contradictions and discrepancies in a story could form the basis for adverse credibility findings (*Akzibekian v Canada (Citizenship and Immigration)*, 2019 FC 278, at para 18). In this case, the omissions, contradictions and discrepancies in the applicants' story concern its central elements, in particular whether the alleged events happened and whether the applicants behaved in a manner consistent with the alleged subjective fear of persecution.

[16] Finally, the applicants submit that the RPD and the RAD failed to mention and follow the Immigration and Refugee Board of Canada's Guidelines 3 and 4 (*Child Refugee Claimants: Procedural and Evidentiary Issues*, and *Women Refugee Claimants Fearing Gender-Related Persecution*).

[17] The lack of any mention of Guidelines 3 and 4 in the RAD's decision cannot, in and of itself, make up for the gaps in the applicants' evidence (*Boluka v Canada (Citizenship and Immigration)*, 2015 FC 37, at paras 16-20). The mere fact of not mentioning them in the decision

is not a determinative error, considering the findings on Ms. Nsimba's lack of credibility (*Tovar v Canada (Citizenship and Immigration)*, 2016 FC 598, at paras 33-34).

[18] Even though it would have been desirable that the guidelines be specifically mentioned in the RAD's reasons, the applicants did not demonstrate how the RPD or the RAD failed to comply with the principles established in those guidelines. In this case, the RPD provided Ms. Nsimba with ample opportunities to explain the contradictions in her testimony. Moreover, the RPD remained sensitive to the potentially traumatizing nature of the alleged facts. Also, the RPD took into account the age of Ms. Nsimba's daughters when they testified. I am of the view that the conclusions drawn from the children's testimony are not the result of a selective analysis of the evidence, but rather of the normal process of assessing evidence.

[19] In the circumstances, the RAD disposed of the appeal in accordance with the instructions of the Federal Court of Appeal in *Huruglica* and did not commit any of the credibility assessment errors described in *Rozas del Solar*. I am therefore of the view that the RAD drew its conclusions reasonably and in a manner consistent with *Dunsmuir*, that is to say, that the panel's finding is within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

III. Conclusion

[20] The applicants essentially call upon the Court to substitute its own opinion on their credibility for that of the RAD. However, it is not the role of the Court, in an application for judicial review, to reassess the evidence and the applicants' credibility in order to substitute its

decision for that of the RAD. In this case, the RAD committed no error warranting the intervention of the Court. In light of the numerous omissions, contradictions and discrepancies in the applicants' testimony, it was reasonable for the RAD to find as it did. This application for judicial review is dismissed.

JUDGMENT in IMM-3871-18

THE COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;
2. No question is certified;
3. No costs are awarded.

“Alan S. Diner”

Judge

Certified true translation
This 9th day of May, 2019.

Michael Palles, Translator

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3871-18

STYLE OF CAUSE: MONIQUE NGAMBU NSIMBA ET AL v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: MARCH 25, 2019

JUDGMENT AND REASONS: DINER J.

DATED: APRIL 30, 2019

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