Federal Court  Cour fédérale

Date: 20191209

Docket: IMM-6228-18

Citation: 2019 FC 1573

Toronto, Ontario, December 9, 2019

PRESENT: The Honourable Mr. Justice Pentney

BETWEEN:

FLORENCE MITAMBA MWAYUMA
NOBLE FAUSTIN AGANZA BALAMAGE
STEVIE KASUZA BALAMAGE
JABEZ NKOLO BALAMAGE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants, Florence Mwayuma (Primary Applicant) and her three children, seek judicial review of the decision of the Refugee Appeal Division (RAD) rejecting their appeal of the denial of their refugee claim. They had appealed to the RAD from the decision of the Refugee Protection Division (RPD) that found that they were neither Convention refugees nor persons in need of protection.

I. Context

[2] The Applicants are all citizens of the Democratic Republic of the Congo (DRC). The husband of the Primary Applicant, and the father of her children, resides in the DRC and works there as a lawyer and Member of Parliament. He is not part of this claim. They have an adult daughter who was a student in the United States and did not form part of this claim.

[3] In January 2016 one of the Applicants, the eldest son, whom I shall refer to as A.B., came to Canada on a student visa. The remaining Applicants, together with the husband and father, came to Canada in July 2016 to visit A.B. The Primary Applicant's husband returned to the DRC in August 2016. The Applicants remained in Canada, and claimed refugee protection on November 22, 2016. Their refugee claim was based on a fear of persecution because of their membership in a particular social group, on the basis of their ethnicity as Banyamulenge, and the Primary Applicant also based her claim on her fear of sexual violence in the DRC.

[4] The hearing before the RPD occurred on February 1, 2017, and it issued its decision rejecting the claim on February 20, 2017. The RPD rejected the claim because it found that both the Primary Applicant and A.B. were lacking in credibility, the delay in filing the claim, and the failure to have made prior claims when they took trips outside of the DRC also called into question the genuineness of their fear of persecution. It is important to the narrative to note that A.B.'s testimony before the RPD was a significant consideration in its finding that the Applicants lacked credibility, because he contradicted their claim, and said he did not fear returning to the Congo.

[5] The Applicants filed an appeal of this decision with the RAD. During the period between the RPD hearing and the release of its decision, A.B. was charged with a criminal offence, which resulted in a psychiatric evaluation in October 2017, during which he was diagnosed with schizophrenia. As a result of this, the Primary Applicant was designated as his representative, and the Applicants applied to file new evidence before the RAD.

[6] The RAD accepted the new evidence regarding A.B.'s condition, as well as country condition evidence relating to the DRC. It also accepted the Applicants' argument that A.B.'s testimony, and any impact it had on the credibility of the Primary Applicant, should be rejected, because this was the product of his psychiatric condition.

[7] The RAD went on to consider the RPD's analysis of the claims advanced by the Applicants, which it reviewed on a standard of correctness. It found that the RPD did not err in concluding that the Primary Applicant's fear of persecution based on her ethnicity lacked credibility. The evidence showed continuing tension between Hutus and Tutsis elsewhere in the DRC, but the Applicants lived in the capital city of Kinshasa, and the evidence indicated that the situation was not as difficult there.

[8] In relation to the finding that the Primary Applicant's behaviour was not consistent with her alleged fear, the RAD found that it was relevant to consider both the extensive travel outside of the DRC and the delay in submitting a refugee claim in Canada. The evidence showed that the Applicants had taken multiple trips outside of the DRC since 2006, but had never made a refugee claim in any of these countries, which included Switzerland, Germany, the Netherlands, Italy, Belgium, and the United States. The RAD also found it was relevant to consider the sequence of

events, noting that the Applicants arrived in Canada in July 2016, the husband left in August, the Primary Applicant enrolled her children in school in Canada in August, and yet no refugee claim was submitted until November. Although this was not determinative, it was a relevant factor in assessing the credibility of their claim.

[9] On the issue of gender-based persecution, the RAD upheld the RPD finding that the Primary Applicant was not as vulnerable as other women in the DRC because she is married to a well-known lawyer who serves as a Member of Parliament, and because she lived in Kinshasa. The RPD and RAD accepted that the Primary Applicant had been subjected to female genital mutilation when she was 12-years old, and that her sister had been kidnapped and raped many years before. It found, however, that the risk assessment for a refugee claim must be forward-looking and the evidence did not support her claim that she had a current fear based on recent, concrete events. The RAD noted that the documentary evidence showed that sexual violence in conflict zones in the DRC is a significant issue, but it found that the evidence did not establish an objective basis for her fear of gender-based persecution.

[10] Concerning her fear that her sons would be forcibly recruited into an armed group, the RAD upheld the RPD finding that the evidence did not demonstrate a risk that young Banyamulenge living in Kinshasa are vulnerable to forced recruitment. The evidence did show that this occurred elsewhere in the country, but that was not relevant to the Applicants' situation.

[11] In light of the diagnosis of A.B.'s schizophrenia, the Applicants also advanced a *sur place* claim, because of the risk of persecution he faced in the DRC because mental illness is not understood, and many in the general population view mental illness as a sign of possession or

witchcraft. They also argued that the lack of adequate treatment facilities meant that A.B. would be unable to obtain ongoing medical treatment, which increased the risk that he would come to the attention of the police, or end up in jail or prison, which would put his life in danger.

[12] The RAD rejected this claim. It found that the Applicants had the onus of establishing that the cumulative effect of discrimination rises to the level of persecution in order to make out a claim under section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The RAD found that the family is wealthy, and the evidence did not support a finding that the "family's financial situation would be an obstacle to [A.B.] having access to treatment. On the contrary, in the circumstances, considering his family's circumstances, he will likely have a better chance than the average Congolese person" (at para 98). The evidence did not show that the family had rejected A.B., and therefore the Applicants had "failed to establish that [A.B.] may face a serious possibility of persecution because of his mental health" (at para 100).

[13] The RAD also rejected the claim that A.B. is a person in need of protection under section 97 of *IRPA*, because such a finding is expressly prohibited if the risk is caused by the inability of the other country to provide adequate health or medical care (*IRPA*, sub-paragraph 97(1)(b)(iv)).

[14] Based on this analysis, the RAD dismissed the appeal. The Applicants seek judicial review of this decision.

II. Issues and Standard of Review

[15] This case raises three issues:

A. Is the finding that A.B. is not a refugee *sur place* unreasonable?

B. Did the RAD make an unreasonable finding regarding the Primary Applicant's fear of gender-based persecution?

C. Is the finding regarding subjective fear and delay unreasonable?

[16] The standard of review of all of these questions is reasonableness: *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93; *Walite v Canada (Citizenship and Immigration)*, 2017 FC 49 at para 18.

[17] The key question in a judicial review on the standard of reasonableness is summarized in *Canada (Attorney General) v Igloo Vikski Inc*, 2016 SCC 38, [2016] 2 SCR 80:

> [18] Reasonableness review is concerned with the reasonableness of the substantive outcome of the decision, and with the process of articulating that outcome. The reasoning must exhibit "justification, transparency and intelligibility within the decision-making process": *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 47. The substantive outcome and the reasons, considered together, must serve the purpose of showing whether the result falls within a range of possible outcomes: *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 14. While the adequacy of a tribunal's reasons is not on its own a discrete basis for judicial review, the reasons should "adequately explain the bases of [the] decision": *Newfoundland Nurses*, at para. 18, quoting from *Canada Post Corp. v. Public Service Alliance of Canada*, 2010 FCA 56, [2011] 2 F.C.R. 221, at para. 163 (per Evans J.A., dissenting), rev'd 2011 SCC 57, [2011] 3 S.C.R. 572.

[18] To put it another way, on judicial review on the deferential standard of reasonableness, a key concern is whether the process and decision indicate that the decision-maker truly "engaged" with the evidence, applying the appropriate legal test. The standard is not perfection. It must be recalled that Parliament assigned the task of conducting the initial inquiry into the facts to the

administrative decision-maker, here the RPD and then the RAD. Deference is due to a decision-maker in particular in a context where the inquiry is primarily factual, and it is within the decision-maker's area of expertise, in a situation where greater exposure to the nuances of evidence or a greater awareness of the policy context may provide an advantage. If the chain of reasoning of the decision-maker can be understood, and if it shows that this type of engagement occurred, the decision will generally be found to be reasonable: see *Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431.

III. Analysis

A. *Is the finding that A.B. is not a refugee sur place unreasonable?*

[19] A refugee is someone who has a well-founded fear of returning to their country of origin or habitual residence. Usually that fear arises because of something that happened in that country. Sometimes it can be linked to something that has happened while the person is in another country, including expressing new political opinions, for example: see *UNHCR Handbook*, paras 95-96; *Balog v Canada (Citizenship and Immigration)*, 2014 FC 449; *Khan v Canada (Citizenship and Immigration)*, 2001 FCT 836 (FCTD).

[20] That is the situation here. The Applicants' claim is that A.B. would be at risk of persecution because of his mental illness, which has manifested itself and been diagnosed while he was in Canada. They feared that A.B. would be at risk because of the lack of adequate treatment facilities in the DRC, combined with the general social attitudes towards persons with mental illness. In addition, the Applicants claimed that if he did not receive proper and ongoing medical treatment, A.B.'s condition was likely to cause him to come to the attention of the police

or security authorities, just as had occurred in Canada. If this happened in the DRC, his life would be at risk because of the conditions in DRC jails and prisons. The Applicants argue that the RAD erred in rejecting this claim on the basis that the family's financial situation would overcome the lack of doctors, hospitals, and medicine in the DRC. The RAD implied that the family could obtain the necessary medical care in South Africa, as they had done previously when the Principal Applicant needed treatment during the complicated birth of her youngest son. This was an unreasonable conclusion because the question is whether A.B. would face persecution in the DRC.

[21] The Applicants submit that they established a "well-founded fear of persecution," which merely requires a demonstration of a reasonable chance of persecution which is something less than the balance of probabilities (*Adjei v Canada (Employment and Immigration)*, [1989] 2 FC 680, 1989 CanLII 5184 (CA)). The RAD erred by rejecting the claim on the basis of speculation about the access A.B. would have to appropriate medical treatment in the DRC because of his family's financial situation.

[22] The Respondent submits that the RAD decision is reasonable based on its assessment of the documentary evidence, and its conclusion that ultimately A.B. would be shielded from the risk of discrimination or mistreatment by virtue of his father's prominent position and his family's wealth. The RAD did not suggest that he could or should travel to South Africa to obtain treatment; rather, it was simply noting that in the past the family had used its financial resources to arrange appropriate medical care when they needed it. The RAD finding that the Applicants had not demonstrated a well-founded fear of persecution is reasonable based on the evidence. The onus rested on the Applicants, and the RAD simply found that they had not met it.

[23] I find the RAD analysis on this question to be unreasonable, because the evidence on which the conclusion is based is not clear, and the finding is contradicted by significant evidence in the record. The RAD based its conclusion on the family's wealth, yet it is not at all clear how this would overcome the lack of doctors, facilities, or appropriate medication in the DRC. While the evidence does show that medical treatment must be privately funded because it is not provided by the state, that in and of itself does not support the RAD's conclusion.

[24] The evidence in the record shows that there is widespread discrimination and mistreatment of persons with mental illness in the DRC. The documents indicate a widespread belief that mental illness is a sign of witchcraft or possession, and children with mental illness or a mental disability are regularly accused of sorcery. Many families mistreat or abandon individuals displaying symptoms of mental illness, or with a mental disability, which is perceived as a curse or embarrassment for the entire family. There is evidence that the risks are not just from security forces, but that family members also engage in forcible confinement and mistreatment. There is ample evidence of widespread societal discrimination based on mental illness and mental disability.

[25] In addition, the documentary evidence demonstrates a critical shortage of appropriately trained doctors, medical facilities, and medication to treat such conditions. As of 2013, it was estimated that there were approximately 30 trained professionals, in a country with a population (at that time) of 69 million people. In addition, the record shows that there is a shortage of facilities and medication: in 2014, it was stated that there were only six mental health hospitals with 500 beds to serve the whole country. There is specific reference in reports provided to the RAD about the shortage of specialists qualified to treat schizophrenia. In addition, the evidence

demonstrates that a significant percentage of the DRC population has some form of mental illness or condition, associated with the long-standing violence that has plagued that country.

[26] In the face of this evidence, it was unreasonable for the RAD to conclude that the family's wealth or the father's standing in society would overcome these obstacles such that there was not a well-founded fear of persecution. It was unreasonable for the RAD to base its finding on speculation, and there is no reference to the evidence on which the RAD relied to support its conclusion on this point: see *Li v Canada (Citizenship and Immigration)*, 2019 FC 229 at paras 15-20; *Zhang v Canada (Citizenship and Immigration)*, 2018 FC 1210 at para 25.

[27] I find that the RAD analysis of the *sur place c*laim is unreasonable, because the evidence on which it was founded is not referred to, and it is unclear why or how the RAD assessed the contradictory evidence referred to above. Absent an explanation in the reasons, I must conclude that the finding was based on speculation, and it is not, therefore, within the range of reasonable outcomes in this case.

B. *Did the RAD make an unreasonable finding regarding the Primary Applicant's fear of gender-based persecution?*

[28] As discussed above, the Applicant asserted a fear of gender-based persecution, based on her personal history and the ongoing risks of sexual violence faced by women in the DRC.

[29] The RAD rejected this claim, because it found that some of the events that the Primary Applicant cited as the basis for her fear had occurred many years ago, and her behaviour since that time did not support an ongoing or current fear. In addition, the RAD's review of the

documentary evidence did not support an objective basis for her fear of gender-based persecution, because it tended to demonstrate that the risks to women were greater in conflict zones. The RAD found that it "must assess the [Primary Applicant's] situation where she lives and on the basis of her situation (a married, educated, affluent woman)" (at para 73).

[30] The Applicants contend that the RAD erred by ignoring the substantial evidence about the risk of sexual violence for all women in the DRC, and that such risks were not confined to conflict zones. I agree.

[31] As with its finding on the *sur place* claim, the RAD concludes that sexual violence is extensively documented in conflict zones in the DRC, but found that such sources "are considerably scarcer for Kinshasa" (at para 73). It concluded that the documentary evidence did not support an objective fear of gender-based persecution.

[32] I agree with the Respondents that considerable deference is due to the RAD regarding findings of fact and its assessment of the evidence. I do not agree, however, that the explanation of the assessment of the documentary evidence regarding gender-based fear meets the threshold of "transparency or justification" in this case. I would adopt the following reasoning by Justice Donald Rennie, in *Lin v Canada (Citizenship and Immigration)*, 2012 FC 39:

> [6] The standard of review applicable to the adequacy of reasons is that of reasonableness. To meet that standard the reasons must communicate, with minimal cogency, the rationale for the findings and conclusions. The reasons must be transparent, meaning that the factual and legal analysis which underlies the conclusion or result must be apparent. This does not require that all arguments, jurisprudence and evidence be referenced but it does mean that the reasons, when read as whole and in the context of the record, demonstrate the reasonableness of the decision:

Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board), 2011 SCC 62.

[33] The record in this case, which describes the DRC as the "rape capital of the world," shows the unfortunate reality in the DRC. The RAD finds that the risks are greater in conflict zones, which is amply supported in the record. The documentary evidence also shows, however, that crimes of sexual violence "occurred largely in conflict zones… but also throughout the country" (DRC 2015 Human Rights Report, at 26); and that sexual violence against women and girls remained "rampant, both in conflict and non-conflict zones, urban and rural areas… Most perpetrators enjoyed total immunity" (Amnesty International Report. 2015/16, DRC). Another report in the record quotes a diplomat in Kinshasa: "Rape is now considered to be a phenomenon just as widespread and violent in the suburbs of Kinshasa as in the Kivus" (FIDH-DRC "Victims of Sexual Violence Rarely Obtain Justice and Never Receive Reparation").

[34] The purpose of citing these references is not to engage in an assessment of the evidence; that is not the role of a reviewing Court. Rather, it is simply to point to evidence which directly contradicts the RAD's conclusion on a key element of the Applicants' claim, and which is not discussed or analyzed by the RAD. This is unreasonable: *Cepeda-Gutierrez v Canada (Citizenship and Immigration)* (1998), 157 FTR 35, 1998 CanLII 8667 (FC), at paras 15-17.

C. *Is the finding regarding subjective fear and delay unreasonable?*

[35] In light of my previous findings, it is not necessary to deal with this issue.

IV. Conclusion

[36] For all of these reasons, I find the RAD decision to be unreasonable. This is a high threshold, which is not easily met. In this case, however, I find that the cumulative errors of the RAD go to the heart of the Applicants' claims.

[37] While reasonableness review does not require perfection, and it is not a requirement that the decision-maker cite every piece of evidence considered in reaching a conclusion, I find that in this case I am simply unable to "connect the dots" in the reasoning of the RAD, given its reliance on evidence which is not specifically mentioned and its failure to address directly contrary evidence on the key points of whether the sur place or gender-based persecution claims were established.

[38] The application for judicial review is allowed and the matter is remitted back to the RAD for reconsideration.

[39] No question of general importance was proposed for certification, and none arises in this case.

JUDGMENT in IMM-6228-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. The matter is remitted back to a different panel of the Refugee Appeal Division of the Immigration and Refugee Board, for reconsideration.

3. There is no question of general importance for certification.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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