

Federal Court



Cour fédérale

Date: 20200618

Docket: IMM-3727-19

Citation: 2020 FC 704

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Montréal, Quebec, June 18, 2020

PRESENT: The Honourable Mr. Justice Gascon

BETWEEN:

**ZICO KITENGA LUNDA,
MMIREILLE NGALULA TSHIMANGA,
OLIANA KINTENGA NZAU**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicants, Zico Kitenga Lunda, his wife MMireille Ngalula Tshimanga and their minor child Oliana Kintenga Nzau, are citizens of the Democratic Republic of Congo. They are seeking judicial review of a decision of the Refugee Protection Division [RPD] dated February 21, 2019 [Decision], in which the RPD refused to grant them status as refugees or persons in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The RPD found that the applicants' account was not credible.

[2] The applicants submit that the RPD erred in its assessment of the evidence and their credibility. They also maintain that the RPD misinterpreted and misapplied rule 11 of the *Refugee Protection Division Rules*, SOR/2012-256 [Rules], by improperly requiring corroborative evidence of their allegations. They ask the Court to set aside the Decision and refer the matter back to the RPD so that their case can be reconsidered by a differently constituted panel.

[3] The only issue raised by this application for judicial review is whether the RPD's Decision was unreasonable.

[4] For the reasons set out below, I will dismiss the application of Mr. Lunda and his family. After reviewing the RPD's reasons and findings, the evidence before it and the applicable law, I see no reason to overturn the Decision. Considered individually or as a group, the gaps in the evidence submitted by the applicants and the contradictions in Mr. Lunda's testimony reasonably support the RPD's findings of lack of credibility, and the RPD's reasons possess the qualities

that make its reasoning logical and coherent within the relevant legal and factual constraints.

There is, therefore, no reason for the Court to intervene.

II. Background

A. *Facts*

[5] The claim made by Mr. Lunda and his family is based on Mr. Lunda's fear of persecution because of his political opinion as a member of the Union for Democracy and Social Progress [UDPS] party in the Congo.

[6] In September 2016, Mr. Lunda was allegedly detained for a week by the Congolese authorities after participating in a demonstration organized by the UDPS.

[7] In April 2017, Mr. Lunda and his family went on vacation to the United States. Although Mr. Lunda was questioned at the airport upon their departure from the Congo, the applicants were able to board their plane and leave the country. Later in April, Mr. Lunda returned to Congo for his work. He claims to have been arrested at Kinshasa airport on arrival, interrogated in connection with the UDPS, and then released. His wife and child, however, had remained in the United States, with their vacation scheduled to last until early May.

[8] During his stay in the Congo, Mr. Lunda was allegedly abducted in May 2017 while on his way to the UDPS offices. The Congolese security services allegedly tortured him before

releasing him in exchange for a ransom. Mr. Lunda was nevertheless able to join his family in the United States on May 25, 2017.

[9] Mr. Lunda and his family did not seek asylum in the United States. On July 25, 2017, they entered Canada and filed their claim for refugee protection with the Canadian authorities, alleging that they feared that the Congolese authorities would target and persecute Mr. Lunda because of his political activism

B. *RPD decision*

[10] In February 2019, the RPD rejected the applicants' claim for refugee protection. Based on its analysis, the RPD found Mr. Lunda's testimony to be lacking in credibility and concluded that there was no subjective fear of persecution for the applicants in the Congo.

[11] The RPD found numerous contradictions between Mr. Lunda's testimony and the evidence presented in his claim. In particular, the RPD found that Mr. Lunda had failed to demonstrate that he would be considered a political opponent by the authorities in the Congo or that those authorities were currently looking for him. According to the RPD, the objective documentation on returnees showed that the Congolese authorities do not focus on low-level supporters such as Mr. Lunda. Moreover, the RPD determined that Mr. Lunda had not established his activism within the UDPS. Finally, the RPD did not accept Mr. Lunda's medical evidence about the events of May 2017 because of doubts about its authenticity.

[12] Consequently, the RPD did not believe that Mr. Lunda was detained, arrested, abducted or tortured at any time by the Congolese authorities because of his political activities.

C. *Standard of review*

[13] Since *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the analytical framework for judicial review of an administrative decision is now based on a presumption that the standard of reasonableness is the applicable standard in all cases (*Vavilov* at para 16). This presumption can only be rebutted in two types of situations. The first is where Parliament has prescribed the applicable standard of review or provided a mechanism for appealing the administrative decision to a court of law; the second is where the issue under review falls into one of the categories of issues for which the rule of law requires review on a correctness standard (*Canada Post Corporation v Canadian Union of Postal Workers*, 2019 SCC 67 [*Canada Post Corporation*] at para 27; *Vavilov* at paras 10, 17).

[14] None of the situations justifying a departure from the presumption of reasonableness applies in this case, either with respect to the RPD's findings of credibility and weighing of evidence or its interpretation of rule 11.

[15] Where the applicable standard of review is reasonableness, the role of a reviewing court is to examine the reasons given by the administrative decision maker and determine whether the decision is based on "an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85; *Canada Post*

Corporation at paras 2, 31). The reviewing court must consider “the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified” (*Vavilov* at para 15). The reviewing court must therefore consider “whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision” (*Vavilov* at para 99, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at paras 47 and 74, and *Catalyst Paper Corp. v North Cowichan (District)*, 2012 SCC 2 at para 13).

[16] It is not enough that the decision is justifiable. In cases where reasons are required, the decision “must also be justified, by way of those reasons, by the decision maker to those to whom the decision applies” (*Vavilov* at para 86). Thus, review under the reasonableness standard is concerned with both the outcome of the decision and the reasoning process that was followed (*Vavilov* at para 87). I note that this approach is consistent with the *Dunsmuir* directive that judicial review should focus on both outcome and process (*Dunsmuir* at paras 27, 47–49). That said, the reviewing court must focus on the actual decision made by the administrative decision maker, including its rationale, and not on the conclusion that the court would itself have reached had it been in the shoes of the decision maker.

III. Analysis

[17] The applicants argue that the RPD’s findings of credibility contained reviewable errors and were unreasonable. The applicants first submit that the RPD erred by simply failing to

analyze the events of September 2016 and Mr. Lunda's statements relating to the persecution he allegedly suffered at that time.

[18] With respect to his activities in the UDPS, Mr. Lunda argues that the RPD erroneously refused to consider his membership card to prove his membership in the party. Relying in particular on *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 (FCA) [*Maldonado*], the applicants argue that the RPD could not require additional documentary evidence to corroborate Mr. Lunda's allegations, unfairly increasing the burden of proof on him when he should benefit from the presumption of truthfulness.

[19] With respect to the May 2017 abduction, the applicants argue that the medical report that was evidence of the May 2017 abduction should not have been excluded by the RPD. Moreover, they maintain that the RPD was overly formalistic in requiring an authentic version of a letter from a relative of Mr. Lunda recounting the ransom demand made at the time of the incident. According to the applicants, the RPD also unreasonably discredited all the favourable objective evidence contained in the National Documentation Package on the Congo, which attested to the mistreatment of opposition party activists in the country in 2016 and 2017 and the likelihood of the arrest of UDPS leaders.

[20] In particular, the applicants allege that the RPD misinterpreted rule 11 because it does not require refugee claimants to prove their allegations with documentary evidence. The applicants argue that rule 11 must be read in light of section 106 of IRPA, and that documents are required to prove identity, but not the allegations in a claim for refugee protection.

[21] I disagree with the applicants' analysis of the RPD Decision.

[22] In *Lawani v Canada (Citizenship and Immigration)*, 2018 FC 924 [*Lawani*], I summarized the principles governing the manner in which an administrative decision maker such as the RPD must assess the credibility of applicants for refugee protection (*Lawani* at paras 20–26). Applying these principles, I find that in all respects the RPD Decision is reasonable. In the case of Mr. Lunda and his family, the gaps in the evidence submitted and the accumulation of contradictions and inconsistencies regarding crucial elements of their claim provide ample support for the RPD's finding of lack of credibility (*Lawani* at para 21). I add that the adverse findings of credibility did not arise from minor contradictions that were secondary or peripheral to the claim, but rather went to the very heart of the underlying narrative, namely, threats of persecution arising from Mr. Lunda's political involvement.

[23] In short, the RPD did not believe Mr. Lunda's story that he was persecuted because of his membership and political activism in the UDPS. As a result, the RPD concluded that Mr. Lunda's allegations of both his arrest and detention in September 2016 and his abduction and torture by Congolese security services in May 2017 were baseless.

[24] With respect to Mr. Lunda's involvement with the UDPS, the RPD considered that Mr. Lunda's possession of a party membership card was not sufficient to establish his political activism. The RPD did not question that Mr. Lunda was a member of the UDPS, but rather determined that, in order for him to become a target of the Congolese authorities and be at risk of persecution, it took more than party membership alone. Moreover, the RPD noted that, for

someone who claimed to be a political activist and to have worked as a financial officer with the UDPS for several years, Mr. Lunda did not even display a minimal knowledge of the party he claimed to actively support and represent. Thus, Mr. Lunda could not recite the names of UDPS candidates or the exact name of the party in power in the Congo. In other words, Mr. Lunda did not have the level of knowledge expected of someone claiming to be an activist.

[25] Mr. Lunda replied that not knowing the names of certain UDPS candidates or the exact name of an opposing party could not reasonably be blamed on him. This argument fails to convince me. Mr. Lunda's claim, I recall, was based on a fear of persecution because of his political activism. Mr. Lunda cited his political views and his involvement in the UDPS as the source of his risk of persecution. However, the questions which Mr. Lunda was unable to answer were basic questions for anyone claiming a minimum of political activism. According to the evidence on the record, not only was Mr. Lunda unable to name certain names of candidates, he was unable to name any. And he was only able to provide vague and unclear information about prominent individuals within the UDPS. If Mr. Lunda had been as active a supporter of the UDPS as he claimed, he should have been able to give much more specific answers about the party. In these circumstances, it was certainly not unreasonable for the RPD to draw an adverse inference as to Mr. Lunda's credibility because there were inexplicable gaps in his knowledge (*Ahmed v Canada (Citizenship and Immigration)*, 2019 FC 1210 at para 33; *Adera v Canada (Citizenship and Immigration)*, 2016 FC 871 at para 26).

[26] With respect to the medical evidence, the RPD gave no weight to a medical report dated May 2016 submitted by Mr. Lunda to support his May 2017 allegation of kidnapping and torture.

In its analysis, the RPD found that both the date of the document itself and the date of the examination it contains were one year prior to the alleged abduction. Again, given this significant double date error, I am satisfied that the RPD could draw a negative inference about Mr. Lunda's credibility, as the medical report did not support any of the allegations that, again, formed the basis of Mr. Lunda's claim for refugee protection.

[27] The medical report having been rejected, the applicants criticize the RPD for taking a formalistic approach in dealing with the letter of support from a relative of Mr. Lunda, which was intended to corroborate the events of May 2017. I disagree with counsel for Mr. Lunda's proposed reading of the offending passage in paragraph 20 of the Decision. On the contrary, it is undeniable in my view that when the RPD referred to a non-authentic document, it was referring to the medical report filed by Mr. Lunda and not to the parent's letter. Far from requiring a notarized document, the RPD decided to give little weight to the letter in support of one aspect of the 2017 events (i.e., the ransom payment) because of the deficient medical report, which it had found to be not authentic in the previous paragraph, and Mr. Lunda's non-credible testimony on that same document.

[28] Moreover, the documentary evidence indicated that individuals perceived as opposition political activists, and who could be at risk of torture if returned to the Congo, were individuals from European countries as well as high-level activists, a profile which Mr. Lunda did not fit at all. Again, I see nothing unreasonable in the RPD's analysis of this documentary evidence and its conclusions in this regard. I note that a general finding of lack of credibility can infect all of the

relevant evidence presented, including the documentary evidence (*Gebetas v Canada (Citizenship and Immigration)*, 2013 FC 1241 at para 29).

[29] In their submissions, the applicants rely heavily on *Maldonado* and on the presumption of the truthfulness of testimony that applicants are to benefit from. However, I disagree with the applicants' interpretation of this decision, and with the scope they appear to want to give it. *Maldonado* does not raise an irrebuttable presumption of truthfulness or immunity from suspicion for the applicants' testimony. On the contrary, *Maldonado* simply establishes the principle that "[w]hen an applicant swears to the truth of certain allegations, this creates a presumption that those allegations are true unless there be reason to doubt their truthfulness" (emphasis added) (*Maldonado* at para 5). This reservation is important because it means that the presumption is extinguished when reasons arise to doubt the veracity of the allegations made in a refugee protection claim. Thus, the presumption is rebuttable where the evidence on the record is inconsistent with a claimant's sworn testimony (*Su v Canada (Citizenship and Immigration)*, 2015 FC 666 at para 11, citing *Adu v Canada (Minister of Employment and Immigration)*, [1995] FCA No 114 (FCA) (QL)), or where the RPD is not satisfied with the claimant's explanation for inconsistencies in the evidence (*Lin v Canada (Citizenship and Immigration)*, 2010 FC 183 at para 19).

[30] The reason underlying the presumption of truthfulness in *Maldonado* is that claimants who have experienced certain types of emergency situations cannot reasonably be expected to always have documents or other evidence to support their claims. These circumstances may include passage through refugee camps, war-torn country situations, discrimination, or events in

which claimants have only a very short period of time to escape from their agents of persecution and subsequently cannot access documents or other evidence from Canada (*Fatoye v Canada (Citizenship and Immigration)*, 2020 FC 456 at paras 35–38).

[31] However, in cases where a claimant has the opportunity to gather corroborative evidence before or after arriving in Canada, the strength of the presumption of truthfulness may depend directly on the extent to which corroborative evidence is provided. It follows that, if there is any reason to doubt the veracity of the allegations made in a claimant's affidavit or sworn testimony, adverse inferences about credibility may be drawn if the claimant is unable to provide an explanation for the lack of reasonably expected corroborative evidence (*Canadian Association of Refugee Lawyers v Canada (Citizenship and Immigration)*, 2019 FC 1126 at para 184; *Murugesu v Canada (Citizenship and Immigration)*, 2016 FC 819 at para 30; *Ndjavera v Canada (Citizenship and Immigration)*, 2013 FC 452 at para 7). Similarly, where corroborative evidence should reasonably be available to establish the essential elements of a claim for refugee protection and there is no reasonable explanation for its absence, the administrative decision maker may make an adverse credibility finding based on the claimant's lack of effort to obtain such evidence (*Ismaili v Canada (Citizenship and Immigration)*, 2014 FC 84 at paras 33, 35).

[32] I would point out that the burden of establishing the elements of a claim for refugee protection rests on the applicants (*Morales Esquivel v Canada (Citizenship and Immigration)*, 2009 FC 468 at para 16). Indeed, under rule 11, a claimant has an obligation to provide documents that establish the elements of his or her claim.

[33] In the present case, the RPD could therefore find that Mr. Lunda made no effort to contact the UDPS to obtain more documents attesting to his political involvement, which was the driving, determinative factor in his claim for refugee protection. The evidence on the record leaves no doubt that Mr. Lunda made no effort whatsoever to obtain evidence to support his story. In light of rule 11, it was reasonable to expect that Mr. Lunda would attempt to contact the UDPS, and given the lack of effort, it was open to the RPD to draw a negative inference about his credibility. If Mr. Lunda was truly persecuted in the Congo because of his political involvement, he could have contacted the UDPS, even from Canada, as it was his participation in a demonstration organized by the UDPS in September 2016 and his visit to the UDPS offices in May 2017 that he believed would have led the Congolese authorities to hunt him down.

[34] I emphasize that, contrary to what the applicants argue, rule 11 is not one-dimensional and is not limited to questions of identity. Rule 11 expressly states that refugee protection claimants “must provide acceptable documents establishing their identity and other elements of the claim. A claimant who does not provide acceptable documents must explain why they were not provided and what steps they took to obtain them” (emphasis added). Indeed, the case law teaches that this rule applies not only to identity-related documents, but also to other elements of the claim: *Juma v Canada (Citizenship and Immigration)*, 2005 FC 844 at para 22. In addition, rule 11 makes it clear that applicants who do not provide acceptable documents must explain why they did not do so and what steps they took to obtain them.

[35] The exercise of review on the standard of reasonableness must include a rigorous evaluation of administrative decisions. However, as part of its analysis of the reasonableness of a

decision, the reviewing court must examine the reasons given with “respectful attention” and seek to understand the reasoning process followed by the administrative decision maker in reaching its conclusion (*Vavilov* at para 84). The reviewing court should adopt a deferential approach and intervene only “where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process” (*Vavilov* at para 13).

[36] It is settled law that the Court owes deference to the RPD’s assessment of a refugee claimant’s credibility (*Dunsmuir* at para 53; *Aguebor v Canada (Minister of Employment and Immigration)* (1993), 160 NR 315 (FCA) at para 4). RPD findings of credibility require a high degree of deference from the courts on judicial review, given the role of the trier of fact attributed to the administrative tribunal (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59, 89; *Lawal v Canada (Citizenship and Immigration)*, 2015 FC 155 at para 9). These credibility issues are the heartland of the RPD’s jurisdiction and expertise (*Pepaj v Canada (Citizenship and Immigration)*, 2014 FC 938 at para 13), and have been described as lying within “the heartland” of its jurisdiction (*Siad v Canada (Secretary of State)*, [1997] 1 FC 608 (FCA) at para 24; *Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at paras 7, 8).

[37] In the end, the arguments put forward by the applicants simply express their disagreement with the RPD’s assessment of the evidence and in fact invite the Court to prefer their opinion and their re-weighing of the evidence to the analysis made by the RPD. This is not the role of a reviewing court on judicial review.

[38] In the wake of *Vavilov*, the reasons given by administrative decision makers take on greater importance and become the starting point for the analysis. They are the primary mechanism by which administrative decision makers demonstrate the reasonableness of their decisions, both to the affected parties and to the reviewing courts (*Vavilov* at para 81). They serve to “explain how and why a decision was made”, to demonstrate that “the decision was made in a fair and lawful manner” and to guard against “the perception of arbitrariness in the exercise of a public power” (*Vavilov* at para 79). In short, it is the reasons that make it possible to establish the justification for the decision. They must be read holistically and contextually in order to understand “the basis on which a decision was made” (*Vavilov* at para 97; *Canada Post Corporation* at para 31).

[39] However, in the case of the applicants, I am satisfied that the reasons for the RPD’s Decision provide ample justification for its conclusions in a transparent and intelligible manner and allow me to understand why the RPD found Mr. Lunda to be lacking in credibility (*Canada Post Corporation* at paras 28–29; *Vavilov* at paras 81, 136; *Dunsmuir* at para 48). They demonstrate that the RPD followed rational, consistent and logical reasoning in its analysis and that the Decision is consistent with the relevant legal and factual constraints affecting the RPD (*Canada Post Corporation* at para 30, citing *Vavilov* at paras 105–7). In the end, there is nothing in the errors alleged by the applicants that causes me “to lose confidence in the outcome reached by the decision maker” (*Vavilov* at para 123).

IV. Conclusion

[40] For the foregoing reasons, the application for judicial review of Mr. Lunda and his family is dismissed. I find nothing irrational in the decision-making process followed by the RPD and its findings. Rather, I find that the RPD's analysis of Mr. Lunda's lack of credibility bears all the required hallmarks of transparency, reasonableness and intelligibility, and that the Decision is not tainted by any reviewable error. I reach the same conclusion with respect to the interpretation and application of rule 11. In all respects, the RPD's reasoning can be followed without encountering any fatal flaws in terms of its rationality or logic.

[41] None of the parties has proposed any question of general importance to be certified, and I agree that none arises.

JUDGMENT in IMM-3727-19

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed without costs.
2. No question of general importance is certified.

“Denis Gascon”

Judge

Certified true translation
This 6th day of July 2020.

Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-3727-19

STYLE OF CAUSE: ZICO KITENGA LUNDA, MMIREILLE NGALULA
TSHIMANGA, OLIANA KINTENGA NZAU v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

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DATED: JUNE 18, 2020

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