Federal Court  Cour fédérale

Date: 20140502

Docket: IMM-5234-13

Citation: 2014 FC 418

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, May 2, 2014

Present: The Honourable Mr. Justice Noël

BETWEEN:

SOLANGE MUSEME ZAMASEKA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

I. Introduction

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA) of the decision made on June 17, 2013, by Renée

Bourque, Member of the Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB) of Canada, in which it was found that the applicant is not a Convention refugee for the purposes of section 96 of the IRPA, or a person in need of protection under subsection 97(1) of the IRPA.

II. Facts

[2] The applicant was born on July 17, 1979, and is a citizen of the Democratic Republic of Congo (DRC).

[3] The RPD hearing took place on April 23, 2013, and the applicant then submitted the following. In August 2010, she found herself in a vehicle in which all the passengers went through an identity check by the soldiers. When the soldiers learned that she was coming from Kinshasa, the applicant was arrested and questioned because she was suspected of being a spy. She was assaulted and raped by a commander of the army (the Commander) while she was held, but then she was let go. Afterward, she went to the police station where, with the help of an attendant from a non-governmental organization (NGO) that assists women, she filed a complaint against the Commander. The Commander and the applicant were then directed to report to the police station. Again in August 2010, soldiers visited the applicant's family to threaten her and she fled. In December 2010, soldiers also attempted to kidnap her, but they apprehended her cousin by mistake. From December 2010 to February 2011, the applicant remained hidden.

[4] She arrived in Canada and claimed refugee status on February 4, 2011.

III. The impugned decision

[5] The RPD began its analysis by explaining that it respected the Chairperson's Guideline 4 – Women Refugee Claimants Fearing Gender-Related Persecution (Guideline 4) during the hearing.

[6] Despite some concerns, the RPD finally declared that it was convinced of the applicant's identity, but that it nevertheless dismissed her application on the ground that she gave testimony that was considered to not be credible because of the inconsistencies, omissions and contradictions stated below.

[7] The RPD did not believe in the existence of the alleged assailant, the Commander, because although she filed a complaint against him with police, the applicant did not know his name. Moreover, according to the RPD, it was not credible that the applicant simply pointed to the Commander without asking the name of the Commander to the police officer who received her complaint or the police officer mentioning the name. Further, the applicant was accompanied by a member of an NGO that aims to assist women and who would surely have suggested that she ask for her alleged assailant's name.

[8] The RPD also rejected the applicant's allegation that she was raped. In this respect, the applicant also omitted some details of the alleged assault in her written story, especially as regards the presence of other soldiers than the Commander. She stated that she was afraid that she had contracted HIV/AIDS as a result of the rape, but she did not undergo screening tests despite all the opportunities she had to do so. She also contradicted herself with respect to the

duration of her hospitalization following the alleged assault and the RPD rejected the validity of the medical certificate, especially because there was no letterhead and that the RPD did not believe that the applicant had been raped.

[9] The applicant's stories were also contradictory with respect to the addresses where she lived, since she stated in her questionnaire that she remained in Kinshasa during the 10 years prior to leaving the country, which contradicts the testimony that she lived in Zake, where the rape allegedly took place. The RPD did not accept the applicant's explanations in this regard.

[10] The RPD also assessed whether the applicant, if she were to return to the DRC, would be at risk because of her membership in a social class of women. It was found that the applicant's profile did not correspond to that of women who have been exposed to a greater risk of being raped and that, as a result, there was no serious possibility that she would be persecuted.

[11] Since the RPD did not believe that the applicant was credible with respect to section 96 of the IRPA, it was also found that she was not covered by paragraph 97(1)(*b*) of the IRPA. Further, the evidence presented did not help establish the existence of a risk under paragraph 97(1)(*a*) of the IRPA.

IV. Arguments of the applicant

[12] The applicant argued that the RPD's decision is not reasonable for the following three reasons.

[13] First, the RPD disregarded evidence that corroborates the main allegations in support of the refugee claim, including the fact that the applicant was raped, that she received assistance from an NGO, that she was summoned by the police station, that the family had to move because of the persecution she was subject to and that she presented the usual symptoms of a woman who has been the victim of sexual assault.

[14] Second, the RPD improperly analyzed credibility. As regards the existence of the Commander, the circumstances related by the applicant were not implausible. Moreover, the RPD's findings on the circumstances of the alleged rape were unreasonable, especially because it did not respect Guideline 4 since the particular state of mind of the applicant resulting from what she experienced was not considered. Also, the applicant in no way contradicted herself with respect to her hospitalization and, with respect to the different locations where she lived, the applicant provided real explanations, but they were not considered.

[15] Third, the RPD's finding on the applicant's membership in the social class of women is not reasonable in particular because the RPD did not address the evidence contrary to its findings because the applicant's family network is geographically remote and because, contrary to what the decision confirms, the applicant lived with her aunt and not with her spouse, from whom she is separated.

V. Arguments of the respondent

[16] The respondent argued that the RPD's decision was completely reasonable and that the applicant, who simply disagrees with the findings, is asking this Court to substitute its own opinion.

[17] The RPD reached the conclusion that the applicant was not credible by relying on sufficiently important reasons. The applicant did not ask any questions about the identity of the Commander when she filed a complaint against him with the police and the RPD further found that the general process of taking complaints by the police was implausible. What is more, according to the RPD, the applicant gave contradictory versions of the number of people present at the time of the assault and of the locations where she lived, her behaviour after the hospitalization was not consistent with her own alleged fear and her testimony contradicted her own evidence. These discrepancies as a whole, the assessment of which was under the RPD's jurisdiction, were more than sufficient to reject the applicant's credibility.

[18] In response to the applicant's arguments, the respondent argued that the RPD is presumed to have considered all the evidence before it, but in the specific case of the medical certificate, the RPD was all the more justified in setting it aside since it had already rejected the credibility of the story on which it relied. In addition, the RPD demonstrated its sensitivity to the applicant's state of mind throughout the hearing and it thus respected Guideline 4 and the case law applicable to this topic. Further, as for the applicant's membership in the social class of women, she had the burden of establishing that she meets the profile of a woman who is at greater risk than other women to be a victim of rape, which she did not do.

VI. Issue

[19] Did the RPD err in finding that the applicant was not credible?

VII. Standard of review

[20] The RPD's findings on the credibility of an applicant are a question of fact that must be reviewed on the standard of reasonableness (*Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732, at para 4; *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 (*Dunsmuir*)). Therefore, this Court should limit its review of the reasonableness of the decision to "justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law". (*Dunsmuir*, above, at para 47)

VIII. Analysis

[21] The RPD's decision shows errors that make it unreasonable and justify the Court's intervention. The applicant's record was not without flaws, but because of the errors described below, it should still be referred back before another RPD officer for redetermination.

[22] The RPD rejected the applicant's credibility, and it was precisely in its appreciation of credibility that the RPD's decision cannot be considered to be reasonable.

[23] First, the RPD found the applicant's claims regarding the identification of the Commander at the police station implausible. The RPD was of the view that it was not plausible that the applicant did not know the name of her assailant and that people simply called him "Commander", that she would not have found out his real name when she filed her complaint, despite having been accompanied by a member of an NGO and that she had not been informed of the name in question by the police officer who received the complaint. As the applicant argued, reliance on findings of implausibility must be limited to the clearest cases (*Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 at para 7, [2001] FCJ No 1131, (*Valtchev*)). The key decision on this topic remains *Valtchev*, above, in which Justice Muldoon stated the following, at para 7:

> [7] A tribunal may make adverse findings of credibility based on the implausibility of an applicant's story provided the inferences drawn can be reasonably said to exist. However, plausibility findings should be made only in the clearest of cases, i.e., if the facts as presented are outside the realm of what could reasonably be expected, or where the documentary evidence demonstrates that the events could not have happened in the manner asserted by the claimant. A tribunal must be careful when rendering a decision based on a lack of plausibility because refugee claimants come from diverse cultures, and actions which appear implausible when judged from Canadian standards might be plausible when considered from within the claimant's milieu. [see L. Waldman, *Immigration Law and Practice* (Markham, ON: Butterworths, 1992) at 8.22]. [Emphasis added.]

Indeed, the applicant's explanations are eloquent and clearly establish that other scenarios could reasonably justify her claims. Further, as the above passage in *Valtchev* indicates, the administrative tribunal, in this case the RPD, must remain sensitive to the cultural differences and ensure not to draw findings of implausibility by applying strictly Canadian standards. Thus,

the RPD should have considered the conditions in the DRC, especially as concerns the judicialization of complaints in cases of sexual violence and police and military culture in the country, elements that are addressed by the national documentation on the DRC. Considering this context, in the small village where the assault took place, which was not the applicant's village, was it plausible that the assailant, who had a high military rank, could have been recognized among the population as the "Commander" and recognized by the police officer by simply being pointed out by the applicant? What is sure, these explanations are not implausible and nothing "demonstrates that the events could not have happened in the manner asserted by the claimant" (*Valtchev*, above, at para 7). It is not one of the clearest cases like the case law requires. The RPD's finding of implausibility in this regard is not justified in particular because of this finding, the RPD states that it does not believe in the assailant's existence, which is an essential element in the applicant's claim.

[24] The Court also believes that the RPD erred with respect to the circumstances surrounding the applicant's assault.

[25] First, the RPD erred by finding that the applicant contradicted herself with respect to the people present during her sexual assault. In her Personal Information Form (PIF), the applicant stated that she was raped by the Commander, although at the hearing, the applicant stated that she had been raped by the Commander while the soldiers held her to the ground. The Court noted that the two versions are more or less the same. One is simply more substantial than the other. On this topic, the applicant's intervener testified that, at the time of preparing the PIF, the applicant was having [TRANSLATION] "acute symptoms of distress" because of the assault she experienced (see the letter from the intervener, in the applicant's record at p. 56), and since it is

much more of an omission than a contradiction, the RPD should have assessed the applicant's testimony in accordance with the Guidelines 4 and asked itself whether the gaps between the versions, which are minimal, were not a result from psychological disorders related to the assault:

> [17] Instead of exhibiting awareness of the Applicant's possible difficulties in recalling her past, the Board appears hypercritical of differences between the Applicant's testimony and PIF. This is despite that fact that the Board relies primarily on omissions rather than contradictions (which are more troubling), and that the Applicant explained at the hearing that she had emotional difficulty in completing her PIF (see for example Certified Tribunal Record at p. 373).
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> [18] In my view, with all of this in mind, the Board was obliged to consider whether the discrepancies it identified and relied on to undermine the Applicant's credibility were the result of psychological difficulties and not of a desire to fabricate evidence. While the Board was not bound to accept the testimony, it was obliged, in this case, to weigh the evidence with the Gender Guidelines in mind. In my view, it did not do so.
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> [*Jones v Canada (Minister of Citizenship and Immigration)*, 2006 FC 405, [2006] FCJ No 591].

[26] Second, after considering the applicant's conduct following her hospitalization, the RPD found that [TRANSLATION] "the panel does not believe that rape took place". According to the RPD, if the applicant had truly been raped and if she was afraid of being infected by HIV/AIDS, she would have had screening tests. In this regard, as in the issue of the PIF, the Court is of the view that the RPD did not respect the Guideline 4. A reading of the documentary evidence shows that the applicant's actions were entirely consistent with those of numerous women who are victims of sexual assault, who hesitate to receive treatment. The RPD should have been more sensitive to the applicant's state of mind before drawing a rather determinative conclusion of the

assessment of the application, i.e. that the rape had not taken place. Indeed, if the RPD does not believe that the applicant was raped, the chances of the success of her application are, as a whole, considerably reduced.

[27] The RPD also erred in finding that the applicant contradicted herself regarding to the duration of her hospitalization. Questioned on this topic, the applicant clearly explained that she received treatment for three days, but remained hospitalized for one week. Nothing in the applicant's PIF indicates that she had allegedly received treatment for one week. Therefore, the applicant did not contradict herself and this finding of fact, in addition to the others, unfortunately undermined the applicant's credibility in the RPD's eyes.

[28] Finally, the RPD rejected the applicant's medical certificate by not giving it any probative value, specifically [TRANSLATION] "because it does not believe that the rape occurred". Since the Court already characterized the RPD's finding on the rape's occurrence to be unreasonable, it goes without saying that the finding on the rejection of the medical certificate must also be set aside. The medical certificate may not be authentic, however the Court notes that the RPD already formed the opinion that the rape had not occurred and, in addition, that the tribunal record does not contain any document mentioning that hospital documents must display the institution's letterhead.

[29] As for the applicant's addresses, this Court also found that reasonable explanations were provided at the hearing in this regard and that the RPD merely relayed part of the explanations. Indeed, the applicant stated that she did not properly understand the questions that the officer asked her at the port of entry, but she specified that it was also because she was exhausted,

distraught and afraid of returning to the DRC, which the RPD did not report in its decision. A more complete explanation would have been necessary to support such a decision, which should have taken into account the applicant's responses.

[30] However, I note that the RPD's analysis regarding the applicant's membership in the social class of women is true: the applicant did not establish that her profile is similar to a woman who is more at risk than other women of being a victim of sexual assault (*N.G.M. v Canada (Minister of Citizenship and Immigration)*, 2013 FC 372 at para 15, [2013] FCJ No 390).

[31] The RPD's errors stated above are fatal to its decision to such a degree that it becomes unreasonable, so that, despite the deference that the Court must show the RPD's decisions, the errors committed nevertheless require that the Court allow the application for judicial review in this case.

[32] The parties were invited to present a question for certification, but none was proposed.

ORDER

THE COURT ORDERS that:

1. The application for judicial review is allowed;

2. The applicant's record will be returned before another RPD officer for redetermination;

3. No question is certified.

"Simon Noël"

Judge

Certified true translation

Catherine Jones, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Mylène Barrière	FOR THE APPLICANT
Émilie Tremblay	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mylène Barrière Counsel Montréal, Quebec	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT