

Federal Court



Cour fédérale

Date: 20150416

Docket: IMM-4306-13

Citation: 2015 FC 478

Ottawa, Ontario, April 16, 2015

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

LOICK KALALA KANKIENZA

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

ORDER AND REASONS

I. Introduction

[1] The Applicant (Loick) is a citizen of the Democratic Republic of Congo (Congo). He was 8 years old when he entered Canada in September 2010. He was accompanied by his maternal aunt, Belle-Grace Kankienza (Grace), who has been living in Canada since 2004 and has refugee status.

[2] In December 2010, Grace filed a refugee protection claim on behalf of Loick pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) as she feared that due to his family situation, there would be nobody to care for him if he were to return to Congo. More particularly, her fear for Loick was grounded on the fact that (i) his father was a high-profile wanted man in Congo, (ii) having nobody to care for him in Congo, he would become a street child in a country where the public system for the protection of orphans or abandoned children is inexistent or deficient, and (iii) Congo is an unstable country.

[3] On May 10, 2013, the Refugee Protection Division of the Immigration and Refugee Board of Canada (the RPD) rejected the claim on the basis that there was no reliable evidence on record establishing such a fear. Loick contends that this finding is unreasonable and that it was made in violation of the rules of procedural fairness as he was required to proceed unrepresented at the crucial phase of the hearing of his claim.

[4] For the reasons outlined below, I would allow the application for judicial review.

II. Background

[5] Loick was born on January 23, 2002, in Kinshasa, Congo. He is the son of Favie Kankienza, Grace's sister, and John Bahati. His father, John Bahati, was a member of the presidential guard of former President Laurent-Désiré Kabila who was assassinated in January 2001. Mr. Bahati was accused of taking part in the assassination and has since been in exile with Loick's mother.

[6] According to the refugee protection claim, the mother allegedly went back to Kinshasa to give birth to Loick and then returned to her husband in exile when the authorities began pursuing her. Before returning to her husband, she left Loick to be raised by her own father, Mr. Kankienza, who then allegedly registered Loick under the name Kankienza to avoid any affiliation with his biological father.

[7] When Mr. Kankienza died in 2010, Grace attended the funeral and brought Loick back with her to Canada, using a false Belgian passport she obtained through a “family’s friend”. Grace had previously fled Congo in 2004 after the authorities began persecuting her due to her relation to her sister and Mr. Bahati. It is on that basis that she was granted refugee status in Canada.

III. The RPD Decision

[8] From the outset, the hearing before the RPD lasted over six sessions, spread out over a period of a little more than one year, with counsel representing Loick for the first two sessions, a different counsel for the following two, and no counsel for the last two. Grace first acted as the Designated Representative for Loick but after having been found unreliable, the RPD decided that she should be removed from that position. She was replaced as Designated Representative for Loick by a pro-bono lawyer, Michèle Brady (Ms. Brady), who first appeared at the hearing’s third session in February 2012.

[9] In its decision, the RPD first expressed its satisfaction with the document establishing Loick’s identity, an issue over which it struggled significantly, namely his school records. The

RPD then noted that although Grace affirmed that Loick's maternal grandfather gave him his name to avoid any link with his wanted father, the other identification documents, namely the birth certificate, health record and parental authorization, did identify Loick's parents as being John Bahati and Favie Kankienza. The RPD further noted that Loick testified that he lived with his parents, had visited Mr. Kankienza before his arrival to Canada and that once in Canada, he spoke frequently on the phone with his mother.

[10] Based on these findings, the RPD disbelieved the story that Loick grew up in Congo alongside his maternal grandfather. In fact, the RPD concluded that the only person able to confirm this story was Grace, who it found not to be credible. The RPD harshly commented on Grace's behaviour; whether it was regarding the false passport, her encouragement of Loick to lie to the authorities or the fake parental authorization she obtained to get custody of Loick upon their arrival in Canada.

[11] The RPD therefore found that the evidence adduced did not establish that Loick had no relatives who could take care of him in Congo. The RPD also considered the fact that Grace had two children in Congo that she had left with a friend when she fled Congo in 2004 to seek asylum in Canada. The RPD found incongruous that Grace would leave her own children to a friend but would not make arrangements for her nephew to stay in Congo in the care of relatives.

[12] The RPD concluded that the reasons alleged in the refugee protection claim for fearing to return to Congo were not the real reasons for Loick's presence in Canada and that therefore, Loick was not a person at risk within the meaning of either sections 96 or 97 of the Act.

IV. Issues and Standard of Review

[13] This case raises the issue of whether the RPD reached unreasonable conclusions by disregarding evidence before it or by predicating its factual conclusions on incorrect legal assumptions. It is not disputed that decisions on credibility and findings of fact are subject to the reasonableness standard of review (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190; *Golesorkhi v Canada (Minister of Citizenship and Immigration)*, 2008 FC 511, at para 8, [2008] FCJ No 637 (QL); *Zavalat v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1279, at para 18, [2009] FCJ No 1639 QL).

[14] Loick also claims that the RPD violated the rules of natural justice by requiring that he proceed unrepresented at the crucial phase of the hearing. Given my answer to the first question, it will not be necessary to address this second issue.

V. Submissions of the Parties

[15] Loick submits that the RPD's entire decision is predicated on the assumption that he can live with his parents or other appropriate relatives in Congo. He claims that the RPD's reasoning is unduly vague. In particular, he says that the RPD disregarded Ms. Brady's testimony that no relative could be located in Congo and made no reference to this evidence in its reasons. He further says that although the RPD noted that he testified that he spoke with his mother on the phone, it disregarded the evidence that he did not understand the terms mother and father as biological parents.

[16] Loick also puts forward that the RPD's concerns with regard to Grace's credibility were unreasonable because her entire testimony was discredited on the basis that she initially lied to the Canadian border authorities and the Children's Aid Society about Loick's identity, although it was later recognized that the Children's Aid Society was satisfied that Grace was the appropriate caregiver for him. He further contends that the RPD drew unreasonable inferences and speculated as to the reasons why Grace left her own children with a friend in Congo when she came to Canada to claim asylum. Relying on *Gracielome v Canada (Minister of Employment and Immigration)*, 9 Imm. LR (2d) 237, [1989] FCJ No. 463 (QL)(*Gracielome*), Loick asserts this to be a fundamental flaw in the decision since this finding was central to the decision and that Grace never had the opportunity to rebut the RPD's doubts in this regard.

[17] The Respondent claims that the RPD's finding that Loick could live with a family member in Congo is based on credibility and the absence of trustworthy evidence in this regard and is, therefore, reasonable. It further claims that even if no reference is made in the RPD's decision to the evidence given by Ms. Brady, there is a presumption that the RPD has considered all the evidence before it. Furthermore, it contends that it was open to the RPD to prefer Loick's testimony to that of Ms. Brady or Grace, even if Loick had just turned 10 at the time of the hearing.

[18] The Respondent also states that the findings regarding Grace's own children and their placement with another family member in Congo was reasonable and that the RPD had no obligation to confront her with that fact.

VI. Analysis

[19] I find that the problem with the RPD's decision is not so much the vagueness of the reasons but rather the unclear distinction between Grace and Loick's testimonies. Indeed, the decision does state, in my view, the reasons for the negative credibility findings: Loick's testimony indicating that he had contact with his mother in Congo and Grace's lack of credibility due to her actions when she brought Loick to Canada with her, following Mr. Kankienza's funeral.

[20] However, the RPD, in my view, fatally erred by not referring to and not explaining the impact of Loick's entire testimony, particularly in light of the guidelines of the Immigration and Refugee Board of Canada on evidentiary issues regarding child refugee claimants (*Chairperson Guideline 3, Child Refugee Claimants: Procedural and Evidentiary Issues*) (the Guidelines), which are not even mentioned in the decision. Indeed, it is clear that Loick's testimony impacted on the finding that the protection claim was not credible but there are some troubling aspects of the testimony that are not addressed by the RPD. For instance, there is no reference to the fact Loick claimed his mother to be Grace a few minutes after saying that he was frequently speaking with his "mother" on the phone since being in Canada. There is no reference either to the fact he testified he was living with his mother in Congo whilst, in fact, the woman he recognized as being his mother – Grace - lives in Canada. There is also no reference to the fact he gave a name other than John Bahati when questioned about his father's name and to the fact he eventually said he did not really remember his parents' names. The decision is silent on Loick testifying that he

lived alone with his mother while at the same time, when asked of his father's whereabouts, answering that his two parents were living together.

[21] The RPD cannot have it both ways and rely on some part of the testimony that suits its finding regarding the credibility of the story (such as the fact that he was speaking with his mother on the phone) without considering the obvious inconsistencies with the rest of the testimony (none of the names Loick gave for his parents were in conformity with his birth certificate, for example). In particular, there is no analysis as to whether Loick could be considered as a proper witness according to the Guidelines which list the factors to be considered in order to determine whether a child claimant is able to provide evidence and there is no analysis either of the Guidelines' factors regarding the assessment of the weight to be accorded to such evidence, when it is provided.

[22] In addition, there is no reference in the RPD's decision to Ms. Brady's evidence that Loick did not understand the terms "mother" and "father" as biological parents. There is no reference either to the fact that Loick was told to tell a story that was not his to the authorities upon his arrival in Canada. All those factors were relevant to the assessment of Loick's evidence and yet, they were ignored by the RPD, which casts doubts on the reasonableness of its analysis and conclusions.

[23] It is true that *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 limited the scope of intervention of the reviewing court when reasons are considered incomplete. However, the standard remains that

the reviewing court be able to understand what lead the administrative tribunal to reach its conclusion. In the present case, I find that it is unclear, for this Court, what was accepted from Loick's testimony and what was rejected, and why.

[24] The Respondent contends that the RPD's conclusions were reasonable as they were based on the absence of evidence that Loick's remaining family members in Congo could not take care of him. However, very little is submitted by the Respondent on this issue. It is trite law that the burden of proof to establish a claim lies with the refugee claimant (*Li v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1, [2005] 3 FCR 239). However, this Court has also considered that cases where the burden of proof was set too high for the applicants ought to be sent back for redetermination by a differently constituted panel (*Rajadurai v Canada (Minister of Citizenship and Immigration)*, 2013 FC 532, at para 48, [2013] FCJ No 566 (QL); *Alam v Canada (Minister of Citizenship and Immigration)*, 2005 FC 4, at para 9, 41 Imm LR (3d) 263; *Leal Alvarez v Canada (Minister of Citizenship and Immigration)*, 2011 FC 154 at para 5, 96 Imm LR (3d) 334).

[25] In this case, I find that the Respondent's argument cannot stand. Grace testified she had no contact with her family members in Congo. She repeatedly told the RPD the same story regarding her brothers and sisters in Congo. She did not contradict herself. It is difficult to understand what the RPD was expecting, beside the highly problematic evidence of a 10 year old child, in order to prove that nobody was able to take care of Loick in Congo.

[26] The Respondent claims that the assessment of Grace's credibility was well within the scope of the RPD's authority. Indeed, in *Nour v Canada (Citizenship and Immigration)*, 2012 FC 805, [2012] FCJ No 761, a case also involving a child refugee claimant, the Court confirmed that the assessment of family members' testimony is part of the overall analysis of the refugee claim. However, such assessment must still be reasonable:

44. The Court finds that the member attributes far too much significance to a few contradictions in the family members' testimony. Her fixation "on the details of what [A. Nour] stated to be [her] story caused [the member] to forget the substance of the facts on which [A. Nour] based [her] claim" (see *Djama v Canada (Minister of Employment and Immigration)*, [1992] FCJ No 531).

[27] Similarly, the only time Grace testified - aside from the first hearing when she was acting as Designated Representative for Loick - was at the last hearing session. The RPD drilled her with questions regarding Mr. Kankienza's Will. No questions were asked with regards to Grace's own children and no questions were asked on her behaviour at the border or with the Children's Aid Society as to her motivation to act the way she did.

[28] The case of *Gracielome*, above, referred to by both parties, was a case where the Immigration Appeal Board found inconsistencies in the evidence but where the actions of the refugee claimants could have been explained if only the matter was put to them at the hearing. I find this case to be applicable to the case at bar.

[29] The Respondent contends that the RPD had no obligation to confront Grace with the "obvious discrepancies" in her testimony. I can find no such "obvious discrepancies" in the hearing transcript. The fact that Grace has two children in Congo is a pure question of fact. This

fact was not even put forward by her and she was not confronted with it. There cannot be discrepancies when the fact was not even addressed by the RPD. As it was said in *Shaiq v Canada (Minister of Citizenship and Immigration)*, 2009 FC 149 at paragraph 77, [2009] FCJ No 149 (QL):

77. Although the RPD is not required to raise all concerns with an applicant that are related to the Act and the regulations, procedural fairness does require that an applicant be afforded an opportunity to address issues arising from the credibility, accuracy or genuine nature of information submitted. See, for example, *Kuhathasan v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 587 at paragraph 37. Consequently, I think the RPD in the present case should have provided the Applicant with an opportunity to address an issue that was central to its negative credibility finding.

[30] Furthermore, it is well established that findings of fact based on mere speculation are inherently unreasonable as such findings are generally characterized as mere guesses and devoid, therefore, of any legal value (*Ukleina v Canada (Citizenship and Immigration)*, 2009 FC 1292, at paras 8 and 14, [2009] FCJ No 1651 (QL)). Here, the fact that Grace had children whom she left with a friend when she fled Congo was based on the Respondent's records dating from Grace's own refugee claim in 2004. It is impossible to know what happened to these children in Congo. Perhaps they are no longer there or their father is in charge or they don't wish to leave Congo. Nevertheless, this failure to confront Grace with that fact leads to the inferences drawn from it by the RPD to be qualified as pure speculation and, as a result, as unreasonable.

[31] It was completely out of the realm of the RPD to speculate and I find that this should have had no impact on Loick's refugee claim and the assessment of his actual fears of returning to Congo grounded, as I indicated previously, on the status of his father in Congo, on the fact

that he would become a street child, and on the general instability of that country, aspects that are all missing in the RPD's decision.

[32] This judicial review application is therefore allowed, as it does not meet the criteria of a justified, intelligible and transparent decision (*Dunsmuir*, above at para 47), and the matter is remitted back to the RPD for redetermination by a differently constituted panel. Loick will then be older and, hopefully, if he testifies again, aware of the issues and prior evidence.

[33] Neither party has proposed a question of general importance. None will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;
2. The decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada, dated May 10, 2013, is set aside and the matter is remitted back to a different member for re-determination; and
3. No question is certified.

"René LeBlanc"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4306-13

STYLE OF CAUSE: LOICK KALALA KANKIENZA v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: OCTOBER 21, 2014

JUDGMENT AND REASONS: LEBLANC J.

DATED: APRIL 16, 2015

APPEARANCES:

Mr. Raoul Boulakia FOR THE APPLICANT

Ms. Melissa Mathieu FOR THE RESPONDENT

SOLICITORS OF RECORD:

Raoul Boulakia FOR THE APPLICANT
Barrister and Solicitor
Toronto, Ontario

William F. Pentney FOR THE RESPONDENT
Deputy Attorney General of Canada
Toronto, Ontario