

Federal Court



Cour fédérale

Date: 20151027

Docket: IMM-2141-15

Citation: 2015 FC 1213

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, October 27, 2015

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Applicant

and

**ALEXIS MUKANYA KABUNDA
ANNIE BUBUANGA MAKITA**

Respondents

JUDGMENT AND REASONS

I. Preliminary

[1] The identity of a refugee protection claimant is at the very core of every refugee protection claim (*Barry v Canada (Minister of Citizenship and Immigration)*, 2014 FC 8 at para 19; *Toure v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1189 at para 32).

Although the Minister's representative may raise arguments and present analyses supplied by the CBSA, it is the RPD—and subsequently the RAD, if necessary—that is tasked with assessing the probative value of a refugee protection claimant's identity. (*Matingou-Testie v Canada (Minister of Citizenship and Immigration)*, 2012 FC 389 at para 27; *Jackson v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1098 at para 34). When making findings regarding a claimant's identity, the RPD must arrive at its conclusions based upon the totality of the evidence (*Yang v Canada (Minister of Citizenship and Immigration)*, 2009 FC 681).

[2] The case law of this Court shows, as the respondents submit, that the RAD may show a certain degree of deference towards the RPD's credibility findings (*Malambu v Canada (Minister of Citizenship and Immigration)*, 2015 FC 763 at para 42). However, this rule is not absolute. When, as in this case, the RPD renders a decision without considering the CBSA's analysis reports to the effect that certain documents used to establish their identity were apocryphal or inconclusive, the RAD could not defer to the RPD on its credibility findings.

II. Introduction

[3] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board, dated April 20, 2015, allowing the respondents' refugee protection claims.

III. Facts

[4] The respondents, Alexis Mukanya Kabunda and Annie Bubuanga Makita, stated in their Basis of Claim Form [BOC Form] that they are citizens of the Democratic Republic of the Congo [DRC]. Mr. Kabunda had been an active member of a Congolese political party called Union pour la démocratie et le progrès social [UDPS] since the late 1990s. He alleges that, after taking part in a demonstration on April 12, 2010, he was arrested, handcuffed and detained at Camp Lufungula until April 16, 2010. After being released, the male respondent fled to Angola. The respondents then left Angola separately in February 2013 to return to the DRC, claiming that they had been persecuted in Angola. They entered the DRC on Angolan passports that, although genuine, had been issued illegally. Once back in the DRC, the respondents were persecuted again, so they fled to the United States.

[5] After staying in the United States for two months, the respondents filed a claim for refugee protection at the Saint-Armand border crossing on May 14, 2013, on the basis of persecution for their political opinions.

[6] In a decision dated June 10, 2014, the Refugee Protection Division [RPD] found that the respondents' testimony was "generally fluid and spontaneous and contained no significant contradictions or inconsistencies with regard to how these [illegally procured Angolan passports] and the visas inside them were obtained". After the first hearing held before the RPD on July 12, 2013, the Minister's representative filed a notice of intervention signed on September 5, 2013, stating that the Canada Border Services Agency [CBSA] was not satisfied as to the identity of

the respondents. A second hearing was therefore held on September 11, 2013. On October 31, 2013, the Minister's representative requested that the RPD delay its decision while she waited for the results of the CBSA's verification of the respondents' identities. The RPD denied that request in its decision dated June 10, 2014.

[7] In its decision, the RPD concluded that the respondents had submitted a number of documents (DRC voter cards, driver's licences, birth certificates, residence certificate, family composition certificate, act of notoriety replacing a marriage certificate, and school records) to determine their identities, and that they had therefore satisfactorily proved their identities as citizens of the DRC.

[8] The Minister of Public Safety and Emergency Preparedness appealed this decision to the RAD. The RAD confirmed the RPD's decision. It is that decision of the RAD that is now the subject of this application for judicial review.

IV. RAD decision

[9] The decision under judicial review is that of the RAD, dated April 20, 2015, by which the RAD confirmed the decision of the RPD and allowed the respondents' refugee protection claim. The RAD admitted into evidence the CBSA reports dated November 15, 18, and 19, 2013, regarding the identities of the respondents, those reports having been unavailable for submission to the RPD. The RAD found that the reports raised an important question regarding the respondents' credibility and were essential to the decision.

[10] In deciding the appeal from the RPD's decision, the RAD stated that it had to "assess all the evidence to determine whether the decision is well founded in light of the evidence before the RPD and any additional evidence admitted by the RAD as new evidence" (RAD Decision, para 38) while at the same time showing deference with regard to the respondents' credibility, unless the RPD's findings of fact or of mixed fact and law were erroneous or were not supported by the evidence.

[11] The RAD assessed each of the reports submitted by the CBSA individually. It also stated that a number of factors had to be taken into account to determine the identity of a refugee protection claimant. Thus, although the RAD recognized that when taken on their own, some of the documents filed had only little probative value with respect to the refugee protection claimants' identities, the RAD considered the fact that the RPD had had the opportunity to see and hear the respondents' testimony and had believed their testimony to the effect that they were citizens of the DRC who had lived in Angola under false identities with genuine but illegally obtained Angolan passports.

[12] In short, the RAD concluded that, considering all the evidence and the contradictions in the respondents' testimony, the respondents "established that it is more likely than not that they are Congolese citizens rather than Angolan citizens" (RAD Decision, para 63).

V. Issue

[13] The Court finds that the application raises the following issue:

Is the RAD's decision reasonable?

VI. Statutory provisions

[14] The following statutory provisions of the IRPA and the *Refugee Protection Division Rules*, SOR/2012-256 [RPDR] apply:

Credibility

106. The Refugee Protection Division must take into account, with respect to the credibility of a claimant, whether the claimant possesses acceptable documentation establishing identity, and if not, whether they have provided a reasonable explanation for the lack of documentation or have taken reasonable steps to obtain the documentation.

Documents

11. The claimant 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 did not provide the documents and what steps they took to obtain them.

Crédibilité

106. La Section de la protection des réfugiés prend en compte, s'agissant de crédibilité, le fait que, n'étant pas muni de papiers d'identité acceptables, le demandeur ne peut raisonnablement en justifier la raison et n'a pas pris les mesures voulues pour s'en procurer.

Documents

11. Le demandeur d'asile transmet des documents acceptables qui permettent d'établir son identité et les autres éléments de sa demande d'asile. S'il ne peut le faire, il en donne la raison et indique quelles mesures il a prises pour se procurer de tels documents.

VII. Positions of the parties

A. *The applicant*

[15] First, the applicant submits that the RAD erred in limiting the questions that could be asked regarding the respondents' identities. Second, the applicant submits that the RAD's analysis of the respondents' identities is clearly not supported by sufficiently reliable and probative evidence and that the RAD did not refer to objective documentary evidence. Moreover, it was not open to the RAD to rely on the RPD's credibility findings because the RPD did not have the CBSA's analysis reports in its possession when it found that the respondents were citizens of the DRC alone. Third, the RAD did not take into consideration that a passport holder is presumed to be a national of the country of issue (*Abedalaziz v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1066 [*Abedalaziz*]; *Mathews v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1387), noting that a refugee protection claimant must show a fear of persecution in every potential country of nationality (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 [*Ward*]; *Canada (Minister of Citizenship and Immigration) v Munderere*, 2008 FCA 84; *Williams v Canada (Minister of Citizenship and Immigration)*, [2005] 3 FCR 429, 2005 FCA 126).

B. *The respondents*

[16] First, the respondents argue that the RAD had the discretion to limit the questions that could be asked at the hearing before the RAD. Second, the respondents submit that the RAD considered all the evidence and that its finding regarding the respondents' identities is

reasonable. The respondents submit that, in addition to having been heard by the members of the RPD, they presented several items of evidence from different times proving their Congolese identities. Moreover, the respondents submit that the findings in the analysis reports that certain documents are apocryphal do not contradict their testimony. Third, regarding their Angolan passports, the respondents submit the applicant never presented any evidence contradicting their testimony about how they obtained them. In short, the respondents submit that the RAD rendered a decision based on all the evidence that was presented to it and that the decision is reasonable.

VIII. Standard of review

[17] The RAD's findings regarding the respondent's identities and credibility are questions of fact that must be reviewed in accordance with the reasonableness standard (*Selvarasu v Canada (Citizenship and Immigration)*, 2015 FC 849; *Diallo v Canada (Minister of Citizenship and Immigration)*, 2014 FC 471; *Aguebor v Canada (Minister of Employment and Immigration)*, 160 NR 315 (FCA)). The RAD's decision is reasonable if it is transparent, justifiable and intelligible and falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

IX. Opinion

[18] The identity of a refugee protection claimant is at the very core of every refugee protection claim (*Barry v Canada (Minister of Citizenship and Immigration)*, 2014 FC 8 at para 19; *Toure v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1189 at para 32). Although the Minister's representative may raise arguments and present analyses supplied by the

CBSA, it is the RPD—and subsequently the RAD, if necessary—that is tasked with assessing the probative value of a refugee protection claimant’s identity. (*Matingou-Testie v Canada (Minister of Citizenship and Immigration)*, 2012 FC 389 at para 27; *Jackson v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1098 at para 34). When making findings regarding a claimant’s identity, the RPD must arrive at its conclusions based upon the totality of the evidence (*Yang v Canada (Minister of Citizenship and Immigration)*, 2009 FC 681).

[19] Given the key role that identity plays in any refugee protection claim, it is surprising that the RPD did not wait to see the CBSA’s analysis report regarding the respondents’ identities before rendering a decision.

[20] It is even more surprising that the RAD nonetheless supported the RPD’s findings regarding the respondents’ credibility and thus accepted the RPD’s conclusions that the respondents are DRC citizens who fled to Angola and lived there under false identities until they were discovered by the Angolan authorities. The RAD drew this conclusion while acknowledging that “when taken on their own, some of the documents filed have only little probative value with respect to the refugee protection claimants’ identities” (RAD Decision, para 55).

[21] The case law of this Court shows, as the respondents submit, that the RAD may show a certain degree of deference towards the RPD’s credibility findings (*Malambu v Canada (Minister of Citizenship and Immigration)*, 2015 FC 763 at para 42). However, this rule is not absolute. When, as in this case, the RPD renders a decision without considering the CBSA’s

analysis reports to the effect that certain documents used to establish their identity were apocryphal or inconclusive, the RAD could not defer to the RPD on its credibility findings.

[22] Furthermore, as the applicant submits, there is a *prima facie* presumption that a passport holder is a national of the country of issue (*Abedalaziz*, above; *Becirevic v Canada (Minister of Citizenship and Immigration)*, 2015 FC 447 at para 8). The respondents testified before the RPD that their Angolan passports were genuine ones that had been fraudulently obtained. The authenticity of the passports was confirmed in the CBSA's reports.

[23] After analyzing all the evidence, the RAD concluded, "I am of the opinion that the appellant failed to establish that the RPD erred in finding that the refugee protection claimants established that they are citizens of the DRC rather than citizens of Angola" (RAD Decision, para 67). The RAD's role was not to determine whether the respondents were citizens of the DRC rather than citizens of Angola, but to determine of which countries they were citizens and, subsequently, whether they had a fear of persecution in all the countries of which they are nationals (*Ward*, above).

[24] Yet the RAD concluded that the respondents "established that it is more likely than not that they are Congolese citizens rather than Angolan citizens". The RAD did not have to determine whether the respondents were Congolese citizens rather than Angolan citizens; it had to determine all the countries of which the claimants were nationals.

[25] The Court is of the opinion that, given the key role that identity plays in a refugee protection claim, the RAD was required to conduct a thorough analysis of the claimants' identities and could not, as it did, prevent the Minister from submitting additional evidence.

X. Conclusion

[26] The Court concludes that the RAD's decision was not reasonable. The application for judicial review is therefore allowed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review be allowed and that the file be referred back to a differently constituted panel for reconsideration. There is no question of importance to be certified.

“Michel M.J. Shore”

Judge

Certified true translation
Michael Palles

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2141-15

STYLE OF CAUSE: THE MINISTER OF CITIZENSHIP AND
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