Federal Court  Cour fédérale

Date: 20160721

Docket: IMM-559-16

Citation: 2016 FC 848

[ENGLISH TRANSLATION]

Ottawa, Ontario, July 21, 2016

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. Background

[1] Determining the identity of a refugee claimant is vital to a refugee protection claim, given the rationale of the international refugee protection system: the responsibility of another state is engaged only when protection cannot be provided by a claimant's country or countries of

nationality. In this regard, see *Canada (Attorney General) v. Ward*, [1993] 2 SCR 689 [Ward] at paragraph 18:

> International refugee law was formulated to serve as a back-up to the protection owed a national by his or her state. It was meant to come into play only in situations where that protection is unavailable, and then only in certain situations. The international community intended that persecuted individuals be required to approach their home state for protection before the responsibility of other states becomes engaged. For this reason, James Hathaway refers to the refugee scheme as "surrogate or substitute protection", activated only upon failure of national protection; see *The Law of Refugee Status* (1991), at p. 135.

II. Introduction

[2] This is an application for judicial review made under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [IRPA], of a decision made by the Refugee Protection Division (RPD) on June 10, 2014, allowing the respondents' claims for refugee protection.

III. Facts

[3] The respondents, Alexis Mukanya Kabunda (principal respondent) and Annie Bubuanga Makita (respondent), claimed to be citizens of the Democratic Republic of Congo (DRC). The principal respondent was allegedly persecuted in the DRC because of his political involvement with the Union for Democracy and Social Progress, a Congolese party. The respondent, although not a member of this political party, allegedly supported the principal respondent in his political activities. The respondents fled to Angola. They returned to the DRC

after having been identified by the Angolan authorities. Upon returning to the DRC, they were allegedly persecuted once again. The respondents therefore fled the DRC for the United States.

[4] After a two-month stay in the United States, the respondents claimed refugee protection, at the Saint-Armand border crossing station on May 14, 2013, because of persecution on the basis of their political opinions. They arrived in Canada with fraudulently obtained Angolan passports.

[5] In a decision dated June 10, 2014, the RPD found that the respondents had testified [TRANSLATION] "in a generally flowing and spontaneous manner, and with no major contradictions or inconsistencies, with regard to how they obtained these [illegally obtained Angolan passports] and the visas inside them." Following the first hearing before the RPD on July 12, 2013, the Minister's representative tabled a notice of intervention, signed on September 5, 2013, indicating that the Canada Border Services Agency (CBSA) was not satisfied with respect to the respondents' identities. A second hearing was therefore held on September 11, 2013. The respondents sent new evidence to the RPD to corroborate their identities as well as additional submissions. On October 31, 2013, the Minister's representative requested that the RPD wait for the results of the checks conducted by the CBSA regarding the respondents' identities before rendering its decision. The RPD denied this request and rendered its decision on June 10, 2014.

[6] In its decision, the RPD held that the respondents had produced several documents (voter's cards from the DRC, driver's licences, birth certificates, a certificate of residence, a family composition form, an act of notoriety supplementary to a marriage certificate and other school documents) as proof of their identities, and therefore, that they had provided sufficient proof of their identities as citizens of the DRC.

[7] The Minister of Public Safety and Emergency Preparedness appealed this decision before the Refugee Appeal Division (RAD). In a decision dated April 20, 2015, the RAD confirmed the RPD's decision.

[8] This decision was the subject of a judicial review. In a decision dated October 27, 2015, (*Canada (Citizenship and Immigration) v. Kabunda*, 2015 FC 1213), the Court granted the application for judicial review and ordered that the file be sent back for redetermination by another panel. However, a fact not raised by the parties to the case and unknown to the Court at that time was that the RAD did not have the jurisdiction to hear the appeal under paragraph 110(2)(d) of the IRPA. In a decision dated February 19, 2016, the RAD dismissed the appeal for lack of jurisdiction.

[9] On February 5, 2016, in its application for leave and for judicial review, the applicant filed a motion for an extension of time under paragraph 72(2)(*c*) of the IRPA. On May 3, 2016, by order, Justice Yvan Roy allowed the application for judicial review.

IV. Analysis

[10] It is recognized that determining the identity of refugee claimants is at the very core of the RPD's expertise (*Toure v. Canada (Citizenship and Immigration)*, 2014 FC 1189, at paragraph 32 [*Toure*], citing *Rahal v. Canada (Citizenship and Immigration)*, 2012 FC 319, at paragraph 48).

[11] Determining the identity of a refugee claimant is vital to a refugee protection claim, given the rationale of the international refugee protection system: the responsibility of another state is engaged only when protection cannot be provided by a claimant's country or countries of nationality. In this regard, see *Ward*, above, at paragraph 18:

> International refugee law was formulated to serve as a back-up to the protection owed a national by his or her state. It was meant to come into play only in situations where that protection is unavailable, and then only in certain situations. The international community intended that persecuted individuals be required to approach their home state for protection before the responsibility of other states becomes engaged. For this reason, James Hathaway refers to the refugee scheme as "surrogate or substitute protection", activated only upon failure of national protection; see *The Law of Refugee Status* (1991), at p. 135.

[12] According to this principle, it is the duty of a refugee claimant who has citizenship in several countries to show that he or she has a reasonable fear of persecution in each of the countries in which he or she has or could obtain citizenship (*Canada (Minister of Citizenship and Immigration) v. Williams*, [2005] 3 FCR 429, 2005 FCA 126).

[13] In this case, the Minister's representative voiced doubts to the RPD regarding the respondents' identities, and filed a motion with the RPD requesting that it wait for the results of the CBSA's analysis reports on the respondents' identities before rendering a decision. This motion was denied by the RPD since the RPD found that the Minister's representative was vague as to the requested time frame and checks.

[14] The case law specifies on numerous occasions that the Court must show a high degree of deference to the RPD's findings with regard to concerns about or acceptance of a refugee claimant's identity—so long as the RPD gives sufficient reasons to support these findings based on relevant factors that were or should have been considered in answering the vital question as to the refugee claimants' identities (*Barry v. Canada (Citizenship and Immigration)*, 2014 FC 8, at paragraph 19; *Toure*, above).

[15] In this case, it appears that the CBSA has the necessary expertise and means to determine whether documents are genuine or whether they have been altered. It also appears that the applicant could have displayed greater diligence and informed the RPD of the reasons why checks were necessary and of the time frame required to complete the report.

[16] The Court, acknowledging its duty to show a high degree of deference to the RPD and the vital role of a refugee claimant's identity, concludes that it was not reasonable for the RPD to deny the motion made by the Minister's representative to wait for the report to be filed without, at the very least, holding the Minister's representative to a time limit for the report's submission.

Acknowledging the vital role that identity plays in a refugee protection claim, the RPD therefore ought to have conducted an in-depth assessment of the respondents' identities.

[17] As specified by Madam Justice Snider in *Shuaib v. Canada (Citizenship and Immigration)*, 2013 FC 596 at paragraph 11:

> [11] In sum, on the particular facts of this case, it was open to the Board to either explain: (a) why the late submission would not be accepted; or (b) why the Post-hearing Documents would not change its conclusion. What was not open to the Board was to ignore the Post-hearing Documents as it did.

V. Conclusion

[18] The Court finds that the RPD's decision was not reasonable. Consequently, the application is allowed; the case is set aside and is referred back to the RPD for redetermination by a differently constituted panel.

JUDGMENT

THE COURT ORDERS that the application for judicial review be allowed and that the case be set aside and referred back to the Refugee Protection Division for redetermination by a differently constituted panel. There is no question of importance to certify.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-559-16
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION v ALEXIS MUKANYA KABUNDA, ANNIE BUBUANGA MAKITA
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	JULY 14, 2016
JUDGMENT AND REASONS:	SHORE J.
DATED:	JULY 21, 2016

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