

Federal Court



Cour fédérale

Date: 20160830

Docket: IMM-5313-15

Citation: 2016 FC 985

[ENGLISH TRANSLATION]

Fredericton (New Brunswick), August 30, 2016

PRESENT: The Honourable Mr. Justice Bell

BETWEEN:

OUMAR KONARE

Applicant

And

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision rendered on November 5, 2015, by the Refugee Appeal Division (RAD) of the Immigration and Refugee Board of Canada, rejecting the application made by Oumar Konare [Mr. Konare] for recognition as a refugee or as a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, chapter 27 [the Act].

II. Background

[2] Mr. Konare was born on May 14, 1974, and is a citizen of Mali. He claims that in October 2010, he and other Malian partners formed a company called the "Compagnie africaine de construction et de gestion" [the Company], which conducted canvassing operations for a Quebec company with the goal of winning contracts in several African countries. Mr. Konare claims that he received death threats from two of his partners on January 26, 2014. According to Mr. Konare, these two partners were growing impatient with not seeing the expected profits. The two partners allegedly gave Mr. Konare 45 days to reimburse them for their investments and pay them the profits they had expected. Mr. Konare says he tried in vain to gather the money.

[3] On March 15, 2014, one of Mr. Konare's friends allegedly informed him that his partners were looking for him in order to harm him and his family. Mr. Konare moved to another area of Bamako, in Mali, where he says he remained in hiding. He claims to have filed a complaint with the police and to have moved his family on April 20, 2014, to Diré, a town in Mali located more

than 1,000 km from Bamako. Mr. Konare says he remained in Bamako until September 5, 2014, the date on which he allegedly joined his family in Diré, more than four months after having moved them. Mr. Konare claims to have received a visit from his two partners in Diré on September 15, 2014. He says that his two partners were armed with machetes and threatened to kill him. Mr. Konare allegedly escaped their attack and tried to file a complaint with the court in Diré. Following this incident, he says he relocated his family to Sikasso to give him time to pursue his business activities in the Ivory Coast. He returned to Sikasso and made another trip to the Ivory Coast, then returned once again to Sikasso. Using a Canadian multi-entry visa that he had obtained in September 2011, Mr. Konare arrived in Canada on December 9, 2014, and filed for refugee protection on January 9, 2015.

III. Contested decision

[4] In a decision dated March 16, 2015, the Refugee Protection Division (RPD) rejected Mr. Konare's application for refugee protection. The RPD did not believe Mr. Konare's story and held that his testimony was not trustworthy. The RPD found that several elements undermined his credibility, specifically the fact that he was unable to submit into evidence the Company's account statements or the original subpoena documents issued by the police for his assailants. The RPD found it unlikely that the two partners would travel 1,000 km to Diré to attack Mr. Konare when he was their only possible source of reimbursement. The RPD also held that Mr. Konare's behaviour was not consistent with the behaviour of someone who fears for his life. In this regard, the RPD refers to the fact that Mr. Konare chose to remain in Bamako for several months to continue his business activities, instead of joining his family in Diré. The RPD

also cites his travels to the Ivory Coast, where he continued his business affairs and remained conspicuous, returning to Mali on two occasions.

[5] Mr. Konare appealed the RPD's decision to the RAD. The RAD agreed with the RPD's conclusions regarding lack of credibility and denied the appeal, finding that Mr. Konare was not a Convention refugee under section 96 of the Act or a person in need of protection under section 97 of the Act. According to the RAD, Mr. Konare's behaviour was inconsistent with that of someone who fears for his life. The RAD's grounds are as follows:

- (1) When Mr. Konare was questioned as to why he had waited more than four months to join his family in Diré following threats from his partners, he explained that he had filed a complaint with the police at the beginning of April 2014 and that he was waiting for them to take action. At the hearing before the RPD, Mr. Konare testified that the police's efforts were not taken seriously. The RAD found it implausible that Mr. Konare would wait so long to join his family in Diré if he knew that the police's efforts were not taken seriously.
- (2) Before the RPD, Mr. Konare testified that before joining his family in Diré, while he remained on the outskirts of Bamako, he communicated with individuals and continued to work on managing a project in Gabon. The RAD found that such actions did not demonstrate that Mr. Konare was in hiding as he had claimed to be.
- (3) Given that he had been in possession of a Canadian multi-entry visa since September 2011, Mr. Konare had the opportunity to leave his country. Instead, he chose to continue his business activities, travelling at least twice to the Ivory

Coast, all the while continuing to return to Mali. The RAD did not find it reasonable for Mr. Konare to wait several months to apply for refugee protection in Canada.

- (4) When questioned by the RAD as to why he did not stay in the Ivory Coast, Mr. Konare explained that he was conspicuous there and that he returned to Mali to care for his children. The RAD did not find these explanations sufficient, adding that if Mr. Konare feared for his life, he would have found other arrangements for the children, so as not to put his own life in danger.

[6] Regarding the attempted attack by the two partners in Diré, the RAD concurred with the RPD's finding that such a story was implausible. The RAD held that it was unlikely that these partners, who had been described as rich and well-known bigwigs, would themselves travel 1,000 km to make threats. It also found it implausible that they would wish to eliminate their only possible source of reimbursement.

[7] The RAD also concurred with the RPD's determination that Mr. Konare's inability to provide evidence regarding the Company's expenses and investments undermined his credibility. The RAD took into consideration Mr. Konare's explanations that the amounts paid by the Company were recorded in a workbook held by his partners, and that it was therefore impossible for him to submit into evidence any accounting documentation. It noted that Mr. Konare had testified to being the Company's manager, a point corroborated by the Company's articles of incorporation dated October 2010, submitted as evidence by Mr. Konare. The RAD examined this document and noted that it stated the numerous authorities and responsibilities conferred

upon the manager, particularly the responsibility to prepare the company's balance sheet and income statement at the end of each fiscal year, as well as a written management report explaining the state of the Company's affairs. The RAD held that Mr. Konare, as manager, was extensively involved in managing the Company's operations, including accounting. Thus, Mr. Konare's duties and responsibilities as manager are not consistent with his claims of not having access to an accounting document.

[8] The RAD gave no probative value to the complaint filed by Mr. Konare with a court in Diré. The complaint to the court mentioned that Mr. Konare had joined his family two days after their departure for Diré and contradicted his testimony that he had waited more than four months before joining them there. The RPD did not address this aspect of the evidence, and the RAD stated that its analysis of the complaint to the court was conducted in a supplementary fashion, in accordance with its duty to independently assess the evidence.

[9] The RAD also agreed with the RPD's determination that Mr. Konare's inability to submit the original subpoena documents undermined his credibility. The RPD had noted that it was impossible for Mr. Konare to be unable to procure these original documents while his fiancée was able to locate a copy saved on a USB key. The RAD therefore gave no probative value to the copies of the subpoena documents, given that Mr. Konare's testimony lacked credibility and that his behaviour was inconsistent with that of someone who fears for his life.

[10] The RAD nevertheless noted that Mr. Konare had submitted the original subpoenas to the RAD. After analyzing the admissibility of these documents, specifically whether they met the legislative requirements of subsection 110(4) of the Act, the RAD concluded that these

documents were not new evidence, as a copy of them had been provided to the RPD at the hearing, because they preceded the rejection of the refugee protection application and were reasonably available.

IV. Legislative provision

[11] Subsection 110(4) of the Act provides that:

**Appeal to Refugee Appeal
Division**

*Evidence that may be
presented*

(4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.

**Appel devant la Section
d'appel des réfugiés**

*Éléments de preuve
admissibles*

(4) Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet.

V. Issues in dispute

[12] Mr. Konare maintains that the RAD: (i) erred in adding another ground to attack his credibility, without mentioning this concern to him; (ii) rendered an unreasonable decision by rejecting the new evidence in the file (the original subpoenas); and (iii) rendered an unreasonable decision in its assessment of his credibility.

VI. Standards of review

[13] The issue of the RAD's obligation to allow an applicant to respond to its stated concerns is subject to procedural fairness and must be assessed using the standard of correctness (*D'Amico v. Canada (Citizenship and Immigration)*, 2013 FC 470, [2013] FCJ 524 at paragraph 38 [*D'Amico*]; *Reza Azali v. Canada (Citizenship and Immigration)*, 2008 FC 517, [2008] FCJ 674 at paragraph 12 [*Azali*]).

[14] Issues regarding the admissibility of new evidence under subsection 110(4) of the Act in appeals of RPD decisions and issues regarding the assessment of an applicant's credibility are questions of mixed fact and law. These require that the standard of reasonableness be applied. Regarding the admissibility of evidence, see *Olowolaiyemo v. Canada (Citizenship and Immigration)*, 2015 FC 895, [2015] FCJ 895 at paragraphs 9–11, and *Singh v. Canada (Citizenship and Immigration)*, 2014 FC 1022, [2014] FCJ 1074 at paragraphs 35–42. Regarding the RAD's findings on credibility, see *Bikoko v. Canada (Citizenship and Immigration)*, 2015 FC 1313, [2015] FCJ 1370 at paragraph 8 [*Bikoko*].

VII. Analysis

A. *Did the RAD err in adding a new ground without making Mr. Konare aware of this concern?*

[15] Mr. Konare criticizes the RAD for not bringing to his attention the discrepancy between the complaint to the court in Diré, which stated that he had joined his family two days after their move on April 20, 2014, and his testimony, which alleged that he had waited more than four

months before joining them in Diré. According to Mr. Konare, the RAD's obligation to review the evidence does not allow it to draw new conclusions as to the applicant's credibility, and the RAD must give the applicant a chance to respond to its concerns. In support of this argument, Mr. Konare cites *Malala v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 94 [2001] FCJ 290.

[16] Although in general, a tribunal must inform an applicant of discrepancies noted between the evidence and the testimony in order to give him or her the chance to address it, "[t]heir duty of fairness does not require that the applicants be confronted with information which they themselves supplied." (*Azali*, above, at paragraph 26). In this case, the complaint to the court in Diré as evidence was submitted by Mr. Konare. He was aware of the information it contained. Under such circumstances, there is no obligation on the part of the RAD to confront the applicant regarding his own inconsistencies (*D'Amico*, above, at paragraphs 51–53). I am therefore of the opinion that there was no breach of the duty of procedural fairness, as the RAD did not base its conclusion on extraneous evidence.

B. *Did the RAD render an unreasonable decision by rejecting the new evidence?*

[17] The Act stipulates in subsection 110(4) that an applicant can submit additional evidence to the RAD under specific circumstances. Mr. Konare maintains that the RAD unreasonably rejected the submission of the original copies of the subpoenas. The RAD concluded in paragraph 12 of its decision:

[TRANSLATION] Having analyzed these original copies of the summons to appear in light of the case law, I am of the opinion that these documents are not new evidence, as they precede the rejection of the application for refugee protection and were

reasonably available. Furthermore, a copy of these documents was submitted to the RPD at the hearing.

[18] According to Mr. Konare, his explanation that it was impossible for him to submit the originals at the RPD hearing, as a third party had possession of them, shows that subsection 110(4) of the Act applies, which is to say that the evidence was not reasonably available at the time of the RPD hearing. I note here that in deciding that the originals were not new evidence, the RAD based its decision on *Iyamuremye v. Canada (Citizenship and Immigration)*, 2014 FC 494, [2014] FCJ 523 [*Iyamuremye*] and *Singh v. Canada (Citizenship and Immigration)*, 2014 FC 1022, [2014] FCJ 1074. In *Iyamuremye*, Mr. Justice Shore refers to Federal Court of Appeal case *Raza v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385, [2007] FCJ 1632 to establish that the applicable legal criterion in paragraph 113(a) of the Act is relevant in analyzing the admissibility of evidence under subsection 110(4) of the Act. This criterion involves weighing several issues: the credibility of the new evidence, its relevance, its newness, its materiality, and the express statutory conditions (*Raza*, above, at paragraph 13).

[19] It is clear that the RAD considered the case law relating to the interpretation of subsection 110(4) of the Act, and its conclusion that the originals are not new evidence falls within a range of reasonable outcomes. The RAD specified in particular at paragraph 34 of its decision that in any case, the subpoenas were not determinative in this case, given that Mr. Konare's behaviour—the fact that he waited more than four months before leaving Bamako—seriously undermined his credibility and was not consistent with that of someone who fears for his life. Given that the evidence was not determinative, it was reasonable for the RAD not to allow it.

C. *Did the RAD render an unreasonable decision in its assessment of Mr. Konare's credibility?*

[20] Mr. Konare maintains that the RAD's findings regarding his credibility and his fear are unreasonable. He is of the opinion that the RAD committed an error in its assessment of the file. It is his submission that the RAD gave no grounds for rejecting his explanation that he was not in possession of the Company's accounting documents. I disagree with these arguments. The RAD explicitly indicated at paragraphs 45–47 of its decision that it had taken Mr. Konare's explanations into account, but that it was reasonable to expect that Mr. Konare, as partner and manager of the Company for several years, would have access to documents related to the Company's management, including the accounting books. This expectation is specifically underpinned by the fact that the Company's articles of incorporation state that the manager holds these responsibilities.

[21] Regarding the RAD's conclusions that Mr. Konare's behaviour is inconsistent with that of someone who fears for his life, Mr. Konare claims that the RAD committed an unreasonable error by rejecting his explanation. He stated that he had left the country only as a last resort, after having tried to solicit a new client and to find a way to pay his debt to his partners. Mr. Konare also maintains that he submitted numerous documents corroborating his business ties with the Canadian company, his association with his assailants and the many steps taken to try to find new contracts. It appears that Mr. Konare simply disagrees with the RAD, which is insufficient to justify this Court's intervention. It is up to the RAD to weigh the value of the explanations given by the applicant and to draw conclusions regarding credibility. It is not this Court's role to

re-weigh the evidence, the testimony or the explanations given by the applicant, or to substitute its own conclusions for those of the RAD (*Bikoko*, above, at paragraph 10).

VIII. Conclusion

[22] The RAD did not fail to fulfil its duty of procedural fairness in not giving Mr. Konare the opportunity to address the discrepancies raised by the evidence he submitted. I am also of the opinion that the RAD's conclusions regarding Mr. Konare's lack of credibility and the inadmissibility of the new evidence, based on the evidence and the grounds listed, are justified, transparent and intelligible, and fall within a 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 paragraph 47). Intervention by this Court is therefore not justified.

JUDGMENT

THE COURT'S JUDGMENT is that the application for judicial review is dismissed without costs. None of the parties proposed a question of general importance, and no question has been certified.

"B. Richard Bell"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

STYLE OF CAUSE: OUMAR KONARE v. THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

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