Date: 20061212

Docket: IMM-1987-06

Citation: 2006 FC 1483

Ottawa, Ontario, December 12, 2006

PRESENT: THE HONOURABLE MR. JUSTICE BLANCHARD

BETWEEN:

Kwassi Wobuibe KLUTSE

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

1. Introduction

[1] This is an application for judicial review filed pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), of a decision of the Immigration and Refugee Board, Refugee Protection Division (the Board), rendered on March 21, 2006. In that decision, the applicant, Kwassi Wobuibe Klutse, was denied the status of

a “refugee,” as defined in section 96 of the IRPA, and of a “person in need of protection,” as defined in section 97 of the IRPA.

[2] The applicant is asking this Court to set aside the Board’s decision and refer the matter to a differently constituted panel for rehearing.

2. Factual Background

[3] The applicant, a citizen of Togo, arrived in Canada on January 7, 1998 as a foreign student and filed a refugee claim in Canada on September 6, 2005. His application is based primarily on a fear that the Togolese authorities will make an attempt on his life should he ever return to Togo. The claim was heard in Montreal on January 26, 2006.

[4] The applicant’s father, Kwassi Klutse, was prime minister of Togo during the transitional government. Prior to that, during the regime of Edem Kodjo, he had held the position of minister of territorial development. In 1996 he was appointed prime minister by General Eyadema and remained in office until May 1999. Subsequently, it appears that he kept his position within the party as an ordinary member of parliament.

[5] At the time of the 2003 elections, when President Eyadema expressed his intention not to run for the presidency again, the applicant’s father and two other people were put forward by the ruling party to hold the office. The two other candidates declined the offer, but the applicant’s father accepted. It appears that, at the end of the day, President Eyadema decided to run.

According to the applicant, this proposal by the party was in fact a ruse to find out what his father's political ambitions were.

[6] An assassination attempt was made against Mr. Klutse senior on May 6, 2003 by President Eyadema's son, who was then a colonel in the army. The applicant's father was shot and wounded in the leg, shoulder and stomach. The applicant, who was not in Togo at the time, but in Canada pursuing his education, explained that this assassination attempt was covered up. The Board, on the other hand, noted that there was no documentary evidence confirming that this incident ever actually took place.

[7] Following that incident, the applicant's father spent over six months in hospital. Four days after his arrival, soldiers surrounded the location to exercise surveillance.

[8] On his release from hospital, Mr. Klutse senior was placed under house arrest and constant surveillance.

[9] After the death of General Eyadema, one of his sons, Faure Gnasingbe, became President, and another son, Kpatcha Gnasingbe, Minister of National Defence. Mr. Klutse is still looked upon as a formidable adversary by the sons of the former dictator.

[10] The applicant claims to fear imprisonment and death at the hands of the Togolese authorities if he returns to Togo. The applicant explained that the authorities see his death as a means of avoiding future political confrontations and hurting Mr. Klutse senior. In that regard, the

Eyadema family allegedly stated that they were quite prepared to eliminate the entire Klutse family to prevent them from attempting a *coup d'état.*

[11] The applicant also asserts that all opposition supporters risk imprisonment, torture and even death; he states that his cousin Sebastien Klutse was beaten up for that reason.

[12] In March 2004, a childhood friend of the applicant was arrested by Kpatcha Gnasingbe, who allegedly told the friend that if the applicant returned to the country he would pay because his father had tried to replace General Eyadema.

[13] The applicant alleges that several members of his family have taken refuge in Benin, Ghana, France and the Netherlands, and that two of his brothers live in Quebec. His younger brother Fabrice, who lives in Québec City and with whom he has little contact, also made a refugee claim, unbeknownst to the applicant.

[14] The applicant explains the lengthy interval between his arrival in Canada and his claim to refugee status by his fear of reprisals from the Togolese authorities if he ever returned to Togo.

3. Impugned Decision

[15] The Board ruled on March 24, 2006, that the applicant was neither a refugee within the meaning of IRPA section 96 nor a person in need of protection within the meaning of IRPA section 97.

[16] The Board found that the applicant was not credible and that his behaviour belied any subjective fear. For these reasons, it took the view that the applicant would not be in danger if he returned to Togo, despite his seeking asylum in Canada. Furthermore, the Board found it reasonable to believe that the authorities would protect him.

[17] First, the Board based its finding that the applicant was not credible by pointing to an inconsistency that it characterized as significant between the applicant's testimony and his brother's Personal Information Form (PIF):

- his brother stated that his father climbed the wall during the shooting to seek refuge with the neighbours, whereas the applicant alleged that neighbours rushed to help his father when they heard the gun shots; and
- his brother seemed not to know who the people were who tried to assassinate their father, whereas the applicant identified the son of the former dictator.

On that score, the Board rejected the applicant's explanation to the effect that his brother may not have thought it necessary to provide all the details in his PIF and that two people can have different perceptions of the same situation.

[18] The Board also raised the fact that the rather substantial documentary evidence offered by the Immigration protection officer was silent on the attempted assassination of the former prime minister of the country. The applicant's explanation for the absence of this information in the documentary evidence, i.e., that his father had withdrawn from the political scene, was rejected by the Board on the basis that Mr. Klutse senior was campaigning to be president of the country

at the time. The Board added that it found the applicant negligent for not having saved a copy of the article that he had read online on this subject. Counsel for the applicant alleged that this document, as well as a letter sent by Mr. Klutse senior's former head of security, was in the possession of Immigration Québec, but that she did not have these documents because of the very short period (two months) between the filing of the PIF and the hearing. In that regard, the Board acknowledged first that the credibility of the applicant cannot be tainted by the absence of corroborating evidence, but that, given the fact that the applicant's credibility was tainted, such evidence would have been useful and, further, that its absence was surprising, even negligent, given the notoriety of the applicant's father. The Board drew a negative inference from this gap in the documentary evidence and stated its belief that Kpatcha never made the alleged threats.

[19] Next, the Board found that the applicant's testimony entirely lacked credibility on the question of whether his father was a presidential candidate in 2003. It determined that there was nothing in the documentary evidence to indicate that he actually ran in the elections; indeed, what it indicates is that General Eyadema always intended to stand for election. The Board rejected the applicant's explanation that his father's nomination was just a way to ascertain his ambitions, that it did not receive media coverage and that the party's offer was eventually withdrawn.

[20] The Board found as well that the applicant did not have a subjective fear because he had been without status since October 1, 2004 and did not seek refugee protection until September 2006. The Board thus rejected the applicant's explanation about trying during that time to regularize his situation by applying for a *Certificat d'acceptation du Québec* because he

did not meet the applicable financial criteria. Nor did it accept his explanation that he believed the death of President Eyadema meant salvation for Togo and, consequently, the end of his need to seek protection in Canada. Finally, given that the refugee claim process is confidential, the Board also rejected his explanation according to which he did not want to claim refugee status for fear of hurting his father.

4. Issue

[21] The issue to be decided by the Federal Court in this case is essentially whether the Board made a reviewable error by concluding that the applicant had no credibility.

5. Standard of Review

[22] The law is well-settled: in judicial review proceedings, the applicable standard with respect to witness credibility determinations is that of patent unreasonableness: see: *Aguebor v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. no. 732 (QL); *R.K.L. v. Canada (Minister of Citizenship and Immigration)* [2003] F.C.J. no. 162 (QL); and *Khaira v. Canada (Minister of Citizenship and Immigration)*, 2004 F.C. 62. A decision is patently unreasonable when, in view of all the circumstances, it is clearly abusive, flagrantly unjust, contrary to common sense or lacking any basis in law or in fact.

6. Analysis

[23] The applicant contends that the Board erred in its assessment of his credibility. He argued that the Board used the testimony of a third party, his brother, to assess his credibility. He explained the discrepancies in their respective testimony by the fact that his brother left Togo

after he did (i.e., he experienced events that the applicant himself did not) and by the fact that the same incident can be perceived and related differently by two people. He added that the Board could not base its finding on the credibility of his brother's testimony because it was not reliable evidence. He takes the view that if the decision-maker has doubts about a portion of testimony and wishes to reject it, the decision-maker must do so on the basis of reliable contrary evidence or make a ruling that such portion is inconsistent or suspect.

[24] The respondent counters that it was proper for the Board to use the applicant's brother's PIF to assess his credibility on the basis that there were inconsistencies between the two narratives.

[25] The applicant also contends that the Board should not have required corroborating documentary evidence because it had no reason to doubt his testimony.

[26] The respondent believes rather that the Board came to a well-founded conclusion when it found that the assassination attempt never took place, because the documentary evidence does not mention it, and that the applicant was consequently never threatened.

[27] The applicant also impugns the Board's conclusion that his testimony contradicted the testimonial evidence relating to the fact that President Eyadema stood for election in 2003, whereas he testified rather that his father had agreed to run for president because he believed the incumbent President was withdrawing from the race. The respondent is essentially contending the contrary.

[28] The applicant's final assertion is that the Board ignored a portion of the evidence in its decision. On this latter point, the respondent asserts that, since the Board does not believe the applicant's story, it had no need to examine that evidence.

[29] There is a well-established principle in the case law to the effect that an administrative tribunal is in an advantageous position for evaluating the credibility of witnesses, which means that the Court must show deference when reviewing findings in this respect. The principle is expressed as follows in *R.K.L. v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. no. 162 (QL) at paragraphs 7 to 9 :

> The determination of an applicant's credibility is the heartland of the Board's jurisdiction. This Court has found that the Board has well-established expertise in the determination of questions of fact, particularly in the evaluation of the credibility and the subjective fear of persecution of an applicant. (Citations omitted)
>
> Moreover, it has been recognized and confirmed that, with respect to credibility and assessment of evidence, this Court may not substitute its decision for that of the Board when the applicant has failed to prove that the Board's decision was based on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it. (Citations omitted)
>
> Normally, the Board is entitled to conclude that an applicant is not credible because of implausibilities in his or her evidence as long as its inferences are not unreasonable and its reasons are set out in "clear and unmistakable terms." (Citations omitted)

[30] The Court recognizes that it must show deference when reviewing conclusions relating to the credibility of witnesses. Nevertheless, when faced with patently unreasonable errors, the Court does have the authority to intervene on credibility issues. The principle whereby the

allegations made by an applicant under oath are presumed to be true unless there are valid reasons to doubt their veracity has been reiterated numerous times by the Federal Court of Appeal: *Moldonado v. M.E.I.*, [1980] 2 F.C. 302, 305; *Sathanandan v. M.E.I.*, [1991] F.C.J. no. 1016 (QL); *Villarroel v. M.E.I.*, [1979] F.C.J. no. 210 (QL). Moreover, inferences with respect to credibility must be supported by the evidence: *Frimpong v. Canada (Minister of Employment and Immigration)*, [1989] F.C.J. no. 441 (QL).

[31] On reading the Board's decision, one sees that its finding with respect to the applicant's credibility relies in large part on a number of contradictions between the applicant's narrative and his brother Fabrice's PIF. Regarding that evidence, the Board found that "so many significant inconsistencies between two versions of the same story about an event central to the claimant's refugee protection claim irreparably taints the credibility of this event."

[32] I am in agreement with the Board's determination that this evidence, notably the circumstances surrounding the attempted assassination of the applicant's father, is at the heart of his refugee claim. However, I disagree with the determination that the differences between the applicant's statements and his brother's irreparably compromise all credibility around the incident. It is true that in both his testimony and his PIF the applicant states that it was the neighbours who came to the aid of his father and not, as his brother says, his father who went to take refuge at the neighbours' home. It is also true that the applicant's brother makes no mention of the name of his father's assailant. However, the evidence reveals that neither the applicant nor his brother were physically present in Togo when these events occurred, so their knowledge is purely the product of reports from third parties. Thus, since nothing indicates that they obtained

their information from the same sources, there is nothing surprising about the fact that their respective accounts of the incident differ. The decisive aspects of their testimony, for comparison purposes, are the source of their fear (i.e., the alleged assassination attempt against their father) and the source of their father's problems (i.e., his decision to run in the 2003 presidential elections).

[33] What is more, while this Court acknowledges that past actions of third parties may have a certain impact on the plausibility of a narrative, it cannot accept that the written testimony of a third party, given in the context of separate proceedings and thus not subject to cross-examination, should be able to destroy the credibility of the applicant on a major aspect of his narrative account. Furthermore, on the basis of the evidence before it, the Board was in no position to pronounce on the credibility of the applicant's brother in these proceedings. In the case at bar, the applicant's brother's PIF does not constitute valid evidence capable of rebutting the presumption of credibility enjoyed by the applicant's testimony delivered under oath. To the extent that the transcripts of the Board hearing and decision do not reveal any other reason to doubt the applicant's credibility on this part of his narrative, the Court must find that there is no basis in law or fact for the Board's conclusion in this regard. I am therefore of the opinion that the Board erred in determining that the difference between the applicant's and his brother's statements irreparably compromise all credibility around this incident, that is, the incident at the very heart of the refugee claim.

[34] The respondent submitted to this Court that Mr. Justice Michel Beaudry, in *Liu v. M.C.I.*, [2006] F.C.J. no. 889 (QL), at paragraph 39, ruled that the PIF of other refugee claimants could

be used in the assessment of a claimant's credibility. Without questioning the correctness of that decision, I cannot apply the reasoning used by Beaudry J. to the present circumstances. In *Liu*, the Court determined that the applicant's story was a stock narrative, wholly invented, presenting major similarities to the stories of six other refugee claimants who all dealt with the same counsel and the same translator. In the case before us, the Board used one PIF to identify contradictions within the applicant's narrative account, even though there is nothing to indicate that the applicant's brother's account is any more reliable than the applicant's.

[35] The Board's decision is also based on the lack of corroborating documentary evidence. It is established in the case law that the Board cannot reject an applicant's evidence solely on that ground: *Ahortor v. Canada (M.E.I.)*, [1993] F.C.J. no. 705 (QL); *Attakora v. Canada (M.E.I.)*, [1989] F.C.J. no. 444 (QL). In the case at bar, the Board concluded as it did because it deemed that the applicant was not credible, as demonstrated in the passage below:

> Although the panel cannot draw negative inferences when a claimant fails to produce corroborating evidence, this document would have been useful in the specific circumstances of this case <u>because the claimant's credibility is tainted</u>. Considering the renown of the claimant's father, the panel could reasonably expect to receive this corroboration. […] In this case, the claimant's father is a major figure in Togo as he was the country's prime minister for four years. According to the claimant's testimony, his father was still an RPT member of parliament at the time of the alleged assassination attempt. (my emphasis.)

[36] It is clear, upon reading the Board's reasons for decision, that the erroneous finding regarding the credibility of the central element of the refugee claim taints the Board's entire decision. I am of the opinion therefore that this is in and of itself a material error warranting the Court's intervention.

[37] For these reasons, the application for judicial review will be allowed. The decision of the Board will be set aside and the matter referred to a differently constituted panel for rehearing.

[38] The parties did not propose certification of any serious question of general importance as contemplated in paragraph 74(*d*) of the Act. I am satisfied that no such question was raised in these proceedings. No question will be certified.

ORDER

THE COURT ORDERS AS FOLLOWS:

1. The application for judicial review is allowed.

2. The decision of the Board is set aside and the matter referred to a differently constituted panel for rehearing.

3. No question is certified.

Edmond P. Blanchard
Judge

Certified true translation
François Brunet, LLB, BCL

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1987-06
STYLE OF CAUSE:	Kwassi Wobuibe Klutse v. MCI
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	November 14, 2006
REASONS FOR ORDER AND ORDER BY:	The Honourable Mr. Justice Blanchard
DATE:	December 12, 2006

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