

Federal Court



Cour fédérale

Date: 20130128

Docket: IMM-3814-12

Citation: 2013 FC 84

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, January 28, 2013

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

**GEA MUBENGAIE MALABA
RENA PRISCILLE MUBENGAIE NSULA
KENAYA CHANAYA MUBENGAIE MALABA
CHRISTELLE MILC MUBENGAIE LUFKA
OBED DLI GEORGE MUBENGAIE
KABAATSUSUIL
GLORY MUBENGAIE KANDOPO**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application to consider the legality of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the panel) rejecting the applicants' claim for refugee protection primarily based on the principal applicant's lack of subjective fear.

[2] The principal applicant (female applicant) is a citizen of the Democratic Republic of Congo (DRC), originally from the Eastern province. She is married and is a mother of five children, including twins (collectively called the applicants). The primary basis of the refugee claim relies on their belonging to a social group, the family, and the religious and political opinions of the female applicant who was actively involved in the Église Armée de la Victoire (the Church) and its political movement “Save the Congo”.

[3] After finishing her studies, the female applicant went to live in Kinshasa; she became a member and singer at the Church in 1989. At the same time, she is very active in the [TRANSLATION] “Youth for Christ” section, and in 1999, she got married to a man that she described in her Personal Information Form (PIF) as a “right-hand man” of Archbishop Kutino. It will be recalled that he is the founder of the Church and its political movement. He is an activist and a very visible opponent of the regime in the DRC and known world-wide. The fact that he was persecuted by the authorities is not disputed by the respondent.

[4] From 2002, the female applicant was the announcer of a television program that is broadcast weekly on the Canal Radio et Télévision Message de Vie (Canal RTMV) station. The station’s studios were located in the chambers of the Church. In fact, Canal RTMV is a private station closely associated with archbishop Kutino and his political movement. The television station is focused on [TRANSLATION] “guiding youth in God’s way of thinking”.

[5] At the beginning of June 2003, the female applicant was made responsible for mobilizing the province of Kinshasa for activities organized by the Church at the Tata Raphaël stadium in Kinshasa. Archbishop Kutino then publicly criticized the political situation in his country and the Minister of the Interior accused him of inciting the masses. On June 10, 2003, during the General Assembly of Save the Congo, two men came out of the crowd and ordered one of the archbishops of the Church, who was in the middle of a speech, to give them the microphone. Then the crowd was brutally dispersed by the police. Several participants were arrested, beaten and brought to unknown destinations. A general panic followed during which the female applicant attempted to flee by climbing a wall, but she fell on some bricks and seriously injured herself.

[6] In the wake of this incident, law enforcement officers took over the property of the Mission Mondiale Message de Vie de l'Église and ransacked the studios of Canal RTMV. Some time afterward, the police arrested the female applicant and other [TRANSLATION] "members and servants of God" of the Church to bring them to the Kasa-Vubu police station. By chance, while in detention, the female applicant received help from the brother of a family friend that she knew and who is a major in the police. Around the end of the afternoon she was evacuated from the police station, under the pretext of receiving outside treatment. Two officers, appointed by the major known by the female applicant, drove the female applicant to her maternal uncle's home in Kinsuka. That same night, the female applicant and her husband crossed the river to get to Brazzaville, the capital of the Republic of the Congo (Congo-Brazzaville).

[7] During six years or so, the applicants lived in safety in Congo-Brazzaville and were left alone by the authorities. Unfortunately, the climate changed drastically after a visit of the new

president Kabila to Congo-Brazzaville. Around the end of August and the beginning of September 2009, DRC nationals in Brazzaville were sought out and persecuted by the authorities because they now wanted to remove them from the DRC. The return of illegal nationals from the DRC to Congo-Brazzaville is not disputed. The applicants' fear of return is real. In fact, the female applicant related that during an attack, police officers entered her residence to arrest her while she was alone with her children; she hid in the ceiling.

[8] Following this incident, the applicants went to hide in the north of Brazzaville, while waiting to obtain visas for the United States. The female applicant was resolved to come to Canada, since several members of her husband's family already live in Montréal, where French is spoken, a language that the female applicant can understand. On February 21, 2010, the female applicant and the twins arrived in the United States with their Congolese passports and on May 22, 2010, they crossed the border with the help of a smuggler who took all their travel documents.

[9] The female applicant was afraid of being imprisoned on arriving in Canada and she wanted to stay with her young children. That is how she explained her delay of one month in claiming refugee status in Canada. However, on June 28, 2010, the female applicant claimed refugee status after she obtained new identification documents for herself and the twins. To join her and to escape the situation in the DRC and in Congo-Brazzaville, the female applicant's three other children arrived in Canada two months later, on August 16, 2010. However, the female applicant's husband decided to stay in Congo-Brazzaville because of his involvement with Archbishop Kutino.

[10] The refugee claim was rejected. In short, if I summarize the essence of the panel's reasoning, it first alleged that the female applicant spent around seven years in Congo-Brazzaville without ever claiming state protection. The panel also alleged that the female applicant did not claim the protection of the American authorities during the three months when she stayed in the United States and that she waited an additional month before claiming refugee status in Canada. The panel found that the female applicant "is not credible with respect to her subjective fear", while "[her] behaviour invalidates the claimant's fear with respect to her country of origin". Regarding the passage, the panel did not find credible the incident of June 10, 2003, when the female applicant said that she was arrested, held and then driven to her uncle's home. The panel also pointed out the ambiguity of the version of the facts given by the female applicant with respect to her travel documents and her long trip between New York and Montréal.

[11] While I agree with the respondent that the panel is generally in a better position than the Court to determine whether a refugee claimant is compatible with the existence of a well-founded fear of persecution, the Court must also still be satisfied that the panel has considered all of the evidence in the record (*Touré v Canada (Citizenship and Immigration)*, 2012 FC 773, at para 55). Thus, the long delay in making a claim must not be a pretext and is not in itself sufficient to reject a refugee claim without reviewing the other facts in the record. It should be remembered that the assessment of the fear of persecution is always forward-looking and there may be a new risk or a personalized risk even though the refugee claimant has not claimed state protection sooner.

[12] At the risk of repeating myself, it seems dangerous to base the rejection of a claim on the fact that the refugee claimant did not claim protection as soon as he or she had the opportunity.

More recently, the following warning can be found in *Ramos v Canada (Citizenship and Immigration)*, 2011 FC 15, at para 28, [2011] FCJ No 24:

In addition, the RPD's conclusion that the Applicants' failure to claim asylum at the earliest opportunity (that is, in the U.S.) indicates their lack of subjective fear is contrary to Federal Court of Appeal jurisprudence, which says that a board may consider this factor in assessing subjective fear, provided it is not the only evidence upon which the board relies. See *Hue v Canada (Minister of Employment and Immigration)*, [1988] FCJ No. 283 (FCA) (*Hue*).

[Emphasis added.]

[13] It should be remembered that in *Hue*, quoted above by the Court, following an attempted coup in the Seychelles Islands in 1981, the refugee claimant, who had worked for a political party for years, had been arrested and beaten by police. He succeeded in fleeing after he was taken to the hospital. He had then left his country in 1981 to go to Greece, where he had been hired as a seaman on a ship. Five years later, he made a refugee claim in Canada, on the basis of membership in a political party. His claim was rejected because he had not made his claim in Greece in 1981 "This, for the Board, would show that the Appellant's fear was not real and that his contention to that effect, his having waited so long before making it, was not credible" (at para 3).

[14] The application for judicial review was allowed. Paragraph 4 of the judgment of the Federal Court of Appeal rendered by Marceau J. reads:

While we do not dispute that the delay in making a claim for refugee status may be an important factor to take into consideration in trying to assess the seriousness of an applicant's contentions, we disagree completely with the Board's reasoning in the present case. It seems to us obvious that the Applicant's fear is in relation to his having to return to the Seychelles and as long as he had his sailor's papers and a ship to sail on, he did not have to seek protection.

[Emphasis added.]

[15] Further, before making a finding of lack of subjective fear, the panel must consider any explanation provided by the refugee claimant about the causes of the delay in requesting state protection and it cannot, at the same time, arbitrarily set aside any reasonable explanation in that case (*Pulido Ruiz v Canada (Minister of Citizenship and Immigration)*, 2012 FC 258, at para 57, 217 ACWS (3d) 674; *Correira v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1060, at para 28, 2005 FCJ No 1310; *Hue*, at para 4).

[16] The panel's overall reasoning is based on an overview—a very superficial one in fact—of certain peripheral events that occurred after the incident of June 10, 2003, i.e. after the female applicant and her family fled the DRC to go to Congo-Brazzaville. I find that this approach is not reasonable in the circumstances, while the panel gave undue importance to the details of the female applicant's trip to Canada and to the fact that she did not request protection sooner.

[17] Further, the panel is clearly unconcerned with the female applicant's personalized fear, while the departure from Congo-Brazzaville in 2009 was precisely precipitated because the female applicant, who had always felt safe there, did not want to be deported back to the DRC. It is unfortunate that, under the cover of the long delay in claiming protection, the panel did not address the true elements that form the basis of the fear of persecution and the return to DRC with respect to the events that took place in the DRC relating to nationals that may have the female applicant's profile.

[18] In fact, the specific events that caused the female applicant's departure from the DRC in 2003 – the brutality of the repression directed against the supporters of the Church and its political movement – were only mentioned once and only to point out the panel's scepticism with respect to her arrest: "The panel finds it odd, to say the least, that the claimant had been arrested by the authorities of her country and that those same authorities made the effort to drive her to a family member's home". However, when we look at the female applicant's testimony on this question of fact, the explanations provided in great detail are much more nuanced, which warranted the panel's consideration if it wished to draw a negative inference. Therefore, the gratuitous questioning of the panel appears to me to be inappropriate, especially since the panel did not explicitly dispute the credibility of the evidence submitted to it (*Kika v Canada (Citizenship and Immigration)*, 2011 FC 1039, at para 14).

[19] The panel also did not bother to comment on the numerous pieces of evidence that nevertheless corroborated the female applicant's account of persecution and fear of returning to her country, which is a reviewable error in this case (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, (1998) 157 FTR 35 (FCTD), 157 FTR 35; *Miranda Ramos v Canada (Citizenship and Immigration)*, 2011 FC 298, [2011] FCJ No 422; and *Nyota v Canada (Citizenship and Immigration)*, 2011 FC 675, 391 FTR 108).

[20] For example, the panel did not mention the letter dated March 9, 2011, from a close collaborator of archbishop Kutino, which explained that the DRC's security services were searching for the female applicant and her husband. This same letter explains that the members of the Church are still subjected to threats.

[21] I also note that the panel failed to consider another letter, dated March 11, 2011, from the General Coordinator of Canal RTMV, who characterized the female applicant's active role in the "Save the Congo" movement as host of the program "Carrefour des jeunes". This letter also provides explanations with respect to the extra-judicial proceedings by DRC intelligence forces. This letter corroborates the fact that the female applicant left the DRC for Congo-Brazzaville to escape this kind of persecution.

[22] Another letter dated March 6, 2011, described the manhunt of DRC nationals in Congo-Brazzaville prior to the female applicant's departure for the United States. The author of this letter also stated that he was responsible for the female applicant's three children until they left to join their mother.

[23] Another example of omission is in the failure to consider this letter dated April 5, 2011, which highlighted the most visible roles of the female applicant in her involvement with "Save the Congo". The female applicant argued that this letter was especially important in confirming the dangers that still exist in the DRC for her and her family.

[24] In its written memorandum, the respondent essentially submitted that the long delay in filing the claim was in itself sufficient to reject the refugee claim, and that, in any case, there is a presumption that [TRANSLATION] "the panel listened carefully to all of the evidence before making its findings and the fact that it did not mention one element does not indicate that it did not consider it".

[25] At the hearing before this Court, the respondent's learned counsel repeated this rather generic argument. I say "generic" because the respondent did not specifically respond to the applicant's allegations. That being said, the respondent agrees that a distinction must be made between a behaviour that is inconsistent with a well-founded fear of persecution (which may be presumed from a lengthy delay in making a claim) and whether the applicant's account of persecution is credible or not.

[26] In this case, on the question of the female applicant's credibility, it seems that the panel gave the female applicant the benefit of the doubt. And therein lies the problem, because without a serious analysis of the evidence of personalized persecution of the female applicant and the risks that a person with the female applicant's profile may encounter upon returning, the rejection of the refugee claim does not seem to me to be an acceptable outcome in respect of the facts and law.

[27] For these reasons, this application for judicial review will be granted. The decision will be set aside and the matter will be referred back to a differently constituted panel for reconsideration. There is no question of general importance to be certified.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review is allowed. The panel's decision is set aside and the matter is referred back to the Immigration and Refugee Board for redetermination of the female applicant's refugee claim before a different member of the Refugee Protection Division. There is no question for certification.

“Luc Martineau”

Judge

Certified true translation

Catherine Jones, Translator

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-3814-12

STYLE OF CAUSE: GEA MUBENGAIE MALABA
RENA PRISCILLE MUBENGAIE NSULA
KENAYA CHANAYA MUBENGAIE MALABA
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GLORY MUBENGAIE KANDOPO v
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IMMIGRATION

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APPEARANCES:

Stewart Istvanffy FOR THE APPLICANTS

Emilie Tremblay FOR THE RESPONDENT

SOLICITORS OF RECORD:

Law Office of Stewart Istvanffy FOR THE APPLICANTS
Montréal, Quebec

William F. Pentney, FOR THE RESPONDENT
Deputy Attorney General of Canada
Montréal, Quebec

