

Federal Court



Cour fédérale

Date: 20140506

Docket: IMM-4359-13

Citation: 2014 FC 430

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, May 6, 2014

PRESENT: The Honourable Mr. Justice Noël

BETWEEN:

TSHIJIMBA SISI KANYINDA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR ORDER AND ORDER

I. Introduction

[1] 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 rendered on May 16, 2013, by Sheriff Atallah, member of the Refugee Protection Division (RPD) of the Immigration and

Refugee Board of Canada (IRB), in which it was found that the applicant is neither a Convention refugee for the purposes of section 96 of the IRPA nor a person in need of protection under section 97 of this same Act.

II. Facts

[2] Before the RPD, the applicant claimed that he was a 38-year-old citizen of the Democratic Republic of the Congo (DRC). He was allegedly arrested, detained, tortured and raped in his country of origin owing to his opposition to the government in power. He made a claim for refugee protection under section 96 of the IRPA based on his political opinions and his membership in a particular social group, and he claimed to be a person in need of protection within the meaning of section 97(1) of the IRPA because he was in danger of torture, at risk to his life or at risk of cruel or unusual treatment or punishment.

[3] During the processing of the refugee claim, authorities from the United States reviewed, at Canada's request, the applicant's fingerprints. The review revealed that they were the fingerprints of a 43-year-old Angolan man named Joao Baptista Simao. Before the RPD, the applicant indicated that he obtained a fraudulent Angolan passport as soon as he began to fear for his safety in the DRC and that fingerprinting was also necessary in obtaining his biometric passport from the DRC.

[4] The applicant arrived in the United States under the identity of Tshijimba Sisi Kanyinda on August 1, 2009, after obtaining a visa.

III. Impugned decision

[5] The RPD found that the applicant was not credible with respect to his identity and, since it was not satisfied of the applicant's identity, it rejected his claim in its entirety.

[6] The applicant claimed to be Tshijimba Sisi Kanyinda, citizen of the DRC, aged 38, but the RPD rejected the applicant's explanations that fingerprinting was required to obtain a biometric passport from the DRC. In addition, the identity documents used by the applicant to obtain the biometric passport appeared to be fraudulent and the applicant was unable to explain the various irregularities in the documents. Thus, the only identity document establishing that the applicant is Tshijimba Sisi Kanyinda, that is to say, his biometric passport from the DRC, was allegedly obtained fraudulently. The RPD also rejected the applicant's explanations as to why he continued to assume, while in Canada, the identity of Joao Baptista Simao, including maintaining an active Facebook account in that name. Finally, the RPD found that it was unreasonable that the applicant did not remember how old he was when he got married in the DRC or the name of the opposition party of which he was an activist in that country, which undermined the applicant's credibility regarding his identity. The RPD therefore found that the applicant was a citizen of Angola and not of the DRC.

IV. Applicant's arguments

[7] The applicant finds that the decision is unreasonable for three reasons. First, the RPD erred in assessing the evidence before it rejected his Congolese identity. The applicant tendered a number documents to confirm his Congolese identity, but the RPD, which is far from being an

expert in this area, doubted the validity of those documents without valid reason and rejected the applicant's explanations in that respect. At the same time, it found that the Congolese passport was obtained fraudulently. The RPD also gave too much weight to some evidence in its decision, such as the applicant's fingerprints, the Facebook account in the name of Joao Baptista Simao, and the fact that the information he provided regarding his age when asked how old he was when he got married was incorrect by one year.

[8] Second, the RPD failed to address his risk of persecution in the DRC, instead simply reviewing and rejecting the applicant's identity. However, the documentary evidence on the treatment of opposition members in the DRC clearly indicates that the applicant is at risk of arbitrary detentions and arrests, torture, cruel, inhuman and degrading treatment, and poor prison conditions. There is nothing in the decision of the RPD that reflects the examination of such evidence.

[9] Third, the applicant's removal to the DRC by the RPD is a violation of the *Canadian Charter of Rights and Freedoms* (Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11) (Canadian Charter) and of Canada's international legal obligations under the international treaties to which Canada is party, including the Convention Against Torture, the Geneva Convention, the Covenant on Civil and Political Rights and the American Declaration of the Rights and Duties of Man.

V. Respondent's arguments

[10] The respondent submits that the decision of the RPD is reasonable as it is the result of its consideration of the evidence before it. The RPD identified a number of problems with the applicant's evidence: one of the documents was not showing the correct stamp and was not issued in the applicant's region, important information was missing from the applicant's nationality certificate, the applicant failed to demonstrate that he had to be fingerprinted to obtain his Congolese passport from the Embassy in Ottawa, and the applicant could not remember how old he was when he purportedly got married or the opposition party of which he allegedly was an activist and had a Facebook profile in the name of Joao Baptista Simao. It was therefore reasonable for the RPD to question the applicant's identity. Furthermore, since his arrival in Canada, the applicant continuously lied about the use of his second identity even though he had no reason to hide it.

VI. Applicant's reply

[11] In his reply, the applicant reiterates that he reasonably explained to the RPD all issues with the documents he submitted into evidence. Moreover, it was not reasonable for the RPD to reject the applicant's Congolese identity, albeit supported by extensive evidence, over the false Angolan identity, which is solely based on a false Angolan passport and a Facebook account.

VII. Issue

[12] Did the RPD err in determining that the applicant's account was not credible on the basis that the applicant failed to prove his identity?

VIII. Standard of review

[13] The RPD's findings on an applicant's identity and credibility must be reviewed on a standard of reasonableness as it is a question of fact (for identity, see *Bagire v Canada (Minister of Citizenship and Immigration)*, 2013 FC 816, at paragraph 18, [2013] FCJ No 866; for credibility, see *Aguebor v Canada (Minister of Citizenship and Immigration)*, [1993] FCJ No 732, at paragraph 4, 160 NR 315, and see for example *Gezgez v Canada (Minister of Citizenship and Immigration)*, 2013 FC 130, at paragraph 9, [2013] FCJ No 134).

[14] Consequently, the analysis of this Court will be limited to "the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, at paragraph 47, [2008] 1 SCR 190).

IX. Analysis

[15] The RPD's decision is not reasonable and the applicant's refugee claim must be referred back to a differently constituted panel of the RPD for reconsideration.

[16] Throughout the decision, the RPD sought to analyze and challenge some of the evidence filed in the application to support the applicant's Congolese identity, but it never questioned the genuineness of the applicant's Angolan identity. Indeed, the RPD attempted in 10 or so pages to successively cast doubt on the applicant's testimony, his explanations, his biometric passport from the DRC, his nationality certificate, his certificate of lost identity documents, and so forth. It also relied on the expertise of a Canadian Migration Integrity Officer to question the validity of those documents. As for the Angolan identity, however, it is only supported by a Facebook page and a passport that the applicant also claims to have obtained fraudulently and which was not even submitted into evidence before the RPD. The Court questions why the RPD went to the trouble of analyzing so rigorously the validity of the passport which the applicant claimed was real only to then accept at face value the one that the applicant claimed to be false.

[17] In short, the RPD's finding on the Congolese passport is entirely reasonable and supported by adequate reasons, whereas, conversely, finding on the Angolan passport is not at all.

[18] However, since the RPD's reasoning with regard to the Congolese passport was reasonable, as indicated above, the decision-making process underlying the decision as a whole could have very well survived this judicial review if only the RPD had simply rejected the applicant's Congolese identity without addressing the Angolan identity. However, that is not the case. The RPD went further and found, on the last page of its decision, as follows: "Since the claimant is a citizen of Angola and he does not allege any fear of returning to that country, his claim is rejected." In light of the weakness of the finding on the Angolan passport, that statement suggests to me that not only did the RPD not question the applicant's Angolan citizenship, but it

also had to have presumed it to be valid, which leads one to believe that its decision to reject the Congolese identity was undoubtedly influenced by the presumed genuineness of the Angolan identity. While rejecting the applicant's Congolese identity would not have been unreasonable in itself, it was unreasonable to base such rejection, even partly, on the existence of another identity that is not verified and that is weakly supported. Indeed, by adopting such a reasoning, the RPD falls into inconsistency: on the one hand, it rejects the claim on the ground that the applicant was unable to establish his identity, and on the other hand, it confirms the other identity without any verification. This reasoning is not at all reasonable given the flagrant lack of analysis in that respect and is sufficient to question the existence of justification, transparency, and intelligibility within the decision-making process independently of the rest of the decision.

[19] The parties were invited to submit a question for certification but none was submitted.

ORDER

THE COURT ORDERS that:

1. The application for judicial review is allowed;
2. The applicant's refugee claim will be referred back to a differently constituted panel of the RPD for reconsideration;
3. No question is certified.

"Simon Noël"

Judge

Certified true translation
Daniela Guglietta, Translator

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4359-13

STYLE OF CAUSE: TSHIJIMBA SISI KANYINDA v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: MONTRÉAL, QUEBEC

DATE OF HEARING: MAY 1, 2014

**REASONS FOR ORDER AND
ORDER:** NOËL J.

DATED: MAY 6, 2014

APPEARANCES:

Anne Castagner FOR THE APPLICANT

Alain Langlois FOR THE RESPONDENT

SOLICITORS OF RECORD:

Anne Castagner FOR THE APPLICANT

Lawyer

Montréal, Quebec

William F. Pentney

Deputy Attorney General of Canada

FOR THE RESPONDENT