

Federal Court



Cour fédérale

Date: 20150814

Docket: IMM-7933-14

Citation: 2015 FC 970

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, August 14, 2015

PRESENT: The Honourable Mr. Justice Gascon

BETWEEN:

PLACIDE NTAKU W NYEMBUA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Placide Ntaku W Nyembua, is a citizen of the Democratic Republic of the Congo [DRC]. In 2009, his son, who was a member of the Congolese army, tried to expose corruption at the border station where he worked, between the DRC and Zambia. He was placed in detention. Mr. Nyembua obtained his son's release and then sent him Canada. In September

2009, shortly after his son's departure, soldiers came to Mr. Nyembua's home, looking for his son.

[2] Over three years later, Mr. Nyembua became embroiled in a series of incidents involving DRC soldiers. On the night of December 31, 2012, soldiers arrived at his residence, extorted money from him and reminded him that they were going to find his son. On March 31, 2013, two army vehicles arrived at Mr. Nyembua's home, and a captain questioned Mr. Nyembua about how he had organized his son's flight to Europe, which Mr. Nyembua denied. Lastly, on August 9, 2013, Mr. Nyembua was stopped at the airport by the national intelligence agency of the DRC, which questioned him about his activities and those of his son. Later that same day, Mr. Nyembua's nephew and his friends had an altercation with a group of soldiers who had come to Mr. Nyembua's home in search of his son.

[3] On August 13, 2013, Mr. Nyembua crossed the border into Zambia before making his way to the United States, and then to Canada, where he arrived on August 17, 2013. He claimed refugee protection upon arrival. On September 29, 2014, the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada rejected Mr. Nyembua's refugee protection claim and determined that he was neither a Convention refugee nor a person in need of protection.

[4] Mr. Nyembua is now seeking judicial review of the RPD decision denying his claim for refugee protection. He argues that the decision is unreasonable and that the panel erred in finding that he was not a member of the particular social group of his son's family and in determining that he did not have a well-founded fear of persecution based on membership in this particular social group.

[5] The only issue here is to determine whether the RPD's decision is unreasonable.

[6] For the reasons that follow, Mr. Nyembua's application for judicial review must fail because the Court finds that the RPD's decision is reasonable and that it falls between a range of possible, acceptable outcomes in the circumstances.

II. Background

A. *RPD decision*

[7] Although it confirmed the identity and credibility of Mr. Nyembua, the panel found in its decision that Mr. Nyembua had failed to sufficiently establish that he is a Convention refugee or a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA]. There is no need for the Court to deal with RPD's findings with regard to the absence of risks under 97 of the IRPA, given that Mr. Nyembua acknowledged at the hearing that his judicial review application was not based on these elements of the decision but solely on the denial of his refugee status.

[8] With respect to his fear of persecution and status as a refugee, the RPD determined that the reasons provided by Mr. Nyembua were insufficient to conclude that he would be at risk of persecution by reason of his membership in a particular social group, namely, that of his family. The incidents described by Mr. Nyembua establish only that he was targeted by soldiers because his son had deserted the Congolese army after having denounced corruption within its ranks. According to the panel, Mr. Nyembua provided no indication or evidence that his son's denunciations resulted from his political opinion or other Convention ground. Nor did Mr. Nyembua cite persecution as a ground as far as he was personally concerned. Furthermore, the panel noted that he had suffered only a financial loss at the hands of the soldiers who showed up at his home and was not mistreated by the officers who had questioned him at the airport.

B. *Standard of review*

[9] The applicable standard of review is reasonableness. Indeed, counsel for Mr. Nyembua acknowledged as much at the hearing before the Court.

[10] Issues regarding adequacy of reasons for a finding of risk for family members of a person who fears persecution and assessment of incidents presented as persecution are in fact questions of mixed fact and law that call for a review on a standard of reasonableness (*Awadh v Canada (Citizenship and Immigration)*, 2014 FC 521 at para 16; *Sefa v Canada (MCI)*, 2010 FC 1190 at para 21; *Liang v Canada (MCI)*, 2008 FC 450 at para 12).

[11] Reasonableness is concerned with the existence of justification, transparency and intelligibility within the decision-making process, and whether the decision falls within a range

of possible, acceptable outcomes which are defensible in respect of the facts and law. The reasons for a decision are considered to be reasonable if they “allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes” (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47; *Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16 [*Newfoundland Nurses*]). In this context, the Court must show respect for and deference towards the panel’s decision and should not substitute its own reasons. However, the Court may, if it finds it necessary, look to the record for the purpose of assessing the reasonableness of the decision (*Newfoundland Nurses* at para 15).

III. Analysis: Is the RPD’s decision unreasonable?

[12] Mr. Nyembua submits that the panel erred in finding that he was not a member of the particular social group of his son’s family, in failing to consider the evidence in the record and in determining that the DRC soldiers were after his son for desertion. Mr. Nyembua argues that his son had expressed his political opinion when he denounced corruption at the border between the DRC and Zambia and had been arrested and detained as a result of that denunciation. The panel thus allegedly misconstrued the concept of the particular social group of the family and expression of political opinion. Furthermore, Mr. Nyembua suggests that the panel failed to consider documentary evidence in the record corroborating the corruption of the authorities as well as the impunity they enjoy in the DRC.

[13] The Court does not agree with these arguments. On the contrary, I find that in light of the evidence that was before the panel, the RPD’s decision falls within the range of possible and

reasonable outcomes in respect of the facts and law. Mr. Nyembua is simply inviting the Court to re-weigh the evidence, and to substitute its assessment for that of the RPD. However, that is not the role of a court sitting in judicial review.

[14] That said, I do share Mr. Nyembua's view that political opinion includes any opinion on any matter in which the government may be engaged (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at paras 88-90 [*Ward*]; *Martinez Menendez v Canada (MCI)*, 2010 FC 221) and that denouncing corrupt officials when the machinery of state is also corrupt may constitute an expression of political opinion (*Klinko v Canada (MCI)*, [2000] 3 FCR 327 at paras 34-35 [*Klinko*]). It is also true that a family may constitute a particular social group in the context of a refugee protection claim (*Granada v Canada (MCI)*, [2004] FC 1766 at paras 15-16 [*Granada*]; *Macias v Canada (MCI)*, [2004] FC 1749 at paras 10, 13 [*Macias*]).

[15] However, in this case the RPD concluded that, on each of these elements, the evidence in the record was not conclusive. Although Mr. Nyembua was credible, the evidence of his son's denunciation of corruption and of the soldiers allegedly pursuing Mr. Nyembua on that ground was insufficient in the eyes of the panel. The RPD instead determined that the authorities in the DRC were seeking Mr. Nyembua's son because he had deserted the army and had targeted Mr. Nyembua for that reason. To be sure, some of the evidence and the transcript of the hearing before the RPD indicate that Mr. Nyembua claimed his son was being sought for having denounced corruption within his army unit. The panel in fact makes reference to this in its decision.

[16] However, other evidence also indicates that the authorities were looking for Mr. Nyembua's son not for his denunciation of corruption but for having deserted the army. Indeed, in the transcript of the hearing, Mr. Nyembua himself mentioned that the soldiers wished to find his son in order to sanction him for his "lack of discipline". Furthermore, when asked by the panel whether the authorities had accused his son of having deserted the military, Mr. Nyembua answered in the affirmative.

[17] It was therefore not unreasonable in the circumstances for the tribunal to have found that the authorities were after his son for that reason and not because he had denounced the corruption in his army unit. In addition, as the panel noted in paragraph 21 of the decision, Mr. Nyembua provided no evidence to support his claim that his son had denounced corruption in the Congolese army or that those denunciations stemmed from his political opinion or some other Convention ground.

[18] A refugee claim cannot be based solely on membership in a family, but must be supported by an underlying Convention ground for the claimed persecution (*Serrano v Canada (MCI)*, 1999 CanLII 7997 (FC) at para 42 [*Serrano*]; *Granada* at para 16). In this case, the panel found that Mr. Nyembua had identified no such ground.

[19] Mr. Nyembua submits that the panel failed to consider the overwhelming documentary evidence of widespread corruption in the DRC. The Court cannot accept this argument. Given that the RPD concluded that the denunciations of his son did not stem from his political opinion and that Mr. Nyembua had failed to demonstrate that he would face a risk as a family member of

a person fearing persecution, there was no need to examine the documentary evidence of corruption of the authorities in the DRC. At any rate, a panel is presumed to have considered all of the evidence and is not required to refer to each constituent element (*Newfoundland Nurses* at para 16).

[20] Moreover, the panel also considered all of the incidents cited by Mr. Nyembua with a view to determining whether, taken together, they constituted persecution. Indeed, “multiple incidents of discrimination can constitute persecution pursuant to 96 of the IRPA” (*Smirnova v Canada (MCI)*, 2013 FC 347 at para 23). In order for mistreatment to be considered persecution, it must be serious and the infliction of harm occurs with repetition or persistence, or in a systematic way (*Sefa v Canada (MCI)*, 2010 FC 1190 at para 10). But the incidents reported by Mr. Nyembua included no mistreatment and no conduct that demonstrates a sustained and generalized violation of fundamental rights. The panel reasonably found that, viewed from this angle, Mr. Nyembua’s fear of persecution was not well-founded.

[21] Mr. Nyembua attempts to rely on *Klinko* but that decision is of little help to him as the facts in that case are fundamentally different from those here. In that case, the refugee claimant had in fact submitted solid evidence of his denunciation of corruption within the Ukrainian government, namely, an official complaint about corrupt activities (at para 4). This is precisely what is lacking in Mr. Nyembua’s record and what led the panel to find there were insufficient reasons cited by Mr. Nyembua in support of his fear of persecution. The existence of a political opinion and nexus to a Convention ground are questions of fact that must be determined on a

case-by-case basis (*Khedri v Canada (MCI)*, 2015 FC 326 at para 15 [*Khedri*]). In this case, as was the case in *Khedri*, the evidence was inadequate.

[22] Lastly, with respect to the particular social group of his son's family, there must be a "clear nexus between the persecution that is being levelled against one member and that which is taking place against him or her" (*Macias* at para 13; *Granada* at para 16). Membership in a family may constitute membership in a particular social group for the purposes of refugee protection, but persecution against one family member does not automatically entitle all other family members to be considered refugees (*Achkar c Canada (MCI)*, 2013 FC 472 at para 40; *Serrano* at para 42). For a family to be considered a social group, the persecution suffered by a person must be attributable directly to the fact that he or she is a member of that family and there must be a clear nexus between the persecution that is being levelled against one of the family members and that which is taking place against the others (*Asghar v Canada (MCI)*, 2005 FC 768 at para 19). In this case, Mr. Nyembua has not established that nexus according to the panel.

IV. Conclusion

[23] For the foregoing reasons, Mr. Nyembua's application for judicial review is dismissed. The RPD's decision finding that the fear of persecution invoked by Mr. Nyembua was not sufficiently founded is transparent and intelligible, and it falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[24] The parties raised no questions for certification in their written and oral submissions, and I agree that none arises in the record.

JUDGMENT

THIS COURT ODRERS AND ADJUDGES that:

1. The application for judicial review be dismissed, without costs;
2. No serious question of general importance shall be certified.

“Denis Gascon”

Judge

Certified true translation
Sebastian Desbarats, Translator

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-7933-14

STYLE OF CAUSE: PLACIDE NTAKU W NYEMBUA v THE MINISTER
OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: AUGUST 10, 2015

JUDGMENT AND REASONS: GASCON J.

DATED: AUGUST 14, 2015

APPEARANCES:

Clarel Midouin

FOR THE APPLICANT

Kirk G. Shannon

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Clarel Midouin Law Office
Attorney(s)
Ottawa, Ontario

FOR THE APPLICANT

William F. Pentney
Deputy Attorney General of Canada
Ottawa, Ontario

FOR THE RESPONDENT