

Federal Court



Cour fédérale

Date: 20160318

Docket: IMM-3615-15

Citation: 2016 FC 334

Ottawa, Ontario, March 18, 2016

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

BERTHELINE NINA TCHANGOUE

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Ms. Bertheline Nina Tchangoe, seeks judicial review of a decision by the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada [IRB] dated July 10, 2015, which dismissed her appeal of the decision of the Refugee Protection Division [RPD]. The RPD found that the Applicant is neither a Convention refugee nor a person in need of protection within the meaning of sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] For the reasons set out below, the application for judicial review is allowed.

I. Background

[3] The Applicant is a citizen of Cameroon. She arrived in Canada on December 13, 2014, and claimed refugee protection on January 16, 2015, on the basis that she fears persecution as a result of her activities as a youth activist and advocate promoting the educational rights of young women and lesbian, gay, bisexual and transgendered [LGBT] young people in Cameroon. Specifically, she alleges that on November 9, 2014, she was arrested, detained and mistreated because of her efforts to organize a two (2) day educational forum which was supposed to take place on November 17 and 18, 2014, entitled “Importance of Girls and LGBT Education, Inclusion should be now”.

[4] On April 15, 2015, the RPD rejected the Applicant’s claim on the basis that there was insufficient credible and trustworthy evidence to substantiate her claim, thus undermining her credibility. Particularly, the RPD was not convinced that the educational forum had occurred, as the Applicant could not describe the two (2) day event in sufficient detail. Given that the Applicant had participated in several international meetings and had acquired knowledge and experience through these events, the RPD stated that it would have expected her to be able to provide more information on the educational forum, such as the schedule of events and the themes for the workshops. The RPD found that her inability to provide such details had a considerable impact on her credibility. Additionally, the RPD was not convinced that the Applicant had been arrested, detained or visited the hospital, as she was unable to provide any credible documentary evidence corroborating these events. The RPD was particularly concerned

regarding the absence of any documentary evidence mentioning her detention and the closure of the organization she had co-founded, given her high profile as an activist and youth leader within Cameroon and at the international level.

[5] On May 5, 2015, the Applicant filed an appeal with the RAD. After filing her written representations on May 26, 2015, the Applicant subsequently requested that the RAD admit new evidence pursuant to Rule 29 of the *Refugee Appeal Division Rules*, SOR/2012-257 [RAD Rules] and that an oral hearing be held pursuant to subsection 110(6) of the IRPA. The new evidence was received by the RAD on July 3, 2015.

[6] On July 10, 2015, the RAD dismissed the Applicant's appeal. The RAD first considered whether it would admit the Applicant's new evidence. It found that the Applicant had not provided a satisfactory explanation as to why the documents had not been produced with her appeal pleadings on May 26, 2015. Notwithstanding, the RAD considered the relevance and the probative value of the new documents as per Rule 29(4)(a) of the RAD Rules. It admitted the new evidence on the basis that all the documents related to the alleged events which caused the Applicant to leave Cameroon.

[7] After determining that the new evidence would be admitted, the RAD proceeded to consider the evidence before the RPD and agreed with the RPD's credibility findings. It then considered the Applicant's new evidence and ultimately gave it little weight because of concerns regarding the authenticity of the documents. Overall, the RAD decided that there was insufficient credible or trustworthy evidence to support the Applicant's claim. It concluded that since it gave

little weight to the documents produced as new evidence by the Applicant, in accordance with subsection 110(6) of the IRPA, no oral hearing would be allowed.

II. Issue

[8] The Applicant submits that the RAD erred by misapprehending the new evidence and that it should have convened an oral hearing in order to provide the Applicant the opportunity to address its concerns regarding the credibility and authenticity of the new evidence.

[9] The Respondent, on the other hand, argues that the RAD's decision was reasonable and that it appropriately weighed the new evidence. The Respondent submits that the RAD clearly admitted the new evidence but reasonably concluded that it was not credible and afforded it little probative value given its timing, nature, and the lack of plausibility of underlying events.

[10] In my view, the determinative issue in this application for judicial review is whether the RAD erred in its application of subsection 110(6) of the IRPA by refusing to hold an oral hearing in the circumstances of this case.

[11] Subsection 110(3) of the IRPA sets out the general rule that the RAD must proceed without an oral hearing. However, in accordance with subsection 110(6) of the IRPA, where new evidence presented at the RAD: (a) raises a serious issue with respect to the credibility of the person who is the subject of the appeal; (b) is central to the decision with respect to the refugee protection claim; and (c) if accepted, would justify allowing or rejecting the refugee protection claim, the RAD may convene an oral hearing.

[12] The decision to hold an oral hearing is thus based on the RAD's assessment of whether the criteria set out in subsection 110(6) of the IRPA have been established and if so, whether it should exercise its discretion to hold an oral hearing. Therefore, the question of whether the RAD erred in its application of subsection 110(6) of the IRPA involves a question of mixed law and fact, discretion, as well as the interpretation of a home statute, and thus should be reviewed on the standard of reasonableness (*Sanmugalingam v Canada (Citizenship and Immigration)*, 2016 FC 200 at para 36). Moreover, while an oral hearing is discretionary, that discretion must be exercised reasonably in the circumstances of the case (*Zhuo v Canada (Citizenship and Immigration)*, 2015 FC 911 at para 11). According to the standard of reasonableness, a reviewing Court must ensure that the RAD's decision is justified, transparent and intelligible and 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 para 47, [2008] 1 SCR 190).

[13] In support of her appeal, the Applicant produced several documents which consisted of:

- a) three (3) photographs which allegedly show the Applicant in a hospital bed;
- b) an affidavit of the Applicant's common-law spouse dated May 10, 2015, along with an attached summons, bail bond, undertaking and two (2) arrest warrants;
- c) a sworn statement from the Applicant's lawyer in Cameroon to which a medical report is attached;
- d) affidavits from the Applicant's uncle and mother and accompanying translations;

- e) a *News Room* publication issued December 3, 2014, containing an article entitled “Youth activist escape from detention”;
- f) an online article in French dated December 5, 2014, from lebledparle.com on the appellant and accompanying translation in English;
- g) a letter from the Applicant’s advocacy group dated October 23, 2014;
- h) a copy of the agenda for the two (2) day forum, undated;
- i) a flyer for a two (2) day forum dated November 17 and 18, 2014;
- j) an advocacy toolkit;
- k) a receipt of an envelope from Cameroon mailed June 22, 2015.

[14] The RAD gave little weight to the documents for a number of reasons including the Applicant’s failure to produce originals, the lack of explanation as to the tardiness of producing the documents and its concerns regarding the authenticity of the documents. Specifically on this last issue, the RAD found that the presence of data written over the seals found on the medical report and the affidavits of the Applicant’s spouse, uncle and mother undermined the integrity of the seals, and as a result, the credibility of the documents themselves. The RAD also noted the similarity of handwriting on the medical report and the affidavit of the Applicant’s common-law spouse.

[15] The RAD also gave little weight to both the *News Room* publication issued on December 3, 2014, which contained a half-page article regarding the Applicant's detention in Cameroon, and to the online article, dated December 5, 2014, regarding her activities which led to her detention. It dismissed the *News Room* publication on the basis that there was little information regarding the provenance of the publication aside from the publisher's name and phone number which appeared on the front page. As for the online article, the RAD stated that it was a downloaded electronic version of an article that could have been altered or fabricated. The RAD further questioned why these two (2) documents had not surfaced in the search conducted by the Research Directorate of the IRB in early 2015.

[16] Relying on *Devundarage v Canada (Minister of Citizenship and Immigration)*, 2005 FC 245, where the Court stated that when a story recounted by the claimant is found to be untrustworthy and fabricated it is reasonable to question the veracity of the documents, the RAD gave little probative value to the documents given its finding that the Applicant was not credible. The RAD concluded its analysis of the probative value of the two (2) news articles by stating that the submission of false or irregular documents, such as the various affidavits and the medical report, has an impact on the weight assigned to the other documents provided by the Applicant and also the overall credibility of the Applicant.

[17] I find that it was unreasonable in the circumstances of this case for the RAD not to have convened an oral hearing so as to provide the Applicant the opportunity to address the RAD's concerns regarding the authenticity of the new documents. This was clearly a serious issue which undermined the Applicant's credibility and which was not before the RPD. Moreover, the new

documents, and in particular, the medical report, the arrest warrants and the news articles were central to the decision since the absence of documentary evidence regarding the two (2) day educational forum and the Applicant's detention and mistreatment by the authorities in Cameroon was unequivocally determinative in the RPD's decision. If accepted, the new evidence would have justified allowing the refugee protection claim.

[18] While I recognize that the decision to hold an oral hearing is discretionary, in my view, the RAD committed a reviewable error in failing to conduct a proper analysis of whether the criteria for holding an oral hearing set out in subsection 110(6) of the IRPA were met and if so, whether it should exercise its discretion and grant an oral hearing. With the exception of the RAD's comment that no oral hearing would be allowed given the little weight it gave to the documents provided as new evidence, the decision is silent on the application of the criteria set out in subsection 110(6) of the IRPA and the exercise of discretion. With due respect to the RAD and its expertise in these matters, the weight given to the new evidence should not have been the determining factor in its decision not to hold an oral hearing. Accordingly, for the reasons above, I find that the RAD's decision is unreasonable and thus cannot stand.

[19] The parties did not propose any question of general importance for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;
2. The matter is returned to the Refugee Appeal Division for re-determination;
3. No question of general importance is certified.

"Sylvie E. Roussel"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3615-15

STYLE OF CAUSE: BERTHELINE NINA TCHANGOUE v THE MINISTER
OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: FEBRUARY 25, 2016

JUDGMENT AND REASONS: ROUSSEL J.

DATED: MARCH 18, 2016

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