

Federal Court



Cour fédérale

Date: 20190430

Docket: IMM-4397-18

Citation: 2019 FC 541

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, April 30, 2019

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

VICTORINE VICKY NDOUNGO

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The applicant, a citizen of Cameroon, is seeking judicial review of a decision by the Refugee Appeal Division [RAD] which, on July 25, 2018, upheld the decision of the Refugee Protection Division [RPD] not to grant her refugee protection claim under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 21 [Act]. Both the RPD and the RAD found that the refugee protection claim lacked credibility.

[2] The allegations underlying this claim may be summarized as follows:

- a. The applicant was born in 1975 and comes from a family of five children; at the age of five, she was orphaned and placed in the care of one of her mother's female cousins;
- b. This cohabitation was difficult because the woman (Françoise) and her husband were skilled practitioners of magic whereas she had a special interest in the Bible; she claims to have been psychologically tortured; in particular, she was accused of having made a pact with the devil;
- c. When she turned 18, Françoise asked her to leave home, and she found herself living with a divorced uncle and his five children, who also made her life difficult;
- d. When her grandmother, to whom she was close, died in 2003, she decided to move to Gabon, a neighbouring country, where she found a job as a medical representative; she found this job fulfilling; meanwhile, her sisters, who were still in Cameroon, were forced into marriage;
- e. Except for a short period when she stayed with her uncle Célestin, she lived alone until she departed for Canada in January 2013;
- f. In 2011, her uncle Célestin forced her to care for a cousin who she would learn was pregnant; she then realized that she had been chosen to dedicate herself to caring for the family in accordance with the rites that her family observed; she also realized that the cousin's spouse was pressuring her to have an abortion, which the applicant opposed; she expressed her disagreement at a family meeting that she had convened; in August 2012,

in connection with this matter, the spouse physically assaulted her and threatened to kill her; and

- g. In January 2013, she left Gabon for Canada; she maintains that returning to Cameroon would subject her to a risk to her life because she disagrees with her family's decision to designate her as the one dedicated to caring for the family, which, among other things, requires her not to marry, which is against her wishes.

[3] The applicant came to Canada on a visitor visa. The visa was renewed until August 25, 2016. She claimed refugee protection three days before the visa expired. In support of her claim, she submitted to the RPD a report by Gilles Bibeau, Professor Emeritus, Department of Anthropology, University of Montréal. This report [Bibeau Report] takes an anthropological look at the status of orphaned children in traditional African societies, their vulnerability, the impact of the curse on the family environment and the traditional rules by which a child can be [TRANSLATION] "chosen" to be the keeper of tradition, and it discusses the applicant's personal situation at the same time.

[4] The RPD found that the claim was not credible. In particular, it found it implausible that Françoise, whom the applicant would allegedly fear if she returned to Cameroon, would still be interested in her, even to the point of threatening her with death, whereas the applicant had lived in Gabon for some 10 years without being bothered by this woman. In the same vein, the RPD was of the opinion that the applicant's fear of her uncle Célestin was unfounded because, by her own admission, the threats he allegedly made to her amounted to threatening looks. The RPD noted that these so-called threats did not prevent the applicant from living, working and

travelling on business in Gabon. It also noted that, despite the incident in August 2012 involving the spouse of the cousin entrusted to her by her uncle Célestin, at which point she allegedly started to fear for her life, the applicant nevertheless stated that she was able to live without any problems, avoiding her family members, until she departed for Canada in January 2013.

[5] The RPD also found a lack of subjective fear because the applicant had waited three and a half years to make a claim for refugee protection in Canada. In particular, it noted that the applicant had extended her visitor visa before claiming refugee protection.

[6] The RPD ruled that the Bibeau Report alone could not corroborate the applicant's allegations. It stated that, because of her education, work experience and distance from family, the applicant had been able to live in safety, independently, doing work that she herself described as fulfilling. It therefore gave little weight to the report in terms of fear of persecution and risks alleged by the applicant if she were to return to Cameroon.

[7] As noted above, the RAD did not seek to intervene after conducting its own review of the evidence before the RPD. Apart from a factual error as to the identity of the person who threatened her after the family meeting in 2011 because she was opposed to her little cousin, who was in her care, having an abortion, an error that it deemed non-determinative and which, in any event, the applicant did not revisit in this judicial review, the RAD also found, for essentially the same reasons as the RPD, that the applicant's refugee protection claim lacked credibility.

[8] In particular, the RAD found that the late submission of the refugee protection claim undermined the applicant's subjective fear of the prospect of returning to Cameroon. It also found that the Bibeau Report does not corroborate the applicant's allegations and that it should therefore be given little weight.

[9] The applicant criticizes the RAD mainly for three things. First, she criticizes it for not taking into account that the time it took her to make her claim for refugee protection was related to her not knowing the criteria for a refugee protection claim and to her not knowing that she had legal status in Canada, at least until the end of August 2016. Second, she criticizes it for essentially ignoring the Bibeau Report.

[10] Lastly, at the hearing of this judicial review, counsel for the applicant argued that the RAD had failed to conduct a detailed analysis of each part of the claim, namely, the part related to section 96 and the part related to section 97. However, counsel acknowledged that this was a new argument. She explained the delay by the fact that she was not the solicitor of record at the time the applicant's memorandum was filed in this Court. Not surprisingly, counsel for the respondent objected to this argument being considered.

[11] In principle, eleventh-hour arguments must be rejected, since they take the opposing party by surprise and do not allow for an informed debate, especially when such debate may affect the outcome of the dispute. In cases brought before the Court under the Act in particular, the parties are required to record in writing their respective positions in fact and in law before they are brought before the Court for adjudication. The Court's rules are flexible enough to allow

for the filing of amended memoranda by both sides. I note that the memorandum filed on behalf of the applicant in this case was filed on October 1, 2018. I also note that the change of counsel was made on March 18, 2019. Since the hearing of this judicial review had, at that point, already been scheduled for April 17, 2019, I do not see what would have prevented counsel for the applicant from filing an amended memorandum setting out this new argument. In short, I will not consider it.

[12] In any event, counsel for the applicant, sensing slippery ground, did not emphasize this point. That was a wise decision. Moreover, the applicant would have faced the same credibility issues regardless of the approach taken by the RAD.

[13] Therefore, at issue here is whether the RAD, in deciding as it did, made an error that warrants the Court's intervention, particularly with regard to the time limit for claiming refugee protection and the weight given to the Bibeau Report.

[14] It is now well established that RAD decisions, when they do not involve procedural fairness considerations, are reviewable on the standard of reasonableness (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at paras 30–35; *Adebayo v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 330 at paras 20 and 23; and *Caleb v Canada (Citizenship and Immigration)*, 2018 FC 384 at para 18). I note that an administrative decision-maker's decision is reasonable when the process that led to it is transparent and intelligible and the conclusions reached fall 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).

I. Delay in making a claim

[15] The applicant submits that she provided a reasonable explanation for the length of time it took her to make her refugee protection claim, namely, her lack of knowledge of the criteria for a refugee protection claim and the legality of her status in Canada, and she submits that the RAD was wrong in finding that this explanation was not credible.

[16] Although a delay in making a claim may not, on its own, sometimes be sufficient to justify the rejection of a claim for refugee protection, it may be used to support adverse findings already made by the RPD or RAD regarding the credibility of the key elements of the claim (*Bello v Canada (Minister of Citizenship and Immigration)*, [1997] FCJ No 446 (TD); *Heer v Canada (Minister of Employment and Immigration)*, [1988] FCJ No 330 (FCA)).

[17] The Court has already determined that obtaining legal visitor status in Canada does not affect the issue of failing to claim refugee protection at the earliest opportunity. This failure, even in these circumstances, can undermine an applicant's credibility and cast doubt on their subjective fear of returning to the country where they allege a fear of persecution:

[36] The Board considered the Principal Applicant's explanation for her delay but found this was "not satisfactory." Although in the country legally as a visitor at the time, it is reasonable to expect that the Principal Applicant would make a claim at the first possible opportunity and to determine that a failure to do so further undermines her subjective fear and credibility (see *Jeune v Canada (Minister of Citizenship and Immigration)*, 2009 FC 835, [2009] FCJ No 965 at para 15). As the Respondent points out, the fact that she did not attempt to inform herself about the options available until her visitor's visa was about to expire supports the Board's conclusion.

[Emphasis added]

(Mallampally v Canada (Citizenship and Immigration), 2012 FC 267)

[18] In this case, the RAD noted that the applicant offered no explanation when the RPD asked her why she had applied for an extension of her visitor visa before making her refugee protection claim, when she said she feared her family if she returned to her home country. It saw this as an additional element that cast doubt on the credibility of the key elements of the claim for refugee protection.

[19] I note that, according to her own expert, Mr. Bibeau, going into [TRANSLATION] “exile in the West” or [TRANSLATION] “fleeing elsewhere” was [TRANSLATION] “[the applicant’s] only means of escaping the attacks that might lead to her death” (Certified Tribunal Record at p 194). The fact that the applicant chose to renew her visitor visa and made her refugee protection claim only a few days before the visa expired, three and a half years after her arrival in Canada, is surprising in these circumstances and raises more questions than answers about her subjective fear of returning to Cameroon.

[20] I therefore see nothing unreasonable in the RAD’s finding regarding the applicant’s delay in claiming refugee protection, which reinforced its preliminary conclusions regarding the overall credibility of the refugee protection claim. In this latter regard, the RAD had already noted that the applicant did not appear to question the contradictions or inconsistencies noted by the RPD in relation to the following:

- a. The applicant expressed fear of Françoise and her uncle Célestin during her testimony before the RPD even though she had lived for 10 years in Gabon without being bothered

by Françoise, making it unlikely that Françoise would suddenly come forward and make death threats against her;

- b. The applicant said that she had no further contact with her uncle Célestin and then stated that she had spoken to him twice since she arrived in Canada because she had mixed feelings towards him.

[21] The applicant relies on *Gyawali v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1122 [*Gyawali*] to argue that it was reasonable for her to wait all this time before making a claim for refugee protection on account of her status as a visitor. In that case, the Court, noting that the failure of an applicant to claim refugee status immediately upon arrival or within a reasonable delay can be an important factor to consider in determining credibility, held that, in some circumstances, this delay cannot be the sole basis for a non-credibility finding (*Gyawali* at para 16).

[22] These “circumstances” in *Gyawali* were related to the fact that the applicant, who was in Canada on a study visa, learned during his stay in Canada that the rebels in his country of origin, whom he had feared in the past, had set fire to the family home and farm. He claimed refugee protection as soon as he learned of this incident because, now being deprived of financial support from his family, he feared having to return to his country and face the threat of these rebels. He had been in Canada for some time. The Court held that the applicant could not be penalized for the delay in making a claim because it was the result of circumstances arising during his stay in Canada that were beyond his control.

[23] In this case, however, the situation is altogether different. The applicant does not claim to fear events that have occurred since her arrival in Canada. She also does not argue that she applied for refugee protection as soon as there arose a situation giving rise to fear of persecution that she had not foreseen and could not reasonably have foreseen. Rather, she justified her considerable delay in making a claim by the fact that she was reportedly on vacation. In short, the applicant failed to provide a reasonable explanation for her delay in making a claim for refugee protection, and the RAD reasonably concluded that there was no subjective fear on her part. Note that, even according to *Gyawali*, failure to make a timely claim can “be an important factor” to consider in determining a refugee protection applicant’s credibility.

II. Bibeau Report

[24] It cannot be said that the RAD, and the RPD before it, failed to consider the Bibeau Report, since they each refer to it in their decision. Rather, the applicant’s argument is that, if this report had been considered as a whole, as it should have been, neither of the two decision-making bodies would have reached the conclusion that was reached.

[25] The RAD agreed with the RPD’s finding that, although the Bibeau Report provided an interesting anthropological perspective on the situation as described by the applicant, it could not, on its own, corroborate the applicant’s allegations, which were found not to be credible.

[26] The problem with this kind of evidence, whether from psychologists, anthropologists or specialists in other disciplines, is that it depends on the facts reported by the person concerned. If the facts are not found to be credible, as in this case, the expert’s view, however competent and

well-intentioned, is generally no more valuable (*Jele v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 24 at para 50; *Hajikhanov v Canada (Citizenship and Immigration)*, 2018 FC 1249 at para 15; *Moussounda v Canada (Citizenship and Immigration)*, 2018 FC 506 at para 8).

[27] Here, the fear of persecution and the risk of cruel or unusual treatment mentioned by the applicant did not survive the credibility test. Her spending 10 years in Gabon without being truly threatened either by Françoise or by her uncle Célestin; the threats of this uncle, which amounted to [TRANSLATION] “threatening glances”; her delay in claiming refugee protection without giving a reasonable explanation; and her delay in leaving Gabon despite claiming to have been threatened with death in the August 2012 incident were fatal in the eyes of the RPD and the RAD, and the applicant has not satisfied me that there was a need to intervene. From that point on, it was open to both decision-makers to give little weight to the Bibeau Report.

[28] In other words, it was not enough for the applicant to describe, even through the eyes of an expert, her status as an orphan in Africa and the traditional rites still practised in certain villages. She also had to demonstrate that this resulted in fear of persecution or risk of abuse. In the eyes of the RAD, neither was demonstrated in a credible manner. This finding, as stated earlier, has the qualities that make it reasonable.

[29] I also note that there is no evidence on the record to suggest that, if the applicant returns to Cameroon, she will no longer be able to live safely in Gabon, as she did for some 10 years before leaving for a vacation in Canada.

[30] Therefore, I am unable to allow this application for judicial review. Neither party has proposed a question for certification for an appeal. I am also of the opinion that there is no question for certification arising in the circumstances of this case.

JUDGMENT in IMM-4397-18

THIS COURT'S JUDGMENT IS that

1. The application for judicial review is dismissed; and
2. No question is certified.

“René LeBlanc”

Judge

Certified true translation
This 13th day of May, 2019

Vincent Mar, C Tran

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4397-18

STYLE OF CAUSE: VICTORINE VICKY NDOUNGO v THE MINISTER
OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: APRIL 17, 2019

**REASONS FOR JUDGMENT
AND JUDGMENT:** LEBLANC J.

DATED: APRIL 30, 2019

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