Federal Court  Cour fédérale

Date: 20110928

Docket: IMM-1722-11

Citation: 2011 FC 1105

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, September 28, 2011

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

MORGAN MUBIALA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application to review the lawfulness of a decision dated December 13, 2010, by the Refugee Protection Division of the Immigration and Refugee Board (panel) rejecting the applicant's refugee claim. For the following reasons, intervention is not warranted, since the impugned decision was reasonable in every respect and the rules of procedural fairness were followed in this case by the panel.

BASIS OF THE REFUGEE CLAIM

[2] We will see later that at the time of the applicant's oral testimony before the panel on December 13, 2010, he contradicted himself on several fundamental aspects of his refugee claim, as noted by the panel, which found his account not to be credible. That being said, according to the Personal Information Form (PIF) signed on December 9, 2008, the applicant, who is a citizen of the Democratic Republic of the Congo (DPR), fears persecution because of his membership in the Bunda Dia Kongo (BDK) church. This is a Congolese political and religious movement that is very active in the province of Bas-Congo and that has an anti-government political agenda.

[3] As a member of the BDK, the applicant claimed that he espouses the movement's views but also stated that he did not get involved on a daily basis in the claims of the Church, of which he is apparently a deacon. The fact remains that on April 27, 2006, the home of his spiritual leader was searched by the Congolese national police, who even vandalized the Church's places of worship. Two months later, the members used the annual march for the Independence Day celebration of June 30, 2006, to protest against these aggressive actions on the part of the national police, but the demonstration ended in violent clashes: ten BDK members were beaten and several others were injured or imprisoned. Fortunately, the applicant emerged unscathed.

[4] A resident of Kinshasa, the applicant claimed that he travelled twice a year to Bas-Congo, both for family reasons and for his business, because he owned a garage in Luozi. However, the Congolese government, acting through the governor of Bas-Congo, still wanted to exterminate members of the BKD and, in fact, several BKD members were killed in February 2008. Concerned for the safety of his grandparents who were also members of the Church, and considering that he

had to see to the operation of his garage in Luozi, the applicant said that he went to Luozi in early March 2008. Unfortunately, he was never able to get to his grandparents' home because he was arrested immediately in the street by soldiers (government police) who had been alerted to his presence.

[5] The applicant continued his account by explaining that he was imprisoned in a cell in Luozi, where he was held for two weeks. There, he was subjected to the worst kinds of torture and humiliation, which left permanent effects. He finally escaped on March 30, 2008, with the help of a soldier named Jacques, who was an old acquaintance and who took pity on him. Jacques drove him to the forest to kill him but instead fired some shots in the air and asked him to leave. He then managed to get to the village of Kinete at the Congo-Brazzaville border, where he was given indigenous treatment for his injuries. He also managed to contact his family and, finally, after being moved from village to village while he was in Congo-Brazzaville, he met a smuggler in early October 2008. The applicant explained that he arrived at the Trudeau airport in Montréal on October 17, 2008, and after spending the first night at the airport, he submitted his refugee claim at an immigration office the next day.

NON-CREDIBILITY FINDING

[6] It is settled law that the assessment of the evidence and testimony, and the assessment of their probative value, is within the exclusive expertise of the panel (*Aguebor v. Canada (Minister of Employment and Immigration)* (1993), 160 N.R. 315 (FCA), [1993] F.C.J. 732; *Aguirre v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 571 at para. 14, [2008] F.C.J. 732). Since the standard of review is reasonableness, a high degree of deference is owed to the decision of the

specialized tribunal, and the reviewing court must limit its review 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 para. 47, [2008] 1 S.C.R. 190 and *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para. 59, [2009] 1 S.C.R. 339.

[7] In this case, the refugee claim was rejected simply because the panel did not believe the applicant's account, given the many contradictions identified in the decision under review. Among other things, the applicant testified at the hearing, contrary to his written statement:

- that his arrest took place on March 30, 2008 (and not at the beginning of that month);
- that he did not take part in the march on June 30, 2006, but was instead passing through on his way to Luozi;
- that he waited about 5 months after the February 2008 massacres before going to Luozi to his grandparents' home (on this point the applicant contradicted himself one other time at the hearing, when he explained that he had been present during the massacres which took place in Boma);
- that he was arrested at the hotel (and not in the street) by police officers who came and knocked at his door while he was trying to rest;
- that he was arrested for the first time in 2008 (while he had told the immigration officer that his first arrest dated back to 2006);
- that he held the position of "moderator" in the BDK, stating that there was no deacon or subdeacon in the church (when he had stated in his PIF that he was a deacon);

- that he had had no contact with his family members from the time he was arrested in March 2008 to his departure from Congo in October 2008 (when they had signed or provided him with several documents during this period);
- that after leaving Congo-Brazzaville on October 6, 2008, to come to Canada through Morocco, he arrived at the Trudeau airport in Montréal on October 7, 2008, and not on October 17, 2008, as mentioned in his PIF;
- that he left Congo-Brazzaville without having any identity documents in his name and that he had no idea how the service passport in his name and containing his photo was issued in Kinshasa on September 28, 2008 (date on which he claimed he was hiding in the forest with no contact with his family);
- that his date of birth his in fact July 8, 1961, and not February 8, 1961, which appears in the substitute birth certificate obtained on August 7, 2008 (date on which he claimed he was hiding in the forest with no contact with his family);
- that his garage in Kinshasa is in the commune of Ngiri-Ngiri and is called GARAGE MUBIALA when the service card from GARAGE MAKWANA filed in the record is a false document made by members of the BDK;
- finally, that his BDK membership card was taken by his country's authorities and that members of the BDK had issued him a new one, when according to the panel's specialized knowledge the BDK has not issued membership cards since 2002.

[8] The panel also found that the above-mentioned contradictions were of a nature to irreparably undermine the probative value of many of the pieces of documentary evidence filed by the applicant, such as the substitute birth certificate, the certificate of acknowledgement, the letter of

appointment and the BDK membership card issued to “KINSHSA, KIA 01/05/2004” [*sic*] on which the notation 2004 has *prima facie* been altered, according to the panel. Similarly, the panel decided not to attach any weight to the letter of support from the applicant’s spouse, which it characterized as being a document of convenience. Also, the panel found that the psychological report, the letter from the applicant’s attending physician and the letter from the social worker had no probative value because the facts on which the opinions of the experts in question were based had been found not to be credible.

COMPLIANCE WITH THE GUIDELINES ON VULNERABLE PERSONS

[9] A previous order of the panel, dated December 7, 2010, recognized the applicant as being a “vulnerable person” within the meaning of the *Guideline on Procedures with respect to Vulnerable Persons Appearing Before the IRB*, December 2006 (the Guidelines) and set out various procedural measures to protect the applicant at the hearing. It follows that regardless of whether what the applicant says is true or not, the post-traumatic stress he suffers from required the panel to be sensitive and attentive to his current condition. Moreover, breaks were recommended by the specialist who examined the applicant when the memory of painful events [TRANSLATION] “exceeds his emotional and cognitive capacities”.

[10] Today, the applicant is principally challenging the fact that, in assessing his credibility, the panel did not attach sufficient weight to the fact that he is a “vulnerable person”. The applicant’s learned counsel admits that the procedural accommodations mentioned in the Guidelines and the panel’s previous order had indeed been made at the hearing by the panel member who heard his testimony (reversing the order of questioning, breaks, etc.). However, she argues that the substantive

effect of the Guidelines must also be considered: form cannot operate to the detriment of substance when the panel analyzes the testimony of a “vulnerable person”. However, the psychological reports in the record clearly show that the applicant is unable to discuss the events that took place in the Congo without experiencing significant trauma in the form of flashbacks or confusion. In assessing the applicant’s credibility, the panel therefore had to take into account his inability to recollect traumatic events: *Lozano Pulido v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 209 at para. 39, [2007] F.C.J. 281, and *Hassan v. Canada (Minister of Citizenship and Immigration)*, 174 F.T.R. 288 at para. 22, [1999] F.C.J. 1359.

[11] The respondent submits that all of the accommodation measures were taken by the panel to facilitate the applicant’s testimony at the hearing in accordance with the Guidelines and the order dated December 2, 2010. Nevertheless, the panel was not in any way obliged to give credence to the applicant’s account of persecution, given that he contradicted himself many times during his oral testimony on major points in his claim.

[12] In fact, the applicant’s claims cannot be accepted by the Court. It should be recalled once again that the purpose of the Guidelines is to make sure that persons recognized as vulnerable are heard with sensitivity by the panel and not to remedy the defects of testimony that is full of major contradictions and implausibilities. Here, these many contradictions or implausibilities pertain to essential aspects of the refugee claim and clearly go beyond simple memory lapses, inconsistences or an inability to relate relevant events because the applicant is suffering from post-traumatic stress. Other contradictions or implausibilities identified by the panel simply concern the documentary evidence. Contrary to the situation noted by the Court in the decisions raised by the applicant, the

rejection of this refugee claim is not the result of any insensitivity on the part of the panel concerning the applicant's state of psychological vulnerability.

[13] Moreover, I am equally satisfied that the panel took his psychological condition into account in assessing the answers he was able to give at the hearing. Based on a careful reading of the transcripts, the applicant's medical condition does not seem to have affected the coherence of his remarks. The pace of his testimony at the hearing was excellent overall. The applicant's responses were not confused. The applicant was even talkative and his memory lapses seemed rather strategic and occurred just when he was embarrassed or confronted with major contradictions from his previous testimony. In short, this is not a case where a refugee claimant claims not to be able to remember past facts, but a case where, when confronted with a contradiction, he visibly adjusted his testimony in relation to what he stated in the past in great detail and with great conviction.

ASSESSMENT OF THE MEDICAL EVIDENCE

[14] The applicant is also challenging the fact that the panel did not attach any probative value to his psychological report, the letter from his attending physician or the letter from his social worker, even though this evidence supported his account. In this case, this second ground of attack, which is a variation of the theme developed above, cannot be accepted either. We have already seen that the panel took into account the diagnosis of post-traumatic stress in terms of the applicant's ability to recollect certain facts; there therefore remains the credibility to be given to the allegations of persecution and torture that form the basis of the refugee claim.

[15] In *Kabedi v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 154 at paras. 19-20, [2005] F.C.J. 224, Justice Beaudry noted the applicable case law:

> Case law in similar matters has established that it is the responsibility of the panel to judge upon the value to be given to expert testimony. In *R v. Abbey*, [1982] 2 S.C.R. 24, at paras. 41 and 48, the Supreme Court of Canada stated as follows:
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> > An expert witness, like any other witness, may testify as to the veracity of facts of which he has first-hand experience, but this is not the main purpose of his or her testimony. An expert is there to give an opinion. And the opinion more often than not will be based on second-hand evidence. This is especially true of the opinions of psychiatrists.
> >
> > . . .Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist. [Emphasis added.]
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> In *Danailov v. Canada (Minister of Citizenship and Immigration)*, [1993] F.C.J. No. 1019 (F.C.T.D.) (QL), at para. 2, Reed J. explained that:
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> > With respect to the assessment of the doctor's evidence, to find that that opinion evidence is only as valid as the truth of the facts on which it is based, is always a valid way of evaluating opinion evidence. If the panel does not believe the underlying facts it is entirely open to it to assess the opinion evidence as it did. [Emphasis added.]

[16] In conclusion, the Court's intervention is warranted only where the panel has disregarded evidence that is essential to the refugee claim. This is obviously not the case here and it is not necessary for this Court to intervene in this regard.

[17] For these reasons, the application for judicial review must fail. Counsel agreed at the hearing that no serious question of general importance arises in this case.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed. No question is certified.

"Luc Martineau"
Judge

Certified true translation
Susan Deichert, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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