Federal Court Cour fédérale

Date: 20120118

Docket: IMM-2610-11

Citation: 2012 FC 62

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, January 18, 2012

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

GENEVIEVE BOKA DI MPASI MANSONI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The plausibility of the account and the assessment of the subjective fear are central to this matter.

II. Judicial procedure

[2] 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 by the Refugee Protection

Division (RPD) of the Immigration and Refugee Board (IRB) dated March 29, 2011, that the applicant is neither a Convention refugee as defined in section 96 of the IRPA nor a person in need of protection pursuant to section 97 of the IRPA.

III. Facts

[3] The applicant, Geneviève Boka Di Mpasi Mansoni, is a citizen of the Democratic Republic of the Congo (DRC).

[4] Since 2002, the applicant has apparently worked as a French teacher and was a member of the Alliance Franco-Congolais de Kinshasa (AFCK) network, under the leadership of Beya Kabenga, who is also an elected member for the People's Party for Reconstruction and Democracy (PPRD), headed by the current president of the DRC.

[5] Between March 2007 and June 2008, the applicant protested with some of her colleagues against Beya Kabenga by denouncing, among other things, his poor financial management of the AFCK.

[6] The applicant, who held the position of educational consultant, was apparently suspended as of January 2007.

[7] Between September 2007 and December 2007, two of her colleagues were reportedly arrested on the orders of Beya Kabenga. Other employees allegedly managed to avoid attempts to arrest them.

[8] Beya Kabenga, during a meeting with members of the AFCK, apparently justified the arrests. Subsequently, several of the applicant's colleagues resigned or were dismissed. Beya Kabenga allegedly continued his campaign of intimidation and abused his power with the help of his contacts within the country's security agencies to intimidate the members of the AFCK who opposed his leadership.

[9] In 2008, the applicant began teaching again while continuing her efforts, along with her colleagues, to denounce Beya Kabenga, calling for his resignation.

[10] In June 2008, the applicant allegedly obtained a Canadian visa to attend the 12th World Congress of the Fédération internationale des professeurs de français (FIPF).

[11] The applicant alleges that she suffered major stress because of the risk of arbitrary arrest she faced.

[12] After her arrival in Canada on July 18, 2008, the applicant chose not to return to the DRC where she was subject to sexual violence and arbitrary arrest.

[13] She did not seek Canada's protection until October 7, 2008, two and a half months after she arrived in Canada.

[14] While in Canada, the applicant stayed in touch with her former colleagues, who told her that Beya Kabenga had continued to threaten her colleagues with arbitrary arrest.

IV. Decision under review

[15] The RPD found that the applicant was not a person in need of protection. It noted, first, that the applicant had continued to work for the AFCK without being persecuted, even though she had vigorously objected to the work of Beya Kabenga between March 2007 and June 2008.

[16] The RPD believed that she was suspended in 2007 because of a work conflict and not because of her efforts against Beya Kabenga.

[17] The RPD was of the opinion that the applicant had not demonstrated the reasonable conduct of a person whose safety is at risk by not fleeing the DRC as soon as she obtained her visa and by not taking measures to avoid a possible arrest.

[18] The applicant did not establish that Beya Kabenga had tried to mistreat her in her country or after her arrival in Canada.

[19] The RPD found that the applicant would be subjected only to a generalized risk and not a personalized risk if she were to return to the DRC.

V. Issue

[20] Is the RPD's decision reasonable in the circumstances?

VI. Relevant legislative provisions

[21] The following provisions of the IRPA apply in this case:

Convention refugee	Définition de « réfugié »
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	*a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	*b*) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
Person in need of protection	Personne à protéger
97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	**97.** (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(*a*) to a danger, believed on	*a*) soit au risque, s'il y a

substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	*b*) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,	(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
Person in need of protection	Personne à protéger
(2) A person in Canada	(2) A également qualité de

who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection	personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

VII. Position of the parties

[22] The applicant is claiming that the RPD did not refer to the evidence she had adduced concerning the abuses of power committed by Beya Kabenga and the human rights violations taking place in the DRC. She argues that the RPD did not take into account the position he holds within the government and the power he has to make arbitrary arrests, as shown in the newspaper articles adduced into evidence. The applicant would therefore be subject to a personal risk of persecution. In addition, the RPD erred by finding, despite testimonial evidence, that the applicant's colleagues had not been concerned after her departure when one of her colleagues had been threatened with arbitrary arrest and forced to quit his job in December 2008.

[23] The applicant also contends that, because of her ethnic background and her gender, she would be more likely to suffer violence at the hands of the authorities if she were to return to the DRC. The applicant also notes that the existence of a moratorium on removals to the DRC should have been considered by the RPD.

[24] The respondent argues, first, that the RPD found that the applicant's allegations were not credible. The applicant would not be persecuted or even threatened by Beya Kabenga because she had continued to work for the latter without suffering any consequences for her criticisms of his leadership. In addition, the evidence in the record shows that the applicant was suspended because

of a work conflict concerning wage conditions, among other things. The respondent also notes that the applicant's failure to leave the DRC at the first opportunity undermines her credibility. Also, the applicant did not demonstrate that she would be subject to a personalized risk if she were to be deported to the DRC. The documentary evidence shows, to the contrary, that crime is widespread in the DRC.

VII. Analysis

[25] It is well settled that deference is owed to findings of fact made by an administrative body. This principle is explained as follows by the Supreme Court in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62:

> [13] This, I think, is the context for understanding what the Court meant in *Dunsmuir* when it called for "justification, transparency and intelligibility". To me, it represents a respectful appreciation that a wide range of specialized decision-makers routinely render decisions in their respective spheres of expertise, using concepts and language often unique to their areas and rendering decisions that are often counter-intuitive to a generalist. That was the basis for this Court's new direction in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, where Dickson J. urged restraint in assessing the decisions of specialized administrative tribunals. This decision oriented the Court towards granting greater deference to tribunals, shown in *Dunsmuir*'s conclusion that tribunals should "have a margin of appreciation within the range of acceptable and rational solutions" (para. 47). [Emphasis added.]

[26] The RPD did not believe the applicant's allegations that the head of the AFCK would persecute her.

[27] The Federal Court of Appeal, in *Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 (QL/Lexis), made the following cautionary remarks about plausibility:

> 4 There is no longer any doubt that the Refugee Division, which is a specialized tribunal, has complete jurisdiction to determine the plausibility of testimony: who is in a better position than the Refugee Division to gauge the credibility of an account and to draw the necessary inferences? As long as the inferences drawn by the tribunal are not so unreasonable as to warrant our intervention, its findings are not open to judicial review. In Giron, the Court merely observed that in the area of plausibility, the unreasonableness of a decision may be more palpable, and so more easily identifiable, since the account appears on the face of the record. In our opinion, Giron in no way reduces the burden that rests on an appellant, of showing that the inferences drawn by the Refugee Division could not reasonably have been drawn. In this case, the appellant has not discharged this burden. [Emphasis added.]

(Also, *Antonippillai v Canada (Minister of Citizenship and Immigration)* (1999), 157 FTR 101, [1999] FCJ No 382 (QL/Lexis)).

[28] In this case, the RPD drew a negative inference with regard to the applicant from the fact that the applicant had worked for the AFCK until her departure for Canada, despite the fact that other teachers had been prevented from carrying out their duties. The RPD did not err by dismissing, among other things, the applicant's explanation that the authorities could not have taken action against her in such a short time frame. It was open to the RPD to arrive at that conclusion.

[29] In addition, the RPD gave significant weight to the fact that the applicant had obtained a visa that would have enabled her to flee her country of origin earlier. As the Court explained in *Manirazika v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1309:

> [18] As the respondent correctly pointed out, it is settled law that returning to the country of persecution, delay in leaving the country of persecution or failure to claim protection in countries that are signatories to the 1951 *Geneva Convention* or the 1967 *Protocol Relating to the Status of Refugees* can seriously undermine a claimant's credibility (*Lopez v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1318, 136 A.C.W.S. (3d) 894 at para. 5; *Prayogo v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1508, 143 A.C.W.S. (3d) 1087 at para. 26; *Ilie v. Canada (Minister of Citizenship and Immigration)*, (1994), 88 F.T.R. 220, 51 A.C.W.S. (3d) 1349; *Saez v. Canada (Minister of Employment and Immigration)*,

> (1993), 65 F.T.R. 317, 41 A.C.W.S. (3d) 719 (F.C.A.); *Nguyen v. Canada (Minister of Citizenship and Immigration)*, (1998), 79 A.C.W.S. (3d) 136, [1998] F.C.J. No. 420 (QL); *Sokolov v. Canada (Minister of Citizenship and Immigration)*, (1998), 87 A.C.W.S. (3d) 1193, [1998] F.C.J. No. 1321 (QL)). [Emphasis added.]

[30] The RPD also analyzed the evidence adduced by the applicant that shows that her suspension was the result of a work conflict concerning her pay and not the result of the denunciations of the actions taken by the head of the AFCK.

[31] The RPD also seems to have considered whether Beya Kabenga could be "influential" (RPD's decision at para 22), as the following excerpt from the RPD's decision also shows:

> [18] …First, as mentioned, the panel is of the opinion that the claimant failed to establish that this leader tried to mistreat her when she was living in her country. In addition, since she left in July 2008, nearly 30 months ago, the claimant has not heard that anyone—particularly a member of the authorities in the DRC or the leader of the AFCK—had the least bit of interest in her. [Emphasis added.]

[32] The argument that the RPD did not take into account the fact that the applicant, as a woman, was more at risk than her male colleagues of being arbitrarily arrested, leading to sexual violence, must be addressed.

[33] The Court notes that the way the RPD dealt with sections 96 and 97 of the IRPA within the same paragraphs creates confusion and that it must be determined whether these two sections were properly analyzed based on the appropriate legal tests (*Kandiah v Canada (Minister of Citizenship and Immigration)*, 2005 FC 181). Even though the country conditions indicate generalized crime, the RPD had to determine whether there was a nexus between the applicant's fear and one of the grounds in section 96 of the IRPA (*Luc v Canada (Minister of Citizenship and Immigration)*, 2010 FC 826, 374 FTR 38).

[34] Generalized risk is a test that is exclusively associated with section 97 of the IRPA. However, the reasoning given in *Ocean v Canada (Minister of Citizenship and Immigration)*, 2011 FC 796 applies in this case:

> [15] Justice Pinard also stated the following:
>
> > [29] This is not to say that membership in a particular social group is sufficient to result in a finding of persecution. The evidence provided by the applicant must still satisfy the Board that there is a risk of harm that is sufficiently serious and whose occurrence is “more than a mere possibility”.
>
> [16] Justice Martineau stated the following at paragraph 36 of *Josile*:
>
> > . . . Had the Board accepted that a risk of rape is grounded in the applicant’s membership in a particular social group, then the inquiry should have resulted in a determination of whether there is “more than a mere possibility” that the applicant risks suffering this harm in Haiti.
>
> If the response had been “yes”, the next step would have been to determine whether the state was able to protect her.
>
> …
>
> [18] In this case, the panel did not err in law like those in *Dezimeau* and *Josile*. The panel accepted the principles stated in these two judgments. More specifically, it did not transfer its reasoning concerning section 97 to section 96. What the panel found was that the basis or the heart of the applicant’s claim under section 96 was not her fear of persecution because she belongs to a particular social group, that of Haitian women returning to that country after a prolonged absence and fearing being raped because of their gender. The basis of her fear of return concerned a fear of a different nature. My reading of the hearing transcript in this case confirms that the panel’s decision on this point was reasonable.

[35] In this case, the RPD did address the applicant’s concerns about the difference between her situation and that of her male colleagues, but found, at paragraph 18 of its decision, that the applicant had not shown “a serious possibility of persecution”. Thus, it ruled out the application of

section 96. The Court must point out that the argument centred primarily on the applicant's fear of the president of the AFCK, which called for an analysis pursuant to section 97. Despite the fact that the RPD dealt with both sections at the same time, it did not confuse the legal tests applicable to them.

[36] While it would have been preferable to undertake a more detailed analysis of gender-related persecution, in view of the consideration given to the *Guideline on Women Refugee Claimants Fearing Gender-Related Persecution* (Guideline 4), the RPD did not err in its assessment of the applicant's subjective fear.

[37] Given its credibility findings, the RPD was not required to pursue its analysis of the objective evidence on state protection as the applicant wanted (*Flores v Canada (Minister of Citizenship and Immigration)*, 2010 FC 503).

[38] Thus, in applying section 97 of the IRPA, it was open to the RPD to find that the testimonial evidence did not show that the applicant had been personally targeted, but instead showed that the applicant faced, according to its analysis of the documentary evidence, a generalized risk within the meaning of the case law.

[39] The Court cannot find that the risk of persecution alleged by the applicant was assessed in an arbitrary or unreasonable manner by the RPD.

[40] For all of the foregoing reasons, the application for judicial review is dismissed.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review be dismissed. There is no question of general importance to be certified.

Obiter

Nevertheless, despite the remarks made in this decision, a moratorium is in effect concerning the Democratic Republic of the Congo because of the precarious situation currently prevailing in that country with respect to the human condition.

"Michel M.J. Shore"
Judge

Certified true translation
Susan Deichert, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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