

Federal Court



Cour fédérale

Date: 20160520

Docket: IMM-5149-15

Citation: 2016 FC 565

Ottawa, Ontario, May 20, 2016

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

HUGUETTE KABASELE IYOMBE

Applicant

and

**MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision, dated September 18, 2015, of the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada [IRB], which found that the applicant was neither a “Convention refugee” nor a “person in need of protection” pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] The applicant is a citizen of the Democratic Republic of Congo [DRC] who alleges that, as a nurse, she treated a young woman [the victim], who had been raped by a high-ranking police officer [the officer]. The applicant accompanied the victim to the clinic, and then to the public prosecutor in order to denounce the rape. The applicant alleges that as a result of her assisting the victim, she was subsequently arrested and detained by the police, and that the same officer who committed the rape accused the applicant of encouraging the victim to produce a defamatory declaration against him. The applicant was released from custody due to a health issue. Following her release, she continued to be threatened by the officer.

[3] The RPD noted that the applicant had maintained in her Basis of Claim [BOC] form and file, as well as in her testimony, that the sole reason she was being targeted by the officer was because she had accompanied the victim in denouncing said officer to the authorities, noting that the applicant had not alleged any gender-based persecution from the officer, nor did she describe the beatings she endured while incarcerated as being gender-based violence. The RPD therefore concluded, on the basis of the oral testimony and documentary evidence, that consideration of section 96 of IRPA was not applicable. This finding is not questioned before the Court today.

[4] With respect to the existence of a personalized risk under subsection 97(1) of the IRPA, the RPD determined that, on a balance of probabilities, the applicant was not credible. The standard of reasonableness applies to the credibility finding made by the RPD, including its conclusion that there is no credible basis for the claim (*Hernandez v Canada (Minister of Citizenship and Immigration)*, 2016 FC 144 at para 3). The Court shall not interfere with the RPD's decision if it 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). The reasons provided by the RPD in this case are clear and transparent.

[5] Firstly, the RPD did not believe that the applicant was persecuted or targeted by the officer whose name she did not know. Since the only distinguishing feature of the officer provided by the applicant was that he was “high-ranking”, the applicant was asked at the hearing how she knew this fact. She first stated that she knew the officer was high-ranking because of his uniform, but when asked to provide details, the applicant stated that she had never actually seen the officer and that this was told to her by the victim. The applicant later stated that the officer’s uniform demonstrated that he was high-ranking because it was blue, and then adjusted her testimony yet again to state that the uniform had certain buttons, such as one with a leopard image, which indicated his rank. In both cases, the applicant was unable to explain how a blue uniform or a uniform with leopard buttons meant that the officer was high-ranking. Later, the applicant testified that while she was in detention, the other police officers referred to the officer as the chief of the police station. When asked why she had not mentioned this information when initially asked to explain how she knew the officer was high-ranking, the applicant stated that until the more precise, subsequent question was asked, she did not think to explain that the officer was the police chief. The RPD found that the applicant had adjusted her testimony and that she should have been consistent in her BOC form and her testimony by mentioning that the officer was actually the police chief. As a result, the RPD drew an adverse credibility finding on the part of the applicant.

[6] Secondly, with respect to the applicant's alleged detention by the DRC police for two weeks – from May 13, 2015 to May 24, 2015 – the RPD asked the applicant why she had responded negatively to a question in the Canadian form IMM-0008, which asks if she was ever sought, arrested or detained by the police or any other authority in any country. The applicant initially responded that this was because she had not told her sisters in Canada of her mistreatment, and because she did not know the refugee process in Canada. The applicant then adjusted her testimony to state that she did tell the agent filling out the form and had no reason to think that the agent made a mistake filling out the form for her. The applicant was also asked why she had responded negatively in another form – IMM-5669 – with respect to having been previously detained and incarcerated. The applicant responded that she did tell the agent at the airport that she had been previously arrested, contrary to the written response to that question in form IMM-5669. She did not remember why she had signed the form with this written response, but maintained that she had verbally answered yes to having been detained and incarcerated. The RPD did not accept these explanations. The RPD noted that the applicant is university educated, had stated that she understood French, and had proceeded at her hearing in French without the need for an interpreter. As a result, the RPD determined that the applicant had understood forms IMM-0008 and IMM-5669, and signed them to the effect that she agreed with their contents and declared said contents to be truthful. The burden of proof was on the applicant with respect to the evidence, and the RPD therefore determined that her failure to state in the forms that she had been previously detained and arrested further undermined her credibility.

[7] Thirdly, the RPD also noted that when the applicant entered Canada on a cancelled Canadian visa, she stated to a Canadian border officer that she had no problems in returning to

the DRC the following day. When asked at the hearing why she had made this statement, the applicant stated that she had been demoralized at the news that she had to go back and did not know the Canadian refugee process. When asked why she had not informed the border officer that she did have problems in returning to the DRC, in spite of not knowing the refugee process, the applicant stated that she was very emotional at the time due to the cancelled visa. Counsel for the applicant further stated that the applicant may have meant that she had no *physical* problems in returning to the DRC. The RPD did not accept these explanations. The RPD found that if the applicant was facing a danger to her life and further illegal detention and torture in the DRC, the applicant would have stated this to the border officer rather than declaring that she had no problems in returning to the DRC. Her statement thus reflected behaviour incompatible with the risk of harm being alleged. Moreover, there was no evidence that the applicant's statement of having no problems with returning to the DRC was made in relation to physical problems only. As a result, the RPD made a negative credibility finding.

[8] Fourthly, the RPD also considered the documentary evidence in light of the allegation made by the applicant that she was whipped and kicked in the back while in police custody and that she had sought medical treatment the day she was released. The RPD noted in this regard that the medical documents provided by the applicant made no mention whatsoever of the claimant having visible marks on her body and that these documents therefore offered no probative value to corroborate these allegations. With respect to the applicant's skin condition that she allegedly developed while in police custody, the RPD determined that the applicant's overall lack of credibility and the lack of documentary evidence did not support this allegation. With respect to the medical report and police complaint corroborating the victim's rape, the RPD

noted that even if these documents were valid, they made no reference whatsoever to the applicant and therefore did not corroborate, *per se*, that the applicant was in any way associated with the victim such that she would be targeted by the victim's rapist. The RPD found these documents to have no probative value with respect to the applicant's allegations.

[9] Finally, the RPD also considered the Court's decision in *Quintero Cienfuegos v Canada (Citizenship and Immigration)*, 2009 FC 1262 at para 1 [*Quintero Cienfuegos*] to the effect that the accumulation of contradictions between the applicant's testimony, port-of-entry statements, and BOC form are sufficient for a negative credibility finding. The RPD also noted that risks identified in country condition documentation are not sufficient to establish that a claim is well-founded; rather, a claimant must demonstrate how country conditions apply to her personal circumstances, which the applicant failed to do in this case, on the balance of probabilities. The RPD concluded that the applicant had not established the credibility of her allegations with respect to being targeted by the officer, and had therefore not established on the balance of probabilities that she faced a prospective risk of harm in the circumstances. As a result, there was no credible basis for her claim with respect to subsection 107(2) of IRPA.

[10] Today, the applicant challenges the reasonableness of these various non-credibility findings. With respect to the RPD's finding regarding how the applicant knew that the officer was high-ranking, the applicant submits that she is a simple civilian and thus not an authority on what indications or criteria would be useful in establishing the rank of an officer. Rather, the applicant was simply testifying to what she perceived to be indications of the officer's high rank, and she was entitled to present testimony based on this belief or perception that she held. With

respect to the RPD's finding that she had omitted to mention in her BOC form that the officer was the police chief, the applicant states that this omission does not alter the fact that a police officer was causing or threatening to cause her harm, and therefore that a fear of persecution existed. The applicant asserts that a reasonable margin of appreciation must be applied to perceived flaws in a claimant's testimony, that the RPD should not engage in a microscopic examination of the evidence, and that explanations that are not obviously implausible should be taken into account. Moreover, inconsistencies or contradictions found by the RPD must be significant and central to the claim and must not be exaggerated.

[11] With respect to the applicant's failure to mention that she was previously sought, arrested or detained by police in response to questions in port-of-entry forms IMM-0008 and IMM-5669, the applicant submits that she testified under oath that it was an immigration officer who filled out the forms, and that she had verbally responded that she had been previously detained. While she may have negligently signed these forms without verifying their content, the applicant maintains that she was alone and in a stressful environment at the time. Moreover, she points out that she was not under oath when the forms were filled out, and the statements she made were given without the guidance of a lawyer or immigration consultant. The applicant also cites secondary sources and case law, which underline the legitimate reasons and "inhibitory factors" behind why initial interviews with asylum seekers may legitimately produce errors, omissions and apparent discrepancies.

[12] The applicant also reiterates that her statement to the Canadian border officer that she would have no problems returning to the DRC was made in the context of feeling very

demoralized and emotional at the prospect of being sent back to the DRC due to a cancelled visa, and due to her lack of awareness of the Canadian refugee determination process. In addition, the applicant makes a distinction between the physical or logistical possibility of returning, and the problems she would face if she were to return; while she would not be prevented from going back to the DRC, she submits that she would face serious problems from the officer that raped the victim if she were to do so.

[13] Finally, the applicant states that the medical documents she submitted corroborate the victim's rape by the officer and that the RPD was too harsh in making a finding that there is no credible basis for the claim. In addition, the documents on country conditions in the DRC establish that there is a lack of justice in the country, as well as human rights abuses. Furthermore, there was a presumption in the applicant's favour with respect to the evidence produced.

[14] The arguments made by the applicant are not convincing. I am not satisfied that the credibility findings made by the RPD are unreasonable. I basically endorse the arguments for dismissal made by the respondent in both the memorandum of arguments and the oral submissions of counsel. The RPD clearly identified in its reasons many omissions and inconsistencies between the applicant's testimony, port-of-entry statements, and statements in her BOC. The RPD also found that the applicant adjusted aspects of her testimony during the course of the hearing. This Court has repeatedly confirmed that such contradictions or omissions are sufficient to serve as the basis for a negative credibility finding (*Quintero Cienfuegos* at para 1). Moreover, the RPD determined that other aspects of the applicant's behaviour and

statements undermined the credibility of her claim – for example, her statement to a Canadian border officer that she had no problems returning to the DRC the following day. Taken together, it was reasonable for the RPD to draw a negative credibility finding on the basis of these factors (*Siete v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1286 at para 19). The applicant is simply asking the Court to re-evaluate the evidence submitted at the hearing, and to substitute its own opinion. In the present case, the applicant has not shown that the RPD's findings are arbitrary or unreasonable, considering the weaknesses of the applicant's evidence with respect to central elements of her claim. The applicant had the burden to prove that her allegations were well-founded, and she failed to do so. She therefore did not establish her claim on a balance of probabilities.

[15] Yet, the fact that the RPD finds that an applicant's testimony is not credible does not, *de facto*, lead to a finding that there is no credible basis for a claim (*Foyet v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 16312 (FC) at para 23 [*Foyet*]). There is a high threshold for finding that there is no credible basis for a claim (*Ramón Levario v Canada (Citizenship and Immigration)*, 2012 FC 314 at para 18). The RPD may not make a "no credible basis" finding in cases where there is independent and credible documentary evidence (*Foyet* at para 19). However, as the Federal Court of Appeal specified in *Rahaman v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 89 at para 19, "in order to preclude a "no credible basis" finding, the "independent and credible documentary evidence" to which Denault J. [in *Foyet*] refers must have been capable of supporting a positive determination of the refugee claim." This is not the case here.

[16] I am satisfied that the RPD carefully examined the documentary evidence provided by the applicant. The RPD noted that neither the medical documents relating to the rape of the victim, nor the complaint, actually referred to the applicant. As a result, the RPD could give these documents no probative value in terms of being able to corroborate her allegations that she was being targeted by the police officer on this basis. As for the medical documents relating to the applicant's skin condition, which she allegedly developed while in police custody, the RPD found that these documents did not corroborate the applicant's claim that she had been kicked and whipped in the back, as there was no mention of markings or injuries of this kind. As a result, and in light of the other concerns with the applicant's credibility, the RPD found that these documents also lacked probative value.

[17] Finally, with respect to the country condition evidence submitted by the applicant, the RPD noted that a claimant must demonstrate how country conditions apply to his or her particular circumstances. While these documents may well establish a pattern of human rights abuses in the country, the applicant nevertheless failed to demonstrate how these conditions applied to her individual case, particularly in light of the fact that the RPD found key aspects of her story to lack credibility. Therefore, it was reasonable for the RPD to determine that the documents submitted did not amount to "credible documentary evidence", and as a result, it was also reasonable for the RPD to conclude that there was no credible basis for the applicant's claim pursuant to subsection 107(2) of IRPA.

[18] For the foregoing reasons, the application for judicial review is refused. Counsel agree that this case does not raise a question of general importance.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be dismissed.

No question is certified.

"Luc Martineau"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5149-15

STYLE OF CAUSE: HUGUETTE KABASELE IYOMBE v MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: MONTRÉAL, QUEBEC

DATE OF HEARING: MAY 16, 2016

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

DATED: MAY 20, 2016

APPEARANCES:

Me Jeffrey Platt FOR THE APPLICANT

Me Anne-Renée Touchette FOR THE RESPONDENT

SOLICITORS OF RECORD:

Me Jeffrey Platt FOR THE APPLICANT
Attorney
Montréal, Quebec

William F. Pentney FOR THE RESPONDENT
Deputy Attorney General of Canada
Montréal, Quebec