

Federal Court



Cour fédérale

Date: 20160530

Docket: IMM-3859-15

Citation: 2016 FC 599

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, May 30, 2016

PRESENT: The Honourable Mr. Justice Gascon

BETWEEN:

**BELINDA KIFUNGO
KEVIN KIFUNGO**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicants, Belinda Kifungo and her brother, Kevin Kifungo, are citizens of the Democratic Republic of the Congo. They are applying for judicial review of a decision rendered on July 31, 2015, by the Refugee Protection Division (RPD) of the Immigration and Refugee

Board of Canada (IRB), refusing to grant them status as a refugee or person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act* (IRPA), S.C. 2001, c. 27, on the grounds that their story is not credible and that they failed to discharge their burden of proof.

[2] In July 2010, Belinda and Kevin Kifungo, who were at the time 16 and 13 years old, respectively, accompanied their mother and their older sister Anaïs on a trip to Europe and the United States. Towards the end of August 2010, their mother returned to the Congo, leaving the children alone in the United States. In the absence of news from their parents, Anaïs took steps to make a claim for refugee protection at the Canada-United States border with her sister Belinda and her brother Kevin, but Anaïs was sent back because she had reached the age of majority. Belinda and Kevin Kifungo's claim for refugee protection went ahead because they were unaccompanied minors.

[3] In their refugee protection claim, Belinda and Kevin Kifungo state that their father was detained in the Congo from August 2010 until January 2011 because of a complaint their parents had filed with the local police after Belinda was the victim of attempted sexual assault in May 2010. Their father had to leave the Congo afterwards, and Belinda and Kevin Kifungo maintain that they fear persecution in the Congo because of these events. The RPD denied their application on the grounds that the evidence of their father's detention was insufficient and that Belinda and Kevin Kifungo's story also lacked credibility.

[4] Belinda and her brother argue that in rendering its decision, the RPD did not have sufficient grounds to doubt their credibility or their father's detention. Furthermore, they argue that the RPD underestimated their fear of persecution and failed to respect the *Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution (Guidelines)* issued by the IRB. They ask that the Court set aside the RPD's decision and refer the matter back for redetermination before a differently constituted panel, in light of all the evidence submitted.

[5] The following issues are in dispute:

1. Was the RPD wrong when it determined that Belinda Kifungo and her brother Kevin had not discharged their burden of proof?
2. Was the RPD wrong in its estimation of the applicants' fear of persecution?

[6] For the following reasons, Belinda and Kevin Kifungo's application for judicial review must be rejected. I cannot find any error in the RPD's decision that would justify the Court's intervention. Rather, I find that the RPD's conclusions regarding the lack of credibility to Belinda and Kevin Kifungo's story and the lack of sufficient proof of their father's detention to be reasonable and to fall clearly within the possible, acceptable outcomes in the circumstances. In addition, I find that the Guidelines, which aim to ensure that gender-based claims are heard with compassion and sensitivity, do not apply to Belinda Kifungo's refugee protection claim, since her fear of persecution was based on totally different grounds from those set out in the Guidelines.

II. Background

A. *The Facts*

[7] Belinda Kifungo claims to have been the victim of attempted sexual assault in the Congo in May 2010, after which her parents filed a complaint with the local police. Her father is a high-ranking executive with the telecommunications company Airtel, and her mother is a cabinet member for the governor of Kongo Central, as well as a well-known activist with the organization *Congolese Women's Caucus*. In June 2010, Congolese police officers arrived at the family's home and escorted Belinda's father to the police station. Two days later, the father returned home, saying that everything was settled.

[8] In December 2010, Belinda and Kevin Kifungo, who were in Canada at the time, following their claim for refugee protection, learned that their mother had taken refuge in a convent because their father had been detained. In January 2011, their father said he had been detained from August 2010 to January 2011, allegedly because of the sexual assault complaint filed on Belinda's behalf in May 2010. In 2012, the applicants' father filed a new complaint with Congolese police, contesting his arbitrary arrest and detention in 2010. Following this complaint, he sought refuge in Gabon. The applicants' mother, however, remained in the Congo and continued her political activities.

B. *The RPD's decision*

[9] In its decision, the RPD concludes that Belinda and Kevin Kifungo's story is not credible, given the circumstances and the fact that their parents are well known, and that they therefore failed to discharge the burden of proof necessary to obtain the status of refugee or person in need of protection.

[10] The RPD does not believe that Belinda and Kevin's father was detained from August 2010 until January 2011. It notes that the father was a successful businessman who frequently appeared in the media. The disappearance of such a man for a period of five months would certainly have drawn the attention of the media and of human rights protection organizations. Furthermore, Airtel, the company for which he was working at the time, would undoubtedly have reported the disappearance of its director of operations.

[11] The RPD also grants little probative value to the documentary evidence provided by Belinda and Kevin Kifungo as proof of their father's detention. It notes, firstly, that this evidence was submitted late, even though it had been available since the beginning of the refugee protection claim process. Furthermore, the documents contain no security features that would allow their authenticity to be confirmed, since they are photocopies sent by email. The RPD also does not accept the explanations given by Belinda Kifungo and her lawyer to the effect that they no longer knew which documents to file and that they were focussed on preparing another matter for the hearing before the panel.

[12] The RPD adds that, even if their father truly was detained, Belinda Kifungo and her brother are not at risk in the Congo. The RPD bases its decision particularly on the circumstances of their mother, who continues her political activities in the Congo without difficulty, even though she regularly condemns the assault that Belinda allegedly suffered. The RPD finds it inconsistent, under the circumstances, that the father would be arrested to silence his complaint regarding his daughter's sexual assault, whereas the mother is not at risk herself, despite being a well-known activist and politician in the Congo.

C. *Standard of review*

[13] It is well established that, with regard to the credibility or plausibility of a refugee protection claimant, the RPD's conclusions are considered factual in nature and command a high degree of judicial deference, considering the role of the trier of fact in the administrative tribunal (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 (*Khosa*) at paragraph 59; *Lawal v Canada (Citizenship and Immigration)*, 2015 FC 155 at paragraph 9; *Martinez Giron v Canada (Citizenship and Immigration)*, 2013 FC 7 at paragraph 14; *Dong v Canada (Citizenship and Immigration)*, 2010 FC 55 at paragraph 17).

[14] Assessing credibility is the very core of the RPD's expertise and is intimately linked to the facts of a given case (*Pepaj v Canada (Citizenship and Immigration)*, 2014 FC 938 at paragraph 13, *Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at paragraphs 7-8). Since it is a mixed issue of fact and law, the applicable standard of review for questions of credibility and assessment of evidence by the RPD is therefore that of reasonableness (*Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No

732 (FCA) at paragraph 4; *Bikoko v Canada (Citizenship and Immigration)*, 2015 FC 1313 at paragraph 8). In such questions of credibility and assessment of evidence, the Court must not substitute its point of view for that of the administrative tribunal, even if that point of view could, in the Court's eyes, lead to a better result (*Khosa* at paragraph 59). The Court must only intervene if the decision-making process fails to be transparent and intelligible, and if the decision does not "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 paragraph 47).

[15] The reasons for a decision are considered to be reasonable "if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 (*Newfoundland Nurses*) at paragraph 16). In this context, the Court must exercise deference toward the panel's decision. Its mission is not to weigh the case's evidence once again or to interfere with the panel's conclusions of fact; instead, it should limit itself to determining whether a conclusion is irrational or arbitrary (*Mikhno v Canada (Citizenship and Immigration)*, 2010 FC 385 at paragraphs 32–33; *Diallo v Canada (Citizenship and Immigration)*, 2007 FC 1062 at paragraph 30).

[16] If the reasons for decision show evidence of justification, transparency and intelligibility, and allow for determination as to whether the conclusion is within the range of possible acceptable outcomes, then there is no reason for the Court to interfere.

III. Analysis

A. *Was the RPD wrong when it determined that Belinda Kifungo and her brother Kevin had not discharged their burden of proof?*

[17] Belinda and Kevin Kifungo argue that the RPD paid a disproportionate amount of attention to the documents submitted regarding their father's detention, when it was not even a key factor in their claim. They maintain that, at the time of the first hearing held in 2012, the RPD had not yet requested these documents, and that it is therefore normal that neither they nor their lawyer would have thought to submit them prior to the RPD requesting them. In addition, Belinda Kifungo and her brother allege that the RPD erred in granting little probative value to these documents because of their nature and their source, when the panel had held a hearing specifically regarding the admissibility of these documents and had not raised any concerns about their authenticity or about the steps taken to obtain them.

[18] I do not agree with the arguments formulated by Belinda Kifungo and her brother. It is quite clear from the RPD's determination that the detention of the applicants' father was the catalyst for Belinda and Kevin Kifungo's refugee protection claim, and that they were therefore obligated to substantiate this key factor in their claim. The absence of evidence corroborating their father's detention could reasonably have undermined Belinda and Kevin Kifungo's credibility in the eyes of the RPD.

[19] It is well established that a refugee protection claimant bears the burden of establishing the merits of the claim (*Singh v Canada (Citizenship and Immigration)*, 2007 FC 62 at paragraph 16). Belinda Kifungo and her brother alleged that their parents, their father in particular, had been subject to reprisal in the form of an arbitrary arrest and detention, after filing a complaint for the attempted sexual assault Belinda suffered. The father allegedly then filed a complaint regarding his arbitrary detention, which allegedly led to additional reprisal that caused him to flee to Gabon.

[20] Contrary to Belinda and Kevin Kifungo's arguments, this does not constitute an issue that is secondary or peripheral to their claim for refugee protection. Quite the contrary; it is clear from the case that this is the very basis for their claim. If they fear for their safety in the Congo, it is precisely because their parents allegedly suffered reprisals. It was therefore essential to establish that these reprisals had truly occurred.

[21] This is not a case where, as in *Sothinathan v Canada (Citizenship and Immigration)*, 2015 FC 154, the panel only indirectly mentions those aspects of an applicant's credibility that pose a problem. On the contrary, this is a situation wherein, after an in-depth analysis, the panel found there to be a lack of credibility regarding the central elements of the applicants' refugee status claim. In such circumstances, the lack of credibility could extend to other elements of the refugee protection claim and be generalized to all of the documentary evidence presented to corroborate a version of the facts (*Sheikh v Canada (Minister of Employment and Immigration)*, [1990] FCJ No 604 (FCA) at paragraphs 7–9).

[22] Of course, the RPD cannot base its determination regarding the claimant's lack of credibility on minor contradictions arising in evidence that is secondary or peripheral to the refugee protection claim. The panel "should not be over-vigilant in its microscopic examination" of issues that are irrelevant or peripheral to the claim (*Attakora v Canada (Minister of Employment and Immigration)* (1989), 99 NR 168 (FCA) at paragraph 9; *Cooper v Canada (Minister of Citizenship and Immigration)*, 2012 FC 118 at paragraph 4; *Akhigbe v Canada (Minister of Citizenship and Immigration)* 2002 FCT 249 at paragraph 16). It is an entirely different matter when a piece of evidence addresses the very essence of the refugee protection claim, as is the case here regarding the detention of Belinda and Kevin Kifungo's father.

[23] The RPD is also entitled to draw conclusions concerning the credibility of a refugee protection claimant based on implausibilities, common sense and rationality, and to reject evidence if it is inconsistent with the probabilities affecting the case as a whole (*Shahamati v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 415 (FCA) at paragraph 2 [*Shahamati*]; *Yin v Canada (Minister of Citizenship and Immigration)*, 2010 FC 544 at paragraph 59; *Hernandez Utrera v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1212 at paragraph 61). I expect that this is the approach that guided the RPD in this case.

[24] Furthermore, I share the RPD's opinion that the evidence corroborating the detention of the applicants' father was filed late. A lack of effort made to obtain evidence in support of a refugee protection claim can affect an applicant's credibility (*Quichindo v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 350 at paragraph 28). It was not unreasonable for the

RPD not to accept the explanations offered by Belinda and Kevin Kifungo regarding the delay, given the circumstances.

[25] Regarding the applicants' argument that they had been asked for so many documents since the beginning of their refugee claim that they no longer knew which ones to submit, I do not find this convincing at all. Nor do I find convincing their lawyer's statement that he believed that the hearing would be about the omission of Belinda's sexual assault from the original refugee protection claim form, and that he was preparing for it accordingly. The IRB forms clearly indicate that all evidence corroborating the allegations made must be submitted in support of the refugee protection claim.

[26] Finally, I note that an administrative tribunal may base its conclusions on rationality and common sense and make negative inferences if there is no documentary evidence to support an allegation, when one might have expected some (*Shahamati* at paragraph 2; *Saliaj v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1247 at paragraph 53). Given the high profile of the applicants' father in the business world, and the large number of organizations that report violations of fundamental rights in the Congo, it was totally plausible for the RPD to conclude that, if it indeed occurred, the disappearance of Belinda and Kevin Kifungo's father would have been reported by some kind of organization, or at the very least, by his employer.

[27] Similarly, it was also reasonable for the RPD to conclude that, if the applicants' father had suffered reprisals for filing an individual, private complaint, it was unlikely that the applicants' mother would escape any kind of reprisal when, for her part, she continued to publicly condemn the assault on her daughter in the Congo.

[28] As part of an application for judicial review, the Court's mission is not to reassess the evidence in the case; rather, it must limit itself to finding whether a conclusion is irrational or arbitrary. According to the reasonableness standard, it is sufficient that the process and the outcome respect the principles of justification, transparency and intelligibility, and the Court must not substitute its own opinion for that of the panel. The arguments put forward by Belinda and Kevin Kifungo simply express their disagreement with the RPD's assessment of the evidence and in fact ask the Court to prefer their assessment and their reading to that of the panel. However, this is not the Court's role with respect to judicial review. The reasons for the RPD's decision regarding the applicants' lack of credibility and the insufficiency of the evidence are intelligible and transparent, and demonstrate that the conclusion falls within a range of acceptable outcomes. There is therefore no reason for the Court to intervene.

[29] In summary, I am of the opinion that the RPD was not wrong in determining that Belinda Kifungo and her brother did not discharge their burden of proof.

B. Was the RPD wrong in its estimation of the applicants' fear of persecution?

[30] Belinda and Kevin Kifungo furthermore maintain that the RPD made no distinction between their fear of persecution and that of their mother. In addition, they argue that the RPD further erred by failing to take into consideration the attempted sexual assault suffered by Belinda and by not taking the Guidelines into account in its analysis.

[31] I do not share the applicants' opinion on these matters.

[32] There is no doubt that refugee claimants must establish the objective and subjective basis for their fear of persecution (*Chan v Canada (Minister of Employment and Immigration)*, [1995] 3 SCR 593 at paragraphs 119–120 and 148–151), and that the absence of an objective fear is fatal to the claim. Under the circumstances, I am satisfied that the RPD was not wrong in analyzing the applicants' fear in light of their mother's behaviour. In fact, the analysis of the mother's fear went to the heart of the objective and subjective basis for the fear of persecution formulated by Belinda Kifungo and her brother. The RPD thus rightly noted that the applicants' mother did not feel it necessary to leave the Congo like the father did, that she was a member of the Kongo Central governor's inner circle and that she continued in her public involvement with the *Congolese Women's Caucus*. And yet there is no evidence indicating that she was the target of threats or intimidation.

[33] In the absence of credible evidence of reprisals against the applicants' father, coupled with their mother's behaviour, which did not seem to put her at risk, it was not unreasonable for the RPD to determine that Belinda and Kevin Kifungo had no objective fear of persecution.

[34] Regarding the criticism that the RPD failed to consider Belinda's fear as a woman victimized by violence and failed to make direct reference to the Guidelines in its decision, I do not see any error on the part of the RPD in this regard. Belinda Kifungo did not flee the Congo because she feared she would become a victim of sexual violence; she left the country on a family vacation with her mother, brother and sister. The basis of Belinda and Kevin Kifungo's claim for refugee protection is the fear of reprisal by association, due to the alleged detention of their father. At no time was Belinda Kifungo's alleged sexual assault the reason for her refugee protection claim. Under the circumstances, the RPD simply did not need to refer to the Guidelines in its decision.

[35] This Court has established that the Guidelines only need to be considered by the RPD in appropriate cases (*Higbogun v Canada (Minister of Citizenship and Immigration)*, 2010 FC 445 at paragraph 57). This is the case, for example, when refugee claimants allege having been victims of violence due to their sex (*Khon v Canada (Minister of Citizenship and Immigration)*, 2004 FC 143 at paragraph 20). However, in this case, the assault that Belinda may have suffered, although unfortunate, does not constitute the basis for her refugee protection claim. The Guidelines were therefore in no way relevant in such a context, and the RPD cannot be criticized for having ignored them.

IV. Conclusion

[36] For the foregoing reasons, Belinda and Kevin Kifungo's application for judicial review is dismissed. The RPD's decision in refusing their refugee protection claim is transparent and intelligible, and its conclusions regarding the applicants' failure to establish the basis for their allegations and to establish an objective fear of persecution in the Congo fall within the range of possible, acceptable outcomes which are defensible in respect of the facts and law. Furthermore, at no time did the RPD fail to fulfill its obligations to apply the Guidelines.

[37] The parties did not raise any serious questions of general importance for certification in their submissions, and I agree that there are none in this case.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed, without costs;
2. There is no serious question of general importance for certification.

“Denis Gascon”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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