

Federal Court



Cour fédérale

Date: 20181204

Docket: IMM-2712-18

Citation: 2018 FC 1216

Ottawa, Ontario, December 4, 2018

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

ERIC MBUYI TSHIUNZA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION CANADA**

Respondent

JUDGMENT AND REASONS

[1] If Mr. Mbuyi Tshiunza had been believed it is quite possible he would be in Canada today as a refugee. However, both the Refugee Protection Division (RPD) and the Refugee Appeal Division (RAD) of the Immigration and Refugee Board of Canada found that he was not credible and did not face a serious possibility of persecution or would otherwise be in danger should he be returned to the Democratic Republic of the Congo.

[2] This is the judicial review of the RAD'S decision.

I. MR. MBUYI TSHIUNZA'S STORY

[3] Mr. Mbuyi Tshiunza, an educated man, began working for a Non-Governmental Organization by the name of Réseau Jeunes Dans le Monde pour la Paix, in February 2014 in the City of Kananga.

[4] In January 2015, he was sent to a conference in Kinshasa, some 900 kilometers away. There he was arrested and tortured over a period of about six weeks before he bribed himself out. He then went into hiding in the family home in Kinshasa. Over time he obtained a Congolese passport under a fake name and a Canadian Visitor Visa. He arrived here in June 2016 and made a refugee claim.

II. THE REFUGEE PROTECTION DIVISION DECISION

[5] The RPD focused on credibility, as well as the delay in leaving the DRC for Canada. In addition, a newspaper article in the record was inconsistent with Mr. Mbuyi Tshiunza's narrative.

[6] He was found not to be credible for a number of reasons. His testimony was inconsistent. It was not spontaneous. He often repeated questions. He knew neither the full administrative makeup nor the habitual phraseology used by the NGO.

[7] The Member was not satisfied that he lived in Kananga. It followed that he did not work there, and did not attend a conference in Kinshasa.

[8] In addition he remained in his country for some 15 months after having escaped from detention. He remained in the family home in Kinshasa and waited some 5 weeks after he had obtained his fraudulent Canadian Visa before leaving the Democratic Republic of the Congo.

III. THE REFUGEE APPEAL DIVISION DECISION

[9] A perennial problem facing the RAD is the deference it should show the RPD on credibility findings. The Federal Court of Appeal held in *Huruglica v Canada (Citizenship and Immigration)*, 2016 FCA 93 that deference should be shown when the RPD is in a better position to make an assessment.

[10] In this case the RAD showed no deference and so the very fulsome recent analysis done by Mr. Justice Diner in *del Solar v Minister of Citizenship and Immigration*, 2018 FC 1145 has no bearing.

[11] The RAD was not prepared to make a negative credibility finding on the basis that Mr. Mbuyi Tshiunza lacked spontaneity, and on other points. However, it agreed that there was no evidence that he had lived in Kananga, with the inconsistencies in the newspaper article, and the delay in leaving the country.

IV. ANALYSIS

[12] Mr. Mbuyi Tshiunza testified in French. However, questions had been put to him in English, and all we have is a record of the English questions and his answers as translated from French to English. This could well explain why he asked that many questions be repeated and why some of his answers appeared not to be spontaneous.

[13] This is a classic case of attacking one's credibility on peripheral points and then concluding that the major event, Mr. Mbuyi Tshiunza's arrest and torture in Kinshasa, never occurred.

[14] Both the RPD and the RAD were not satisfied that Mr. Mbuyi Tshiunza lived in Kananga. If he had not lived in Kananga, then he did not work for the NGO, and the NGO did not send him to Kinshasa where he was detained and tortured.

[15] Yet there was a letter from the NGO authorizing a return trip from Kananga to Kinshasa, and the evidence included, among other things, his employee identification card. The RAD noted that this card simply stated that it was issued in Kananga but not that he worked and lived there. It would follow that the letter authorizing a return trip from Kananga to Kinshasa was a forgery. Yet the evidence clearly shows that the NGO was a well-known organization.

[16] The findings are highly tenuous and certainly do not justify an inference that the arrest in Kinshasa never took place (*Canada (Minister of Employment and Immigration) v Satiacum* (1989) 99 NR 171, 1989 FCJ No 505).

[17] Mr. Mbuyi Tshiunza was criticised for not being able to explain away the inconsistencies between his own narrative and the article in the newspaper. With respect, he was being asked to speculate about another person's knowledge, which was at best a conjectural basis for challenging Mr. Mbuyi Tshiunza's credibility and not a reasoned inference (*Ukleina v Canada (Citizenship and Immigration)*, 2009 FC 1292 at paragraphs 12-14).

[18] Having found Mr. Mbuyi Tshiunza not to be credible, his 15 month delay in leaving Kinshasa was a clear indication that he lacked subjective fear. To claim refugee status there must be an objective basis for the claim and a subjective fear.

[19] The delays in leaving can be explained by his efforts to obtain a false passport and a fraudulent Canadian Visitors Visa.

[20] The fact that he remained in the family home in Kinshasa, where the electricity was billed in his own name does raise some concern. However, if by this point the RAD had believed his story, it may have been more open to the proposition that as a lesser member of the opposition, he would not be actively searched out at his family home in Kinshasa. Whereas, if he left Kinshasa he would have been found and detained at checkpoints.

[21] In any case, the RAD could not reasonably conclude that Mr. Mbuyi Tshiunza lacked subjective fear simply because he was compelled to remain in hiding at his family residence before he left the DRC. As is often raised in the context of assessing if a refugee claimant has an internal flight alternative, it is not appropriate to draw conclusions that essentially compel the

refugee claimant to hide in perpetuity in order to feel safe (*Offei v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1619 at paragraphs 14-15; *Ako v Canada (Minister of Citizenship and Immigration)*, 2006 FC 647 at paragraphs 28-29).

[22] Consequently, this matter is to be referred back to another Member of the RAD for redetermination. Mr. Mbuyi Tshiunza has the right, if he so wishes, to call for a French record.

JUDGMENT in IMM-2712-18

THIS COURT'S JUDGMENT IS that:

1. For the reasons given, this judicial review is allowed and this matter is referred back to another Member of the Refugee Appeal Division for redetermination.
2. The Style of Cause shall now read ERIC MBUYI TSHIUNZA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION.
3. There is no serious question of general importance to certify.

"Sean Harrington"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2712-18

STYLE OF CAUSE: ERIC MBUYI TSHIUNZA v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION CANADA

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: NOVEMBER 15, 2018

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