

Federal Court



Cour fédérale

Date: 20210222

Docket: IMM-7186-19

Citation: 2021 FC 174

Ottawa, Ontario, February 22, 2021

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

**Mbombo DITU
Pety DITU
Yolanda DITU
Francisca DITU**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

(delivered orally from the bench on February 22, 2021)

[1] Ms. Ditu and her children apply for judicial review of the dismissal of their claim for refugee protection. They are nationals of the Democratic Republic of Congo, but lived in South Africa from 2002 to 2017. They say that they were granted refugee status in South Africa, but

they provide no supporting evidence of this. Briefly stated, they allege that they would be at risk of political persecution in the DRC, because of the involvement of Ms. Ditu's late husband in politics, and discrimination amounting to persecution in South Africa, because they are foreigners.

[2] The RPD dismissed their claim. It found that Ms. Ditu's credibility was severely undermined. Thus, it did not believe the facts alleged by Ms. Ditu to buttress her assertion of a well-founded fear. Moreover, it rejected her assertion that failed refugee claimants returning to the DRC are exposed to a risk of persecution. As it found that Ms. Ditu and her children could safely return to the DRC, the RPD did not find it necessary to assess the risks alleged against South Africa.

[3] The RAD dismissed the Ditus' appeal. It agreed with the RPD's findings regarding credibility and the risks faced by failed refugee claimants returning to the DRC. It noted that the central issue was not whether Ms. Ditu's husband died in 2002. Rather, the fact of his death, alone, was not sufficient to prove that he was politically involved or that Ms. Ditu and her children would be perceived as political opponents of the Congolese regime today. The RAD also dismissed the claim based on subsection 108(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act], the "compelling reasons" provision, because the alleged persecution was not "so exceptional in its severity as to rise to the level of appalling or atrocious."

[4] On judicial review, Ms. Ditu first argues that the RAD should have considered the fact that she obtained refugee status in South Africa and that this creates a presumption in her favour. However, she did not cite any decision supporting her argument. In this regard, the RAD's task was to assess Ms. Ditu's fear of persecution as of today. The assessment is forward-looking: see, among many decisions making this basic point, *Brovina v Canada (Minister of Citizenship and Immigration)*, 2004 FC 635 at paragraph 9. A forward-looking assessment in 2002 does not necessarily lead to the same results when performed in 2019, especially given Ms. Ditu's position that there has been a change in circumstances in the DRC since then. The fact that Ms. Ditu did not provide any documentary evidence regarding her claim for refugee status in South Africa certainly does not help in the resolution of this issue.

[5] Second, Ms. Ditu alleges that the RAD should have examined the risk she would face upon returning to South Africa. She says that given the temporary suspension of removals to the DRC, she will be removed to South Africa. This argument was not made before the RAD and, on judicial review, the RAD cannot be faulted for not discussing it. In any event, it can be summarily dismissed.

[6] At this moment, it is speculative that the Ditus would be removed to South Africa. I note, in this regard, that the Minister does not take the position that the Ditus have any kind of legal status in South Africa and does not invoke article 1E of the Refugee Convention or section 101(1)(d) of the Act. Should the Minister attempt to remove them to South Africa, they will be able to make their arguments regarding *non-refoulement* in the context of a pre-removal risk

assessment [PRRA]. Under sections 96 and 97 of the Act, the RAD only needed to assess the Ditus' well-founded fear of persecution in the country of their nationality, the DRC.

[7] Ms. Ditu's third ground is that the RAD failed to apply properly the compelling reasons provision. I reject this submission. As I mentioned in a recent decision, *Gomez Dominguez v Canada (Citizenship and Immigration)*, 2020 FC 1098, at paragraph 40, three things must be proven for the provision to apply: (1) the applicant met the definition of refugee at some point in the past; (2) the applicant no longer meets the definition because of a change in circumstances in the country of origin; (3) there are compelling reasons not to return to that country, which are equated to appalling and atrocious persecution. The RAD reasonably dismissed the claim on the third ground alone. It stated the correct legal test and reached a conclusion that was reasonable on the facts. Because the three criteria are conjunctive, failure on one prong of the test dispensed the RAD from examining the two other prongs.

[8] Counsel asked that a question be certified regarding the impact of the claimants' refugee status in South Africa on the analysis of risk upon return to the DRC. I decline to certify the question for the following reasons. First, according to the Federal Court of Appeal, a certified question has to be of general importance, which means that it is likely to arise in an array of cases: *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22, [2018] 3 FCR 674, at paragraph 46. As I mentioned earlier in my judgement, counsel cited no other cases in which the issue arose. Thus, I cannot reach the conclusion that it will have a general importance for other cases, although I am sensitive to the fact there may be people fleeing South Africa for similar reasons. Second, there is very little evidence as to what status was granted to

the applicants in South Africa. No document has been produced that show why refugee status would have been granted to them. It would therefore be very difficult for the Court of Appeal to analyze the issue in depth, as there is no evidentiary foundation.

[9] For these reasons, the application for judicial review is dismissed.

JUDGMENT in file IMM-7186-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. No question is certified.

"Sébastien Grammond"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-7186-19

STYLE OF CAUSE: MBOMBO DITU, PETY DITU, YOLANDA DITU
AND FRANCISCA DITU v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: BY VIDEOCONFERENCE BETWEEN OTTAWA,
ONTARIO AND MONTREAL, QUEBEC

DATE OF HEARING: FEBRUARY 22, 2021

JUDGMENT AND REASONS: GRAMMOND J.

DATED: FEBRUARY 22, 2021

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