Federal Court  Cour fédérale

Date: 20141128

Docket: IMM-6077-13

Citation: 2014 FC 1150

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, November 28, 2014

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

ANASTASIE META THSUNZA

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the case

[1] This is an application under subsection 72 (1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), for judicial review of the decision dated August 15, 2013, by the Refugee Protection Division (RPD) of the Immigration and Refugee Board, rejecting the refugee

claim of Anastasie Meta Thsunza (the applicant) and concluding that she is neither a "Convention refugee" nor a "person in need of protection" under sections 96 and 97 of the IRPA.

[2] The applicant's Personal Information Form (PIF) states that the applicant's family name is "Tshiunza". However, her counsel's submissions and other documents in the record indicate that her family name is "Tshunza". Although this inconsistency is on balance quite minor, it appears relevant to me to mention it by way of clarification.

[3] For the following reasons, I am dismissing this application.

II. Background and facts

[4] The applicant is a citizen of the Democratic Republic of Congo (DRC) who claims to be a "refugee" under section 96 of the IRPA because she says she fears persecution as a woman raped and tortured by the police in her country. She also states that she is a "person in need of protection" under section 97 of the IRPA because she fears being tortured on her return to her country on the basis that she was tortured, detained, accused of treason and sexually assaulted by the police in her country. The applicant also says that she is wanted by the Agence nationale de renseignement (ANR).

[5] The applicant indicated in her PIF that she is a retired educator and that she has two years of post-primary education. Specifically, she maintains that she was employed by the Congolese

state as an educator for illiterate housekeepers but that she is now retired. The applicant's PIF indicates that her mother tongue is Tshiluba but that she also speaks Lingala.

[6] On June 29, 2011, the applicant accompanied her sisters to collect the pension of the deceased husband of one of them. When the responsible official informed the applicant and her sisters that no pension would be paid, the applicant reacted by shouting that President Joseph Kabila and his ministers were thieves. In a fit of anger, she also told the official in question that things were going to be different when Étienne Tshisekedi, president of the Union for Democracy and Social Progress (UDPS) (an opposition party), was elected.

[7] Later, either the same day or the following day (the applicant's evidence is contradictory), three police officers arrested the applicant and her sisters. They took them to prison where they were beaten and raped. The applicant claims she was released on July 2, 2011, after her husband paid a bribe. The applicant says that she received care at Ngaba's centre hospitalier de référence mère et enfant from July 4 to 6, 2011.

[8] The applicant left the DRC on September 19, 2011, for South Africa where she spent two months with her two daughters. The applicant says she did not tell her two daughters that she had been raped because, she claims, rape is a culturally taboo subject.

[9] The applicant is the mother of nine children who live in different countries, including South Africa, Canada and Congo.

[10] On November 15, 2011, the applicant arrived in Canada with a visitor's visa and went to live with her oldest son, who had been recognized as a political refugee by the Immigration and Refugee Board (IRB) in 1997. To obtain her visitor's visa, the applicant stated that she wanted to visit her grandchildren in Canada.

[11] On November 30, 2011, the applicant attended at the offices of Citizenship and Immigration Canada (CIC) to claim refugee status.

[12] During the hearing before the RPD, which took place on August 7, 2013, the applicant testified in her second language, Lingala, because the interpreter did not speak Tshiluba.

III. Decision

[13] In its decision, the RPD indicated that it had considered the Guidelines on women claiming refugee status because of their sex (Guidelines). The RPD recognized that the applicant was a woman alleging that she had been a victim of rape and violence who maintained that she could not count on the government of her country to protect her.

[14] However, the RPD maintained that, although it applied the guidelines, it was entitled to assess the truthfulness of the applicant's testimony (*Solis Morales v Canada (Citizenship and Immigration)*, 2011 FC 1239).

[15] The RPD contended that the applicant was not credible for the following reasons:

1. The applicant was incapable of recounting the alleged facts coherently.

2. The applicant knew her narrative by heart but appeared to be upset when specific questions were asked. She looked down when the RPD asked her for details.

3. The applicant stated at the hearing that the police arrested her on June 29, 2011, the same day as the incident at the Ministère des Finances, whereas she stated in her PIF that the police arrested her the next day, June 30, 2011.

4. The applicant said that she had been treated at the medical centre in Yolo. The applicant submitted a report from Ngaba's centre hospitalier de référence mère et enfant. Confronted with this contradiction, the applicant said that this hospital centre was, in fact, located next to the Yolo area.

5. When the RPD asked the applicant where she had obtained the centre hospitalier's report, she hesitated for a long time, looked at her lawyer then finally stated that she had this document at home, and her husband sent her a copy.

6. The RPD concluded that the medical report was fraudulent because it was sent to Canada late and because it stated that the applicant was given a contraceptive pill

even though she was 64 years old. The RPD also took into consideration the fact that the applicant provided a copy of the medical report, not the original.

[16] The RPD also found that the applicant did not demonstrate a real fear of returning to the DRC. This finding was based on the following facts:

1. The applicant waited two months after being imprisoned to leave the Congo for South Africa to join her daughters.

2. The applicant did not claim refugee status in South Africa. The RPD found that the applicant's explanations that she did not know about the concept of refugee protection when she arrived in South Africa were unsatisfactory. Moreover, the RPD noted that, although the applicant's daughters did not know that their mother had been raped, they knew that the applicant had been arrested and therefore they could have suggested that she make a refugee claim when she arrived in South Africa.

3. The applicant did not claim refugee protection when she arrived in Canada but attended at the CIC two weeks after she arrived.

[17] The RPD disregarded the applicant's psychological report on the basis that she saw the applicant for only a total of one hour and twenty minutes.

IV. Issues

[18] There are two issues:

1. Did the RPD breach the principle of procedural fairness because of the quality of the interpretation?

2. Did the RPD err in its assessment of the applicant's credibility?

V. Submissions of the parties

A. *Applicant's submissions*

[19] The applicant alleges that she speaks Tshiluba and a little Lingala and that she could not adequately understand the interpretation of some words translated by the interpreter from French to Lingala. The applicant claims that she asked the RPD to provide an interpreter who spoke Tshiluba, which the RPD refused to do.

[20] The applicant alleges that she was unable to have access to an interpreter, which constitutes a denial of natural justice. Moreover, the applicant points out that the Federal Court does not need to show deference where an administrative body has breached procedural fairness.

[21] The applicant also argues that the RPD erred in assessing the evidence of her credibility. The applicant recognizes that credibility findings are to be decided on a reasonableness standard (*Elmi v Canada (Citizenship and Immigration)*, 2008 FC 773, at para 21 [*Elmi*]).

[22] The applicant argues that when an applicant swears that certain facts are true, there is a presumption that they are unless there are valid reasons to doubt their truthfulness.

[23] In addition, where the RPD finds a lack of credibility as a result of a misapprehension of the evidence or a failure to consider the evidence or because the evidence does not support the conclusion, the RPD's decision may be reversed (*Owusu-Ansah v Canada (Citizenship and Immigration)*, [1989] FCJ No 442 (FCA) (QL)).

[24] The applicant submits that the RPD misapprehended the evidence for the following reasons:

1. The RPD stated that the applicant is a retired teacher. In her PIF, the applicant indicated that she was a monitor in a learning centre for illiterate housekeepers. The applicant did only two years of post-primary school, and the last time she went to school was in 1961.

2. The RPD failed to take into account that it was only one week after her arrival in Canada, on November 22, 2011, that the applicant was advised by her

daughter-in-law to make a refugee claim. The applicant maintains that she was unaware of this process prior to that date. Her daughter-in-law's advice was based, *inter alia*, on the fact that the applicant found out on November 22, 2011, that her husband and two sisters had been arrested by the police because she had left the country without authorization from the police commander. Moreover, it was not until November 22, 2011, that the applicant admitted to her daughter-in-law that she had been raped when her daughter-in-law noticed that the applicant was talking to herself.

3. The RPD did not assess all the evidence. Although the RPD maintained that it applied the Guidelines concerning sex, nowhere in its decision did it apply one of the principles of these Guidelines.

4. There was no basis for the RPD to refuse to consider the cultural aspects of this case. If the RPD had considered this factor, it would have understood that a Luba mother does not talk about sexual matters with her children; it is taboo.

5. The RPD concluded that the applicant did not establish that she had been attacked or raped. The applicant proved with the assistance of a medical and psychological report that she had been raped. Moreover, the applicant's testimony about the rape was not contradictory.

> 6. The RPD concluded that the applicant was not an accurate witness because she had a great deal of difficulty answering questions. On the contrary, the applicant answered the RPD's questions in detail although she was testifying in her second language.

[25] The applicant therefore submits that the evidence does not support the RPD's findings.

[26] The applicant also contends that if the RPD had considered all the facts submitted to it, it would have concluded that the applicant has a real fear of persecution and that the facts alleged are true.

[27] Furthermore, the applicant argues that the RPD's analysis of the medical evidence was flawed.

[28] First, the applicant submits that the RPD erred in its assessment of the medical report presented. The RPD erred by treating the report as invalid on the basis that the applicant claimed she had been treated at the Yolo medical centre whereas the medical report came from Ngaba's centre hospitalier de référence mère et enfant. In stating that she was treated at the Yolo medical centre, the applicant was indicating the commonly known location.

[29] Second, the applicant submits that the RPD could not conclude that the copy of the medical report was fraudulent on the basis that the applicant hesitated in explaining its origin. On

the one hand, the applicant states that the medical report appears authentic. On the other hand, the applicant submits that the RPD told her legal advisor that it was not necessary to produce the original medical report. Moreover, the applicant contends that when she said she had the document at home, she meant to say that she had received the document on-line at home.

[30] Finally, the applicant submits that the RPD erred in doubting the authenticity of the medical report on the basis that it stated that the applicant, then 64 years old, was prescribed a contraceptive pill.

B. *Respondent's submissions*

[31] The respondent argues that the credibility analysis is reviewable on a reasonableness standard (*Uwitonze v Canada (Citizenship and Immigration)*, 2012 FC 61, at para 26 [*Uwitonze*]). The Court must show significant deference to credibility determinations (*Aydin v Canada (Citizenship and Immigration)*, 2012 FC 1329, at para 22). The RPD is entitled to rely on contradictions or the omission of important facts in the narrative to assess an applicant's credibility (*Ramirez Bernal v Canada (Citizenship and Immigration)*, 2009 FC 1007, at para 19).

[32] The respondent submits that the applicant must establish the essential facts of her refugee claim, which she did not do because she did not demonstrate that she was arrested by the police or that she subsequently went to the Yolo clinic.

[33] The respondent also contends that the applicant's behaviour was inconsistent with her fear because she did not make a refugee claim in South Africa and did not claim refugee status until two weeks after her arrival in Canada. This undermines the applicant's credibility.

[34] The respondent notes that in *Francis v Canada (Citizenship and Immigration)*, 2011 FC 1078, at para 15 [*Francis*], this Court determined that the RPD was entitled to reject a refugee claim because the applicant had spent 11 days in the United States prior to claiming refugee protection in Canada.

[35] The respondent argues that, taking into consideration all the errors in the record, the RPD did not err in finding that the applicant was not credible.

VI. Analysis

A. *Appropriate standard of review*

[36] The credibility analysis is reviewable on a reasonableness standard (*Uwitonze*, at para 26, *Elmi*, at para 21). Accordingly, the Court must show deference since the credibility analysis is central to the RPD's role (*Elmi*, at para 21). In fact, the Court 's role is limited with respect to reviewing the RPD's credibility findings because it "had the advantage of hearing the witnesses testify, observed their demeanor and is alive to all the factual nuances and contradictions in the evidence" (*Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319, at paragraph 42).

[37] However, the quality of the interpretation is a question of procedural fairness subject to the correctness standard (*Singh v Canada (Citizenship and Immigration)*, 2007 FC 267, at para 16; *Francis*, at para 2).

B. *Adequacy and interpretation of procedural fairness*

[38] The applicant indicated in her PIF that Tshiluba was her mother tongue and the language in which she was the most comfortable but that she also spoke Lingala. In her PIF, the applicant requested that the translation at the hearing before the RPD be done in Tshiluba or Lingala.

[39] In *Singh v Canada (Citizenship and Immigration)*, 2010 FC 1161 [*Singh*], at para 3, Mr. Justice Lemieux summarized the principles regarding the quality of the interpretation:

> Both counsel agree the question of the quality of the interpretation is governed by the Federal Court of Appeal's decision in *Mohammadian v. Canada (MCI)*, 2001 FCA 191 (CanLII), [2001] F.C.J. No. 916, applying the Supreme Court of Canada's decision in *R. v. Tran*, 1994 CanLII 56 (SCC), [1994] 2 S.C.R. 951. In my view, the principles enunciated in *Mohammadian* may be briefly summarized as follows:
>
> a. The interpretation must be precise, continuous, competent, impartial and contemporaneous.
>
> b. No proof of actual prejudice is required as a condition of obtaining relief.
>
> c. The right is to adequate translation not perfect translation. The fundamental value is linguistic understanding.
>
> d. Waiver of the right results if an objection to the quality of the translation is not raised by a claimant at the first opportunity in those cases where it is reasonable to expect that a complaint be made.

> e. It is a question of fact in each case whether it is reasonable to expect that a complaint be made about the inadequacy of interpretation.
>
> f. If the interpreter is having difficulty speaking an applicant's language and being understood by him is a matter which should be raised at the earliest opportunity.
>
> [Emphasis added]

[40] In *Licao v Canada (Citizenship and Immigration)*, 2014 FC 89, the applicants had indicated in their PIF that their first language was Tagalog but that the dialogue they spoke fluently was Cebuan. The applicants had requested an interpreter who spoke Cebuan or Tagalog. At the hearing, the principal applicant maintained that he needed a Cebuan interpreter. In that case, Madam Justice Strickland stated at paragraphs 34, 38, 41:

> 34. In these circumstances, it really becomes a question of whether, on a practical level, a Cebuan rather than a Tagalog translator was needed in order to preserve procedural fairness.
>
> . . .
>
> 38. Here, the female Applicant's affidavit does not point to any material errors in the interpretation that impacted the decision. Nor does it state how the answers given by the female Applicant would have differed if a Cebuan translator had been provided. Nor do the Applicants point to any aspects of the hearing they could not understand or identify any portion of the hearing that could have been better explained by the Principal Applicant than by his wife.
>
> . . .

> 41. In this case, the Applicants have failed to demonstrate how the hearing was compromised by the lack of a Cebuan interpreter. Specifically, they have not demonstrated how their factual evidence concerning the sole issue addressed at the hearing, which was delay, would have differed if they had a Cebuan translator and have not identified any errors in the interpretation that impacted the decision.
>
> [Emphasis added]

[41] It is clear from the jurisprudence that it is important, *inter alia*, to determine whether the interpretation errors influenced the heart of the RPD's decision or, in other words, gave rise to one or more of the determinative findings (*Khatun v Canada (Citizenship and Immigration)* 2012 FC 159, at para 51; *Fu v Canada (Citizenship and Immigration)*, 2011 FC 155, at para 10; *Francis*, at para 6). Although a perfect translation is not required and, in fact, is virtually unattainable (*Francis*, at para 6), interpretation errors that affect a central aspect of the RPD's conclusions will lead the Court to find that a deficient translation is a breach of procedural fairness.

[42] In this case, the RPD maintains that the applicant was incapable of coherently recounting the alleged facts during the hearing. The RPD determined that the applicant knew her narrative by heart and that she seemed to be upset when she was asked a question. Therefore, the applicant's hesitations seriously undermined her credibility during the hearing. For her part, the applicant contends in her affidavit that she sometimes spoke Tshiluba to the interpreter who did not speak that language and that the errors in translation and the hesitations that resulted led the

RPD to conclude that she was not credible. Accordingly, it appears that the applicant's credibility is the central aspect of this case and, in fact, the jurisprudence states that issues relating to the determination of a refugee claimant's credibility are determinative findings (*Umubyeyi v Canada (Citizenship and Immigration)*, 2011 FC 69, at para 11; *Miranda Ramos v Canada (Citizenship and Immigration)*, 2011 FC 298, at para 10).

[43] Here, I recognize that the transcript of the hearing shows the possibility of an imperfect translation. Indeed, it reveals that the applicant's responses were halting and that her answers were inaudible on numerous occasions. However, I also note that the applicant, through her counsel, states in her memorandum that she accurately answered the RPD's clarification questions despite the fact that Lingala is not her first language.

[44] Therefore, although the translation may have been imperfect, there is nothing in the applicant's record to support the inference that she was unable to adequately respond to the member's questions. Indeed, the transcript reveals instead that the applicant was able to respond to every question the member asked her.

[45] In addition, the applicant does not point out in her affidavit any specific aspect of her testimony that could have been explained better if the quality of the interpretation had been different.

[46] Moreover, I note that at the beginning of the hearing the member expressly asked the applicant if she understood the interpreter when she spoke to her in Lingala; The applicant's response to that question was [TRANSLATION] "Yes, I understand".

[47] I also note that when applicant's counsel raised the translation problem at the hearing, indicating that the applicant was sometimes speaking in Lingala and other times in Tshiluba, the member stated: [TRANSLATION] "But until now, we have been understanding each other very well, sir. It cannot be said that there are hesitations. Madam is answering well. There is nothing that's off the mark." In addition, despite this intervention by her counsel, the applicant stated: [TRANSLATION] "Yes, I am going to speak in Lingala."

[48] In fact, counsel for the applicant did not indicate that she had difficulty expressing herself in Lingala but that she sometimes spoke in Tshiluba. That primarily posed a problem for the interpreter even though the applicant could express herself in Lingala. The applicant did not ask that the hearing be postponed or that a Tshiluban interpreter be provided.

[49] Therefore, the record shows that (i) the applicant herself requested an interpreter who spoke [TRANSLATION] "Tshiluba or Lingala"; (ii) applicant's counsel did not indicate that there was a translation problem at the beginning of the hearing; (iii) the applicant responded accurately to every question that was put to her; (iv) the applicant herself agreed to speak Lingala during the hearing and (v) the member asked the applicant whether she understood the translation, and she replied that she understood.

[50] In light of the foregoing, I am of the opinion that the interpretation, although not perfect, does not amount to a denial of natural justice. The applicant responded adequately to the member's answers, and she even asked that the translation be done in Lingala. In addition, the applicant simply indicated generally that the quality of the interpretation altered the credibility analysis without specifically explaining how the principle of linguistic understanding was not complied with. In my view, the applicant's submissions are insufficient to conclude that the RPD's decision to conduct the hearing in Lingala was incorrect.

C. *Applicant's credibility*

[51] In my opinion, the following key facts led the RPD to make its findings:

1. The applicant seemed uncertain about the date of her arrest. She gave contradictory evidence about the fact that she was arrested the day of her visit to the minister or the next day.

2. Some aspects of the medical report from the centre hospitalier de référence mère et enfant in Ngaba cast doubt on its validity: the fact that (i) the applicant did not provide the correct name of this centre ("Centre médical de Yolo"); (ii) the report states that the doctor administered a contraceptive pill to the applicant, who was 64 years old at the time; (iii) the applicant provided a copy and not the original of this report; and (iv) the copy of the report was filed late.

> 3. The applicant did not leave the DRC until September 19, 2011, almost two months after her release, although she had obtained a visa allowing her to leave for South Africa on July 11, 2011. Moreover, the applicant did not take any steps concerning her refugee claim prior to November 30, 2011, after spending two months in South Africa and about two weeks in Canada.

[52] In this decision, I consider these three findings separately.

(1) Date of arrest

[53] As the RPD mentioned, the applicant seemed uncertain about the date of her arrest when she testified. At the hearing, the applicant indicated on two occasions (transcript, pp. 13-14) that she was arrested on June 29, 2011, the day of her visit to the Ministère de Finances. However, the applicant changed her answer when the RPD told her that her PIF indicated she was arrested the day after her visit to the Ministère des Finances (transcript, p. 16). After that comment by the RPD, the applicant stated that she had been arrested on June 30, 2011. Based on my reading of the transcript, this confusion was not the result of a translation problem.

[54] Furthermore, it is difficult to justify and explain the applicant's uncertainty about the time between the kidnapping that provoked her arrest and the arrest itself, even considering the Guidelines. In my opinion, the RPD's finding on this point is reasonable.

(2) Medical report

[55] On their face, the applicant's explanations regarding the validity of the medical report might seem reasonable. As for the name of the centre hospitalier, the applicant used an informal name to identify it. With respect to the administration of a contraceptive pill, it is possible that this is a standard treatment for rape victims regardless of their age. Finally, regarding the fact that she provided a copy of the report instead of the original, I asked myself whether if, irrespective of that fact, it was reasonable to find that the report was fraudulent.

[56] However, because the RPD is in a privileged position to make credibility findings about a refugee claimant, it is important to show deference to findings of fact (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, at para 46).

[57] I am of the view that the evidence regarding the medical report contains certain inconsistencies: the applicant did indeed mention a name that was not the name of Ngaba's centre hospitalier de référence mère et enfant to designate it, and the medical report states that the physician who treated the applicant administered a contraceptive pill despite her age. Because of these contradictions, the RPD was justified in requesting reliable evidence to corroborate the applicant's allegations, such as the original medical report. Since the applicant did not submit the original report, I am of the view that the RPD reasonably found that the report was fraudulent. The RPD considered the relevant facts and reached a conclusion that was justified, transparent and intelligible in respect of the facts and law. Moreover, the RPD may, in

certain cases, reasonably find that a medical report is not genuine on the basis of the applicant's credibility (*Yasik v Canada (Citizenship and Immigration)*, 2014 FC 760, at para 37).

[58] Finally, contrary to the applicant's argument, I find no indication in the RPD's transcript that it stated it was not necessary to file the original report. I note that the panel indicated at the end of the hearing that it was too late to provide the original report.

(3) Delay in claiming refugee status

[59] The applicant explained that she was unable to leave her country earlier, that is, less than two months after being arrested, because she did not have the money for an airline ticket. The RPD considered the applicant's explanation. However, it seems that the applicant did not change her itinerary at all despite the incidents that she claims to be a victim of because the applicant had already planned her trip. That may reasonably indicate that the applicant did not fear persecution in the DRC, as the RPD concluded.

[60] In addition, the applicant stated that she had no knowledge of the refugee system prior to November 22, 2011, the date on which her daughter-in-law advised her to make her refugee claim. Before that date, the applicant had not told her family that she had been raped because of a cultural taboo.

[61] Even if I accept that the applicant did not disclose the fact that she had been raped, the fact remains that her family knew she had been arrested and mistreated. As the RPD stated in its

decision, it would have been legitimate to expect that her daughters would have suggested that she apply for refugee status while she was in South Africa.

[62] Furthermore, it is difficult to imagine that the mother of a son who has been a refugee in Canada since 1997 for political reasons did not know that she could apply for refugee status.

[63] I agree that it would have been preferable if the RPD had discussed the evidence indicating that the applicant concluded that she could not return to the DRC when she was informed that her husband and sisters had been arrested. Hthe applicant did not really fear returning to her country.

[64] A brief mention regarding the psychological report. I am of the view that it was reasonable that the RPD did not follow the psychological opinion that the applicant was raped because the applicant and the psychologist met for a brief period of time. In addition, contrary to the applicant's allegations, the psychological report does not state that the applicant sometimes has memory lapses.

VII. Conclusion

[65] The application for judicial review should be dismissed.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that

1. The application for judicial review is dismissed.

2. There is no serious question of general importance to certify.

"George R. Locke"
Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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