Date: 19991025

Docket: IMM-6717-98

OTTAWA, ONTARIO, OCTOBER 25, 1999

PRESENT: THE HONOURABLE MADAM JUSTICE TREMBLAY-LAMER

Between:

NDJADI DENIS NGONGO and

CATHERINE CHIRE MUBEMBE

Applicants

- and -

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

O R D E R

The application for judicial review is allowed. The matter is referred back to a different panel for redetermination.

Danièle Tremblay-Lamer

JUDGE

Certified true translation

Peter Douglas

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REASONS FOR ORDER

TREMBLAY-LAMER J.:

[1] This is an application for judicial review of an Immigration and Refugee Board (Refugee Division) decision dated November 30, 1998, determining that the applicants were not Convention refugees.

[2] The applicants are citizens of the Democratic Republic of the Congo (former Zaire). They allege that they have a fear of persecution for reasons of political opinion and membership in a particular social group, their family.

[3] The male applicant alleges that he joined Kabila"s PRP (people"s revolutionary party) in 1989. In 1990, the PRP asked him to take charge of mobilization and propaganda in the capital. Members of the SARM (military action and intelligence service) arrested him at his home on November 5, 1990. The SARM had found PRP leaflets handed out by one of his sisters. He says he was held in a SARM jail for 13 months.

[4] On December 4, 1991, he and his sister were released when another sister stepped in and bribed the colonel in charge of the jail.

[5] According to the female applicant, she was first arrested on September 20, 1991, assaulted in detention and released three months later when a PRP leader, Bisoé Biringanine, stepped in and bought off the guards.

[6] On December 11, 1991, the male applicant left the country for Sweden using his brother"s passport. He was turned back to Germany. In June 1992, he left Germany for Sweden, where he sought refugee status.

[7] In December 1994, the female applicant was spotted in the Bukavu region by SARM agents looking for her husband. She was held in a SARM jail but again escaped thanks to bribes Bisoé gave the jailers.

[8] On March 24, 1995, she left Zaïre to join her husband in Sweden, where she claimed refugee status. In June 1996, Swedish officials dismissed the applicants" claims.

[9] The male applicant says he keeps in touch (by telephone) with Bisoé, first vice-president of the PRP, who is still in the DRC. Disappointed with the dictator Kabila"s behaviour, Bisoé has now joined the UDPS (union for democracy and social progress). The male applicant says Bisoé was jailed early in 1998.

[10] On March 12, 1998, the male applicant quit the PRP so he too could join the UDPS-Canada in April 1998. He participates in monthly meetings and a study group. In the event of return to the DRC, the applicants would fear for their lives because the UDPS-Canada has been infiltrated by AFDL agents.

[11] The Refugee Division found that the applicants" claim was not credible and that there was not enough evidence to establish a well-founded fear of persecution in the event of return to the DRC.

[12] The applicants submit that the Refugee Division erred in law by failing to confront the male applicant over a major contradiction in his testimony.

[13] I note that in its decision, the panel relied on Mr. Justice Gibson"s recent decision in *Ayodele v. Canada (M.C.I.)* .[1]That decision limits the scope of *Gracielome v. Canada (M.E.I.)*[2] and holds that failing to put a contradiction to a claimant is not in itself an error of law:

> I think it is fair to assume that any contradictions in the applicant's testimony would have been as apparent to counsel as to the CRDD members. In such specific circumstances, to have a decision fail, by reason only of the failure on the part of the CRDD members to put the contradictions to a represented applicant goes well beyond what I take to be the position enunciated in *Gracielome* and places what, in my view, is an unwarranted burden on members of the CRDD. To reiterate, the Applicant was represented. Presumably, counsel was attentive to the testimony. It was open to counsel to examine or reexamine his or her client on any perceived inconsistencies without coaching from the CRDD members.

[14] More recently in *Matarage v. M.C.I.*,[3] Mr. Justice Lutfy used the same reasoning.

[15] Mr. Justice Lutfy stated that there may still be circumstances, however, where a discrepancy should be brought to the attention of a refugee claimant. On this point, he cited *Guo* v. *Canada (M.C.I.)*.[4]

[16] In my view, regard should be had in each case to the fact situation, the applicable legislation and the nature of the contradictions noted. The following factors may serve as guidelines:

1. Was the contradiction found after a careful analysis of the transcript or recording of the hearing, or was it obvious?
2. Was it in answer to a direct question from the panel?

3. Was it an actual contradiction or just a slip?

4. Was the applicant represented by counsel, in which case counsel could have questioned him on any contradiction?

5. Was the applicant communicating through an interpreter? Using an interpreter makes misunderstandings due to interpretation (and thus, contradictions) more likely.

6. Is the panel"s decision based on a single contradiction or on a number of contradictions or implausibilities?

[17] Having regard to these factors, I am of the view that in the case at bar, the panel was not required to confront the claimant. This matter is proceeding in the context of the new legislation. The contradiction was obvious and in answer to a direct question from the panel. It did not stem from a careful analysis by a panel seeking to justify an adverse credibility finding. It admittedly escaped the panel"s notice such that the applicant was never directly confronted over the contradiction. However, he was represented by counsel. In my view, as in *Ayodele* ,[5] the contradiction was as apparent to counsel as to the CRDD members, such that counsel could have reexamined his client on that point.

[18] Furthermore, in addition to this contradiction was the panel"s finding that on the whole, the Bisoé Biringanine situation was implausible. Despite his political profile (which was known to the authorities), he managed to deal with and bribe jailers and a number of officials without encountering any problems before 1997.

[19] It was not unreasonable for the panel to find this situation implausible; it stands in sharp contrast with that of the applicants, who allege that pro-Mobutu forces hounded the female applicant, who was not engaging in any political activity and had fled 1,400 kilometres from Kinshasa.

[20] I therefore see no reason to set aside the panel"s decision for not having confronted the male applicant over the contradiction.

Analysis of activities in Canada

[21] The male applicant became a member of the UDPS-Canada. Nevertheless, the panel found that his membership in the UDPS was opportunistic and thus that his new commitment was not credible. Because of this finding, the panel did not determine whether the male applicant had a fear of persecution linked with his activities in Canada.

[22] According to James Hathaway in *The Law of Refugee Status*,[6] regard must be had to the impact of political activities abroad even when those activities are prompted by the claimant"s intention to secure asylum:

> It does not follow, however, that all persons whose activities abroad are not genuinely demonstrative of oppositional political opinion are outside the refugee definition. Even when it is evident that the voluntary statement or action was fraudulent in that it was prompted primarily by an intention to secure asylum, the consequential imputation to the claimant of a negative political opinion by authorities in her home state may nonetheless bring her within the scope of the Convention definition. Since refugee law is fundamentally concerned with the provision of protection against unconscionable state action, an assessment should be made of any potential harm to be faced upon return because of the fact of the non-genuine political activity engaged in while abroad.[7]

[23] I share that view. The only relevant question is whether activities abroad might give rise to a negative reaction on the part of the authorities and thus a reasonable chance of persecution in the event of return.

[24] In this regard, in *Manzila v. Canada (M.C.I.)*,[8] Mr. Justice Hugessen held that the panel had erred in disregarding the applicant"s activities in Canada:

> With respect, the member"s error was that he completely failed to deal with the second part of the applicant"s claim, namely his allegation that his activities here in Canada would have serious repercussions for him in his home country. The member mentions these activities at the very beginning of his decision but he does not dispose of the applicant"s claim that his activities here make him a refugee irrespective of his activities in his country of origin.[9]

[25] Under the circumstances, the application for judicial review is allowed. The matter is referred back to a different panel for redetermination.

[26] Neither counsel suggested that a question be certified.

Danièle Tremblay-Lamer

JUDGE

OTTAWA, ONTARIO

October 25, 1999

Certified true translation

Peter Douglas

FEDERAL COURT OF CANADA

TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT NO.: IMM-6717-98

STYLE OF CAUSE: NDJADI DENIS NGONGO et al.

v.

MCI

PLACE OF HEARING: MONTRÉAL, QUEBEC

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REASONS FOR ORDER OF TREMBLAY-LAMER J.

DATED OCTOBER 25, 1999

APPEARANCES:

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DANIEL LATULIPPE	FOR THE RESPONDENT

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[1] (December 30, 1997), IMM-4812-96 (F.C.T.D.).

[2] (May 30, 1989), A-507-88 (F.C.A.).

[3] (April 9, 1998), IMM-1987-97 (F.C.T.D.).

[4] (September 16, 1996), A-928-92 (F.C.A.).

[5] *Supra* note 1.

[6] Chapter 2 "Alienage" (Toronto: Butterworths, 1991).

[7] *Ibid*. at p. 39.

[8] (September 22, 1998), IMM-4757-97 (F.C.T.D.).

[9] *Ibid*. at para. 4.