Mvudi v. Canada (Minister of Citizenship and Immigration)

Between
Ndondi Mvudi, applicant, and
The Minister [of Citizenship and Immigration], respondent

[1999] F.C.J. No. 668
Court File No. IMM-3168-98

Federal Court of Canada - Trial Division
Montreal, Quebec
Teitelbaum J.

Heard: April 30, 1999.
Judgment: May 5, 1999.
(39 paras.)

Aliens and immigration — Admission, refugees — Grounds, well-founded fear of persecution — Appeals or judicial review, grounds.

This was an application by Mvudi for judicial review of the dismissal of her application for Convention refugee status. Mvudi was a citizen of the People's Republic of Congo. She studied in Belgium but returned to the Congo to look after her father's affairs after his death, and to care for her brothers. She completed her studies at the university in Kinshasa. She participated in a demonstration organized by university students to demand the Prime Minister's resignation and to denounce some of his policies. Mvudi was arrested after the demonstration. The authorities recognized the name of her brother, who had been sought by the authorities for five years and had obtained refugee status in Canada. Mvudi testified that the authorities also had photos of demonstrations in Belgium in which she had participated. The authorities subjected Mvudi to 48 hours of interrogation, but she escaped from prison and left for Belgium. She then joined her brother in Canada. The panel found that Mvudi did not establish a well-founded fear of persecution. The panel found that she was not a major activist in the student movement, and was unlikely to continue to fight the new government if she were forced to return.

HELD: Application dismissed. The panel did not make a reviewable error of law. It did not use an excessive burden of proof in determining whether there was a well-founded fear of persecution. The panel did not make a reviewable error in finding that Mvudi's testimony was not credible. It did not make a reviewable error with respect to the inferences it drew from the testimony. Despite the absence of meaningful changes in circumstances in the political situation in the Congo, Mvudi did not establish a well-founded fear of persecution.

Counsel:

Johanne Doyon, for the applicant.
Patricia Deslauriers, for the respondent.

TEITELBAUM J. (Reasons for Order):—

INTRODUCTION

1 This is an application for judicial review of a decision of the Immigration and Refugee Board (the Panel) dated May 28, 1998, refusing the claim of the applicant, a citizen of the People's Republic of Congo, on the ground that she is not a Convention refugee. The applicant asks this Court to reverse that decision and refer the matter back to a different panel of the Board.

FACTS

2 According to the facts in the record, the applicant studied in Belgium from 1991 to 1994. Following her father's death, she went back to live in the People's Republic of Congo (Zaire at the time) in order to look after her father's affairs and take care of her brothers.

3 In 1996, she went back to complete her university studies in economics at the University of Kinshasa. On November 5 of that year, she participated in a demonstration organized by higher and university education students to demand the then-Prime Minister's resignation and denounce some of his policies.

4 After the demonstration, the applicant was arrested for questioning. On this occasion, the authorities involved recognized the name of her brother, who has been soughtby the authorities since 1991 and obtained political refugee status in Canada. The applicant also says the authorities recalled photos taken by Zairean spies at demonstrations in Belgium in which she had participated.

5 As a result of these discoveries, the authorities involved subjected the applicant to 48 hours of interrogation for her to admit her ties to her brother, say where he was hiding and explain the photos taken at demonstrations in Belgium.

6 The applicant says she escaped from prison with the help of a security guard and her uncle on or about November 7, 1996. After her escape, she telephoned her brother, who suggested she come to join him in Canada.

7 On December 8, 1996, the applicant left Zaire (at the time) for Belgium, and on December 29, 1996, left Belgium for Canada.

8 According to the Panel's decision, the applicant did not establish a well-founded fear of persecution. The Panel found there was no objective basis for her fear of persecution, because it did not believe she was a major activist in the student movement or would continue the fight against the new government if she had to go back to her country of origin.

9 In these circumstances, the Panel held that considering the applicant's slight involvement, it was very unlikely the authorities would target her. It added that her potential agent of persecution had disappeared, as a new government had been in office since May 1997.

SUBMISSIONS OF THE PARTIES

Argument of the applicant

10 Referring to the Federal Court of Appeal in Adjei,[1] the applicant submits that the Panel erred in law by imposing an excessive burden with respect to the well-founded fear of persecution.

11 The applicant submits that judging by the terms of the decision - [TRANSLATION] "this slight political involvement makes it unlikely the claimant would be a significant target for the authorities" - the Panel used the balance of probability test, whereas the applicable test is to establish a reasonable chance that persecution will take place, in other words, fear that goes beyond a mere possibility of persecution.

12 Furthermore, the applicant submits that the Panel did not give adequate reasons for deciding to disregard her evidence when she said she would continue the fight for fundamental rights in her country if she had to go back there, considering that her credibility was not questioned with respect to the facts she experienced and alleged.

13 The applicant also submits that the Panel did not assess the fear of persecution existing at the time of the hearing. The Panel simply mentioned the change of government as the reason for the lack of persecution. The applicant therefore submits that the Panel did not listen to her testimony before deciding to disregard it.

Argument of the respondent

14 The respondent submits that the Panel was entitled to draw its own inferences from the applicant's testimony and that in any event, the applicant did not show that they were unreasonable.

15 The respondent also submits that considering the applicant's marginal political participation when she went back to Zaire (at the time) in 1994, it was reasonable for the

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[1] Adjei v. Canada (M.E.I.), [1989] 2 F.C. 680 (F.C.A.).

Panel to find there was no credible evidence of a reasonable or serious chance of persecution.

16 With respect to the test the Panel used regarding the applicable burden of proof, the respondent submits that although the Panel used the expression "unlikely" instead of "serious possibility" or "reasonable chance", it still correctly used the test set out in Adjei, supra. In this regard, the respondent cites Osei,[2] in which the Federal Court of Appeal said that what mattered was the application of the proper test, not the verbal formulation of the test.

17 The respondent also submits that there has well and truly been a change of government since May 1997, and as the applicant left the country in 1996, she has never since protested against the new government in office.

18 Furthermore, to the applicant's argument regarding the allegation that the Panel disregarded her testimony about her fear of persecution in relation to the new government, the respondent replies by pointing out that the Panel is presumed to have analysed all of the evidence.

19 In any, event, the respondent submits that the assessment of the change in circumstances is purely a question of fact for the Panel to determine, and that in these circumstances, only a patently unreasonable error would warrant the Court's intervention.

ISSUES

20 The application for judicial review essentially raises three issues:

(1) whether the Panel erred in law in determining whether there was a well-founded fear of persecution;
(2) whether the Panel made a reviewable error in assessing the applicant's testimony or drew unreasonable inferences from that testimony;
(3) whether the Panel erred in fact or in law in assessing whether there was a change in circumstances in the political situation in the applicant's country of origin and in assessing the consequences thereof to the applicant's case.

ANALYSIS

Existence of a well-founded fear of persecution

21 The applicable test for determining whether there is a well-founded fear of persecution was substantially set out by the Federal Court of Appeal in Adjei, supra:

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[2] Osei v. Canda (M.E.I.) (1990), 12 Imm. L.R. (2d) 49 (F.C.A.).

It was common ground that the objective test is not so stringent as to require a probability of persecution. In other words, although an applicant has to establish his case on a balance of probabilities, he does not nevertheless have to prove that persecution would be more likely, than not. Indeed, in Arduengo v. Minister of Employment and Immigration (1981), 40 N.R. 436 (F.C.A.), at page 437, Heald J.A. said:

> Accordingly, it is my opinion that the board erred in imposing on this applicant and his wife the requirement that they would be subject to persecution since the statutory, definition supra required only that they establish "a well-founded fear of persecution". The test imposed by, the board is a higher and more stringent test than that imposed by the statute.

The parties were agreed that one accurate way, of describing the requisite test is in terms of "reasonable chance": is there a reasonable chance that persecution would take place were the applicant returned to his country of origin?
We would adopt that phrasing, which appears to us to be equivalent to that employed by Pratte J.A. in Seifu v. Immigration Appeal Board (A-277-822, dated January 12, 1983, not reported):
... [I]n order to support a finding that an applicant is a Convention refugee, the evidence must not necessarily show that he "has suffered or would suffer persecution"; what the evidence must show is that the applicant has good grounds for fearing persecution for one of the reasons specified in the Act. [Emphasis added].
What is evidently indicated by phrases such as "good grounds" or "reasonable chance" is, on the one hand, that there need not be more than a 50% chance (i.e., a probability), and on the other hand that there must be more than a minimal possibility. We believe this can also be expressed as a "reasonable" or even a "serious possibility", as opposed to a mere possibility.

22 In Lai,[3] the Federal Court of Appeal Court stated:

The double question put to the Board was whether the Applicant had a genuine fear to return to his country and whether that fear was reasonable, i.e. founded on good grounds. In answering that question, the Board has to assess all the evidence put before it. This is particularly important here where the Applicant has successfully made out a pattern of long-standing and persistent persecution, and the real question remaining is whether or not there is reason to believe that this pattern might not have ceased.

23 In Ponniah,[4] Madam Justice Desjardins J.A. stated:

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[3] Lai v. Canada (M.E.I.) (1989), 8 Imm. L.R. (2d) 245 (F.C.A.).

> An applicant, according to Adjei, does not have to prove that persecution would be more likely, than not. He has to establish "good grounds" or "reasonable chance" for fearing persecution.
> "Good grounds" or "reasonable chance" is defined in Adjei as occupying the field between upper and lower limits; it is less than a 50% chance (i.e. a probability), but more than a minimal or mere possibility. There is no intermediate ground: what falls between the two limits is "good grounds".

24 In Lacassi,[5] Mr. Justice Richard (as he then was) said:

> Counsel for the applicant claimed that the Board had set too high a standard of proof for the applicant to establish that she was a Convention Refugee. In its decision, the Board had stated that the applicant must present evidence that there is a serious possibility of facing persecution should she return to Uruguay. Counsel submitted that the applicant was not required to establish a serious possibility, but only a mere possibility. Counsel relied on various dictionary definitions of the word serious and of the word mere. However, in Adjei Mr. Justice MacGuigan made it clear that it must be a reasonable or even a serious possibility as opposed to a mere possibility. In the Chan case, Mr. Justice Major, speaking on behalf of a majority, of the Supreme Court also indicated that the test is that of serious possibility. Accordingly, the Board did not err in law when it adopted the test of a serious possibility. [Emphasis added, footnotes omitted.]

25 As the applicant says, when the Panel determined whether she had actually established a well-founded fear of persecution, it stated:

> [TRANSLATION] The panel considers her political involvement very tenuous, although it is possible she joined the demonstrators' ranks on November 5, 1996. However, this slight political involvement makes it unlikely the claimant would be a significant target for the authorities.

26 The evidence shows that the applicant's political activities amounted to this:

> [TRANSLATION] She participated in just one demonstration after returning to her country in 1994. She testified that she had participated in meetings, without being part of any political movement. She allegedly participated in two meetings in 1996 and cannot remember attending any other meetings in 1994 and 1996.

[para27] Thus, in view of the evidence and despite the use of the term "unlikely", I am satisfied that the Panel made no reviewable error of law, in that it did not use an

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[4] Ponniah v. Canada (M.E.I.)(1991), 13 Imm. L.R. (2d) 241 (F.C.A.).
[5] Lacassi v. Canada (M.E.I.), [1996] F.C.J. No. 1156.

excessive burden of proof in determining whether there was a well-founded fear of persecution.

28 As Associate Chief Justice Richard said in Lacassi, supra, the applicant had the burden of showing a serious possibility that there was a well-founded fear of persecution; in saying it was unlikely the applicant would be a target for persecution, the Panel in fact found there was no serious possibility of persecution.

Assessment of the applicant's testiniony

29 The applicant submits that since her credibility was not questioned with respect to the facts she experienced and alleged, there was no basis for the Panel to disregard her sworn testimony when she said that if she had to go back to her country of origin, [TRANSLATION] "she would have no choice but to stay involved as long as fundamental rights were trampled in her country".

[para30] In Hercules,[6] Mr. Justice Gibson said:

> I find that there did not exist an obligation on the part of the CRDD in this case to accept sworn allegations as true, even though credibility is not in question, where those allegations are in the nature of a speculative conclusion, and whether or not that speculation is well-founded.

31 Also, in Tung,[7] the Federal Court of Appeal said it could be concluded that the Panel had made a reviewable error when it drew inferences that the evidence did not substantiate.

> Fifthly, I agree that an error was committed by the Board in finding that the appellant had taken "his time to shop around for the best country where he could claim asylum". This is simply not substantiated by the evidence and no facts were proven from which such an inference could reasonably be drawn. In his testimony, the appellant gave a plausible and uncontradicted explanation of reasons which led him to select Canada as a safe haven over other countries he had considered with the assistance of the agent.

32 I must say that just because a refugee claimant states that his or her allegations are truthful, the Panel members are not obliged to accept them as such. After seeing and hearing the claimant or witness, the Panel members are entitled to accept or reject the testimony if they find it implausible.

33 In view of these facts, I am satisfied that the Panel made no reviewable error when it decided to disregard the applicant's testimony and made no reviewable error with respect to the inferences it drew from the testimony before it.

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[6] Hercules v. Canada (M.E.I.) (1993), 67 F.T.R. 131.
[7] Tung v. Canada (M.E.I.) (1991), 124 N.R. 388 (F.C.A.).

Change in circumstances

34 Recently, in Bibomba Biakona,[8] I repeated the applicable law with respect to the existence of meaningful changes in circumstances radically affecting the political or social situation in the claimant's country of origin:

> The applicart relies on the decisions Cuadra v. Canada (1993) (A-179-92, July, 20, 1993) and Ahamed v. M.E.I., (1993) (A-89-92, July, 14, 1993) for the proposition that because of the recent changes in conditions, it was incumbent on the Commission to provide clear reasons for determining that the well-founded fear of the applicant's past experiences no longer exists.
> In Cuadra, supra, the Federal Court of Appeal considered, inter alia, the issue of a change in circumstances and stated the following:
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> > Moreover, after affirming that the Sandinistas continued to play a role in the military and political scene in Nicaragua, the tribunal found that a change in circumstances undermined the claim on the basis that "the documentary evidence points to positive steps taken and progress made towards that objective [of diminishing the influence of the Sandinistas]". Again, a more detailed analysis of the conflicting evidence in respect of a change in circumstances was necessary to meet the requirement that the change be meaningful and effective enough to render the genuine fear of the appellant unreasonable and hence without foundation.
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> Also, in Ahmed, supra, the Federal Court of Appeal stated:
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> > Similarly, the mere fact that there has been a change of government is clearly not in itself sufficient to meet the requirements of a change of circumstances which have rendered the genuine fear of a claimant unreasonable and hence without foundation.
> > There is nothing in the reasons of the tribunal to even suggest that the inferences it drew from the evidence were actually made in accordance with the legal principles involved. Indeed, we doubt that these inferences are sustainable: the nature and the agents of the persecution feared by the appellant do not suggest that the persecution would be confined to particular areas of the country, and the mere declarations of the new four-month old government that it favoured the establishment of law and order can hardly be seen, when the root of the appellant's fear and the past record of the new government with respect to human rights violations are considered, as a clear indication of the meaningful and foundation of the appellant's claim. But, in any event, even if the conclusions of the

[8] Bibomba Biakona v. MCI, [1999] F.C.J. No. 391.

> tribunal were correct, we do not accept that they, can be advanced without more explanation to establish that the appropriate legal principles were applied. The applicant's claim was not properly dealt with and the decision cannot be allowed to stand.
> We will therefore grant the appeal, set aside the decision of the tribunal and send the matter back for a reconsideration by, a panel differently constituted.

The necessity, of a detailed analysis of the evidence in cases of recent changes in circumstances was furiher reiterated in a most recent judgment, Kifoueti v. Canada (IMM-937-98, February 11, 1999) where Madame Justice Tremblay-Lamer states the following:

> Pour le juge Gibson le fait qu'il y ait un changement dans la situation politique ne constitue pas la preuve que les problèmes du revendicateur sont terminés.
> Dans une situation semblable il doit y avoir une analyse détaillée de la preuve pour déterminer si un changement est suffisamment important pour faire disparaître la crainte du demandeur.
> Le juge Gibson s'exprimait ainsi:
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> > In this matter, there was no conflict in the evidence respecting changed country circumstances or conditions. There was, however, clear indication that the dramatic changes that had taken place in Ukraine in the months immediately preceding the applicant's hearing before the CRDD were evolving very rapidly and had not stabilized. This is reflected in the very headings cited by, the CRDD which refer to the Ukrainian parliament voting for a transitional army, a new security force to replace the KGB and to parliament working out new principles for the new security force. None of these phrases reflect a basis for concluding the changes are or will be "truly effective" or "durable", or in the terms quoted from Cuadra above, "meaningful and effective". No analysis of the meaningfulness and effectiveness or of the effectiveness and durability, of the changes is undertaken by the CRDD. To paraphrase the quotation from Cuadra, above, I conclude that a more detailed analysis of the evidence in respect of a change in circumstances in Ukraine was here necessary to meet the requirement that the change be meaningful and effective enough, or substantial, effective and durable enough, to render the genuine fear of the applicant in this matter unreasonable and hence without foundation.

35 In view of the evidence in the Panel's record and as I previously indicated in Bibomba Biakona, supra, there is no doubt that despite the fall of the Mobutu regime, the

political situation in the People's Republic of Congo has not changed. Thus, I readily acknowledge that the Panel misapprehended the evidence in the record regarding the changes in circumstances in the applicant's country of origin when it stated:

> [TRANSLATION] Furthermore, President Mobutu, who was ruling the country at the time, is no longer in power, and a new government has now been in office since May 1997. Her potential agent of persecution has therefore disappeared.

36 Nevertheless, despite the lack of meaningful changes in circumstances in the political situation in the applicant's country, the fact remains that she has not established a well-founded fear of persecution.

37 Thus, the Panel's misapprehension of the documentary evidence has no effect on its main finding regarding the lack of a well-founded fear of persecution. Under these circumstances, the Panel made no reviewable error that would affect the main finding of its decision.

CONCLUSION

38 This application for judicial review is dismissed.

39 The parties did not submit any question for certification.

Certified true translation: Peter Douglas