Federal Court  Cour fédérale

Date: 20171205

Docket: IMM-2624-17

Citation: 2017 FC 1106

Ottawa, Ontario, December 5, 2017

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

AICHA SANDRA DIAWARA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review brought by the Applicant pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], of a decision made by the Refugee Protection Division of the Immigration and Refugee Board [the RPD], dated May 30, 2017, determining that the Applicant is neither a Convention refugee nor a person in need of protection for the purposes of section 96 and 97(1) of *IRPA* [the Decision].

II. Facts

[2] The Applicant entered Canada on January 22, 2017 with her two children [the Minors]. The Applicant and the Minors are citizens of Burundi.

[3] The facts that led to the Applicant and the Minors entering Canada from the United States and making a claim for refugee status are as follows. I will deal with the two countries of reference (Guinea and Burundi) separately:

Respecting Guinea

- The Applicant was born in Guinea-Bissau to a father with Guinea-Conakry [Guinea] citizenship and a mother with Burundi citizenship. According to *Guinea's Civil Code*, a child born to a Guinean father is Guinean by birth; however Guinean citizenship may be both lost and later regained, as discussed below;
- The Applicant has passports from both Guinea and Burundi, although the circumstances surrounding the acquisition of the Guinean passport by the Applicant's father are in doubt;
- The Applicant's father, originally from Guinea has lived in exile since 1973, when he escaped to avoid an assassination attempt. He has lived as a permanent resident in Burundi and has not returned to Guinea since 1973. The Applicant and her father submit that he is seen by Guinean authorities and people as a traitor in Guinea. As such, the Applicant has little to no knowledge of or contact with her father's family; and,
- The Applicant went to Guinea (she was not born there, to emphasize, but in neighbouring Guinea-Bissau) in 1993, when she was 11 years old to visit her father's mother. That was

24 years ago. However, she was forced to flee Guinea after only 6 months because women in her grandmother's village sought to perform female genital mutilation on her. In this connection, country condition documents filed with the RPD state as many as 97% of women and female children ages 15 to 49 years in Guinea have been subject to FGM.

Respecting Burundi

- I note first of all that the RPD considered the Applicant credible. The matters that follow were therefore not in dispute;
- As an adult, the Applicant, her husband, and the Minors, all of Tutsi ethnicity, resided in a predominantly Tutsi neighbourhood in Burundi;
- In May 2015, the Applicant took part in a women's protest against President Nkurunziza's third term in Burundi [the May 2015 Protest];
- On the same day, there was a failed attempt to overthrow the Burundi government, which, authorities associated with the May 2015 Protest;
- The protestors, including the Applicant, were considered to be coup plotters and accomplices;
- In June 2015, the Applicant and the Minors fled to Rwanda; however, she and the Minors were starving to death in Rwanda so they returned to Burundi a week later;
- In August 2015, the Applicant was stopped by four armed military personnel, three of whom physically and sexually assaulted her, saying they were, "putting Tutsi women in their place". After this incident, the Applicant was detained for five weeks;
- Upon her release, the Applicant and her family moved neighbourhoods and the Applicant changed jobs. However, shortly after, she began experiencing problems at work, particularly with her executive director who was a Hutu;

- In December 2016, the Applicant and the Minors travelled to the United States on a visa for a vacation. While there, the Applicant's husband contacted her from Burundi to say that a friend had informed him that the National Intelligence Service was looking for her as part of the reactivation of the manhunt for protestors during the May 2015 Protest; and,
- On January 22, 2017, the Applicant and the Minors entered Canada as an exception to the Canada-U.S. Safe Third Country Agreement; the Applicant's aunt and uncle reside in Canada. On that day, the Applicant and the Minors advanced a claim for refugee protection.

[4] The Applicant applied to the RPD for refugee protection pursuant to sections 96 and 97(1) of *IRPA* because of her fear of persecution at the hands of the authorities in Burundi due to her real and imputed political opinion as well as her Tutsi ethnicity.

[5] In respect of Guinea, the Applicant's claim to the RPD was based on her father's past political activities.

[6] The Minors, also citizens of Burundi, sought refugee protection under sections 96 and 97(1) of *IRPA* because of their fear of persecution at the hands of the authorities in Burundi due to their mother's real and imputed political opinion as well as their Tutsi ethnicity.

[7] In a decision dated May 30, 2017, the RPD found that the Minors were Convention refugees with reference to Burundi. However, the RPD rejected the Applicant's claim entirely,

holding that the Applicant "has or has access to Guinean citizenship" where, the RPD held there was insufficient risk to the Applicant.

[8] The Applicant accepted and there is no dispute regarding the RPD's findings respecting the Minors.

[9] There is no doubt the RPD would have accepted the Applicant's claim for refugee status in reference to Burundi, given its findings in respect of the Minors were entirely based on the Applicant's situation, but for the RPD's finding that the Applicant has or has access to Guinean citizenship.

III. Issues

[10] In my view, the determinative issue is whether the RPD acted unreasonably in finding the Applicant has or has access to Guinean citizenship.

IV. Standard of Review

[11] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is not necessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question." This Court has determined that a review of the determination of an applicant's citizenship warrants deference, see *Tretsetsang v Canada (Minister of Citizenship and Immigration)*, 2015 FC at paras 9-10 per Mosley J, affirmed

2016 FCA 175 at para 61. See also *Yeshi v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1153 at paras 63, 67 per Kane J and *Dakar v Canada (Minister of Citizenship and Immigration)*, 2017 FC 353 at para 15 per Gleeson J. I therefore accept, and the parties agree, that reasonableness is the standard of review for citizenship.

[12] In *Dunsmuir* at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[13] The Supreme Court of Canada also instructs that judicial review is not a line-by-line treasure hunt for errors; the decision should be approached as an organic whole: *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34. Further, a reviewing court must determine whether the decision, viewed as a whole in the context of the record, is reasonable: *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65; see also *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.The RPD accepted the identities of the Applicant and the Minors as nationals of Burundi.

V. Analysis

[14] There is no doubt that a critical preliminary component of any RPD decision is the reasonable determination of a claimant's citizenship. In my very respectful view, the RPD's decision on the Applicant's citizenship with reference to Guinea is not reasonable. My reasons follow.

[15] The RPD's discussion of the Applicant's Guinean nationality is contained in the following paragraph:

> [16] The principal claimant testified that she has citizenship in Guinea. According to the Guinea civil code, a child born to a Guinean father is Guinean by birth, however Guinea does not allow dual citizenship [foot note reference omitted: to the Civil Code of Guinea as found in the National Documentation Package]. Given that her father is a Guinean national, the panel finds that the principal claimant either has or has access to Guinean citizenship. As such, the panel finds that Guinea-Conakry is a country of reference for the principal claimant.
>
> [Emphasis added]

[16] These are disjunctive findings, that she "has … Guinean citizenship", or in the alternative, that she "has access to Guinean citizenship". In order to assess the reasonableness of the conclusion that the Applicant "either has or has access to Guinean citizenship", one therefore must look at each disjunctive finding separately, and do so with reference to the *Guinean Civil Code* put into the record and relied upon by the RPD.

A. *Whether the Applicant "has … Guinean citizenship"*

[17] In this respect, the following are relevant provisions of the *Guinean Civil Code*:

	[TRANSLATION]
TITRE V- DE LA PERTE ET DE LA DECHEANCE DE LA NATIONALITE GUINENNE	TITLE V – LOSS AND DEPRIVATION OF GUINEAN NATIONALITY
CHAPITRE I- DE LA PERTE DE LA NATIONALITE GUINEENNE	CHAPTER I – LOSS OF GUINEAN NATIONALITY
Article 95	Article 95
Perd la nationalité guinéenne le guinéen majeur qui acquiert volontairement une nationalité étrangère.	Guineans of majority age who voluntarily acquire a foreign nationality lose Guinean nationality.
[…]	[…]
Article 99	Article 99
Perd la nationalité guinéenne le guinéen, même mineur, qui ayant une nationalité étrangère, est autorisé sur sa demande, pas le Gouvernement guinéen, à perdre la qualité de guinéen.	Guineans, even minors, who have a foreign nationality can, at their request, and not that of the Government of Guinea, lose their Guinean nationality.
Cette autorisation est accordée par décret.	This authorization is granted by decree.
Le mineur doit, le cas échéant, être autorisé ou représenté dans les conditions prévues aux articles 63 et 64.	Minors must be authorized or represented, as the case may be, in accordance with the conditions set out in articles 63 and 64.

[18] It is not clear to me how the RPD could reasonably reach the conclusion that the Applicant "has …Guinean citizenship", given that the RPD accepted the Applicant was also a citizen of Burundi. The RPD would have acted reasonably if it found that the Applicant "had" Guinean citizenship at birth through her Guinean father, *i.e.*, at her birth. That is not in issue because it comports entirely with the record, *i.e.*, the facts and the *Guinean Civil Code*.

[19] However, the RPD's finding was not that the Applicant "had" Guinean citizenship in the past at birth, but that she "has" Guinean citizenship, *i.e.*, at the present and specifically, at the time of the hearing.

[20] Making a reasonable determination of this Applicant's citizenship requires more than looking at her status at birth. In my view, her birth citizenship does not and cannot, on these facts, reasonably determine her present citizenship, that is, what citizenship she now "has". This is because Article 99 of the *Guinean Civil Code* states that an adult Guinean citizen loses ("perd") Guinean citizenship upon voluntarily acquiring another citizenship. The RPD found the Applicant had acquired Burundian citizenship, but does not say when; was it when she was a minor, or when she was an adult? The time at which the Applicant acquired Burundian citizenship must be determined before a reasonable conclusion on what citizenship she "has" may be made; yet the RPD neither considered nor reached a conclusion on this question. This raises transparency as well as intelligibility issues.

[21] I also note that the *Guinean Civil Code* does not support the RPD's conclusion that, "Guinea does not allow dual citizenship". Rather, what the *Guinean Civil Code* says is that an adult who voluntarily assumes a new citizenship, loses ("perd") his or her Guinean citizenship. In this context, 'not allowing dual citizenship' reasonably means that the Applicant would retain her Guinean birth citizenship (at least in Guinean eyes). But that is not what Guinean law provides; its *Civil Code* states that Guinean citizenship is lost. To characterize a citizenship as retained when on the record it is lost, renders the reference to not allowing dual citizenship unreasonable.

B. *Whether the Applicant "has … access to Guinean citizenship"*

[22] Nor am I able to determine how the RPD concluded that the Applicant "has … access to" Guinean citizenship, which was its alternative finding. That finding was obviously predicated on

her having lost her birth citizenship, which as noted, was a central question which was not in fact actually determined on this record.

[23] I agree, as Respondent's counsel noted, that the *Guinean Civil Code* provides for restoration of Guinean citizenship in Articles 81 to 83. It appears, however, that restoration is only available where the Applicant has residence ("résidence") in Guinea per Article 82. In addition, it appears restoration comes after application and investigation ("après enquête") per Article 81. It further appears that restoration of Guinean citizenship is conditional on proof of Guinean status ("apporter la preuve qu'il a eu la qualité de guinéen") per Article 83:

	[TRANSLATION]
TITRE III- DE L'ATTRIBUTION DE LA NATIONALITE GUINEENE A TITRE DE NATIONALITE D'ORIGINE	TITLE III – ATTRIBUTION OF GUINEAN NATIONALITY AS NATIONALITY OF ORIGIN
II. – REINTEGRATION	II. – REINSTATEMENT
Article 81	Article 81
La réintégration dans la nationalité guinéenne est accordée par décret, après enquête.	Reinstatement of Guinean nationality is granted by decree, after an investigation.
Article 82	Article 82
La réintégration peut être obtenue à tout âge et sans condition de stage.	Reinstatement may be obtained at any age and without a probationary period.
Toutefois, nul ne peut être réintégré s'il n'a en Guinée sa résidence au moment de la réintégration.	However, no one may be reinstated if they are not residing in Guinea at the time of reinstatement.
Article 83	Article 83
Celui qui demande la réintégration doit apporter la preuve qu'il a eu la qualité de guinéen.	Applicants for reinstatement must demonstrate that they had Guinean status.

[24] While the RPD made the alternative finding that the Applicant "has access to" Guinean citizenship, I do not see how it reached that conclusion on the record, given the complexities and

nuances of this case, without further analysis. There are simply too many unaddressed variables giving rise to further intelligibility and transparency issues.

[25] The Respondent relied on the Federal Court of Appeal decision in *Tretsetsang v Canada (Minister of Citizenship and Immigration)*, 2016 FCA 175 [*Tretsetsang*], and in particular, its conclusion at para 72:

> [72] Therefore, a claimant, who alleges the existence of an impediment to exercising his or her rights of citizenship in a particular country, must establish, on a balance of probabilities:
>
> (a) The existence of a significant impediment that may reasonably be considered capable of preventing the claimant from exercising his or her citizenship rights of state protection in that country of nationality; and
>
> (b) That the claimant has made reasonable efforts to overcome such impediment and that such efforts were unsuccessful such that the claimant was unable to obtain the protection of that state.

[26] I am not persuaded that, consistent with *Tretsetsang,* the RPD could reasonably require the Applicant to request restoration and investigation of Guinean citizenship, which as noted above, requires her to go to Guinea, obtain residence (“résidence”) in Guinea, and also establish Guinean status (“qualité”).

[27] Stepping back, and viewing the matter as an organic whole, I have concluded that the critical threshold determination of Guinean citizenship does not meet the transparency and intelligibility criteria set out in *Dunsmuir*. In addition, I am not satisfied the Decision falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law, also as set out in *Dunsmuir*. Therefore the decision with respect to the Applicant must be set aside and redetermined.

[28] Neither party proposed a question of general importance for certification and none arises.

[29] The style of cause is amended on consent to name as the Respondent “The Minister of Citizenship and Immigration”.

JUDGMENT

THIS COURT'S JUDGMENT is that judicial review is granted, the Decision respecting the Applicant is set aside, the matter is remanded to a different member of the RPD for redetermination, no question is certified, the style of cause is amended on consent to name as the Respondent "The Minister of Citizenship and Immigration" and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2624-17
STYLE OF CAUSE:	AICHA SANDRA DIAWARA v THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP
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