Federal Court  Cour fédérale

Date: 20200117

Docket: IMM-6388-18

Citation: 2020 FC 63

Ottawa, Ontario, January 17, 2020

PRESENT: Mr. Justice James W. O'Reilly

BETWEEN:

FREDERIC HAKIZIMANA
MARIE ROSE NIYONZIMA

Applicants

and

CANADA (PUBLIC SAFETY AND EMERGENCY PREPAREDNESS)

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicants, Mr Frederic Hakizimana and Marie Rose Niyonzima, are citizens of Burundi and members of the Tutsi minority. In 2015, after participating in a protest against the President of Burundi, the applicants feared reprisals from the Burundi government and fled first to Rwanda, and then to Uganda, where they were granted asylum. They later travelled to the

United States and then to Canada, arriving on foot in 2018. They sought, and were refused, refugee status here.

[2] An immigration officer found the applicants ineligible for refugee protection in Canada because they had already been granted asylum in another country, Uganda. The officer's decision was subsequently reversed and the applicants were scheduled to appear before a panel of the Immigration and Refugee Board to prosecute their claims. However, before a hearing was held, the Board informed the applicants that on November 30, 2018, an officer with the Canada Border Services Agency (CBSA) had determined that they were, indeed, ineligible for refugee protection. The Board closed their file.

[3] The applicants argue that the CBSA officer misapplied the ineligibility rule in the *Immigration and Refugee Protection Act*, SC 2001, c 27, s 101(1)(*d*) [IRPA] (see Annex). They say that the officer should not have found them ineligible on the basis of their refugee status in Uganda given their fear of persecution there. Further, they submit that the officer treated them unfairly by failing to give them an opportunity to address the officer's concerns. They ask me to quash the officer's decision and order another officer to consider the issue of ineligibility.

[4] I disagree with the applicants that the CBSA officer misinterpreted s 101(1)(*d*). That provision does apply to persons who fear persecution in the country where they have refugee status. There are means of protecting persons in the applicants' circumstances other than granting them refugee status. Further, the applicants were not treated unfairly by the officer.

[5] There are two issues:

1. Did the officer misinterpret s 101(1)(*d*) of IRPA?
2. Did the officer treat the applicants unfairly?

II. The Legal Framework

[6] IRPA provides that claimants for refugee protection are ineligible if they have been granted refugee status in another country and "can be sent or returned to that country". Accordingly, there are two criteria for ineligibility – claimants must have refugee status in another country, and there must be an ability to send or return them there.

[7] This provision has been interpreted to mean that persons will be ineligible for refugee protection in Canada if they have refugee status in another country, they can physically be returned there, and they can legally enter that country (*Farah v Canada (Citizenship and Immigration)*, 2017 FC 292; *Jekula v Canada (Minister of Citizenship and Immigration)*, [1999] 1 FC 266 (aff'd without reasons [2000] FCJ No 1956 (Fed CA)); *Kaberuka v Canada (Minister of Employment and Immigration)*, [1995] 3 FC 252). The fact that these persons may face persecution in the place where they have refugee status does not make them eligible for refugee protection in Canada. The question of whether Canada would, in sending persons to the country where they have refugee status, be in violation of its obligations under the Refugee Convention or the Canadian Charter of Rights and Freedoms does not arise at the stage where eligibility for refugee status is considered.

[8] There is a related issue of whether persons ineligible for refugee protection are, nonetheless, entitled to a pre-removal risk assessment (PRRA) where the risk of persecution in the state where they have refugee status can be evaluated.

[9] IRPA states that persons who have been granted protection by Canada, or by another country to which they can be returned, cannot be removed from Canada to a place where they would be at risk of persecution or of torture or cruel and unusual treatment or punishment (s 115(1)). This is commonly referred to as the principle of non-refoulement. It appears to cover persons, such as the applicants, who are ineligible to claim refugee protection in Canada because they have refugee status in another country to which they can be returned.

[10] However, IRPA goes on to provide that persons who fall within s 115(1) cannot apply for a PRRA (s 112(1)). It follows that persons who are ineligible for refugee protection in Canada on the basis that they have refugee status in another country may not be eligible for a PRRA. At the same time, they cannot be returned to the country where they fear persecution.

III. Did the officer misinterpret s 101(1)(*d*)?

[11] The parties disagree on the standard of review that applies to this question. The applicants say that I can overturn the officer's decision if it was incorrect. The Minister says that I can intervene only if I find the officer's conclusion to be unreasonable.

[12] I agree with the Minister on this point. The officer was interpreting provisions of a statute within the officer's area of expertise. I would apply a standard of unreasonableness to the officer's analysis (*Canada (Canadian Human Rights Commission) v Canada (Attorney General)*,

2018 SCC 31 at paras 27-28). This conclusion is reinforced by the recent decision of the Supreme Court of Canada in which the Court held that the presumptive standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23).

[13] The applicants submit that the officer's interpretation of s 101(1)(*d*) was unreasonable because it conflicts with Canada's obligations not to send persons back to countries where they have a well-founded fear of persecution.

[14] I disagree. The officer's decision was reasonable based on the wording of s 101(1)(*d*) and the case law cited above. Further, according to internal governmental guidelines, the applicants are entitled to receive an assessment of their risk in Uganda before being removed from Canada. The fact that the applicants are ineligible for refugee status does not mean that Canada has failed to discharge its responsibilities under the Refugee Convention or the Charter. More specifically, it is premature to consider whether the principle of non-refoulement is at risk of violation in respect of the applicants.

[15] The proper interpretation of s 101(1)(*d*) was recently considered by Justice Richard Southcott in *Farah*, above. Justice Southcott carefully considered the applicable authorities and the submissions of the parties before him and concluded that the officer in that case had not erred in finding the applicant ineligible for refugee protection "notwithstanding his assertion that he fears persecution in the country which granted him refugee status" (at para 2). In other words, Justice Southcott agreed with the interpretation of s 101(1)(*d*) urged here by the Minister.

[16] The applicants suggest that Justice Southcott did not have the benefit of the arguments they are advancing here, namely, that a finding of ineligibility for persons who fear persecution in the country where they have refugee status violates Canada's obligations under the Refugee Convention and the requirements of the Charter. In fact, Justice Southcott noted that these arguments had been presented in the earlier cases dealing with the equivalent of s 101(1)(*d*) and had been rejected. In addition, he found that the applicable authorities confirm that Charter considerations arise at the stage of removal from Canada not at the point of determining eligibility or admissibility.

[17] On the question of the availability of a PRRA, Justice Southcott offered a tentative conclusion, given that the parties had not provided detailed submissions on the issue. He again observed that the issue of non-refoulement arises at the removal stage, not at the point of deciding eligibility of refugee protection. He also considered the UNHCR *Note on the Interpretation of Article 1E of the 1951 Convention relating to the Status of Refugees* (March 2009) which states that a person who has status in another country, but who fears persecution in that country, should not be excluded from refugee protection. He found that the Note was not determinative because it supported the submissions of both parties before him, but conceded that the parties had not made specific submissions on the meaning of the Note. In the end, Justice Southcott certified the following question of general importance:

> As a matter of statutory interpretation, does ineligibility under s 101(1)(d) of IRPA include those who are making a refugee claim against the country that has recognized them as refugees?

[18] No appeal was pursued in *Farah*, so the question certified by Justice Southcott has not been answered by the Federal Court of Appeal.

[19] The applicants maintain that their submissions should bring about a different interpretation of s 101(1)(*d*) from that which prevailed in *Farah* and the earlier cases. In particular, they point out that:

- IRPA should be interpreted so as to comply with Canada's international obligations, especially international human rights instruments (IRPA s 3(3)(*f*); *R v Appulonappa*, 2015 SCC 59 at para 40); and

- IRPA should also be interpreted in keeping with it fundamental purposes, including saving lives and protecting persons subject to persecution, and treating refugee claimants fairly.

[20] The applicants also point to the UNHCR's Note on Article 1E. Article 1E excludes from refugee protection persons who are recognized as having the same rights and obligations as nationals of the country in which they have taken up residence. The applicants contend that Article 1E is the equivalent of s 101(1)(*d*) of IRPA and that the UNHCR's guidance on the application of Article 1E should influence the interpretation of s 101(1)(*d*). The UNHCR says that it would undermine the object and purposes of the Refugee Convention if Article 1E were applied to persons who fear persecution in the country where they have status.

[21] As I read the UNHCR's note, it would offend the principle of non-refoulement if persons were excluded from refugee protection in Canada and returned to a country where they have a well-founded fear of persecution even if they have status in that country equivalent to nationality.

[22] However, that is not the situation the applicants face. They are ineligible for refugee status in Canada, but no steps have been taken to return them to a country where they face a well-founded fear of persecution.

[23] As mentioned above, the applicants may not be entitled under IRPA to a PRRA. However, the Minister's policy is that persons who claim a risk in the country to which they may be returned are entitled to have that risk assessed before removal. Any potential infringement of the principle of non-refoulement is, at present, speculative.

[24] The applicants argue that any risk assessment they receive will inevitably be inadequate. The Minister's policy does not provide for an oral hearing and there is no guarantee that the person conducting the assessment will be qualified to carry it out.

[25] Again, I find their concerns to be premature. If there are problems or shortcomings relating to the risk assessment the applicants receive, they will have remedies at that stage, including access to this Court for a stay of removal.

[26] Accordingly, I cannot conclude that the officer's finding of ineligibility was unreasonable.

IV. Did the officer treat the applicants unfairly?

[27] The applicants argue that the officer's reasons for finding them ineligible for refugee protection ("You have been recognized as a Convention Refugee by another country") are inadequate. The officer appears not to have considered the actual requirements of s 101(1)(*d*), described above. Specifically, the officer appears not to have determined whether the applicants could be returned to Uganda. Further, the officer failed to give the applicants a chance to respond to the officer's concerns about their eligibility.

[28] I disagree. The onus fell on the applicants to establish their eligibility for refugee protection. The officer's reasons were adequate in the circumstances as it was made clear to the applicants why they were ineligible for refugee protection. Further, their rights at the eligibility stage are circumscribed; their Charter rights are not engaged until the removal stage.

V. Conclusion and Disposition

[29] The officer's conclusion that the applicants are ineligible for refugee protection was not unreasonable. Nor did the officer treat the applicants unfairly. I must, therefore, dismiss this application for judicial review.

[30] The applicants ask me to certify the same question as was stated by Justice Southcott in *Farah*. However, that question was directed to a slightly different set of circumstances. I would restate the question as follows:

> Are persons ineligible for refugee protection under s 101(1)*(d)* of the *Immigration and Refugee Protection Act*, SC 2001, c 27 if they have obtained refugee status in another country, even if they have a well-founded fear of persecution in that country?

JUDGMENT IN IMM-6388-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. The following question of general importance is certified:

> Are persons ineligible for refugee protection under s 101(1)*(d)* of the *Immigration and Refugee Protection Act*, SC 2001, c 27 if they have obtained refugee status in another country, even if they have a well-founded fear of persecution in that country?

"James W. O'Reilly"
Judge

ANNEX

***Immigration and Refugee Protection Act*, SC 2001, c 27**	***Loi sur l'immigration et la protection des réfugiés*, LC 2001, ch 27**
Objectives and Application	Objet de la loi
Application	Interprétation et mise en oeuvre
3 (3) This Act is to be construed and applied in a manner that	**3** (3) L'interprétation et la mise en oeuvre de la présente loi doivent avoir pour effet :
…	[…]
(f) complies with international human rights instruments to which Canada is signatory.	f) de se conformer aux instruments internationaux portant sur les droits de l'homme dont le Canada est signataire.
Convention Refugees and Persons in Need of Protection	Réfugiés et personnes à protéger
Examination of Eligibility to Refer Claim	Examen de la recevabilité par l'agent
Ineligibility	Irrecevabilité
101 (1) A claim is ineligible to be referred to the Refugee Protection Division if	**101 (1)** La demande est irrecevable dans les cas suivants :
…	[…]
(d) the claimant has been recognized as a Convention refugee by a country other than Canada and can be sent or returned to that country;	d) reconnaissance de la qualité de réfugié par un pays vers lequel il peut être renvoyé;
Pre-removal Risk Assessment	Examen des risques avant renvoi
Protection	Protection
Application for protection	Demande de protection
112 (1) A person in Canada,	**112** (1) La personne se trouvant

other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).

Principle of Non-refoulement

Protection

115 (1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.

Convention Relating to the Status of Refugees

1E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

au Canada et qui n’est pas visée au paragraphe 115(1) peut, conformément aux règlements, demander la protection au ministre si elle est visée par une mesure de renvoi ayant pris effet ou nommée au certificat visé au paragraphe 77(1).

Principe du non-refoulement

Principe

115 (1) Ne peut être renvoyée dans un pays où elle risque la persécution du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques, la torture ou des traitements ou peines cruels et inusités, la personne protégée ou la personne dont il est statué que la qualité de réfugié lui a été reconnue par un autre pays vers lequel elle peut être renvoyée.

Convention Relative Au Statut des Réfugiés

1E. Cette Convention ne sera pas applicable à une personne considérée par les autorités compétentes du pays dans lequel cette personne a établi sa résidence comme ayant les droits et les obligations attachés à la possession de la nationalité de ce pays.

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Lesley E. Stalker	FOR THE APPLICANTS
Aman Sanghera	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lesley E. Stalker Barrister and Solicitor Vancouver, British Columbia	FOR THE APPLICANTS
Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT