

Federal Court



Cour fédérale

Date: 20200224

Docket: IMM-1412-19

Citation: 2020 FC 288

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, February 24, 2020

PRESENT: Madam Justice Walker

BETWEEN:

ALAIN BERNADIN BIZIMANA

Applicant

and

**MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The applicant, Alain Bernadin Bizimana, seeks judicial review of a decision (“decision”) from a migration officer from the High Commission of Canada in Dar Es Salaam, Tanzania. The officer rejected his application for permanent residence for his three adopted children, not being satisfied that the adoptions of these children were genuine and were not primarily aimed at

acquiring status or privilege under the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

I. Facts

[2] Mr. Bizimana is a citizen of Burundi. In February 2016, he fled Burundi with his wife to Canada, where he filed a refugee protection claim which was granted to him.

[3] In March 2017, after obtaining his refugee status, Mr. Bizimana submitted an application for permanent residence, including his four children.

[4] This application for judicial review relates to the adoptions of three of Mr. Bizimana's four children: a girl, CH, and two boys. The adoptions started in December 2015 and the Tribunal de grande instance of Burundi granted the adoptions to Mr. Bizimana and his wife at the end of January 2016. The application for permanent residence for the fourth child is not at stake since a DNA test confirmed a biological link between this child and Mr. Bizimana.

[5] Mr. Bizimana provided little information regarding the three children in the application for permanent residence. Consequently, by means of a procedural fairness letter dated September 10, 2018, the officer raised concerns regarding the application. According to the officer, Mr. Bizimana did not submit any evidence to confirm that CH, a 15-year-old girl, was his biological daughter. A DNA test was therefore requested.

[6] As for the two boys, the officer was not satisfied that the adoptions of these children were not entered into primarily for the purpose of acquiring any status or privilege under the IRPA (as noted in subsection 4(2) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (IRPR)). The officer explained that he had noticed that the adoption document for the boys was dated February 19, 2016, which corresponds to the date on which the applicant had filed his refugee protection claim in Canada. As a result, the officer had difficulty believing that a court would have granted an adoption to individuals who had fled the country where this adoption was to take place. In addition, the officer explained that the Burundian Tribunal documents submitted by Mr. Bizimana confirmed that the parents of the boys were still alive, without however explaining the reasons why they would have suddenly decided to grant custody of their children to Mr. Bizimana and his wife.

[7] Mr. Bizimana responded to the procedural fairness letter on November 8, 2018 (“response”). The response in the applicant’s file consists of a two-page letter from his lawyer and 17 pages of documents attached to it. However, only pages 1, 3 and 6 of the response appear in the Certified Tribunal Record dated November 13, 2019 (CTR). The response pages are identifiable, being numbered by hand in the lower right corner. The documents attached to the letter include the following: the decisions of the Burundian Tribunal granting the adoptions of CH and the two boys, which are dated January 29, 2016 (and not February 19, 2016, being the date of service of the decisions); two letters to the Tribunal written by Mr. Bizimana’s wife providing the factual background to the adoptions; the school records of the three children; and proof of payment of tuition fees made by Mr. Bizimana for the children. The letter indicates that the response was sent to the officer by email and fax.

[8] On January 16, 2020, the respondent filed a Supplementary Certified Record with the court (Supplementary CTR No. 1), consisting of six pages. Following a discussion regarding the CTR at the hearing, the respondent filed a second supplementary CTR on February 13, 2020 (Supplementary CTR No. 2). I will discuss the content of Supplementary CTR No. 1 and Supplementary CTR No. 2 as part of my analysis.

II. Impugned decision

[9] The decision is dated December 17, 2018, and consists of the following documents: (1) a letter indicating the refusal to grant permanent residence to the three children adopted as members of Mr. Bizimana's family, the officer having concluded that CH and the two boys could not be considered to be his adoptive children under subsection 4(2) of the IRPR; and (2) the notes from the officer's Global Case Management System that are part of the decision (*Pushparasa v Canada (Citizenship and Immigration)*, 2015 FC 828, at para 15).

[10] Through this decision, the officer accepted that CH was adopted by Mr. Bizimana. However, he pointed out that no evidence was provided to explain the context of this adoption, given that CH was already 15 years old at the time. The officer also referred to his procedural fairness letter in which he explained his concerns regarding the three adoptions, in particular those concerning the adoptions of the two boys which were finalized after the arrival of Mr. Bizimana and his wife in Canada. The officer concluded that the November 8, 2018, response explaining that the adoptions began in December 2015, while the adoptive parents were still in Burundi, was insufficient. Thus, the officer was of the opinion that even if Mr. Bizimana started the adoption process when he resided in Burundi, he did not demonstrate that the

adoptions truly created a parent-child relationship or that the adoptions were not entered into primarily for the purpose of acquiring any status or privilege under IRPA.

[11] The officer's findings read as follows:

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First, the parents of the children are still alive and no explanation has been offered to explain the context of the adoption. Second, the fact that adoption procedures were initiated when the adoptive parents planned to leave Burundi to go and file a refugee protection claim in Canada also suggests that the adoption was motivated by the acquisition of status or a privilege under the Immigration and Refugee Protection Act. You had 60 days to submit evidence to support your statements. No sufficient evidence or explanation has been submitted to address my concerns. According to the information available to me, I am not satisfied that the three adoptions are genuine and were not entered into primarily for the purpose of acquiring any status or privilege under the Act.

III. Issue and standard of review

[12] In the context of his written submissions, the respondent raised a preliminary objection. He submitted that some of the documents contained in the applicant's file, including the children's school records and the payment of their school fees, were not brought to the attention of the officer. Consequently, the respondent submits that the court should not take these documents into account. However, before me, Mr. Bizimana argued that there had been a violation of his right to procedural fairness, because the CTR is incomplete. The documents identified by the respondent as inadmissible are part of Mr. Bizimana's response to the procedural fairness letter. The officer referred to the response in the decision, but only three of the twenty-one pages of the response appear in the CTR. Mr. Bizimana claims that it is therefore not possible to know which documents were actually before the officer.

[13] Mr. Bizimana further submits that the officer's decision is unreasonable. In my view, the determinative issue in this application is whether the documents submitted by Mr. Bizimana in response to the procedural fairness letter were before the officer and, if not, whether the resulting omission infringes the applicant's right to procedural fairness.

[14] The breach of procedural fairness alleged by the applicant will be reviewed on the correctness standard (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Mission Establishment v Khela*, 2014 SCC 24, at para 79; *Canadian Pacific Railway Limited v Canada (Attorney General)*, 2018 FCA 69, at paras 34-56 (*Canadian Pacific*)). The recent Supreme Court of Canada decision in *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (*Vavilov*) does not change this conclusion (*Vavilov* at paras 16, 23).

[15] My review in this regard focuses on the procedure followed to arrive at the decision and not on the substance or merits of the case. I must assess whether the process followed by the officer was fair and just "with a sharp focus on the nature of the substantive rights involved and the consequences for an individual" (*Canadian Pacific* at para 54).

IV. Analysis

[16] The starting point for my analysis is the CTR. The relevant documents in the CTR are as follows:

- Service of the judgment, completed by hand, of the Tribunal de grande instance of Burundi, granting the adoption of CH to Mr. Bizimana and his wife, copy of February 19, 2016;
- The first page of the November 8, 2018, response to the procedural fairness letter, marked at the bottom with the number "1"; followed by the first page of a "Use of

a Representative” form, marked at the bottom with the number “3” and what appears to be the last page of this form, marked at the bottom with the number “6”;

- The second page of a judgment granting the adoption of CH to Mr. Bizimana and his wife, dated January 29, 2016. It seems that the page bears the seal of the Tribunal de grande instance of Burundi, but the print is very pale;
- Service of the judgment, completed by hand, of the Tribunal de grande instance of Burundi, granting the adoption of CH to Mr. Bizimana and his wife, copy of February 19, 2016;
- The second page of a judgment bearing the seal of the Tribunal de grande instance of Burundi, dated January 29, 2016. The page does not contain information regarding the merits of the judgment; and
- Family photos.

[17] Supplementary CTR No. 1 contains the following documents: two copies of the “Additional Family Information” form; a copy of the identification page of the Burundian passports of the two boys; and two copies of the first page of the decision of the Tribunal de grande instance of Burundi granting the adoptions of the two boys to Mr. Bizimana and his wife.

[18] The copies of the decisions of the Burundian Tribunal in the Supplementary CTR are not the same copies as those sent by Mr. Bizimana in the response, because the numbering of the response does not appear on those copies.

[19] At the hearing, the respondent’s attorney indicated that she would request a second additional certification of the entire CTR, that is, Supplementary CTR No. 2. In addition to the documents contained in the CTR and Supplementary CTR No. 1, Supplementary CTR No. 2 contains pages 2, 4 and 5 of the response.

[20] On the face of it, the CTR is incomplete. Three gaps clearly emerge from the pages of the response in the CTR. First, the first two pages of the response consist of a letter from Mr. Bizimana's lawyer, but only the first page of the letter is included in the CTR. The absence of a signature at the end of this page suggests that one or more additional pages should follow. Second, the lawyer's letter reads in part as follows:

[TRANSLATION]

To this end, [my clients] have submitted all the required documents including, for their three... adoptive children, the judgments of the Tribunal de grande instance ruling on the adoption of the three children. (attached copy of the two adoption judgments)

[21] This paragraph indicates that several documents are attached to the response beyond the two pages of a government form.

[22] Supplementary CTR No. 2 indicates that the officer received the second page of the letter from Mr. Bizimana's counsel. He therefore had the signed letter, but the second page raises another concern about the obvious omission of information from the CTR. Counsel noted that:

[TRANSLATION]

My clients have also provided other evidence such as the school fees for the three adopted children and their most recent school records. ...

[23] Third, and as I noted above, each page of the response is marked with a sequential number located at the bottom of the pages. However, the CTR only contains pages 1, 3 and 6. Supplementary CTR No. 2 contains pages 2, 4 and 5 of the response, but I note that these additional pages are only the missing pages of the government form. Thus, I must conclude that

the important documents attached to Mr. Bizimana's response were not in the file and therefore that the officer did not consider them when assessing the application for permanent residence.

[24] Two facts emerge from the decision. First, the response was received by the High Commission in Dar Es Salaam, in whole or in part, and Supplementary CTR No. 2 contains only six pages of the response. Second, despite having read these six pages, the officer did not notice the missing pages. The officer therefore concluded that Mr. Bizimana had not addressed his concerns regarding the genuineness of the three adoptions.

[25] The officer detailed his specific concerns regarding the adoptions in the procedural fairness letter. It follows that the response was the critical document before the officer when he assessed the three children's application for permanent residence on the merits. The question then is which party must bear the risk for an incomplete CTR. Is it Mr. Bizimana, who states that the response was sent in full by email and fax to the officer, but without having provided proof of its complete reception from the High Commission? Alternatively, should the officer be responsible for what is a deficient CTR, despite the certification?

[26] The respondent submits that a CTR is presumed to be complete (*Adewale v Canada (Citizenship and Immigration)*, 2007 FC 1190 at para 10; *El Dor v Canada (Citizenship and Immigration)*, 2015 FC 1406 at para 32 (*El Dor*)). Justice Gascon addressed the question of the evidence required from an applicant who claims that a CTR is not complete (*El Dor* at para 32):

[32] To meet the burden of proof by a balance of probabilities, Ms. El Dor had to demonstrate that she had provided all of the relevant information and documentation to convince the officer (*Singh Khatra* at para. 5), and that the officer ignored them. Where

the Certified Tribunal Record does not contain a document or make any reference to such a document, a bare assertion by the applicant that the document was sent will not suffice to meet this burden (*Singh Khatra* at para. 6; *Adewale v. Canada (Citizenship and Immigration)*, 2007 FC 1190 at para. 11). All the more so when the docket reveals evidence to the contrary and when several documents allegedly submitted are not even consistent with those the Court has in its file. The probative value of the affidavits submitted by Ms. El Dor is therefore undermined by these multiple factual contradictions.

[27] In *El Dor*, the CTR did not contain the document in question nor did it refer to it. In the present case, the evidence shows that Mr. Bizimana's response to the procedural fairness letter was received by the High Commission in Dar Es Salaam. The officer refers to the response in the decision and the Supplementary CTR No. 2 contains only six pages of the response. The response letter refers to the documents attached to it, which do not appear in the CTR. In my view, the pages of the response that are included in Supplementary CTR No. 2 are not read as they should be in the absence of the attachments. This strongly suggests that additional and important information was therefore provided with the accompanying letter. Cumulatively, the clues in Supplementary CTR No. 2 should have indicated to the officer that the CTR was not complete. Any careful examination of the file would have indicated the absence of important documents.

[28] I conclude that the officer had an obligation to seek clarification from Mr. Bizimana regarding the missing pages of his response. I recognize that the procedural fairness requirement for officers examining applications for permanent residence is at the lower end of the scale. However, in this case, the record before the officer was clearly deficient (see *Togtokh v Canada (Citizenship and Immigration)*, 2018 FC 581 at paras 16-23). In addition, the changing content of

the CTR during this case does not allow the court to determine with certainty which documents were or were not before the officer. Given the importance of the rights at stake and the minimum measures required from the officer to confirm having received a complete copy of the response to the procedural fairness letter, I further conclude that by failing to request this confirmation, the officer infringed Mr. Bizimana's right to procedural fairness.

[29] For all these reasons, the application for judicial review is allowed and the case is remitted to a different migration officer for redetermination, taking into account Mr. Bizimana's response of November 8, 2018 and all the documents that are attached thereto.

[30] The parties have not submitted any question of general importance for certification, and this matter does not raise any.

JUDGMENT in IMM-1412-19

THE COURT’S JUDGMENT is as follows:

1. This application for judicial review is allowed, and the matter is remitted to a different migration officer for redetermination in accordance with these reasons.

2. No question of general importance is certified.

“Elizabeth Walker”

Judge

Certified true translation
This 3rd day of March, 2020.

Sebastian Desbarats, Translator

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1412-19

STYLE OF CAUSE: ALAIN BERNADIN BIZIMANA v THE MINISTER
OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: OTTAWA, ONTARIO

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DATE OF REASONS: FEBRUARY 24, 2020

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