Federal Court  Cour fédérale

Date: 20210211

Docket: IMM-7048-19

Citation: 2021 FC 143

Ottawa, Ontario, February 11, 2021

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

PROJECT HABIMANA
JACQUELINE KIYANA
JESSICA UWIMBABAZI
KEVINE MUKARWEMA
LILIANE UWASE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicants seek judicial review of a decision of the Refugee Appeal Division [RAD], dated October 29, 2019, which confirmed that the Applicants were neither refugees nor persons in need of protection, as defined by sections 96 and 97 of the *Immigration and Refugee*

Protection Act, SC 2001, c 27 [*IRPA*]. The central issue in this case is whether the RAD erred in upholding the finding of the Refugee Protection Division [RPD] that the Applicants' had failed to establish their identity.

[2] For the reasons set out below, the application for judicial review is granted.

II. Background

[3] The Applicants are a married couple, Project Habimana and Jacqueline Kiyana, and their three children who claim to be citizens of Rwanda. The Principal Applicant, Mr. Project Habimana, fears persecution in Rwanda because of conflicts with the government. He was a businessman with interests in both Rwanda and the Democratic Republic of the Congo [DRC]. Because of a disability affecting his ability to communicate, his wife and their daughter Jessica testified at the RPD hearing.

[4] The issue which was controversial at the hearing was the national identity of the Applicants. The RPD concluded that the Applicants were not refugees or persons in need of protection because they failed to establish their identity and failed to establish that they face a serious risk of persecution. The Tribunal took issue with discrepancies in the birth dates, birthplaces and citizenship of the Applicants in the documentary record. The RPD concluded that on a balance of probabilities, the parents were citizens of the DRC, not Rwanda. However, the Applicants did not claim protection against the DRC. They were also found to be not credible.

[5] The Applicants appealed the RPD decision to the RAD arguing, among other things, that the RPD Member had displayed a reasonable apprehension of bias towards them. Before the RAD could deal with the matter, the Applicants' counsel was suspended from the Bar for unrelated matters. Their new counsel requested and received leave to present additional submissions on the appeal.

[6] The RAD found that the RPD member did not appear to be biased, that the Applicants failed to establish their identity, and that they were not credible.

III. Issues

[7] Two issues arise in this case:

(a) Is the RAD's decision reasonable?

(b) Did the RAD apply the appropriate test for reasonable apprehension of bias?

IV. Relevant Legislation

[8] The following legislative provisions of the *Immigration and Refugee Protection Act*, SC 2001, c 27 are relevant to this judicial review:

Convention refugee	**Définition de réfugié**
96 A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	**96** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason	**a)** soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du

of that fear, unwilling to avail themselves of the protection of each of those countries; or

fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

[…]

[…]

Person in need of protection

Personne à protéger

97 (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

97 (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to

(iv) la menace ou le risque ne résulte pas de l'incapacité du

provide adequate health or medical care.	pays de fournir des soins médicaux ou de santé adéquats.
[…]	[…]
Credibility	**Crédibilité**
106 The Refugee Protection Division must take into account, with respect to the credibility of a claimant, whether the claimant possesses acceptable documentation establishing identity, and if not, whether they have provided a reasonable explanation for the lack of documentation or have taken reasonable steps to obtain the documentation.	**106** La Section de la protection des réfugiés prend en compte, s'agissant de crédibilité, le fait que, n'étant pas muni de papiers d'identité acceptables, le demandeur ne peut raisonnablement en justifier la raison et n'a pas pris les mesures voulues pour s'en procurer.

[9] The following legislative provision of the *Refugee Protection Division Rules*, SOR/2012-256 is relevant to this judicial review:

Documents	**Documents**
11 The claimant must provide acceptable documents establishing their identity and other elements of the claim. A claimant who does not provide acceptable documents must explain why they did not provide the documents and what steps they took to obtain them.	**11** Le demandeur d'asile transmet des documents acceptables qui permettent d'établir son identité et les autres éléments de sa demande d'asile. S'il ne peut le faire, il en donne la raison et indique quelles mesures il a prises pour se procurer de tels documents.

V. Standard of Review

[10] As determined by the Supreme Court of Canada in *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 30, reasonableness is the presumptive standard for most categories of questions on judicial review, a presumption that avoids undue interference with the administrative decision maker's discharge of its functions. While there are

circumstances in which the presumption can be set aside, as discussed in *Vavilov*, none of them arise in the present case.

[11] The Supreme Court discussed the nature of reasonableness reviews at paragraphs 83-87 of *Vavilov.* The role of courts in these circumstances is to review rather than to decide the issue for themselves. The reviewing court must consider only whether the decision made by the administrative decision-maker was unreasonable. Where written reasons have been provided they are the means by which the rationale for the decision has been communicated and must be considered first:

> [86] Attention to the decision maker's reasons is part of how courts demonstrate respect for the decision-making process: see *Dunsmuir*, at paras. 47-49. In *Dunsmuir*, this Court explicitly stated that the court conducting a reasonableness review is concerned with "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes": para. 47. Reasonableness, according to *Dunsmuir*, "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process", as well as "with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *ibid*. In short, it is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies. While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis.
>
> [87] This Court's jurisprudence since *Dunsmuir* should not be understood as having shifted the focus of reasonableness review away from a concern with the reasoning process and toward a nearly exclusive focus on the *outcome* of the administrative decision under review. Indeed, that a court conducting a reasonableness review properly considers both the outcome of the decision and the reasoning process that led to that outcome was recently reaffirmed in *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 S.C.R. 6, at para. 12. In that case, although the outcome

> of the decision at issue may not have been unreasonable in the circumstances, the decision was set aside because the outcome had been arrived at on the basis of an unreasonable chain of analysis. This approach is consistent with the direction in *Dunsmuir* that judicial review is concerned with *both* outcome *and* process. To accept otherwise would undermine, rather than demonstrate respect toward, the institutional role of the administrative decision maker.

VI. Analysis

A. *Is the RAD's decision reasonable?*

[12] The issue of identity is a central element of each refugee claim, and it falls upon the claimant to establish, on a balance of probabilities, his or her identity with acceptable documentation: *Zheng v Canada (Citizenship and Immigration)*, 2008 FC 877 at para 14; *Qiu v Canada (Citizenship and Immigration)*, 2009 FC 259 at para 6. Failure to do so is fatal to the claim: *Naeem v Canada (Citizenship and Immigration)*, 2014 FC 1134 at para 5.

[13] Part of the controversy before the RPD and the RAD turned on the Applicants' efforts to correct discrepancies in the documentary record by providing a second set of birth attestations to establish the children's Rwandan nationality by correcting dates in the original documents. The Applicants argue that the RAD ignored additional submissions presented by their new counsel relating to the issue of the attestation inconsistencies.

[14] As set out in the IRB's country documentation relating to Rwanda, birth attestations are not birth certificates. Birth attestations are merely declarations and no verifications are made before they are issued. Only a birth certificate is considered a legal document. The Applicants contend that the RAD committed a reviewable error when it failed to consider the country documentation and the Applicants' submissions on this point: *Saalim v Canada (Citizenship and*

Immigration), 2015 FC 841 at para 26 [*Saalim*]; *Myle v Canada (Citizenship and Immigration)*, 2007 FC 1073 at para 20.

[15] It is not at all clear why the Applicants chose to resubmit birth attestations rather than official birth certificates to establish the children's nationality. In my view it was reasonable for the RAD to question the Applicants' argument that only the second set of attestations should have probative value. But that in itself was insufficient reason to discount their claim to Rwandan nationality.

[16] Ms. Kiyana was born in the DRC to Rwandan parents who had sought refuge there. She explained that as a child of expatriates, she was not entitled to Congolese citizenship, pursuant to article 8 of the DRC's *Loi No 04/024 du 12 Novembre 2004 relative à la nationalité Congolaise* [DRC law]. According to that article, children born in the DRC to a foreign parent will not gain Congolese nationality if they have their parent's nationality. As a child of Rwandans, Ms. Kiyana was entitled to Rwandan citizenship and had documentation to that effect.

[17] Based on articles 1 and 26 of the same DRC law, the fact that the Applicants have Rwandan passports excludes them from Congolese citizenship. This fact, brought to the RAD's attention in the additional submissions by the new counsel, does not appear to have been addressed by the RAD.

[18] Additionally, the Applicants argue, the United Nations' *Handbook on Procedures and Criteria for Determining Refugee Status (1979)*, states that nationality may be proved by the

possession of a national passport. Possession of such a passport creates a *prima facie* presumption that the holder is a national of the country of issue, unless the passport itself states otherwise. The Applicants held Rwandan passports.

[19] These significant considerations were given insufficient analysis and weight by the RAD.

[20] The Principal Applicant submitted three government-issued photo identification documents with security features, which all state his correct date of birth. However, in applying for Canadian visas for the family in 2015 to visit their adult son studying at a B.C. university, he had submitted a DRC registration document which falsely stated that he was a citizen of the DRC, a requirement apparently for holding property in that country. The document also stated that he was 14 years younger than he actually is.

[21] The inclusion of the false DRC document in the visa application was not apparently intended to prove nationality in the DRC. It seems to have been used to demonstrate that the family had a reason to return home after visiting their son and brother in B.C. That intention did not provide the RAD with justification for ignoring the obvious problems with the document and treating it as a basis for questioning the Principal Applicant's nationality. The RAD's conclusions on this point are confusing and unintelligible. In my view, it was unreasonable to accord the registration document weight to discount the passport held by the Principal Applicant.

[22] Other issues raised by the Applicants, such as the treatment of Ms. Kiyana's confusion over the date of her marriage, call into question the RPD's and RAD's credibility findings but would not justify the Court's intervention.

B. *Did the RAD apply the appropriate test for reasonable apprehension of bias?*

[23] The test for apprehension of bias is found in *Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369 [*Committee for Justice and Liberty*] where Justice de Grandpré states in his dissenting opinion:

> The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

[24] The Applicants point to a number of excerpts in the transcript of the RPD hearing where the Tribunal member had evidently lost his patience and raised his voice. They acknowledge that frustrations can emerge during a hearing when there appear to be inconsistencies in the evidence. However, they argue, in this instance a reasonable person would conclude from the Tribunal's remarks that he had decided the case prematurely.

[25] In this instance, there are repeated references in the transcript to "[l]e commissaire élève la voix". The Applicants emphasize that at one point, the Tribunal having raised his voice again, there was this exchange:

> Membre Présidant : (Le commissaire élève la voix.) Madame, qu'est-ce que vous faites là, me sortir là à mi-chemin de la deuxième session. Qu'est-ce que c'est ça? Vous trouvez ça drôle?
>
> Mme Kiyana (Interprétée) : Désolée!
>
> Membre Présidant : Bien, désolée, c'est pas suffisant, Madame. Vous prenez ça au sérieux ou non.
>
> […]
>
> Mme Kiyana (Interprétée): Je suis 100 fois sérieuse (ph).
>
> Membre Présidant : Mais, il me semble qu'une personne sérieuse aurait pensé à nous donner des documents à l'avance et non pas après qu'on a demandé si les documents existent.
>
> J'ai de la difficulté à croire qu'il y a vraiment une crainte subjective ici.
>
> […]

[26] The Tribunal member had evidently become frustrated with Ms. Kiyana's manner of presenting her testimony. But it is not clear from the record as a whole that the Tribunal member had lost his objectivity and impartiality and prejudged the outcome before hearing all of the evidence.

[27] The RAD member indicated that he had carefully listened to the recording of the RPD hearing and did not believe that it had been unfair. However, in applying the test set out in *Committee for Justice and Liberty*, which the RAD cited correctly, the member did not consider what an informed person, viewing the matter realistically and practically – and having thought

the matter through – would conclude but rather how a person in the RPD member's position would react. The RAD erred by assessing the apprehension of bias through the board member's lens, instead of through the lens of a reasonably informed observer.

VII. Conclusion

[28] The RAD's decision does not meet the standard of reasonableness set out in *Vavilov.* While there were significant inconsistencies in the Applicants evidence which required consideration, the RAD did not adequately address some of the key evidentiary points in their favour, notably their status as citizens of Rwanda.

[29] The RAD's identification of the test for determining whether there is a reasonable apprehension of bias on the part of the RPD was correct but it erred in its application of the test.

[30] For these reasons, the decision will be quashed and the matter remitted for redetermination by a differently constituted RAD panel.

[31] No serious questions of general importance were proposed and none will be certified.

JUDGMENT IN IMM-7048-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted and the matter is remitted to the Refugee Appeal Division for reconsideration by a differently constituted panel in accordance with these reasons;

2. No questions are certified for appeal.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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