Federal Court  Cour fédérale

Date: 20220419

Docket: IMM-6682-20

Citation: 2022 FC 552

Toronto, Ontario, April 19, 2022

PRESENT: Mr. Justice Diner

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

REGINA DENIS
LINCOLN AGHO
VENICE AGHO
SNOW AYEBOSA AGHO
TROY OSARUYI AGHO

Respondents

JUDGMENT AND REASONS

[1] The Applicant, the Minister of Citizenship and Immigration, seeks judicial review, pursuant to s 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] of a decision (the "Decision") of the Refugee Appeal Division [RAD] allowing the Respondents' appeal and referring the matter back to the Refugee Protection Division [RPD]. The Applicant

requests that the decision be set aside and remitted to a new panel of the RAD for redetermination on the basis of several grounds.

[2] For the reasons that follow, I agree with the Applicant: the Decision is unreasonable. The Court will grant the application for judicial review and return the matter to a new panel of the RAD for redetermination. I provided this outcome orally to the parties from the Bench on April 12, 2022, but in light of the circumstances at the hearing, I promised to provide the reasons shortly afterwards, explaining the outcome. These are the reasons promised.

I. Background

[3] There is a long procedural history to these claims, and the following is a brief summary of the relevant facts for the purposes of this judicial review.

[4] On February 7, 2017, the Respondents (Regina Denis and her four minor children) claimed refugee status in Canada, alleging that they were citizens of Nigeria and no other country, and that they feared persecution on the basis of the principal respondent's bisexuality.

[5] The Minister intervened in the initial claim before the RPD to express concerns about, *inter alia*, the claimants' identities, and led evidence suggesting that they were actually all Spanish citizens. On May 25, 2017, the RPD found that the Minister's evidence was not definitive, but nonetheless determined that the Respondents had failed to establish their identities on a balance of probabilities, and rejected their claims.

[6] The RAD dismissed the Applicant's appeal on March 6, 2018 in a decision that was ultimately set-aside on judicial review on November 26, 2018 and returned to the RAD for redetermination (see *Denis v. Canada (Citizenship and Immigration)*, 2018 FC 1182). The Court found the RAD had unreasonably: failed to assess or give proper weight to identity documents that were before the RPD; refused to admit new identity evidence; and, refused to hold a hearing. At the time, the Respondents denied having lived or had any connection to Spain, let alone being citizens, as the Minister alleged. The entire basis for the claim was a risk of persecution against Nigeria, the only country against which the claim was based.

[7] On February 13, 2019, the RAD wrote to the parties to invite them to submit any additional evidence and submissions. In the 18 months that would follow, a series of events, summarized in greater detail at paragraph 8 of the RAD Decision, took place, including:

A. Two different lawyers either withdrew or were removed as counsel to the Respondents;

B. The Minister provided notice of its intervention on Appeal and provided additional evidence of the Respondents' Spanish citizenship;

C. The RAD repeatedly requested original identity documentation from the claimants, or an explanation for why it was unavailable;

D. The principal Respondent set out a series of new allegations citing a fear her children would be harmed by her husband's family in Nigeria because they are not circumcised; and,

E. The Minister made submissions and disclosed that the Respondents had submitted an application for permanent residence in Canada on humanitarian and compassionate grounds, in which they admitted their Spanish citizenship.

[8] On November 19, 2020, the Respondents made additional submissions, admitting for the first time in the course of their refugee claim that they were actually citizens of Spain and

alleging the principal respondent was forced to make her original refugee application by her abusive husband, who lives in Spain and who she and her children fear.

II. RAD Decision Under Review and Issues Raised

[9] On December 7, 2020, the RAD found that the Respondent's identities had been established and allowed the appeal, but found their claims had not been assessed and returned the matter to the RPD. With regard to the Respondent's new evidence regarding their fear of returning to Spain, the RAD found the new evidence had been submitted in response to the Minister's submissions and in response to the RAD's invitation to provide new submissions. The RAD admitted the new evidence, citing s 110(5) of the *IRPA* as well as *Canada (Citizenship and Immigration) v. Singh*, 2016 FCA 96.

[10] The Minister raises two issues in support of its position that the Decision was unreasonable. The Minister submits the RAD acted without jurisdiction and contrary to s 111 of the *IRPA* when it referred the refugee claim back to the RPD for a new hearing without providing an opinion of how the RPD decision was wrong in law, in fact or in mixed fact and law. The Minister also submits it was unreasonable to allow new evidence regarding the Respondents' fear of returning to Spain.

III. Analysis

[11] It is now well established that the presumptive standard of review on judicial review of decisions is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019

SCC 65 [*Vavilov*]). A court conducting reasonableness review scrutinizes the decision maker's decision in search of the hallmarks of reasonableness – justification, transparency and intelligibility – to determine whether it is justified in relation to the relevant factual and legal constraints that brought the decision to bear (*Vavilov,* at para 99). Both the outcome and the reasoning process must be reasonable and the decision as a whole must be based on an internally coherent and rational chain of analysis (*Vavilov*, at paras 83-85).

[12] The RPD concluded that the Respondents had failed to demonstrate on a balance of probabilities that they were citizens of Nigeria. The RAD acknowledged this finding before noting that having now admitted their Spanish citizenship, their personal and Spanish national identities are established and there is no longer any possibility of the Respondents establishing Nigerian identities. However, the RAD found that it was unable to resolve the Respondent's claims, which are now based on allegations of her abusive husband in Spain, and opted to remit the matter to a new panel of the RPD, with instructions.

[13] I agree with the Applicant that the RAD had no jurisdiction to remit the matter. By finding that the Respondent's identities were definitively established as Spanish citizens, the RAD essentially confirmed the finding of the RPD that their Nigerian citizenship was not established.

[14] The Respondents were aware of their actual citizenship all along, and they were aware of the Minister's position on the matter since as early as May 23, 2017. It was not until November 19, 2020, after the Minister informed the RAD that the Respondents had filed an

H&C application admitting their Spanish citizenship, that the Respondents acknowledged their true identities for the first time.

[15] In other words, the RPD's conclusion that the Respondents had not established their Nigerian identities was correct. It was incumbent on the RAD to consider the appeal under s 111(1) of the *IRPA* and either (a) confirm the determination, (b) set it aside and substitute it with its own determination, or (c) under the limited circumstances set out in s 111(2), refer the matter back to the RPD (see Annex A for the text of section 111).

[16] Specifically, the circumstances under which the RAD can refer back to the RPD are limited to when the RAD finds the RPD decision to be wrong in (i) law, (ii) fact, or (iii) mixed law and fact. Those are the only situations when the matter can be remitted back for a new hearing. Certainly, the RAD, in making its own determination, has discretion to convoke an oral hearing, as set out in the *IRPA*'s s 110(6) exception to the default paper appeal before the RAD, provided for in s 110(3). Convoking an oral hearing may well be required in circumstances such as these (see, for instance, *Okechukwu v. Canada (Citizenship and Immigration)*, 2016 FC 1142 at 29-31).

[17] However, what is not permitted in the situation at hand, is the RAD referring the matter back to the RPD for a rehearing where it has not identified an error on the issue on appeal (which was identity). The Court of Appeal in *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93 at paragraph 103 – after concluding that the RAD's review of the RPD decision is

conducted on the standard of correctness – addressed this point, providing some explanation for the limitation set out in the *IRPA* s. 111(2):

> … Thus, after carefully considering the RPD decision, the RAD carries out its own analysis of the record to determine whether, as submitted by the appellant, the RPD erred. Having done this, the RAD is to provide a final determination, either by confirming the RPD decision or setting it aside and substituting its own determination of the merits of the refugee claim. It is only when the RAD is of the opinion that it cannot provide such a final determination without hearing the oral evidence presented to the RPD that the matter can be referred back to the RPD for redetermination. No other interpretation of the relevant statutory provisions is reasonable.

[18] Without articulating a clear justification for (i) why the RPD decision was incorrect in fact, law or both, and (ii) why the RAD could not make its own determination of the issue on appeal, the RAD, constrained by the applicable provisions of the *IRPA,* and the appellate jurisprudence as articulated in *Huruglica,* and then a short time afterwards in *Majebi v. Canada (Citizenship and Immigration)*, 2016 FCA 274 at paragraph 8 (see also *Deng v. Canada (Citizenship and Immigration)*, 2016 FC 887 at paras 14-18) was barred from remitting the matter to the RPD. Simply put, it exceeded its jurisdiction in remitting the matter back to the RPD.

[19] In light of the above, there is no need for me to consider the Applicant's second argument regarding the reasonableness of accepting evidence in support of a completely new refugee claim against Spain.

JUDGMENT in file IMM-6682-20

THIS COURT'S JUDGMENT is that:

1. The Application for judicial review is granted.
2. The decision of the RAD is set aside and the matter is sent to a new panel for redetermination.
3. No questions for certification were proposed and I agree that none arise.
4. No costs will issue.

"Alan S. Diner"
Judge

ANNEX A

Appeal	Appel
110 (1) Subject to subsections (1.1) and (2), a person or the Minister may appeal, in accordance with the rules of the Board, on a question of law, of fact or of mixed law and fact, to the Refugee Appeal Division against a decision of the Refugee Protection Division to allow or reject the person's claim for refugee protection.	110 (1) Sous réserve des paragraphes (1.1) et (2), la personne en cause et le ministre peuvent, conformément aux règles de la Commission, porter en appel — relativement à une question de droit, de fait ou mixte — auprès de la Section d'appel des réfugiés la décision de la Section de la protection des réfugiés accordant ou rejetant la demande d'asile.
…	…
Procedure	Fonctionnement
(3) Subject to subsections (3.1), (4) and (6), the Refugee Appeal Division must proceed without a hearing, on the basis of the record of the proceedings of the Refugee Protection Division, and may accept documentary evidence and written submissions from the Minister and the person who is the subject of the appeal and, in the case of a matter that is conducted before a panel of three members, written submissions from a representative or agent of the United Nations High Commissioner for Refugees and any other person described in the rules of the Board.	(3) Sous réserve des paragraphes (3.1), (4) et (6), la section procède sans tenir d'audience en se fondant sur le dossier de la Section de la protection des réfugiés, mais peut recevoir des éléments de preuve documentaire et des observations écrites du ministre et de la personne en cause ainsi que, s'agissant d'une affaire tenue devant un tribunal constitué de trois commissaires, des observations écrites du représentant ou mandataire du Haut-Commissariat des Nations Unies pour les réfugiés et de toute autre personne visée par les règles de la Commission.
…	…

Evidence that may be presented

(4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.

Exception

(5) Subsection (4) does not apply in respect of evidence that is presented in response to evidence presented by the Minister.

Hearing

(6) The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3)

(a) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal;

(b) that is central to the decision with respect to the refugee protection claim; and

(c) that, if accepted, would justify allowing or rejecting the refugee protection claim.

Decision

Éléments de preuve admissibles

(4) Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet.

Exception

(5) Le paragraphe (4) ne s'applique pas aux éléments de preuve présentés par la personne en cause en réponse à ceux qui ont été présentés par le ministre.

Audience

(6) La section peut tenir une audience si elle estime qu'il existe des éléments de preuve documentaire visés au paragraphe (3) qui, à la fois :

a) soulèvent une question importante en ce qui concerne la crédibilité de la personne en cause;

b) sont essentiels pour la prise de la décision relative à la demande d'asile;

c) à supposer qu'ils soient admis, justifieraient que la demande d'asile soit accordée ou refusée, selon le cas.

Décision

111 (1) After considering the appeal, the Refugee Appeal Division shall make one of the following decisions:	111 (1) La Section d'appel des réfugiés confirme la décision attaquée, casse la décision et y substitue la décision qui aurait dû être rendue ou renvoie, conformément à ses instructions, l'affaire à la Section de la protection des réfugiés.
(a) confirm the determination of the Refugee Protection Division;	
(b) set aside the determination and substitute a determination that, in its opinion, should have been made; or	
(c) refer the matter to the Refugee Protection Division for re-determination, giving the directions to the Refugee Protection Division that it considers appropriate.	
(1.1) [Repealed, 2012, c. 17, s. 37]	(1.1) [Abrogé, 2012, ch. 17, art. 37]
Referrals	Renvoi
(2) The Refugee Appeal Division may make the referral described in paragraph (1)(c) only if it is of the opinion that	(2) Elle ne peut procéder au renvoi que si elle estime, à la fois :
(a) the decision of the Refugee Protection Division is wrong in law, in fact or in mixed law and fact; and	a) que la décision attaquée de la Section de la protection des réfugiés est erronée en droit, en fait ou en droit et en fait;
(b) it cannot make a decision under paragraph 111(1)(a) or (b) without hearing evidence that was presented to the Refugee Protection Division.	b) qu'elle ne peut confirmer la décision attaquée ou casser la décision et y substituer la décision qui aurait dû être rendue sans tenir une nouvelle audience en vue du réexamen

des éléments de preuve qui
ont été présentés à la Section
de la protection des réfugiés.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6682-20
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND, IMMIGRATION v REGINA DENIS, LINCOLN AGHO, VENICE AGHO, SNOW AYEBOSA AGHO, TROY OSARUYI AGHO
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	APRIL 12, 2022
JUDGMENT AND REASONS:	DINER J.
DATED:	APRIL 19, 2022

APPEARANCES:

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Regina Denis	ON HER OWN BEHALF

SOLICITORS OF RECORD:

Attorney General of Canada Toronto, Ontario	FOR THE APPLICANT
None	FOR THE RESPONDENT