Federal Court  Cour fédérale

Date: 20221004

Docket: IMM-5240-17

Citation: 2022 FC 1374

Ottawa, Ontario, October 4, 2022

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

SIMPHIWE ZWELET SIMELANE
TAKHELE PRINCE ZULU

Applicants

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants, who are cousins and citizens of Swaziland, seek judicial review of a decision made by the Refugee Protection Division (RPD) on September 27, 2017 (the Decision).

[2] The Applicants entered Canada via the United States on June 23, 2017. They made their refugee claims at the port of entry as Safe Third Country Agreement-excepted claimants.

[3] The RPD joined the claims of Applicants Simelane (Simelane) and Zulu (Zulu) with that of their mother/aunt and her two minor children. The minor children are not part of this application. The Applicants' claims for refugee protection were denied by the RPD, which found they were not Convention Refugees nor persons in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c.27 (the *IRPA*).

[4] For the reasons that follow, I am allowing this application and sending the matter back for redetermination by a different panel of the RPD.

II. **Procedural Background**

[5] This Application for leave and judicial review was held in abeyance, together with many other applications, pending the release of a leave decision by the Supreme Court of Canada in the matter of *Kreishan v Canada* (*Citizenship and Immigration*), 2019 FCA 223. The Supreme Court denied leave on March 5, 2020, Docket No. 38864.

III. **Background Facts**

[6] The mother of Simelane is the aunt and guardian of Zulu. Her name is Phindile Constance Nxumalo (Nxumalo). She was married to Khulekani Ncube (Khulekani), who is Simelane's stepfather and Zulu's uncle.

[7] Nxumalo is a protected person in Canada.

[8] The claims of the two Applicants are based on their membership in a particular social group (PSG), their family, and their imputed political opinion for which the risk arises from the active membership of Khulekani in the People's United Democratic Movement (PUDEMO) and Nxumalo being his spouse.

[9] After a bridge was bombed in September 2008, Swaziland authorities sought to arrest Khulekani but he fled to South Africa. As a result, in the hope of finding Khulekani, Nxumalo became the target of the authorities.

[10] On several occasions, Nxumalo was detained by Swazi police for questioning concerning her husband's whereabouts. More than once Nxumalo was physically assaulted and guns were pointed at her by the police. At various times the police placed a plastic bag over her face, then pressed on it so that she had difficulty breathing. Her house was also searched in May and June of 2010 by police looking for Khulekani.

[11] At one point Nxumalo moved in with her sister in another city. The police followed her and then questioned her about Khulekani. They also detained and assaulted her, threatening that she was going to die "the same way they kill those working with PUDEMO."

[12] Khulekani died in a car accident on September 24, 2013. The Applicants allege the accident was suspicious as the car was undamaged and Khulekani had a large cut on the back of his head.

[13] After Khulekani's death, Nxumalo was pressured to marry her brother-in-law in Zimbabwe as required by custom. She refused, and fears that the family could use her children to force her to marry him.

[14] Simelane's narrative describes problems in June 2016, when police raided his mother's house, asking about her whereabouts. The police raided the house and asked where the owner of the house (his mother) was every time he had a gathering or party there.

[15] Although Simelane is a citizen of South Africa through his father, he has not spent a full day with him since birth. His father has his own family in South Africa. Simelane states he would not be safe in South Africa or Swaziland.

[16] In his narrative Zulu refers to the narratives of Nxumalo and Simelane for further details of his fear of persecution. He describes being slapped, threatened, beaten and whipped by the police between September and October 2016 when he would not tell the police where to find Nxumalo. The whipping took some skin off his hips that left permanent scars.

[17] Zulu states the police returned in December 2016 with a few officers who asked him if he had any more information. He said no but he would update them if he heard anything. The police left after verbally giving Zulu their telephone number.

IV. **The Decision**

[18] The RPD found the testimony of the Applicants' and the narrative of Nxumalo were "consistent, detailed and supported by reliable evidence." The RPD also stated it had "no good reason to doubt the allegations of fact as presented in the Basis of Claim forms and in oral testimony."

[19] The RPD had previously determined that Nxumalo was a Convention refugee by virtue of being the spouse of someone who had been targeted for reasons of political opinion. As the state authorities were the agents of persecution, the RPD found that state protection and an Internal Flight Alternative were not viable solutions to Nxumalo's risk.

[20] The RPD found the other four claimants, two of whom are minors, were neither Convention refugees nor persons in need of protection.

[21] With respect to Simelane and Zulu, the RPD accepted their statements that they disagreed with the current government but were not politically active and had not come to the attention of the authorities, as they had not publicly expressed their opinions.

[22] The RPD concluded that Simelane and Zulu were not refugees as there had been only one incident of assault against Zulu and, there was not a serious possibility of persecutory treatment by authorities interested in locating Nxumalo. Therefore, they were not Convention Refugees nor persons in need of protection.

V. **Standard of Review**

[23] The Supreme Court of Canada has established that when conducting judicial review of the merits of an administrative decision, other than a review related to a breach of natural justice and/or the duty of procedural fairness, the presumptive standard of review is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 23. While this presumption is rebuttable, none of the exceptions to the presumption are present here.

[24] The focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to review, and at least as a general rule, to refrain from deciding the issue themselves: *Vavilov* at para 83.

[25] A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard requires that a reviewing court defer to such a decision: *Vavilov* at para 85.

[26] Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention. This includes decisions with consequences that threaten an individual's life, liberty, dignity or livelihood: *Vavilov* at para 133.

VI. **Issues**

[27] The Applicants raise the following issues:

- Whether the RPD erred in finding that physical assault and whipping by state authorities did not amount to persecution or a future risk of persecution of Zulu.
- Whether the RPD ignored or overlooked evidence of risk in South Africa for Applicant Simelane and made a factual error with respect to the citizenship of the Applicants.

VII. **Analysis**

A. *Was the physical assault and whipping of Zulu persecutory or evidence of a future risk of persecution?*

[28] Zulu submits that his severe whipping, which left permanent scarring, satisfies the definition of torture as set out in Article 1 of the Convention against Torture. The Applicant relies on the U.N. Handbook on Procedures and Criteria for Determining Convention Refugee Status that provides, "from Article 33 of the 1951 Convention, it may be inferred that a threat to

life or freedom on account of [. . .] political opinion or membership in a particular social group is always persecution."

[29] The Respondent's answer to the Applicant's submission is that following the whipping incident, when the police returned, they left even though Zulu said he did not know where his aunt was. The Respondent states it was reasonable for the RPD to find that being questioned about the whereabouts of Nxumalo was not mistreatment or persecution.

[30] The reasoning provided by the RPD to support that the whipping of Zulu (Takhele) was not persecutory in nature is as follows:

> Although her children may be asked by police where Ms. Nxumalo is, the evidence does not establish that this questioning rises to the level of mistreatment sufficient to constitute persecution. Takhele was assaulted by police once during an interaction, but the next time the police came, they left after he said that he did not know where the adult female claimant was. The evidence does not establish a sustained and systematic violation of human rights that is sufficient to constitute persecution. Although there was one instance of violence, the other instances were confined to asking questions and leaving.

[31] In *Canada (Attorney General) v Ward,* [1993] 2 SCR 689, [*Ward*] the Supreme Court affirmed James Hathaway's meaning of persecution as "sustained or systemic violation of basic human rights demonstrative of a failure of state protection".

[32] The line of reasoning that only one incident of "mistreatment" does not constitute persecution is fundamentally at odds with the principle that claimants do not have to establish

that they have been persecuted in the past: *Salibian v Canada (Minister of Employment and Immigration)*, [1990] 3 FC 250 at 258 [*Salibian*].

[33] The reasoning in the Decision is simply that Zulu was assaulted in one interaction and not assaulted in another. This led to the conclusion that "the evidence does not establish a sustained and systematic violation of human rights that is sufficient to constitute persecution."

[34] The Applicants argue that this is precisely the error that was found to be unreasonable by Mr. Justice Lemieux in *Ranjha v Canada* (*Minister of Citizenship and Immigration*), 2003 FCT 637 at para 42:

> [42] In my view, the error the tribunal made in its analysis of persecution is not to have determined the quality of incidents in terms of whether they constituted a fundamental violation of human dignity, *e.g.* body mutilation as expressed in *Chan*, *supra*, *viz* torture, beatings, violent physical mistreatment or the breaking up of peaceful rallies. It seems to me that what led the tribunal to this error was an exaggerated emphasis on the need for repetition and persistence.

[35] Zulu submits that the RPD, having accepted that Nxumalo was repeatedly persecuted through assaults and harassment, provided no factual basis or analysis as to why it concluded that the police would only question, rather than abuse and torture him in the future.

[36] I agree. The RPD failed to support their conclusion with any reasoning or analysis based on the facts it found.

[37] The second position of Zulu is that the RPD erred in finding that persecution did not arise because a single incident was not part of a "sustained and systematic violation of human rights that is sufficient to constitute persecution".

[38] In determining that there was no persecution of Zulu, the RPD referred to the whipping it had previously identified and discussed, as Zulu having been "assaulted by police once during an interaction".

[39] In concluding that Nxumalo's children were not at future risk of persecution, the RPD said "[t]he panel is not satisfied that Ms. Nxumalo's children have a well-founded fear of persecution because they may be questioned about the whereabouts of the adult female claimant."

[40] Zulu's narrative however contains the following allegations:

- Around February-March of 2016, Zulu was residing at his aunt's home and the police came multiple times looking for her with the accusation that they were hiding her. When Zulu told the police that his aunt had left while he was in boarding school in South Africa, they asked when and why she left to which he answered that he did not know. They told him they would return and that they wanted more information next time they came back.
- Around September-October 2016, 7 or 8 police officers returned and questioned Zulu further about his aunt's whereabouts. They beat, whipped, slapped and

threatened him with arrest for withholding information. He has scars to this day from this incident.

- Around December 2016, a few officers returned and again asked for more information. When Zulu reassured the officers that he would update them as soon as he heard anything, they gave him their phone number and left.

[41] These details are essential to establishing the quality of the incidents suffered by Zulu but they are absent from the Decision. There is only the reference to "one instance of violence" and "other instances" which were "confined to asking questions and leaving". There is no assessment of the evidence of the allegations that Zulu's human rights were violated.

[42] In the absence of an assessment of these allegations, it is difficult to see how the Board was able to conclude that it was "not satisfied that Ms. Nxumalo's children have a well-founded fear of persecution because they may be questioned about the whereabouts of the adult female claimant."

[43] Another indication that the RPD failed to assess the quality of incidents is the repeated mention of the Applicants' lack of political activity. This is an unnecessary comment that appears at paragraphs 6, 19 and 26 of the Decision. While it is an undisputed fact, the Board relies on it to conclude:

> [26] Both Simphiwe Simelane and Takhele Zulu state that they disagree with the current government even if they are not politically active. Given that they have not given public expression to their personal political views, they have not come to the attention of authorities for mistreatment. Although the panel cannot ask people to cease political activities in order to be safe,

> this is not the case with these claimants. Their life in the community as established by their past actions does not create a serious possibility that authorities would persecute or seriously mistreat them on the grounds of imputed political opinion. In addition, there is not a serious possibility that the interest on the part of authorities in locating Ms. Mxumalo (*sic*) would involve treatment that is persecutory in nature or that would likely involve treatment described in section 97 of the Act. They are neither Convention refugee nor persons in need of protection on this (*sic*) grounds.

[44] The RPD seems to understand that political opinion includes imputed political opinions. Despite this acknowledgement, it then stresses the Applicants' lack of political involvement in reaching the conclusion that they will not face persecution on the grounds of imputed political opinion.

[45] It is worth noting that, even in the absence of such evidence, the RPD simply concludes there is no imputed political opinion because the Applicants were not previously politically active.

[46] Those findings run contrary to the information in the IRB: Interpretation of the Convention Refugee Definition in the Case Law – December 2010 – chapter 4, section 4.6 which sets out refinements made in *Ward* to political opinion in the context of the definition of Convention refugees.

[47] It states first "the political opinion at issue need not have been expressed outright" and, second that the "political opinion ascribed to the claimant" by the persecutor "need not

necessarily conform to the claimant's true beliefs." The relevant consideration for all refugee claims is the perception of the persecutor.

[48] By noting that the Applicants had not given public expression of their personal political views the RPD has not taken into consideration that their political opinions were not required to have been expressed. It is not clear from the reasons that the outcome would be the same if the RPD had taken into account the refinements made in *Ward*.

[49] The second error made by the RPD is that the assessment of the Applicants' persecution is limited to only imputed political opinion with no necessary link to the persecution of the family unit under PSG. The facts are not in dispute: the Applicants faced multiple threats, interrogations, and in Zulu's case, whipping to the point of permanent scarring, concerning Nxumalo's whereabouts. The persecution they faced stems from Nxumalo, whose persecution in turn stems from her late husband's persecution as a member of PUDEMO.

[50] While the assessment of risk pertaining to Nxumalo is not before this Court, the precise nature of her claim is crucial to establishing the Applicants' nexus to Convention grounds as family members of a persecuted person with both real (Nxumalo's husband) and imputed (Nxumalo's) political opinions.

[51] With respect to Nxumalo, the Board found "[t]here is a nexus to the Refugee Convention by means of membership in a particular social group as the spouse of a person who has been targeted for reasons of political opinion".

[52] A review of Nxumalo's extensive BOC narrative demonstrates that she was not just targeted as the spouse of a PUDEMO member. Her narrative documents a lengthy history of surveillance, arrests, detention, interrogation, harassment and threats in direct connection to her husband's activities and whereabouts, and in addition, at least two incidents where she was accused of being involved with PUDEMO herself.

[53] The RPD's lack of consideration of Nxumalo's imputed political opinion led to the failure to assess the Applicants' nexus to the Convention ground of her imputed political opinion. The RPD separated the two grounds. Nxumalo's nexus to the Convention grounds was restricted to only PSG as the spouse of a person who has been targeted for reasons of political opinion and the Applicants' nexus to the Convention grounds was only considered on the ground of imputed political opinion. The Applicants' experience of harassment, assault and interrogations concerning Nxumalo's whereabouts cannot amount to persecution when Nxumalo was never assessed by the RPD as a person targeted for reasons of political opinion.

[54] Recently, Madame Justice Roussel, while a member of this Court, summarized the jurisprudence pertaining to family refugee claims in *Theodore v Canada* (*Minister of Citizenship and Immigration*), 2021 FC 651, at para 8:

> [8] It is recognized that the fact that one family member has been persecuted does not confer refugee status on all of the other members of that family. Those claiming refugee protection who base their claim on membership in a family group must demonstrate a personal connection between themselves and the persecution alleged to have occurred on a Convention ground. The family, as a social group, must be subjected to retaliation and revenge to hope to be granted the protection of Canada. Claimants must show that they have been or will be targeted by the persecutors because they are members of that family (*Ramirez*

> *Estrada v. Canada (Citizenship and Immigration)*, 2015 FC 1019 at paras 8–10; *El Achkar v Canada (Citizenship and Immigration)*, 2013 FC 472 at paras 40–41; *Ndegwa v Canada (Minister of Citizenship and Immigration)*, 2006 FC 847 at para 9; *Granada v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1766 at paras 15–16).

[55] The Applicants submitted evidence demonstrating a personal connection between themselves and the persecution alleged to have occurred on a Convention ground. They provided evidence of being targeted as members of the family. The RPD however erred in not assessing their claims in relation to PSG as well as imputed political opinion.

B. *Did the RPD ignore or overlook evidence of risk in South Africa for Simelane and make a factual error with respect to the citizenship of the Applicants?*

[56] This issue arises from paragraph 27 of the Decision:

> Takhele Zulu is also a citizen of South Africa. The facts as previously-determined (*sic*) do not establish that there is a serious possibility that this claimant would experience persecution or would likely be subject to treatment described in section 97 of the Act because of the work of Khulenkani Ncube in Swaziland before his death in 2013. In addition, for previously-stated (*sic*) reasons, there is not a serious possibility that he would be subject to persecution or serious mistreatment at the hand of the Ncube family.

[57] The Applicant notes that the RPD made a factual error by stating that Zulu was a citizen of South Africa when it was only Simelane who had such citizenship, through his father. Zulu does not have citizenship or any status equivalent to a national of South Africa requiring the RPD to conduct a risk analysis for him there.

[58] The Respondent acknowledges the factual error but submits that the Applicants have not shown the error was determinative of their claim or that the RPD erred in assessing the risk in South Africa to either Applicant. Each of them had studied in South Africa for extended periods of time, including after their mother/aunt had left for Canada and they did not face questioning from authorities in South Africa.

[59] The RPD clearly made a factual error with respect to who has South African citizenship at paragraphs 1 and 27 in the Decision. However, at paragraph 6 of the Decision, the RPD correctly detailed that Simelane "is a citizen of Swaziland through birth in that country and is also a citizen of South Africa through his father." Although this factual error is concerning, and the Applicant is correct in stating that the Board failed to mention documentary evidence pertaining to South Africa, I am mindful of the Supreme Court's cautionary remark that a reasonableness review is not a "line-by-line treasure hunt for error": *Vavilov* at para 102.

[60] Accordingly, I find the Applicants have not shown that the error made by the RPD was critical to or determinative of their claim of risk in South Africa.

VIII. **Conclusion**

[61] The facts of this case are complex. The RPD was tasked to assess the allegations of five family members who faced their own unique set of struggles with the Swazi police. While I can empathize that this was an onerous task, the Decision cannot stand.

[62] The assessment of the Applicants' allegations of fear in Swaziland on the basis of PSG with a nexus to the Convention ground of imputed political opinion were dismissed on the basis that apart from one incident of assault, the Applicants were only "questioned" about Nxumalo's whereabouts. Although past persecution is the best indicia of forward-looking risk, the overemphasis on the frequency of attacks and the absence of analysis regarding the quality of human rights violations, namely interrogation, threats and whipping, on one occasion, is a reviewable error.

[63] Notwithstanding the amount of evidence before the RPD, the reasons that pertain specifically to the Applicants are scant. They are based on an unfounded generalization that the infrequency of past persecution is sufficient to dismiss the forward-looking risk and well-founded fear of persecution.

[64] As stated in *Vavilov* at paragraph 133, the reasons provided to an individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention. The RPD failed to meet this standard.

[65] For the reasons set out above, this application for judicial review is granted. This matter shall be returned for redetermination by a different panel of the RPD.

[66] There is no serious question of general importance arising on these facts.

JUDGMENT in IMM-5240-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.
2. The matter shall be returned for redetermination by a different panel of the RPD.
3. There is no serious question of general importance for certification arising on these facts.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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