Federal Court  Cour fédérale

Date: 20230524

Docket: IMM-1929-22

Citation: 2023 FC 725

Ottawa, Ontario, May 24, 2023

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

P. N.
E. N.
A. O.

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants seek judicial review of a decision of the Refugee Appeal Division ("RAD") dated February 9, 2022, upholding the finding of the Refugee Protection Division ("RPD") that the Applicants are neither Convention refugees nor persons in need of protection

under sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*").

[2] The RAD found the determinative issue on appeal to be the insufficient evidence of a prospective risk of harm facing the Applicants in Kenya. The RAD also found that the Applicants' right to procedural fairness was not materially breached by the actions of their former counsel.

[3] The Applicants submit that the RAD erroneously failed to order a new RPD hearing; found that the former counsel did not breach natural justice without due regard to the evidence; rendered a finding on the prospective risk facing the Applicants in Kenya without regard to the evidence, and; unreasonably found that the Applicants could be granted Rwandan citizenship.

[4] For the reasons that follow, I find that the RAD's decision is unreasonable. This application for judicial review is allowed.

II. Facts

A. *The Applicants*

[5] P.N. (the "Principal Applicant"), her mother E.N. (the "Associate Applicant") and her daughter A.O. (the "Minor Applicant") are citizens of Kenya (collectively the "Applicants").

[6] The RAD held that the Applicants also have a right to citizenship in Rwanda, which the Applicants contest. The Associate Applicant claims that although she was born a citizen of Rwanda, she formally renounced her Rwandan citizenship in 1982 in order to obtain Kenyan citizenship through her marriage to a Kenyan citizen, since neither country allowed dual citizenship at the time. The Associate Applicant claims the Principal Applicant and the Minor Applicant were both born as citizens of Kenya, as children of parents who were Kenyan citizens at the time of their birth, and neither have held Rwandan citizenship.

[7] The Principal Applicant was raised in Mumias Sugar Zone in Kenya. According to her Basis of Claim ("BOC") form, the Principal Applicant volunteered as a communications manager for a local political candidate's campaign during the 2017 general election in Kenya. The candidate was Kennedy Lubanga (Mr. "Lubanga").

[8] The Principal Applicant claims that during the campaign, Mr. Lubanga faced violence and assaults from the political opposition. During the general election on August 28, 2017, Mr. Lubanga lost to an opposing candidate. When the results of this election were found invalid, the Supreme Court of Kenya ruled that a second election be held on October 26, 2017, further intensifying the political climate. On October 26, 2017, the Principal Applicant attended a meeting with Mr. Lubanga and other campaign volunteers, to celebrate the end of Mr. Lubanga's political campaign.

[9] The Principal Applicant claims that later that day, she was traveling in Mr. Lubanga's car with Mr. Lubanga and two other campaign volunteers when they arrived at a barricade. Mr.

Lubanga got out of the car to dismantle the barricade. The Principal Applicant alleges that a group of attackers emerged from a nearby bush, attacked Mr. Lubanga, and began to attack her and the other volunteers soon thereafter. The Principal Applicant claims that the attack ended when passersby intervened and the attackers left the scene.

[10] One of the passersby allegedly drove the Principal Applicant, Mr. Lubanga and the other volunteers to a police station, where a police officer informed them that they could not make a report until they sought medical attention. The Principal Applicant and the others went to a medical clinic to treat their injuries. They returned to the police station the next day, on October 27, 2017, where the police officer informed them that the incident would be investigated and instructed them to obtain another medical report from a government hospital, to ensure the police report's credibility. On November 28, 2017, the Principal Applicant saw a government doctor to complete the police report. She claims that the police promised to continue their investigation.

[11] The Principal Applicant claims that on November 29, 2017, she was approached by an unknown man who held her at gunpoint and instructed her to assassinate Mr. Lubanga in exchange for a monetary reward, or she and her family would be killed. The Principal Applicant claims that the man's car, which had government license plates, identified him as a member of government or a police officer. Therefore, the Principal Applicant claims that she was afraid of reporting this incident to the police. She advised Mr. Lubanga of the attack and travelled to Nairobi for her safety.

[12] The Principal Applicant claims that on December 14, 2017, four men arrived at the Associate Applicant's home in Bungoma, Kenya and kidnapped the Associate Applicant, demanding information about the Principal Applicant's location. On December 15, 2017, the attackers, who the Principal Applicant claims were police officers, came to the Principal Applicant's home in Nairobi. They allegedly brought the Associate Applicant with them and physically attacked both the Principal and Associate Applicants. The Minor Applicant witnessed this attack. The Principal Applicant claims that she reported the attack to the police later that night, after which she travelled to the Riruta area of Nairobi to stay with her father.

[13] The Principal Applicant claims that after travelling to the United States ("US") on January 9, 2018, the Applicants feared the Donald Trump administration and potential deportation. The Applicants therefore travelled to Canada on January 23, 2018 and sought asylum.

B. *RPD Decision*

[14] In a decision dated June 25, 2021, the RPD found that the Applicants are neither Convention refugees nor persons in need of protection pursuant to sections 96 and 97 of *IRPA*. The RPD found that they do not face a serious possibility of persecution nor a danger of torture, a risk to life, or a risk of cruel and unusual treatment or punishment in either Kenya or Rwanda.

[15] The RPD drew a negative credibility finding from the inconsistencies in the Associate Applicant's evidence regarding the status of her Kenyan citizenship. While she indicated in her BOC form that she is a citizen of Rwanda by birth and that her parents and siblings are Rwandan

citizens, she denied being a citizen of Rwanda in her testimony before the RPD. The RPD noted that both Rwandan and Kenyan law allow for dual nationality and given that the Associate Applicant proffered no evidence of ever having renounced her Rwandan citizenship, found that she is a citizen of Rwanda.

[16] The RPD further found that Rwandan nationality law stipulates that a child with at least one parent who is a Rwandan national is automatically considered a Rwandan national. Citing the Federal Court of Appeal ("FCA") in *Williams v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 126 and *Tretsetsang v Canada (Citizenship and Immigration)*, 2016 FCA 175 ("*Tretsetsang*"), the RPD found that persons with a right to citizenship are considered nationals of the country if acquiring citizenship is within their control. The RPD therefore concluded that the Principal Applicant is a citizen of Rwanda, meaning that the Minor Applicant is a Rwandan citizen by descent.

[17] The RPD found that the Applicants failed to establish a prospective risk of harm such that the agents of harm in Kenya would be motivated or able to pursue them in Rwanda. While the RPD acknowledged the Associate Applicant's testimony that she is traumatized by her experiences in the 1994 Rwandan genocide, the Applicants failed to provide any evidence demonstrating that the current circumstances in Rwanda would pose any risk to their lives. The RPD noted that the Associate Applicant has travelled to Rwanda as recently as 2016 and found this to be incompatible with a subjective fear of Rwanda. The RPD concluded that the Applicants did not establish that they face a serious possibility of persecution or harm in Rwanda.

[18] The RPD also found that the Applicants failed to establish that they face such a risk in Kenya. Considering the Principal Applicant's allegation that she remains at risk by the attackers who instructed her to assassinate Mr. Lubanga and that those targeting Mr. Lubanga are government actors, the RPD noted that Kenya is a democratic country with ten main political parties and that Mr. Lubanga has since been granted refugee protection in Canada, meaning he can no longer contest in Kenyan elections and limiting his political clout. The RPD further noted that the Principal Applicant still has family residing in Kenya and none of these family members have been threatened or harmed. The RPD found that the lack of action from the alleged agents of harm demonstrated their lack of interest in pursuing the Applicants.

[19] For these reasons, the RPD refused the Applicants' claim and found that they are neither Convention refugees nor persons in need of protection as per sections 96 and 97 of *IRPA*.

C. *Decision Under Review*

[20] In a decision dated February 9, 2022, the RAD dismissed the Applicants' appeal and confirmed the RPD's decision. The RAD found the determinative issue to be the lack of prospective risk of harm facing the Applicants in Kenya.

[21] On appeal, the Applicants submitted that they were denied their rights to procedural fairness because they were not granted a meaningful opportunity to respond to allegations regarding their Rwandan nationality and because of the incompetence of their former counsel, who represented them before the RPD.

(1) New Evidence

[22] The Applicants proffered new evidence on appeal, both to substantiate their claims that their procedural fairness rights had been breached and to provide further support to merits of their refugee claims. The RAD found that only the new evidence intended to establish the procedural fairness infringement was admissible, which included portions of the affidavit of the Principal Applicant dated September 9, 2021, portions of the affidavit of the Associate Applicant dated September 9, 2021, the affidavit of the Principal Applicant dated October 7, 2021, and the letter to the Applicants' former counsel. The RAD found that the Applicants could not reasonably have raised this new evidence prior to the RPD's decision and that it is credible as to the source and circumstances, thereby meeting the requirements for admissibility of new evidence as laid out in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385, and *Singh v Canada (Citizenship and Immigration)*, 2016 FCA 96. However, the RAD found that this new evidence did not raise a serious issue regarding the Applicants' credibility and therefore did not warrant holding an oral hearing pursuant to subsection 110(6) of *IRPA*.

(2) Procedural Fairness

[23] The RAD noted that an allegation of incompetent representation first requires establishing that the actions or omissions of the representative rise to the level of incompetence, and then requires establishing that the outcome of the RPD hearing would have been different had it not been for the actions of the counsel, such that there was a breach of natural justice (*Isugi v Canada (Citizenship and Immigration)*, 2019 FC 1421 at paras 26-27). The RAD

ultimately found that in the Applicants' case, there had not been a breach of natural justice. The RAD noted the following key facts:

A. The BOC forms clearly indicate that the claimants are responsible for providing supporting documents;

B. The Principal and Associate Applicants' BOC forms included fulsome narratives of the three alleged attacks by the agents of harm;

C. The Applicants' explanation for the inconsistent testimony regarding the status of their Rwandan citizenship is unreasonable because they were reasonably aware that their Rwandan citizenship would be an issue before the RPD, they affirmed that their BOC forms were complete, true and correct before the RPD, and the adult Applicants speak fluent English;

D. The former counsel stated that the decision to not disclose all the Applicants' documents to the Immigration and Refugee Board ("IRB") was strategic and borne from suspicion that some of these documents were fraudulent, which the RAD found to be reasonable and not constituting incompetence;

E. At the end of the RPD hearing, the former counsel requested to submit post-hearing disclosure relating to Mr. Lubanga's political activities, which the RPD panel granted, and these documents were submitted on May 21, 2021.

[24] The RAD found that while the former counsel's representation focused primarily on the Applicants' risk of harm in Kenya as it related to the alleged political violence, the issue of the Applicants' status in Rwanda was a peripheral consideration and the former counsel did not attempt to elicit testimony from the adult Applicants about their legal status in Rwanda. The RAD ultimately concluded that while the former counsel was negligent as it relates to representing the Applicants on the issue of their status in Rwanda, the outcome of the RPD hearing would not have been different but for this negligence and therefore, the negligence did not amount to a breach of natural justice. The RAD found that even if the Applicants were not found to be Rwandan nationals, the fact of their failure to provide sufficient evidence of a risk of persecution in Kenya still remained, and the Applicants were provided opportunities at the RPD hearing to elaborate on their fear of returning to Rwanda and did not do so. The RAD concluded that the Applicants had a fulsome opportunity to present their case and that the former counsel's conduct did not meet the threshold of incompetence.

[25] The RAD also found that the manner in which the RPD hearing was conducted did not breach the Applicants' rights to procedural fairness. Specifically, the RAD found insufficient evidence to demonstrate that the Applicants were interrupted during their testimony or prevented from testifying completely and truthfully, given that they provided extensive responses to questions about their fear of returning to Rwanda and Kenya.

(3) Merits of the Claim

[26] The RAD noted that a claimant must show that they have a well-founded fear of persecution in every country where it is within their control to acquire citizenship, otherwise

referred to as “countries of reference”, and found that Rwanda is a valid country of reference for all the Applicants.

[27] The RAD found that although the Rwandan nationality law has changed since the country’s independence, dual nationality is permitted and regardless of whether the Associate Applicant renounced her Rwandan citizenship after becoming a Kenyan national, it is within her control to re-acquire her Rwandan status “through mere formalities.” Taking a different approach than the RPD on this issue, the RAD found that neither the Applicants’ testimony nor their BOC forms credibly establish their status in Rwanda, and that the RPD erred in finding that the Associate Applicant is a Rwandan citizen, for which there is insufficient evidence. That being said, the RAD concluded that on the basis of the facts and objective evidence, Rwanda is a country of reference for the Applicants.

[28] With respect to the alleged fear of persecution in Kenya, the RAD agreed with the RPD’s finding that the Applicants failed to establish a well-founded fear of persecution in Kenya. While the RAD did not doubt the credibility of the Applicants’ account of the three attacks outlined in their narratives, the RAD noted that the Principal Applicant is no longer politically active in Kenya and has not expressed a desire to be politically active if returned to Kenya. The RAD ultimately found that the Applicants did not establish a forward-facing risk of harm or persecution. For these reasons, the RAD dismissed the appeals and found that the Applicants are neither Convention refugees nor persons in need of protection as per sections 96 and 97 of the *IRPA*.

III. Issue and Standard of Review

[29] While the Applicants raise numerous issues with the RAD's decision, I find that they can all be framed as the sole issue of whether the RAD's decision is reasonable.

[30] The standard of review is not disputed. The parties agree that the applicable standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25) ("*Vavilov*"). I agree.

[31] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). 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 (*Vavilov* at para 85). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

IV. Analysis

[32] The Applicants submit that the RAD's decision is unreasonable on the following grounds: 1) the RAD erred in failing to order a new RPD hearing despite its recognition of the former counsel's negligence; 2) the RAD's finding that natural justice was not breached was made without regard to the Applicants' evidence and testimony; 3) the RAD's conclusion regarding the prospective risk facing the Applicants in Kenya is unreasonable on the basis of the

evidence, and; 4) the RAD's finding that the Applicants would be granted Rwandan citizenship through "mere formalities" was made without regard to the evidence.

[33] I find that the latter ground is determinative of this reasonableness review and I therefore do not assess the remaining errors raised by the Applicants.

[34] The Applicants submit that the RAD unreasonably found that they would be granted Rwandan citizenship as of right through "mere formalities" and that this finding was made without due regard to the Applicants' evidence. The Applicants submit that while the RAD bases this conclusion on its interpretation of two documents in the National Documentation Package ("NDP") for Rwanda, a report about Rwandan citizenship by the European Union Democracy Observatory of Citizenship and the *Organic Law Relating to Rwandan Nationality*, the RAD failed to consider the 2009 Presidential Order *Establishing the Procedure for the Application and Acquisition of Rwandan Nationality* (the "Presidential Order"). The Applicants submit that the Presidential Order sets out the procedures by which Rwandan citizenship can be obtained and therefore contains much more than "mere formalities" referenced by the RAD.

[35] The Applicants submit that the RAD's proper consideration of this Presidential Order and its affect on the Rwandan nationality law is particularly significant given that Rwanda is not a functioning democracy with an independent judiciary and the procedures outlined in the Presidential Order must be given due consideration before the RAD may assume that people have unfettered rights to citizenship that they may exercise at their will. The Applicants assert that the Presidential Order outlines that granting Rwandan citizenship is discretionary, invites

public comment, involves an interview with the Director General of Immigration and Emigration, and must be approved by the Rwandan cabinet. The Applicants submit that when applied to the Associate Applicant's case, this does not meet the requirements for presuming that the Applicants should have to apply for Rwandan citizenship, as per the FCA in *Tretsetsang* at paragraph 39.

[36] The Applicants further submit that the RAD erred by failing to accept as evidence or consider the Rwandan lawyer's opinion on the question of the Applicants' entitlement to Rwandan citizenship. The Applicants submit that the RAD mischaracterized the substance of this letter as arising prior to the RPD hearing, despite the letter being prepared after the RPD decision, specifically to be presented on appeal.

[37] The Respondent submits that the Applicants' submissions with respect to the status of their Rwandan citizenship fail to raise a reviewable error in the RAD's decision because the RAD explicitly stated that the determinative issue was the Applicants' failure to demonstrate a forward-facing risk in Kenya.

[38] I agree with the Applicants that the RAD's finding on the issue of their Rwandan citizenship status is unreasonable and sufficient to warrant this Court's intervention. Firstly, I find that the RAD's assessment of the issue of the Applicants' Rwandan citizenship is material to their case and therefore sufficient to set the decision aside, regardless of whether the RAD itself found that this issue is not determinative of the case on its merits. The issue of a claimant's citizenship is central to their claim for refugee protection and this Court cannot speculate as to

how the outcome of the RAD's decision would have shifted had it meaningfully assessed the issue with regard to the totality of the evidence. I therefore do not find that it is possible to extricate the issue of the Applicants' Rwandan citizenship from the remainder of their case and the RAD's unreasonable finding on a matter as central to a refugee case as the Applicants' citizenship is sufficient to set aside the whole decision (*Peng v Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 119 (FCA)).

[39] Secondly, I find that the RAD committed a reviewable error in basing its finding that the Applicants can obtain Rwandan citizenship through "mere formalities" on a selective review of the evidence. While it is not incumbent on the RAD to explicitly address all the evidence in arriving at its conclusion, the applicability of the Presidential Order, which lays out the procedures by which individuals can obtain Rwandan citizenship, is directly and inextricably connected to the RAD's analysis of whether obtaining Rwandan citizenship is within the Applicants' control. An assessment of the Presidential Order, which qualifies the information relating to Rwandan nationality law that is cited by the RAD, clearly demonstrates that obtaining Rwandan citizenship is not a process of "mere formalities" and, rather, the Rwandan government has discretion to deny citizenship and there are mechanisms by which access to citizenship can be thwarted. As outlined by the FCA in *Tretsetsang* at paragraph 39:

> [39] By way of summary, I arrived at the following general conclusions:
>
> (a) If there is entitlement to citizenship on the face of the law (i.e. <u>there is no legal discretion to deny citizenship</u>) then citizenship is within the claimant's control.
>
> (b) <u>If discretion to deny the claimant citizenship exists as a matter of law then access to citizenship is not within the claimant's control</u>.

> (c) If there is entitlement to citizenship on the face of the law, but there is evidence which establishes on a balance of probabilities that the state or its officials are—notwithstanding the law—exercising an administrative discretion to thwart recognition of that legal entitlement to citizenship (Dolma, Tashi, Sangmo), then citizenship is outside of the claimant's control. This includes scenarios where the claimant may need to litigate in order to bring the executive's conduct in line with the law. The burden will be on the claimant to establish that a presumptive legal right to citizenship is being denied through administrative practices. […]
>
> [Emphasis added]

[40] The Presidential Order in the NDP for Rwanda, which was before the RAD alongside the two documents that it referenced in its reasons, demonstrates that pursuing and obtaining Rwandan citizenship is not within the Applicants' control, as per the considerations outlined by the FCA in *Tretsetsang*. The evidence shows that the Rwandan government has significant deference to deny an application for citizenship at several stages of the process. This represents the RAD's failure to meaningfully grapple with central evidence on the issue of the Applicants' citizenship and undermines the rationality of the line of reasoning between the evidentiary record and the RAD's conclusion and exhibits a failure to account for evidence before it (*Vavilov* at paras 102, 126). Given that the issue of the Applicants' citizenship is material to their claims, I find that this is sufficient to render the decision unreasonable and warrant this Court's intervention.

[41] While I find this issue to be determinative of this review, the Applicants have also raised a reviewable error in the RAD's treatment of the Applicants' former counsel's negligence. Despite finding that the Applicants' former counsel was negligent in failing to make meaningful

submissions on the Applicants' Rwandan citizenship, the RAD did not hold an oral hearing or order a new RPD hearing. I agree with the Applicants that the RAD segmented its negligence finding from the remainder of its analysis and failed to properly assess the former counsel's failure to provide all of the Applicants' additional documentation on the basis that they raised suspicions of fraud. If the documents raised issues of fraud, a negative inference can be drawn from the alleged four months it took the former counsel to investigate them and, alternatively, a negative inference should also be drawn if this alleged period is untrue. The Applicants contend that if the former counsel truly believed that the documents were fraudulent, he had an ethical obligation to present this suspicion to the Applicants. I agree and find that this also raises a reviewable error in the RAD's decision.

V. Conclusion

[42] This application for judicial review is granted. In my view, the RAD's finding regarding the status of the Applicants' citizenship in Rwanda is material to their refugee claims and was made without due regard to the totality of the evidence. No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-1929-22

THIS COURT'S JUDGMENT is that:

1. The decision is set aside and the matter referred back for redetermination by a different decision-maker.

2. There is no question to certify.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1929-22
STYLE OF CAUSE:	P. N., E. N. AND A. O. v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	BY VIDEOCONFERENCE
DATE OF HEARING:	MARCH 2, 2023
JUDGMENT AND REASONS:	AHMED J.
DATED:	MAY 24, 2023

APPEARANCES:

Raoul Boulakia	FOR THE APPLICANTS
Leila Jawando	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Raoul Boulakia Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT