Federal Court Cour fédérale

Date: 20240903

Docket: IMM-1784-23

Citation: 2024 FC 1354

[ENGLISH TRANSLATION]

Ottawa, Ontario, September 3, 2024

PRESENT: Madam Justice St-Louis

BETWEEN:

TSHIBOLA MARGUERITE TSHIMUANGI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Decision

[1] Tshibola Marguerite Tshimuangi, a citizen of the Democratic Republic of the Congo [DRC] and permanent resident of South Africa, is seeking judicial review of a decision of the Refugee Appeal Division [RAD], dated January 12, 2023 [Decision], in which the RAD

dismissed Ms. Tshimuangi's appeal and confirmed the decision of the Refugee Protection Division [RPD].

[2] The RAD confirmed that Ms. Tshimuangi is a person referred to in Article 1E of the *United Nations Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 [Convention], and that she is neither a refugee nor a person in need of protection.

[3] Before the Court, and as she confirmed at the hearing of this application, Ms. Tshimuangi is not disputing the fact that permanent residents of South Africa have essentially the same rights as citizens of this country. Ms. Tshimuangi contends, however, that the RAD erred fatally (1) in the fact that it analyzed Ms. Tshimuangi's allegations of fear of persecution in South Africa after concluding that she was referred to in section E of Article 1 of the Convention [Article 1E of the Convention]; and (2) in its analysis of the alleged fear of persecution in South Africa.

[4] Ms. Tshimuangi is therefore asking the Court to set aside the RAD's decision and to refer the case back to a differently constituted panel for reconsideration.

[5] The respondent, the Minister of Citizenship and Immigration [the Minister], replies that the application for leave and judicial review should be dismissed since the exclusion found by the RAD under Article 1E of the Convention is essentially reasonable. The Minister submits that (1) contrary to the RPD, the RAD analyzed Ms. Tshimuangi's alleged fear of South Africa, her country of residence, before excluding her under section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 7 [Immigration Act]; (2) it was reasonable for the RAD to analyze Ms. Tshimuangi's alleged fear of South Africa, her country of residence, in order to determine

whether or not she was referred to in Article 1E of the Convention and excluded under section 98 of the Immigration Act, since this meets the objectives of the Convention; and (3) in any event, the analysis of Ms. Tshimuangi's alleged fear of persecution in South Africa was reasonable and whether the RAD considered it before or after excluding her does not change the reasonableness of its Decision.

[6] For the following reasons, Ms. Tshimuangi's application for judicial review will be allowed.

[7] The parties confirmed that section 98 of the Immigration Act does not permit consideration of a claimant's allegations of fear of his or her country of residence after it has been determined that said claimant is referred to in Article 1E of the Convention and therefore excluded under section 98 of the Immigration Act.

[8] The parties also confirmed that the Immigration Act does not allow a claimant's allegations of fear of his or her country of residence to be examined under the aegis of sections 96 and 97 of the Immigration Act since these sections only apply to a person's country of nationality (if the person has one).

[9] However, the RAD, which confirmed the RPD's decision without reservation, examined Ms. Tshimuangi's alleged fear of South Africa after concluding that Ms. Tshimuangi was referred to in Article 1E of the Convention and excluding her under section 98 of the Immigration Act. This is contrary to the clear wording of section 98 of the Immigration Act.

[10] Moreover, since the RAD confirmed the RPD's analysis without reservation, there is every indication that it was relying on section 97 of the Immigration Act in analyzing Ms. Tshimuangi's alleged fear of South Africa, her country of residence. This too is contrary to the clear wording of the Immigration Act since section 97 refers only to Ms. Tshimuangi's country of nationality, not her country of residence.

[11] Given that the RAD, like the RPD before it, excluded Ms. Tshimuangi under Article 1E of the Convention and section 98 of the Immigration Act, and yet subsequently examined Ms. Tshimuangi's allegations of fear of South Africa, and given that, in addition, the RAD examined Ms. Tshimuangi's allegations of fear of her country of residence by relying on section 97 of the Immigration Act, the Court finds that the RAD's reasoning was erroneous and fundamentally flawed.

[12] The RAD's decision was thus unreasonable as it was based on erroneous reasoning (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 83, 86–87) and, consequently, cannot be upheld. Ms. Tshimuangi's file will therefore be returned to the RAD for reconsideration.

II. Comments

[13] As mentioned above, the parties argued at the hearing that it was reasonable for the RAD to analyze Ms. Tshimuangi's alleged fear of South Africa, her country of residence, beforehand, or in order to determine whether or not she was a person referred to in Article 1E of the Convention and excluded under section 98 of the Immigration Act. The Minister pointed out that

this approach meets the objectives of the Convention. In the course of the discussion, the Court indicated that the objectives of the Convention were not at stake and that they were unquestionably laudable. Rather, the Court noted that the suggested approach usurped the role of Parliament.

[14] In view of the above-mentioned conclusions as to the nature of the RAD's decision, the approach suggested by the parties is not determinative in this proceeding. It nonetheless seems useful to put down in writing the position presented to the parties at the hearing, and to briefly describe it. The Court is asking the RAD to consider the comments below as part of its reconsideration.

[15] As was mentioned earlier, the parties agree that section 98 of the Immigration Act does not permit consideration of a claimant's allegations of fear of his or her country of residence after it has been determined that said claimant is a person referred to in Article 1E of the Convention and is therefore excluded under section 98 of the Immigration Act.

[16] The parties also agree that the Immigration Act does not allow a claimant's allegations of fear of his or her country of residence to be examined under the aegis of sections 96 and 97 of the Immigration Act since these sections only apply to a person's country of nationality (if the person has one).

[17] However, at the hearing, the parties maintained that the RPD and the RAD may consider a claimant's alleged fear of his or her country of residence before finding that the claimant is a person referred to in Article 1E of the Convention and excluding the claimant under section 98 of

the Immigration Act. In particular, the parties refer to a decision of the RAD designated as a jurisprudential guide [Decision MB8-00025] as well as to certain decisions of the Court (e.g., *Lauture v Canada (Citizenship and Immigration)*, 2023 FC 1121 [*Lauture*]) in order to support their position.

[18] The Court is persuaded that the parties' position is indefensible in light of the teachings of the Supreme Court of Canada. Indeed, their position consists in interpreting a clear text in the absence of any ambiguity in Parliament's intention; their position requires reading into the text of Article 1E of the Convention words and concepts not found there, whereas the text as written suffers from no ambiguity whatsoever. Yet, as I noted in *Saint Paul v Canada (Citizenship and Immigration)*, 2020 FC 493, by reading new wording into the existing text, the RAD, the RPD and the Court would be taking Parliament's place.

[19] Indeed, it is the legislative branch that is responsible for passing and amending laws, while the role of the courts is limited to interpreting those laws. In *R v Multiform Manufacturing Co*, [1990] 2 SCR 624 at 630–31, the Supreme Court of Canada confirmed that the courts <u>must avoid interpreting a provision that is clear:</u>

> When the courts are called upon to interpret a statute, their task is to discover the intention of Parliament. <u>When the words used in a statute are clear and unambiguous, no further step is needed to identify the intention of Parliament</u>. There is no need for further construction when Parliament has clearly expressed its intention in the words it has used in the statute. As Maxwell stated in *The Interpretation of Statutes* (12th ed. 1969), at pp. 28-29:
>
> > If there is nothing to modify, alter or qualify the language which the statute contains, it must be construed in the ordinary and natural meaning of the words and sentences. "The safer and more correct course of dealing with a question of construction is

> to take the words themselves and arrive if possible at their meaning without, in the first instance, reference to cases."

> The rule of construction is "to intend the Legislature to have meant what they have actually expressed." The object of all interpretation is to discover the intention of Parliament, "but the intention of Parliament must be deduced from the language used," for "it is well accepted that the beliefs and assumptions of those who frame Acts of Parliament cannot make the law."

> Where the language is plain and admits of but one meaning, the task of interpretation can hardly be said to arise.

> Or, as Professor P. A. Côté succinctly puts it in *Interpretation of Legislation in Canada* (1984), at p. 2:

> It is said that when an Act is clear there is no need to interpret it: a simple reading suffices.

> [Emphasis added.]

[20] The wording of section 98 of the Immigration Act is unambiguous, showing no latent ambiguities (*Entertainment Software Association v Société canadienne des auteurs, compositeurs et éditeurs de musique*, 2020 FCA 100 at para 84) reading as follows: "A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection."

[21] The wording of Article 1E of the Convention is equally plain and clear, and unambiguous. It reads as follows:

> This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

[22] Neither the Court, nor the RAD, nor the RPD have implicitly or explicitly indicated that Article 1E of the Convention and/or section 98 of the Immigration Act are ambiguous.

[23] On the contrary, in *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68 at paragraphs 66 and 67, the Supreme Court of Canada concluded that Parliament's intent for section 98 of the Immigration Act is clear.

[24] Moreover, the Court read Decision MB8-00025 with interest. In it, the RAD sets out what it considers to be the consistent or traditional line of case law, according to which the Court has allowed a claimant's alleged fear of his country of residence to be analyzed. The RAD also presents what it describes as a traditional framework of analysis, under which a claimant's fear of his or her country of residence is assessed before an exclusion finding is made (Decision MB8-00025 at para 4). With respect, the Court notes, first, that the RAD itself acknowledges that the Court has analyzed fear either before or after excluding a claimant (Decision MB8-00025 at paras 2–4) and, second, that the analysis the RAD describes as traditional has not—even in the decisions cited by the RAD to support its point—been applied traditionally or consistently.

[25] In Decision MB8-00025, the RAD reads into the text of Article 1E of the Convention a concept and words not found there without first, as required by the Supreme Court of Canada, examining whether the wording is ambiguous. Indeed, in Decision MB8- 00025, the Court found no mention of any ambiguity in the wording of Article 1E of the Convention or that of section 98 of the Immigration Act. Moreover, in *Jean v Canada (Citizenship and Immigration)*, 2019 FC 242 at paragraphs 27–30, the Court explicitly pointed out that the analytical framework proposed

by the RAD requires a considerable addition to the current texts of the Convention and/or the Immigration Act.

[26] Thus, in Decision MB8-00025, the RAD proposes an analytical framework that requires not *interpreting* the law, but rather *reading* wording *into* the law that is not there. To justify its analytical framework, the RAD highlights the purposes and objectives of the Convention and the Immigration Act, concluding in some way that the legislation as drafted does not achieve those objectives. It therefore appears that the RAD is attempting to remedy what it considers to be a gap or a problem by reading words into the text despite—as bears repeating—the absence of any ambiguity.

[27] With respect, while it is obviously sensitive to the purposes and objectives of the Convention, the Court concludes rather that reading a concept not found in a statute into that statute usurps legislative authority and is contrary to the separation of powers principle. It is also contrary to the teachings of the Supreme Court of Canada, since the Court ends up making law, rather than interpreting or applying it.

[28] The separation of powers is a constitutional principle of our democratic system. In *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319, the Supreme Court of Canada specifically emphasized the importance of this principle at page 389:

> Our democratic government consists of several branches: the Crown, as represented by the Governor General and the provincial counterparts of that office; the legislative body; the executive; and the courts. It is fundamental to the working of government as a whole that all these parts play their proper role. It is equally

> <u>fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other</u>.
>
> [Emphasis added.]

[29] In that regard, in Decision MB8-00025, the RAD clearly posited that restricting to the pre-removal risk assessment [PRRA] stage any consideration of the risk raised by a refugee protection claimant with respect to the claimant's country of residence is inconsistent with <u>the purposes</u> of Article 1E of the Convention. The RAD also analyzed the 2012 amendments to the Immigration Act and concluded that it was difficult to see how the addition of subparagraph 112(2)(b.1)(i) to the Immigration Act evinced an intention by Parliament that any risk raised by claimants in respect of their countries of residence should only be taken into account at the PRRA stage.

[30] Paradoxically, still in its analysis of the 2012 amendments to the Immigration Act, the RAD pointed out that Parliament would have made a clearer statement of its intention had it wished a particular interpretation of the law:

> [69] Overall, if it had been Parliament's intention in enacting subpara. 112(2)(b.1)(i) in 2012 that only those delegated to make decisions on PRRAs would have the power to take into account the risk raised by claimants in respect of their country of residence, <u>one would have expected a clearer statement of that intention</u>.
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> [Emphasis added.]

[31] Thus, its reading of Decision MB8-00025 has persuaded the Court that the RAD's approach of reading text into the Convention and incorporating into domestic law a protection

regime not found therein is motivated by its finding that the outcome of applying Article 1E of the Convention as it stands is inadequate.

[32] However, in *R v McIntosh*, [1995] 1 SCR 686, the Supreme Court of Canada indicated that the fact that a provision leads to absurd or even unjust results does not justify it being considered ambiguous and that, consequently, a purposive interpretation be applied:

> 28 This principle was eloquently stated by La Forest J.A. (as he then was) in *New Brunswick v. Estabrooks Pontiac Buick Ltd.* (1982), 44 N.B.R. (2d) 201 at p. 210:
>
> > There is no doubt that the duty of the courts is to give effect to the intention of the Legislature as expressed in the words of the statute. And however reprehensible the result may appear, it is our duty if the words are clear to give them effect. This follows from the constitutional doctrine of the supremacy of the Legislature when acting within its legislative powers. The fact that the words as interpreted would give an unreasonable result, however, is certainly ground for the courts to scrutinize a statute carefully to make abundantly certain that those words are not susceptible of another interpretation. For it should not be readily assumed that the Legislature intends an unreasonable result or to perpetrate an injustice or absurdity.
>
> This scarcely means that the courts should attempt to reframe statutes to suit their own individual notions of what is just or reasonable.
>
> 34 I am of the view that the Crown's argument linking absurdity to ambiguity cannot succeed. I would adopt the following proposition: where, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be (*Maxwell on the Interpretation of Statutes*, *supra*, at p. 29). The fact that a provision gives rise to absurd results is not, in my opinion, sufficient to declare it ambiguous and then embark upon a broad-ranging interpretive analysis.

> 36 Thus, only where a statutory provision is ambiguous, and therefore reasonably open to two interpretations, will the absurd results flowing from one of the available interpretations justify rejecting it in favour of the other. Absurdity is a factor to consider in the interpretation of ambiguous statutory provisions, but there is no distinct "absurdity approach".
>
> [Emphasis added.]

[33] The Court would add that [TRANSLATION] "[i]f, in a given case, the 'true meaning' of a text, the meaning intended by Parliament, leads to anomalous results, the remedy under official doctrine is to turn to Parliament to seek an amendment of the text" (Pierre-André Côté, in collaboration with Stéphane Beaulac and Mathieu Devinat, *Interprétation des lois*, 5e ed, Montréal, Thémis, 2021, at 9-10, at para 31).

[34] Thus, the case law and doctrine cited above unequivocally confirm that, if the language is clear and unambiguous, it is not up to the RPD, the RAD or the Court to read terms into the text of a statute, even if the application of the statute as drafted could lead to results that may appear inadequate or contrary to its objectives.

[35] Finally, and with respect, the Court in this case does not agree with the position expressed in paragraphs 35 and 38 of *Lauture*, which the Minister cited at the hearing. The Court notes instead that the Federal Court of Appeal confirmed in its decision in *Canada (Citizenship and Immigration) v Saint Paul*, 2021 FCA 246, that the appeal raised a serious question of general importance and expressly stated that it would not answer the certified question. The debate continues therefore since the Federal Court of Appeal has yet to rule on the matter.

III. Conclusion

[36] Considering that the RAD’s analysis of the subjective fear and generalized risk alleged by Ms. Tshimuangi rests on an erroneous legal foundation, the Decision is unreasonable. Accordingly, the Court will allow the application for judicial review of the Decision and return the matter to the RAD for redetermination.

JUDGMENT in IMM-1784-23

THIS COURT'S JUDGMENT is as follows:

1. The applicant's application for judicial review is allowed.
2. The Refugee Appeal Division's decision dated January 12, 2023, is set aside.
3. The matter is referred back to the Refugee Appeal Division for redetermination by a differently constituted panel.
4. No question is certified.
5. No costs are awarded.

"Martine St-Louis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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