Federal Court  Cour fédérale

Date: 20171214

Docket: IMM-200-17

Citation: 2017 CF 1153

Ottawa, Ontario, December 14, 2017

PRESENT: The Honourable Mr. Justice Bell

BETWEEN:

ARMEL SIMBIZI
MARLENE KAGARI

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

(Delivered orally from the Bench in Toronto, Ontario on November 23, 2017)

I. Nature of the Matter

[1] This is an application for judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [*IRPA*], of a decision rendered by the Canada Border Services Agency [CBSA] on January 3, 2017 finding that the Applicants are

not exempt from the Safe Third Country Agreement [STCA], and are therefore ineligible under paragraph 101(1)(*e*) of the *IRPA* to claim Convention refugee status in Canada [Decision]. At the close of the hearing on November 23, 2017, I granted the application for judicial review and ordered the matter be re-determined by a different officer. I specified that reasons for my decision would follow. These are my reasons.

II. Background

[2] The Applicants, who are married, are citizens of Burundi. They arrived in Canada on January 2, 2017 at Saint-Armand de Lacolle, Quebec port of entry [POE], from the United States. At the POE, they made a claim for refugee status.

[3] Subject to certain exceptions, a refugee claimant is inadmissible if he or she arrives directly or indirectly to Canada from a designated country other than their country of nationality or habitual residence (see paragraph 101(1)(*e*) of the *IRPA*). The United States is a designated country pursuant to section 159.3 of the *Immigration and Refugee Protection Regulations*, SOR/2002-2007 [*Regulations*].

[4] A similar provision exists under subsection 4(1) of the *Agreement between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries* (Safe Third Country Agreement or STCA). Under this provision, the Party of the country of last presence is responsible for determining the refugee status claim of an applicant. According to subsection 1(1) of the STCA, “Country of Last Presence” means that country, being either Canada or the

United States, in which the refugee claimant was physically present immediately prior to making a refugee status claim at a land border POE. Since the Applicants arrived in Canada from the United States, the United States is the Party of the country of last presence. Accordingly, the United States would be responsible for determining the refugee status of the Applicants, subject to certain exceptions.

[5] At the POE on January 2, 2017, a Canadian Border Services Agency Officer [Officer] interviewed the Applicants to determine whether they fell under any of the exceptions enumerated in the STCA. Both asserted that they had a relative in Canada, though only Marlene Kagari [the Claimant] asserted she had a relative in Canada who would qualify as a "family member" for the purposes of an exception. The Claimant asserted she had a niece living in Canada, Ms. Vanessa Sindayihebura [Vanessa]. If true, the Claimant is admissible to claim refugee status in Canada under the family member exception stipulated at paragraph 4(2)(a) of the STCA. If the Claimant is granted refugee status in Canada, Mr. Armel Simbizi also becomes admissible to claim refugee status under the family member exception.

[6] The Claimant's alleged niece, Vanessa, is a citizen of Burundi who immigrated to the United States and obtained citizenship in that country. She became a permanent resident of Canada in May 2013, and now lives in Mississauga, Ontario. The Claimant stated that Vanessa is her niece because she (Vanessa) is the daughter of her half-sister, Libérate Gahurura [Libérate], with whom she (the Claimant) shares a father, Anselme Gahurura [Mr. Gahurura]. Simply stated, the Claimant asserted that her sister, Libérate, is Vanessa's mother. This makes Vanessa the Claimant's niece.

[7] At first blush, the documentary evidence provided by the Claimant to establish the family connection between her and Vanessa was contradictory. According to an extract from the Claimant's marriage certificate, the Claimant is the daughter of Michel Kagari [Mr. Kagari] and Stéphanie Gahurura [Stéphanie]. According to another document ("Attestation de Composition Familiale"), the Claimant is the daughter of Mr. Gahurura and Josée Kanyange [Ms. Kanyange].

[8] The Claimant explained that her biological father, Mr. Gahurura, had been married to Marie Rwaje. Together, they had seven children, including Libérate and Stéphanie. The Claimant says she was born in 1987 as a result of a relationship between Mr. Gahurura (her biological father) and another woman, Ms. Kanyange. The record indicates that the Claimant's purported biological father died in 1991, and her purported biological mother died in 2000. The Claimant would therefore have been a toddler when her biological father died, and approximately 13 years of age when her mother died. As a result, she claims to have been unofficially adopted by her half-sister, Stéphanie, and Stéphanie's husband, Mr. Kagari. She says she was then legally adopted by these two in 2014 as an adult.

[9] The Officer contacted Vanessa on several occasions at her home in Toronto to confirm this information. Vanessa confirmed the facts as recounted by the Claimant. The Officer also contacted Stéphanie in Burundi and asked for proof of the adoption in 2014. Stéphanie provided this proof, and confirmed the version of events as recounted by the Claimant. That is, Stéphanie confirmed that she, Libérate and the Claimant are sisters. The adoption document confirmed that the adoption request was made on December 20, 2013 in Burundi, and was granted on March 18, 2014.

[10] After having reviewed all of this information over the course of a two-day assessment, the Officer ultimately concluded that Vanessa was not the Claimant's niece. He communicated his findings to the Minister's Delegate [Delegate], who agreed with his determination. As a result, the Claimant and her husband were deemed ineligible to apply for refugee status in Canada. That Decision is the subject of the present application for judicial review.

III. Decision-making process and Decision

[11] On January 13, 2017, the Applicants filed an Application for Leave and for Judicial Review [leave application], in which they stated that they had not yet received written reasons for the Decision. Accordingly, the Respondent was sent a request for a copy of the Decision, and written reasons therefore, pursuant to Rule 9 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 [*Rules*], on January 20, 2017. The Respondent provided a response to the request on February 16, 2017. The Respondent admits that this response was sent in error, as it included only the inadmissibility report, the exclusion order, and an interview summary, without the Delegate's eligibility Decision.

[12] An amended Rule 9 response was provided by the Respondent on February 28, 2017. This response included the inadmissibility report, the exclusion order, the Delegate's eligibility Decision, and an interview summary. At the hearing on November 23, 2017, the Respondent admitted that the second response was inadequate in that it contained the Decision, but no written reasons for the Decision. The Decision, dated January 3, 2017, simply stated as follows:

> [TRANSLATION] Kagari, Marlène does not have family members in Canada under the terms of the Safe Third Country Agreement: spouse, common-law partner, legal guardian, child, father, mother,

> sister, grandfather, grandmother, grandson, granddaughter, uncle, aunt, nephew, or niece.

[13] On June 28, 2017, leave was granted by this Court. Pursuant to Rule 17 of the *Rules*. The Respondent filed a Certified Tribunal Record [CTR] on July 18, 2017. The CTR contained the Officer's Global Case Management System [GCMS] notes concerning the Decision, which were created on January 18, 2017 at 5:59 p.m.; five days after the filing of the leave application, but just over 11 weeks before the filing of the Application Record. At the hearing on November 23, 2017, the Respondent admitted that the GCMS notes constituted part of the written reasons for the Decision.

[14] With respect to the relationship between the Claimant and Vanessa, the GCMS notes indicate as follows:

> [TRANSLATION] The following day, we received the document indicating that the legal adoption was granted in 2014 when Marlène was 27 years old. It is written in the document that the consent of Marlène's biological family was received; however, both of her parents had already passed away in 1991 and 2000. It seems more likely that Marlène is in fact the biological child of Stéphanie GAHURURA and Michel KAGARI, which would explain why Marlène's surname is KAGARI, and why the extract of her marriage certificate mentions that her parents are Stéphanie GAHURURA and Michel KAGARI. If that is the case, her family member in Canada would be a cousin, not a niece. On the balance of probabilities, I am not satisfied of the aunt/niece relationship.

IV. Relevant Statutory and Regulatory Provisions

[15] The relevant provisions are paragraph 101(1)(e) of the *IRPA*, section 159.3 of the *Regulations*, and subsections 1(1), 4(1) and 4(2), as well as section 6, of the STCA. These provisions are attached as Appendix A.

V. Issues

[16] The Applicants raise several issues. I will focus on two:

1. Was the decision reasonable?

2. If not, what is the appropriate remedy?

VI. Analysis

[17] The Officer's decision and that of the Minister's Delegate attract a reasonableness standard of review (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 [*Dunsmuir*] at paras 51, 53). The Court must inquire into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to the result. As such, reasonableness is concerned with the existence of justification, transparency and intelligibility within the decision-making process, and a determination of whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir* at paras 47).

[18] The Decision dated January 3, 2017 is scant, even after being supplemented by the Officer's GCMS notes. The Decision states only that the Claimant has no family in Canada, whereas the GCMS notes provide only an incomplete overview of events, as well as a few independent statements regarding the adoption document and the Claimant's family relationships. Neither the Decision nor the GCMS notes outline the Officer's findings on the authenticity of the documentary evidence, or detail the several conversations between the Officer

and the Claimant during the Officer's two-day assessment. Moreover, neither the Decision nor the GCMS notes detail the conversations with Vanessa and Stéphanie.

[19] Based on the record, I am unable to determine with any degree of certainty the basis for the Decision. If the reason for the Decision was a negative credibility finding against the Claimant and/or either of her family members, I would expect contemporaneous notes from the interviews to be included in the GCMS notes. Those notes would have allowed me to assess the reasonability of the credibility finding. Similarly, if the Decision was based on a consideration of the legal impact the Claimant's adult adoption had on her pre-existing parent-child relationship with her deceased parents, I would expect this to be explained in the reasons. Finally, if the Officer concluded that the adoption papers were fraudulent, I would expect clear reasons for this conclusion to be set out in the Decision or GCMS notes. Instead, I am left to speculate.

[20] As a result, I have no alternative but to conclude that the Decision, coupled with the GCMS notes, is insufficient to meet the requirements of reasonableness. In short, I conclude the Decision is not sufficiently justified, transparent and intelligible for me to decide that the result falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. While there may have been a reasonable basis for the Decision, I am unable to divine it from the reasons given and from the other materials in the record.

[21] I readily acknowledge that the insufficiency of reasons is not a stand-alone basis for granting a judicial review. The Decision must be considered within the context of the result and

the complete record in order to determine whether it falls within a range of possible acceptable outcomes (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 at para 14; *Dunsmuir* at para 47). It is precisely this holistic review process that results in my conclusion that the Decision does not meet the reasonableness standard.

[22] At the hearing on November 23, 2017, the Applicants sought costs and an order that the re-determination be made at a border crossing other than the Saint-Armand de Lacolle POE. I stated at the close of the hearing that no such orders would be made, for the reasons given orally. I was, and remain, unwilling to attribute any bad faith to the Officer or the Minister's Delegate. As such, these remedies are rejected.

VII. Conclusions

[23] For the foregoing reasons, I granted the application for judicial review, quashed the Decision of the Delegate, and directed that the issue of the Applicants' eligibility to apply for refugee status in Canada be re-determined by a different CBSA officer.

JUDGMENT in IMM-200-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed, without costs;

2. The Decision of the Delegate is quashed;

3. A new hearing is ordered before a different CBSA officer; and,

4. No question is certified for consideration by the Federal Court of Appeal.

"B. Richard Bell"
Judge

APPENDIX A

Immigration and Refugee Protection Act, S.C. 2001, c. 27:

Ineligibility	**Irrecevabilité**
101 (1) A claim is ineligible to be referred to the Refugee Protection Division if	**101 (1)** La demande est irrecevable dans les cas suivants :
[…]	[…]
(e) the claimant came directly or indirectly to Canada from a country designated by the regulations, other than a country of their nationality or their former habitual residence; or	**e)** arrivée, directement ou indirectement, d'un pays désigné par règlement autre que celui dont il a la nationalité ou dans lequel il avait sa résidence habituelle;
[…]	[…]

Immigration and Refugee Protection Regulations, SOR/2002-2007:

Designation — United States	**Désignation — États-Unis**
159.3 The United States is designated under paragraph 102(1)(a) of the Act as a country that complies with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture, and is a designated country for the purpose of the application of paragraph 101(1)(e) of the Act.	**159.3** Les États-Unis sont un pays désigné au titre de l'alinéa 102(1)a) de la Loi à titre de pays qui se conforme à l'article 33 de la Convention sur les réfugiés et à l'article 3 de la Convention contre la torture et sont un pays désigné pour l'application de l'alinéa 101(1)e) de la Loi.

Agreement between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries:

1 (1) In this Agreement,	**1 (1)** Dans le présent accord,
	[…]
(a) "**Country of Last Presence**" means that country, being either Canada or the United States, in which the refugee claimant was physically present immediately prior to making a refugee status claim at a land border port of entry.	**(c)** Par « **dernier pays de séjour »**, le pays, soit le Canada, soit les États-Unis, dans lequel le demandeur du statut de réfugié était physiquement présent immédiatement avant de faire sa demande du statut de réfugié à un point d'entrée situé à une frontière terrestre;
(b) "Family Member" means the spouse, sons, daughters, parents, legal guardians, siblings, grandparents, grandchildren, aunts, uncles, nieces, and nephews.	**(d)** Par « membre de la famille », le conjoint, le fils, la fille, les parents, le tuteur légal, les sœurs et frères, les grands-parents, les petits-enfants, l'oncle, la tante, la nièce et le neveu;
[…]	[...]
4 (1) Subject to paragraphs 2 and 3, the Party of the country of last presence shall examine, in accordance with its refugee status determination system, the refugee status claim of any person who arrives at a land border port of entry on or after the effective date of this Agreement and makes a refugee status claim.	**4 (1)** Sous réserve des paragraphes 2 et 3, la partie du dernier pays de séjour examine, conformément aux règles de son régime de détermination du statut de réfugié, la demande de ce statut de toute personne arrivée à un point d'entrée d'une frontière terrestre à la date d'entrée en vigueur du présent accord, ou par après, qui fait cette demande.

4 (2) Responsibility for determining the refugee status claim of any person referred to in paragraph 1 shall rest with the Party of the receiving country, and not the Party of the country of last presence, where the receiving Party determines that the person:

(a) Has in the territory of the receiving Party at least one family member who has had a refugee status claim granted or has been granted lawful status, other than as a visitor, in the receiving Party's territory; or

(b) Has in the territory of the receiving Party at least one family member who is at least 18 years of age and is not ineligible to pursue a refugee status claim in the receiving Party's refugee status determination system and has such a claim pending; or

(c) Is an unaccompanied minor; or

(d) Arrived in the territory of the receiving Party:

i. With a validly issued visa or other valid admission document, other than for transit, issued by the receiving Party; or

4 (2) La responsabilité de la détermination du statut de réfugié demandé par toute personne visée au paragraphe 1 revient à la partie du pays d'arrivée, non pas à celle du pays du dernier séjour lorsque la partie du pays d'arrivée établit que cette personne :

(a) a, sur le territoire de la partie du pays d'arrivée, au moins un membre de sa famille dont la demande du statut de réfugié a été accueillie ou qui a obtenu un autre statut juridique que celui de visiteur sur le territoire de la partie du pays d'arrivée;

(b) a, sur le territoire de la partie du pays d'arrivée, au moins un membre de sa famille âgé d'au moins dix-huit ans, n'est pas inadmissible à faire valoir une demande du statut de réfugié dans le cadre du régime de détermination du statut de réfugié de la partie du pays d'arrivée et à une telle demande en instance;

(c) est un mineur non accompagné;

(d) est arrivée sur le territoire de la partie du pays d'arrivée :

i. en possession d'un visa régulièrement émis ou d'un autre titre d'admission valide, autre qu'une autorisation de transit, émis

	par cette même partie;
ii. Not being required to obtain a visa by only the receiving Party.	**ii.** ou sans être requise d'obtenir un visa, uniquement par la partie du pays d'arrivée.
[…]	[…]
6. Notwithstanding any provision of this Agreement, either Party may at its own discretion examine any refugee status claim made to that Party where it determines that it is in its public interest to do so.	**6**. Par dérogation à toute autre disposition du présent accord, l'une des parties, ou l'autre, peut, à son gré, décider d'examiner toute demande du statut de réfugié qui lui a été faite si elle juge qu'il est dans l'intérêt public de le faire.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-200-17
STYLE OF CAUSE:	ARMEL SIMBIZI and MARLENE KAGARI v. THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 23, 2017
JUDGMENT AND REASONS:	BELL J.
DATED:	DECEMBER 14, 2017

APPEARANCES:

Raoul Boulakia	FOR THE APPLICANTS
Tamrat Gebeyehu	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