Federal Court  Cour fédérale

Date: 20191113

Docket: IMM-1084-19

Citation: 2019 FC 1421

Ottawa, Ontario, November 13, 2019

PRESENT: The Associate Chief Justice Gagné

BETWEEN:

CLARISSE ISUGI
JOSHUA GANZA
DANIEL MUGISHA
DAVID NTWALI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Refugee Protection Division (RPD) and the Refugee Appeal Division (RAD) both found that the evidence adduced by Ms. Clarisse Isugi (the Principal Applicant) and her three children (the Minor Applicants) lacked credibility and rejected their claims for refugee protection.

[2] Amongst several issues raised by Ms. Isugi on judicial review, she alleges that her former counsel incompetently represented her and her children before the RPD. The Court granted former counsel leave to intervene in this hearing, allowing her to file written submissions and to make representations.

II. Facts

[3] The following statement of facts comes from Ms. Isugi's Basis of Claim Form and the evidence the Applicants presented before the RPD.

[4] Ms. Isugi is a citizen of Rwanda. Since her mother died in 2002, she has been the trustee of her estate, which includes an income property located in the Democratic Republic of Congo (DRC). In the course of managing this property, she met Mr. Ali Adjaliwa, who presented himself as a potential renter. She exchanged text messages with him and planned to show him the house on September 26, 2016. However, he never attended their meeting.

[5] On October 10, 2016, the Criminal Investigation Department of the National Police Force of Rwanda (CID) contacted Ms. Isugi and requested that she attend their headquarters in Kigali for questioning. They questioned her about Mr. Adjaliwa, a suspected member of the Democratic Forces of the Liberation of Rwanda (DFLR), an armed rebel group active in the DRC considered a threat to the sovereignty of Rwanda.

[6] She consulted with her friend, who is a lawyer, after this first meeting and applied for a visa to Canada on October 18, 2016.

[7] On November 2016, CID convened her to a second meeting and accused her of travelling to the DRC to pursue activities with the DFLR. She was subsequently released from their custody.

[8] CID summoned Ms. Isugi for a third meeting on December 31, 2016, but she had left for Canada on a visitor visa with her three children the day before.

[9] She claimed refugee protection for herself and her children on January 27, 2017.

[10] At that time, she claimed that her husband was missing since he dropped his family off at the airport in December 2016, and that she has not seen him or heard from him since that date. Her brother-in-law told her that he was trying to locate his brother, but he has not yet successfully done so.

III. Impugned decision

[11] Ms. Isugi attempted to file new evidence to the RAD, including:

a. E-mails concerning her visa application and those of her children;

b. A judgment confirming that she was the liquidator of her parents' estate;

c. Electricity bills from the rental property; and

d. Two police summonses from the CID.

[12] However, the RAD concluded that none of these documents were admissible and thus that there was no need for a hearing. It also found that the RPD did not err in its overall findings.

A. *New Evidence and Hearing on Appeal*

[13] The RAD found that the judgement confirming that Ms. Isugi was the liquidator of her parents' estate did not necessarily prove that she is also the trustee of the rental property owned by her parents. Further, the RAD found this evidence, along with the e-mails explaining why Ms. Isugi did not apply for her children's visas at the same time she applied for her own, did not conform to 110(4) of the *Immigration and Refugee Protection Act*, as it was reasonably available at the time of the RPD hearing. In addition, Ms. Isugi's counsel did not present any explanation for why the Applicants only submitted these documents upon appeal.

[14] With respect to the electricity bills, the RAD found that they did not personally identify Ms. Isugi as being the owner of the property in question. In addition, she had told the RPD that in the DRC, renters pay for electricity and not owners. Thus, the RAD found that this evidence contradicted her earlier testimony and put her credibility in doubt.

[15] Lastly, the RAD found that the two summonses from Rwandan police submitted by Ms. Isugi did not conform to the RAD's rules of evidence, as they were not translated into French or English. They also contradicted earlier testimony that she was summoned by phone.

[16] Considering that it found the new evidence inadmissible, the RAD declared that Ms. Isugi had no right to a hearing on Appeal (subsection 110(6) of *IRPA*).

B. *RAD's Review of the RPD Decision*

[17] The RAD determined that the RPD did not have any particular advantage in assessing credibility and thus, that the appropriate standard of review for their findings on the Ms. Isugi's credibility was correctness (*Canada (Minister of Public Safety and Emergency Preparedness) v Gebrewold*, 2018 FC 374 at para 25). On that basis, the RAD agreed with the RPD's assessment of Ms. Isugi's credibility for several reasons.

[18] The first is that she was able to leave Rwanda several times after October 2016, despite her assertion that she was wrongly associated with the DFLR. Ms. Isugi did not sufficiently explain why she believed that the police linked her to Mr. Adjaliwa's activities given that, if she was under surveillance for being a suspected member of the DFLR, she would not have been able to leave the country as frequently and easily as she did.

[19] Second, the RPD and the RAD both concluded that the Principal Applicant had started the process of obtaining a Canadian visa before her interactions with the police began, as she had obtained an attestation of service before her first meeting with the CID. As the RAD wrote:

> Indeed, the RPD first asked the Principal Appellant why she needed this certificate of service, which was dated September 30, 2016. She then replied that "when you complete a visa application at the Embassy, you look for any document that proves that you are actually working, which is why I asked for this, it was just the document I needed to complete my visa application." She then changed her answer and said that she had it already, and that the person who helped her obtain the visa told her that it did not cause any problems [for her application]. (Translation)

C. *Procedural Fairness*

[20] Ms. Isugi also alleges that there was a breach of procedural fairness when the RPD presented her visa application file to her then-counsel for the first time at the hearing. The RPD first stated that it did not intend to use it, but later used it to impugn Ms. Isugi's credibility. The RAD noted that the RPD had sent the visa file in accordance with its rules but that former counsel likely did not receive it because of an error in the postal code. It further noted that the RPD provided former counsel with a short adjournment to review the file and ask questions, and more importantly, that she did not raise any concerns about this late communication to the RPD.

D. *The Disappearance of the Applicant's Husband*

[21] Finally, the RAD expressed skepticism regarding the disappearance of Ms. Isugi's husband. The RAD notes that Ms. Isugi appears to have taken almost no action to find her husband, or to prove that he had disappeared. Since it was a central element of her asylum claim, the RAD found that this inaction damaged her credibility.

IV. Issues and Standard of Review

[22] This application for judicial review raises the following issues:

a. Is the alleged incompetence of the Applicants' former counsel sufficient to amount to a breach of procedural fairness?

b. Did the RAD err in refusing the Applicants' new evidence?

c. DID the RAD err in its assessment of Ms. Isugi's credibility?

[23] If the Court finds that there was a breach of procedural fairness, the decision should be quashed and the file sent back for a new determination.

[24] However, the Court is to review the merits of the RAD's decision, including its assessment of the proposed new evidence, its decision not to hold an oral hearing, and its assessment of the Principal Applicant's credibility under the standard of reasonableness (*Siddiqui v Canada (Citizenship and Immigration)*, 2015 FC 1028 at paras 42-46).

V. Analysis

A. *Is the alleged incompetence of the Applicants' former counsel sufficient to amount to a breach of procedural fairness?*

[25] The Applicants reiterate before the Court that there was a breach of procedural fairness when the RPD confronted Ms. Isugi and her former counsel with her visa application file at the hearing, without prior notice. They blame their former counsel for not having requested an adjournment of the hearing in order to review the visa file and prepare the Principal Applicant's testimony accordingly. In addition, they argue that their former counsel was negligent when she filed the two summonses issued by the Rwanda police as new evidence before the RAD without offering the proper translation required by the RAD Rules. Finally, they blame their former counsel for not having provided the RAD with detailed arguments as to the reason why the new evidence met the criteria found in subsection 110(4) of the *IRPA*.

[26] I agree with Justice Henry Brown that the issue goes to the Applicants' right to fully present their case and that the governing principles for finding that the incompetence or negligence of counsel amounts to a breach of procedural fairness are found in the jurisprudence

(*Srignanavel v Canada (Minister of Citizenship and Immigration)*, 2015 FC 584, at para 17 and 18):

> 18 Relying on *Shirwa v. Canada (Minister of Employment & Immigration*) and *R. v. B. (G.D.)*, 2000 SCC 22 (S.C.C.) [*GDB*], this Court held in *Brown v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 1305 (F.C.) at paras 55-56 that the incompetence or negligence of counsel will amount to a breach of procedural fairness in only limited circumstances as outlined below:
>
> > [55] In order to establish that the incompetence of one's counsel resulted in a breach of procedural fairness, the Supreme Court of Canada in *GDB* [...] held that (1), it must be established that counsel's acts or omissions constituted incompetence; and (2) the Applicant must demonstrate that a miscarriage of justice has resulted. The Supreme Court of Canada also confirmed that the onus is on an applicant to establish the acts or omissions of counsel that are alleged to have been incompetent and "the wisdom of hindsight has no place in this assessment."
> >
> > [56] In proceedings under the *Immigration and Refugee Protection Act*, the incompetence of counsel will only constitute a breach of natural justice in "extraordinary circumstances." With respect to the performance component, at a minimum, the incompetence or negligence of the applicant's representative [must be] sufficiently specific and clearly supported by the evidence. It must also be exceptional and the miscarriage of justice component must be manifested in procedural unfairness, the reliability of the trial results having been compromised. In this regard, the Applicant must demonstrate that there is a reasonable probability that the result would have been different but for the incompetence of the representative.

[27] The test therefore requires that the Applicants show that there is a reasonable probability that, if not for counsel's incompetence or negligence, the result of their hearing would have been

different. This requirement creates a high threshold for applicants claiming their counsel acted incompetently.

[28] With respect to the visa file, former counsel submits that before the RPD hearing, she explained to the Applicant that she had the right to adjourn the hearing if previously undisclosed documents were disclosed during the hearing. Upon receiving the visa file at the hearing, former counsel asked the Principal Applicant, who knew the content of the visa file, if there was anything contained therein that she should be worried about. The Principal Applicant replied in the negative. She also said that she was familiar with what was in the visa file and wanted to continue with the hearing regardless so that she could complete her trial that day.

[29] Former counsel therefore argues that she used reasonable professional judgement in choosing not to request an adjournment, as she had informed her former client of her options before the hearing.

[30] In my view, one would need to apply hindsight in order to find incompetence on the part of counsel in such a circumstance. The visa file was sent to counsel in advance of the RPD hearing but due to an error in the postal code, it never found its way to her office. She cannot be blamed for that. Litigation brings a number of unforeseen situations and surprises that require a judgment call on the part of counsel. Without knowing the result of the judgment call made by former counsel during the RPD hearing (ultimately, the RPD used the date of the certificate of service, along with the fact that the Applicant filed her children’s visa application at a different date than hers, to impugn her credibility), it is impossible to criticize it. The Applicants did not

want to postpone the RPD hearing and it was their right to make that decision. Therefore, I see no fault in former counsel's conduct at the RPD hearing for having gone along with that decision.

[31] However, I have a different view of the fact that former counsel filed two untranslated summonses issued by the Rwandan authorities, and that she failed to provide submissions as to why the Principal Applicant could not reasonably have been expected in the circumstances to have presented the e-mails concerning her visa application and those of her children, at the time of the RPD hearing.

[32] First, it is important to note that in spite of the fact that the RAD rejected the summonses because they were not accompanied with a certified translation, it found that they lacked credibility because of the fact that the Principal Applicant had testified that she was only summoned orally by the Rwandan authorities. With all due respect, I find this latter reason for rejecting the summonses to be unreasonable. The evidence shows that the Principal Applicant received the two summonses on April 29, 2017 from her brother-in-law, who had been able to access her house in Rwanda. Therefore, these documents do not contradict the testimony given by the Principal Applicant at the RPD hearing held on March 27, 2017. They could rather show that the Rwandan police's interest in the Principal Applicant had increased since she left her country.

[33] Having concluded that the only reasonable reason for the RAD to have rejected the summonses is the lack of translation, I must turn to the explanation provided by former counsel.

The latter filed an affidavit stating the she received the two untranslated summonses a few days before the date at which the RAD file needed to be perfected and that, accordingly, she did not have sufficient time to have them translated. She adds that she chose not to take the risk that a motion for an extension of time to perfect the Applicants' file be rejected by the RAD and preferred to file the documents in their original state. Although this is also a judgment call that could have been made in the circumstances, she failed to advise her clients of the potential consequences of this decision. Maybe more important is the fact that the RAD only considered the Applicants' case on January 23, 2019 and issued its negative decision the same day. Former counsel had close to two years to have the two summonses translated and to file a motion for permission to file additional documents before the RAD. She provided no explanation for her failure to do so.

[34] Considering that one of the two summonses post-dates the RPD decision, it would have met the newness test found in subsection 110(4) of the *IRPA*.

[35] In addition, given that the lack of corroborative evidence was an important factor in the RPD's determination of the Principal Applicant's credibility, and that new evidence could have led to the right to a hearing before the RAD, there is a possibility that the result before the RAD would have been different had this evidence been admitted.

[36] This possibility is elevated to a reasonable probability that the result would have been different, as I find that the e-mails concerning the Principal Applicant's visa application and those of her children should also have been accepted as new evidence. This new evidence was

also likely to alleviate the RPD's concerns regarding the lack of corroborative evidence and the credibility issue raised by the fact that the Minor Applicants' visa applications were filed after the Principal Applicant filed her own. The e-mails provide a valid explanation for this discrepancy. Therefore, if the RAD was right to reject the e-mails because of the lack of detailed submissions, the failure to submit detailed arguments regarding the submissions would also constitute negligence of the part of counsel that had an impact on the RAD decision.

B. *Did the RAD err in refusing the Applicants' new evidence?*

[37] If I find that the RAD was wrong in rejecting the e-mails on the sole basis that counsel failed to provide detailed submissions as to why the Applicants could not reasonably have been expected in the circumstances to have presented this evidence at the time of the rejection of their refugee claim, I would also consider this error as being determinative. The e-mails provide a good and logical explanation as to why the Applicants' visa applications were completed at two different dates, and having accepted them would have possibly triggered the Applicant's right to a hearing before the RAD.

[38] Although I do not have to reach a firm conclusion on this issue (as I will return the file to the RAD), I am of the view that the RAD could have considered the explanation provided in the Principal Applicant's Affidavit for the late filing of the e-mails. It is somewhat obvious that the Applicants could not have reasonably expected, when they filed their refugee claim, that their credibility would be impugned by the fact that their visa applications were filed at two different dates. The relevance of this evidence only became apparent after the Applicants received the RPD decision. In my view, this is exactly what the third branch of the test found in subsection

110(4) of the *IRPA* aims at capturing: evidence that is available earlier may not become relevant until later on in the process in ways that an applicant may not initially expect.

VI. Conclusion

[39] Considering the potential impact that the translated summons, which post-dates the RPD decision and the e-mails discussed above could have had on the overall credibility findings made by the RPD and the RAD, I am granting the Applicant's application for judicial review. The parties proposed no question of general importance for certification and none arises from the facts of this case.

JUDGMENT in IMM-1084-19

THIS COURT'S JUDGMENT is that:

1. The Applicants' Application for judicial review is granted;
2. The decision of the Refugee Appeal Division dated January 23, 2019 is set aside and the file is sent back to a different member of the Refugee Appeal Division for a new determination;
3. No question of general importance is certified.

"Jocelyne Gagné"
Associate Chief Justice

FEDERAL COURT

SOLICITORS OF RECORD

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