Federal Court  Cour fédérale

Date: 20200217

Docket: IMM-2953-19

Citation: 2020 FC 256

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, February 17, 2020

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

JOSIANE KIBURENTE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant is a citizen of Burundi and is of Hutu ethnicity. Her husband is the right hand and Chief of Protocol of the President of the Republic of Burundi. The couple's four children and the applicant's mother-in-law are already in Canada and were granted refugee protection in 2016.

[2] The applicant left Burundi fearing the political violence and instability that has prevailed in the country since 2015, after the country's president decided to stay in power despite the opposition of a large part of the population. The applicant's fear culminated in June 2017 when she was attacked during a visit to her hairdresser. She came to Canada through the United States and claimed refugee protection.

[3] The applicant took advantage of the accelerated processing program for refugee protection claims filed by Burundi nationals implemented by the Government of Canada because of the unstable political situation in Burundi over the past several years. The applicant failed to satisfy the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada that her claim was founded.

[4] In a decision dated April 1, 2019, the RPD found the applicant's fear based on her ethnic origin not to be credible because, even though her father was savagely assassinated by Tutsis in 1972, she grew up, went to school and worked in Burundi and, after getting married, was even integrated into the diplomatic corps of that country, where she always voluntarily returned after her visits abroad. The RPD also found that the applicant and her husband benefited from state protection in Burundi, as a benefit and privilege associated with her husband's position with the government. It noted that the applicant travelled abroad several times after the 2015 events, which are the cause of the current political instability. She returned to Burundi voluntarily every time, which, according to the RPD, is a behaviour not normally expected from someone who claims to be fearing for her life in her country of origin.

[5] The applicant argues that the RPD rendered an unreasonable decision, among other things, in misapprehending the evidence before it and in neglecting to analyze her own personal situation in favour of that of her husband. In her written submissions, filed in support of this application for judicial review, she also argued that the RPD member who heard her refugee protection claim gave rise to a reasonable apprehension of bias through his behaviour at the hearing. However, at the judicial review hearing, the applicant abandoned that argument.

[6] This application for judicial review was filed a few days late, and the respondent sought its dismissal solely on that basis in his written submissions. At the hearing before me, he somewhat abandoned that request, leaving it up to my discretion. It should be noted that the applicant first appealed the RPD decision to the Refugee Appeal Division [RAD] of the Immigration and Refugee Board. The RAD stated that it lacked jurisdiction to hear the appeal. This detour towards the RAD, undertaken in good faith, necessarily resulted in delaying the filing of this application.

[7] In my view, everything suggests that this filing should be regularized, since I am satisfied that the applicant showed a continuing intention to challenge the RPD decision; that a reasonable explanation for the delay in filing this application for judicial review exists; that this application has some merit, if not certain merit; and that no prejudice to the respondent arises from the delay to file this application (*Canada (Attorney General) v Hennelly*, 1999 CanLII 8190 (FCA)).

[8] When this case was argued, the standard of review applicable to RPD decisions concerning issues of credibility and state protection was reasonableness, as defined in *Dunsmuir*

v New Brunswick, 2008 SCC 9 [*Dunsmuir*] (*Fleury v Canada (Citizenship and Immigration)*, 2019 FC 21 at para 21; *Meshveliani v Canada (Citizenship and Immigration)*, 2019 FC 1351 at para 14; *Omid v Canada (Citizenship and Immigration*), 2016 FC 202 at para 3).

[9] However, a few days after judgment in this case was reserved, the Supreme Court of Canada handed down its judgment in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], a matter that provided that Court "with an opportunity to re-examine its approach to judicial review of administrative decisions" (*Vavilov* at para 1).

[10] In a direction issued to the parties, I invited them to file additional written submissions regarding the impact that decision could have on this case. They did so. Both parties are of the opinion that the reasonableness standard continues to apply. The applicant notes, however, that judicial review on the reasonableness standard "is not a 'rubber-stamping' process or a means of sheltering administrative decision makers from accountability" (*Vavilov* at para 13).

[11] As I stated in *Elusme c Canada (Citoyenneté et Immigration)*, 2020 CF 225 [*Elusme*], in trying to clarify and simplify the law applicable to determining the standard of review applicable in a given case, the Supreme Court, in *Vavilov*, adopted an analysis framework that "begins with a presumption that reasonableness is the applicable standard in all cases" and which assumes, as a conceptual basis for that presumption, that the administrative decision maker's expertise is to be considered as inherent to its specialized function (*Elusme* at para 11).

[12] As noted by the respondent, this presumption can be rebutted only in two types of situations. The first type of situation is where the legislature has clearly indicated that it intends a standard different from the reasonableness standard to apply. This is the case when the legislature explicitly prescribes the applicable standard of review or has provided a statutory appeal mechanism from an administrative decision to a court. In that case, it is a matter of complying with the legislature's intent (*Vavilov* at para 17).

[13] The second situation in which the presumption of reasonableness review can be rebutted is where the rule of law requires that the standard of correctness be applied. This is the case for constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies (*Vavilov* at para 17).

[14] I agree that this case has none of the characteristics that would make it possible to rebut the presumption that the reasonableness standard of review applies.

[15] With respect to the actual content of the reasonableness standard, in my view, it falls well within the continuity of principles established in *Dunsmuir*, although it must be ensured that applying these principles to a given case aligns well with those stated in *Vavilov*, the ultimate objective of which is "to develop and strengthen a culture of justification in administrative decision making" (*Vavilov* at paras 2 and 143). Ultimately, a reviewing court "must develop an understanding of the decision makers reasoning process" and determine "whether the decision

bears the hallmarks of reasonableness — justification, transparency and intelligibility" (*Vavilov* at para 99).

[16] Applying the reasonableness standard to the facts and circumstances of this case, I am of the view that the Court's intervention is warranted and that the RPD decision should be set aside.

[17] Indeed, reading the RPD decision raises concerns. First, the RPD unreasonably attacked the applicant's credibility with respect to what it perceived as one of the bases of her refugee protection claim, namely, her fear of persecution related to her ethnicity, which dates back as far as 1972, when her father was assassinated. Yet, a reasonable reading of the refugee protection claim and of the evidence on the record clearly shows that the fear at the basis of her claim is related to the upheaval following the decision of the republic's president to stay in power in 2015. The RPD even acknowledged this at the hearing it held in this case (Certified Tribunal Record [CTR], at p 297). Furthermore, in answer to question 2(f) of her Basis of Claim Form asking why she left Burundi when she did, on June 26, 2017, and not before, the applicant stated that she left Burundi on that date because she was convinced, after being attacked at her hair appointment a few days earlier, that her life was in danger.

[18] The same goes for the applicant's visits abroad related to her husband's diplomatic career, which predated 2015. It was unreasonable for the RPD to attribute any weight to them in its analysis of the merits of the applicant's refugee protection claim since they are unrelated to the basis of the claim.

[19] The issue of state protection is next. I note here that the RPD concluded that the applicant enjoyed the benefits and privileges associated with her husband's position with the government of Burundi and that she therefore benefited from state protection. This is supported by the fact that she could count on bodyguard protection when she travelled. However, I see two difficulties with that conclusion.

[20] The first is that, based on the evidence on the record, state protection is quite illusive in the civil-war-like climate the country has experienced since 2015. This is illustrated by the assassination in 2015 and 2016 of important people—ministers, former ministers and generals—associated with the current regime and the attacks on the applicant's family members, including her mother-in-law and her brother. In a country with warring factions that are constantly changing sides for and against the regime in power, there are victims on both sides. In other words, the applicant seems to be no safer there because her husband is close to the republic's president. The attack against her in early June 2017, on which no doubt was cast, illustrates this. It therefore seems unreasonable for the RPD, in this context, to have attributed so much weight to the state protection factor, which is ultimately based on the level of democracy in the state in question (*Canada (Citizenship and Immigration) v Kadendo*, 1996 CanLII 3981 (FCA). If the state is showing signs of breakdown, the presumption that the state is capable of adequately protecting its nationals no longer applies with the same force (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at pp 724–725). The RPD should have been aware of this in the specific circumstances of this case.

[21] My second difficulty is related to the fact that reading the RPD decision on this point creates the impression that the applicant is somewhat the author of her own misfortune because her husband [TRANSLATION] "enabled the president to stay in power," and that president is [TRANSLATION] "still in power" and wishes to remain there [TRANSLATION] "whatever it takes" (CTR, RPD decision, at p 4, paras 18–19). The RPD is thus implying that the applicant's refugee protection claim lacks legitimacy and that the fear at the basis of the claim should be relativized, mainly because of the benefits and privileges related to her husband's position and, in veiled terms, his role in keeping the current president in power.

[22] As the applicant argues, and I agree, the RPD neglected to fully analyze her personal situation in favour of that of her husband and the abuses that the government in power might have committed to hold on to power. This approach seems sufficiently problematic to me to undermine the quality of the reasoning applied by the RPD to conclude as it did and to irredeemably taint the reasonableness of its decision. Although this is not determinative, it is difficult in this case to completely disregard the fact that the applicant's four children and even her mother-in-law were granted refugee protection by Canada. This is especially the case since, contrary to the RPD's understanding, the applicant left Burundi not to visit her children in Canada, as the RPD implied, but because she started to consider herself a target of the opponents of the regime in power.

[23] Finally, regarding the applicant's visits abroad in 2015 and 2016, following the 2015 upheavals, she explained that she did not claim refugee protection during those visits because she still had hope at the time that the situation in the country would normalize. It was not until she

was attacked at her hair appointment on June 3, 2017, that she understood that her life was now in danger.

[24] It was for the RPD to explain why this explanation could not be accepted. It did not do so.

[25] In light of the foregoing, I am of the view that the RPD decision must be set aside and the matter returned to a differently constituted panel for reconsideration.

[26] At the judicial review hearing, counsel for the applicant proposed a question for certification, but then changed his mind and abandoned the idea. In any event, I am of the view that, in this case, no question should be submitted to the Federal Court of Appeal, since the outcome of this case is closely linked to the specific facts on which it is based.

JUDGMENT in IMM-2953-19

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is allowed.
2. The decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada, dated April 1, 2019, rejecting the applicant's refugee protection claim is set aside, and the matter is returned to a differently constituted panel for reconsideration on the basis of these reasons.
3. No question is certified.

"René LeBlanc"
Judge

Certified true translation
This 26th day of February 2020.

Johanna Kratz, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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