Federal Court  Cour fédérale

Date: 20200224

Docket: IMM-2048-19

Citation: 2020 FC 260

Ottawa, Ontario, February 24, 2020

PRESENT: The Honourable Mr. Justice Bell

BETWEEN:

STELLA MBULA-KOLELA
JAELLE KERENE TSHIENDA KALALA ONDO
NOIYA LILYA NTANGA KALALA ONDO

Applicants

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] On September 16, 2016, Stella Mbula-Kolela [the principal Applicant] and her two (2) minor daughters arrived at the Fort Erie, Ontario border crossing with passports from Gabon. In their refugee application, they alleged to have fled from the Democratic Republic of the Congo [DRC] because they faced risks, based upon religion and political opinion, as contemplated by

sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The Refugee Protection Division [RPD] rejected the Applicants' refugee claim, finding that they were neither refugees nor persons in need of protection because they had not established their identity as DRC nationals. The RPD concluded they were Gabonese nationals. In *Mbula-Kolela v Canada (Citizenship and Immigration)*, 2017 FC 1018 this Court dismissed their application for judicial review of the RPD decision.

[2] On March 29, 2018, the Applicants applied for a Pre-Removal Risk Assessment [PRRA] pursuant to s. 112(1) of the *IRPA*. In support of their application, they submitted the following: (1) a statutory declaration from the principal Applicant's mother, Colette Bilonga Kolela mother], who is a Canadian citizen residing in Toronto, Ontario; (2) letters from the principal Applicant's spouse, her uncle, her friend, her pastor and members of the Congolese community attesting to her Congolese identity; and (3) documentary evidence in the form of a US Department of State Report on Gabon and an RPD Response to Information Request on the risk of returnees to the DRC.

[3] The PRRA Officer admitted the new evidence pursuant to paragraph 113(a) of the *IRPA* but gave it no weight.

[4] At the close of the oral hearing held on November 28, 2019, I advised the parties that I would grant the application for judicial review, and that the reasons would follow. I requested further submissions with respect to the appropriate remedy. These are my reasons, including my disposition of the issue of the appropriate remedy.

II. Decision under Review

[5] In commenting upon the decision under review, I will only refer to those parts that are crucial to my decision. The thrust of the principal Applicant's position is that her Gabonese passport is fraudulent, that she is a citizen of the DRC and that she will face persecution if returned to that country. Because of her unlawful status in Gabon, she fears a return to that country as well. Despite numerous documents purporting to prove the principal Applicant is a citizen of the DRC, most notably her mother's statutory declaration attesting to her birth in the DRC, the PRRA Officer concluded she did not prove her identity as a citizen of the DRC. I would note here that Canadian authorities concluded the principal Applicant's mother, a Canadian citizen, was truthful in her own application for refugee status and, furthermore, Canadian authorities concluded the principal Applicant was truthful when she entered Canada and stated that her mother is a Canadian citizen who resides here. Had the Canada Border Services Agency officers not believed the Applicant, they would have denied her entry at the time based upon the Safe Third Country Agreement between Canada and the United States of America.

[6] The mother's statutory declaration deposes, among other matters, that she is the mother of the principal Applicant; that the principal Applicant was born in Kinshasa, RDC on March 14, 1982; that the principal Applicant is a citizen of the DRC and no other country; and that she, the mother, made a successful refugee claim in Canada in 1997.

[7] The PRRA Officer also concluded that a hearing was not required since the Applicants had failed to establish the three factors enumerated in section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*]. He did not analyse, nor make any mention of, those three factors.

III. Relevant Provisions

[8] The relevant provisions are section 96, subsection 97(1), and paragraphs 113(a) and 113(b) of the *IRPA*, as well as section 167 of the *Regulations*. They are set out in the attached Schedule.

IV. Issues

1. Did the PRRA Officer unreasonably assign no weight to the statutory declaration of the principal Applicant's mother?
2. Did the PRRA Officer commit a reviewable error by failing to provide reasons for refusing to hold an oral hearing?

V. Analysis

A. *Did the PRRA Officer unreasonably assign no weight to the statutory declaration of the principal Applicant's mother?*

[9] The PRRA Officer's assessment of the evidence is to be reviewed on a reasonableness standard (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65; *Nwabueze v Canada (Citizenship and Immigration)*, 2017 FC 323 at para 7, citing *Haq v Canada (Minister of Citizenship and Immigration)*, 2016 FC 370 at para 15 and *Nguyen v Canada (Minister of Citizenship and Immigration)*, 2015 FC 59 at para 4).

[10] In addition to the requirements of s. 113(a) of the *IRPA*, jurisprudence holds that evidence is considered "new" pursuant to this section if it (i) proves the current state of affairs in the country of removal or an event that occurred or a circumstance that arose after the hearing before the RPD; (ii) proves a fact that was unknown to the refugee claimant at the time of the RPD hearing; or (iii) contradicts a finding of fact by the RPD (including a credibility finding) (*Chen v Canada (Citizenship and Immigration)*, 2015 FC 565 at para 12, 480 FTR 62, citing *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 at para 13, 289 DLR (4th) 675 [*Raza*]).

[11] The Applicant contends the PRRA Officer afforded the mother's evidence no weight on the sole basis that she is an interested party. The Applicant contends such an approach fails to follow this Court's precedents. With respect, the Applicant overstates her position. Here, the PRRA Officer's notes state that the statutory declaration was not only from an interested party, but also failed to provide any new information about the principal Applicant's identity. He therefore did not rely *solely* on the fact that it originated from an interested party. That said, I am of the view the PRRA Officer committed reviewable error when he concluded the statutory declaration did not provide any new information. The declaration, and some of the other evidence admitted by the Officer, contradicts the finding of facts made by the Officer regarding citizenship. The PRRA Officer, having admitted that "new" evidence, was required to engage with it fully, particularly where the contradiction is plainly obvious. He failed to do so. In my view, the PRRA Officer erred in this regard.

B. *Did the PRRA Officer commit a reviewable error by failing to provide reasons for refusing to hold an oral hearing?*

[12] The PRRA Officer provided the following reasons for refusing to hold an oral hearing: "As the three factors set out in section 167 of the *Immigration and Refugee Protection Regulations* are not met, indeed, there is no reason for holding one". Pursuant to section 167 of the *Regulations*, in the context of a PRRA, the factors to consider for holding an oral hearing are the following:

> (a) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;
>
> (b) whether the evidence is central to the decision with respect to the application for protection; and
>
> (c) whether the evidence, if accepted, would justify allowing the application for protection.

All of these factors must be present. The regulation reads conjunctively (*Gjoka v Canada (Citizenship and Immigration)*, 2018 FC 292 at para 18, citing *Majali v Canada (Citizenship and Immigration)*, 2017 FC 275 at para 29, 51 Imm LR (4th) 321, *Strachn v Canada (Minister of Citizenship and Immigration)*, 2012 FC 984 at para 34, 416 FTR 312 (Eng) and *Ullah v Canada (Citizenship & Immigration)*, 2011 FC 221 at para 25, 385 FTR 91).

[13] Following *Vavilov* at paras 95-98, it is clear that courts cannot supplant reasons or conclude a decision is reasonable by undertaking their own analysis of the evidence. Robust review entails a review of the pathway to a decision based upon the standards of justification, transparency, and intelligibility. None of these qualities is evident in the PRRA Officer's refusal to hold an oral hearing.

[14] In addition to the question of reasonableness, I note that in *Montesinos Hidalgo v Canada (Citizenship and Immigration)*, 2011 FC 1334 at paras 21-23, 6 Imm LR (4th) 5, this Court found that a PRRA Officer breached the Applicant's procedural fairness rights by failing to provide reasons for not holding an oral hearing. See also, *Plata Vasquez v Canada (Citizenship and Immigration)*, 2019 FC 279 at para 12, where this Court stated that failure to provide reasons could, standing alone, justify allowing a judicial review application.

[15] Whether the failure to provide reasons for the refusal to hold a hearing renders the decision unreasonable or constitutes a breach of procedural fairness is of no moment. Regardless of the academic debate, the PRRA Officer erred.

[16] Finally, and perhaps most importantly, in this case the Applicants specifically requested an oral hearing. The PRRA Officer specifically stated in his reasons that there was no request for an oral hearing. This clearly demonstrates the Officer did not consider, even if by inadvertence, the submissions made by the Applicants on the issue of an oral hearing.

[17] Based upon the accumulation of these errors, I conclude the decision cannot stand.

VI. Remedy

[18] As indicated earlier in these reasons, I advised the parties at the conclusion of the oral hearing that I would appreciate further submissions regarding the appropriate remedy. Toward that end, I asked for their views about whether I should remit the matter for redetermination before a different PRRA Officer, without any instructions, or, whether I should remit the matter

with directions that the new PRRA Officer hold a hearing. Both counsel provided very helpful submissions within the time requested by the Court.

[19] The law with respect to the circumstances under which courts may provide instructions to administrative tribunals regarding the manner in which they exercise their powers has recently been restated in *Canada (Citizenship and Immigration) v Tennant*, 2019 FCA 206, 436 DLR (4th) 155. The Federal Court of Appeal instructs that such a remedy is available where, on the facts and the law, "there is only one lawful response, or one reasonable conclusion, open to the administrative decision-maker, so that no useful purpose would be served if the decision-maker were to re-determine the matter" (at para 72). *Vavilov* also speaks to this issue. At paragraph 142, the majority states that there may be cases where it is futile to remit a matter for redetermination because the outcome is inevitable. I have already passed that threshold; I am remitting the matter back. The only issue is whether I usurp the future PRRA Officer's discretion to hold a hearing by directing him or her to do so. In making this determination, I am satisfied I should apply the same test as enunciated by the Supreme Court; namely, is it inevitable that a future PRRA Officer would direct the holding of a hearing?

[20] After careful consideration of the whole of the material before me, I cannot conclude that the decision to hold a hearing would be inevitable. I say this for one simple reason: a future PRRA Officer may not agree that the same new evidence admitted by the PRRA Officer in this case is admissible. A different PRRA Officer may determine that the Applicants' "new" evidence does not satisfy the criteria set out in s. 113(a) of the *IRPA* and the jurisprudence. Without knowing which new evidence will be admitted, it is impossible for the Court to put itself

in the place of a future PRRA Officer for purposes of applying the factors enumerated in s. 167 of the *Regulations*. In my view, it would be inappropriate for the Court, at this time, to make conclusions regarding which evidence meets the test set out in s. 113(a) of the *IRPA* and the factors set out in *Raza*. That responsibility rests with the PRRA Officer, subject, of course, to an application for leave to seek judicial review.

VII. Conclusion

[21] The application for judicial review is allowed without costs. The matter is remitted to another PRRA Officer for redetermination. Neither party proposed a question for certification, and none appears from the record. It follows that no question is certified for consideration by the Federal Court of Appeal.

JUDGMENT in IMM-2048-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted and the matter is remitted to a different Pre-Removal Risk Assessment Officer;
2. No question is certified for consideration by the Federal Court of Appeal; and
3. There is no order of costs.

« B. Richard Bell »
Judge

ANNEX

Immigration and Refugee Protection Act, S.C. 2001, c. 27	***Loi sur l'immigration et la protection des réfugiés***, L.C. 2001, ch. 27
Convention Refugee	**Définition de réfugié**
96 A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	**96** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country	b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner
Person in need of protection	**Personne à protéger**
97(1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	**97(1)** A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(a) to a danger, believed	a) soit au risque, s'il y a

on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,	(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats
[…]	[…]
DIVISION 3	**SECTION 3**
Pre-removal Risk	**Examen des risques avant**

Assessment

[…]

Consideration of application

113 Consideration of an application for protection shall be as follows:

(a) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection;

(b) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;

Immigration and Refugee Protection Regulations, **SOR/2002-227**

Hearing — prescribed factors

167 For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors are the following:

(a) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set

renvoi

[…]

Examen de la demande

113 Il est disposé de la demande comme il suit :

a) le demandeur d'asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'il n'était pas raisonnable, dans les circonstances, de s'attendre à ce qu'il les ait présentés au moment du rejet;

b) une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;

Règlement sur l'immigration et la protection des réfugiés, **DORS/2002-227**

Facteurs pour la tenue d'une audience

167 Pour l'application de l'alinéa 113b) de la Loi, les facteurs ci-après servent à décider si la tenue d'une audience est requise :

a) l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question

out in sections 96 and 97 of the Act;	importante en ce qui concerne la crédibilité du demandeur;
(b) whether the evidence is central to the decision with respect to the application for protection; and	b) l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;
(c) whether the evidence, if accepted, would justify allowing the application for protection.	c) la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2048-19
STYLE OF CAUSE:	STELLA MBULA-KOLELA, JAELLE KERENE TSHIENDA KALALA ONDO, NOIYA LILYA NTANGA KALALA ONDO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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