Federal Court  Cour fédérale

Date: 20200423

Docket: IMM-3049-19

Citation: 2020 FC 541

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, April 23, 2020

PRESENT: The Honourable Associate Chief Justice Gagné

BETWEEN:

MARTINE ESTIMABLE
MIKAEL ESTIMABLE DAVILMAR

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Martine Estimable is applying, on behalf of herself and her minor son, for judicial review of the decision of the Refugee Protection Division (RPD) denying them refugee protection status on the grounds that they have not properly established their identity. Upon arriving in Canada,

the female applicant admitted that her son's Haitian birth certificate is a forgery and that, since he was born in Brazil, he is actually a citizen of Brazil. The RPD found that the other documents provided to prove the applicants' identities were not credible either.

II. Facts

[2] In her Basis of Claim Form, the female applicant alleges that she is a Haitian citizen who left her country for Brazil to flee the extortion of which she was a victim as a businesswoman. She lived in Brazil as a permanent resident from 2011 to 2016, where her son was born in 2013.

[3] She was the victim of arson on her home in Brazil and left for the United States with her son in late 2016. In response to the United States President's attitude towards immigrants and asylum seekers, they entered Canada in August 2017 and claimed refugee protection.

[4] Upon arriving in Canada, the female applicant admitted to the authorities that her son's Haitian birth certificate is a forgery and that he is actually a Brazilian citizen.

[5] The respondent Minister intervened before the RPD to argue that the documents provided to prove the female applicant's identity are also problematic and that the applicants have not properly established their identity. In the alternative, the Minister submits that the applicants are excluded from Canada's protection pursuant to Article 1E of the *United Nations Convention Relating to the Status of Refugees*, UN AG 28, July 1951, and section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

III. Impugned decision

[6] In a decision rendered from the bench, the RPD concluded that the applicants had not established their identity on a balance of probabilities.

[7] The RPD relied on the female applicant's admission at the port of entry to conclude that there was a complete lack of proof of identity for the minor applicant.

[8] As for the female applicant, the RPD took into account her testimony that, when she left Brazil, she gave all her identity documents to an acquaintance so that he could take them back to Haiti; instead, he lost them. The female applicant did this to prevent them from being returned to Haiti when she arrived in Panama. It was only when she was in the United States in 2016 that the female applicant asked her brother, who was still in Haiti, to obtain new identity documents for her. She reportedly provided him with a photo of herself and, as for the rest, she does not know what steps he took to obtain a birth certificate and a national identity card for her.

[9] The RPD concluded that the female applicant's Haitian birth certificate, which has the same serial number and is similar in every way to her son's forged birth certificate, is probably also a forgery. With respect to the national identification card, the RPD notes that it has an issue date in 2010, whereas the female applicant allegedly only obtained it in 2016. The female applicant explained that this might simply be a reissue of a lost document, but the RPD was not satisfied with that explanation.

[10] The RPD also criticized the female applicant for not having taken any serious steps to obtain better evidence of her identity and that of her son, even though she received the Minister's request to intervene and knew that proof of her identity was going to be one of the key elements of her hearing before the RPD. The applicants were represented by their former counsel when they made their refugee protection claim, and by their current counsel, who replaced their former counsel more than 10 months before the hearing. Even if the first counsel had been negligent, the current counsel of record had sufficient time to adequately advise her clients.

[11] The female applicant was accompanied by a friend at the hearing. She did not intend to call her as a witness, but her friend agreed to answer questions from the RPD. She met the female applicant when she arrived in Canada but stated that she heard about her when she was about nine years old while she was in Haiti. Since her testimony was vague and confused in this regard, the RPD gave it little weight.

[12] Finally, for substantially the same reasons, the RPD refused the applicants' counsel's request, at the very end of the hearing, that they be given time to obtain affidavits from family members in Canada attesting to their identity.

IV. Issues and standard of review

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

A. *Did the RPD err in concluding that the applicants had not satisfactorily established their identity?*

B. *Does the RPD's refusal to grant an adjournment of the hearing violate the principles of natural justice and procedural fairness?*

[14] The standard of review applicable to the RPD's findings regarding the applicants' identity is that of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, at paras 16–17, 23). As for the issue of procedural fairness, since the Supreme Court of Canada decision in *Vavilov* does not specifically address this issue, the previous jurisprudence still applies. Accordingly, if the Court finds a violation, the decision must be set aside and the record returned to the RPD for redetermination.

V. Analysis

A. *Did the RPD err in concluding that the applicants had not satisfactorily established their identity?*

[15] In essence, the applicants allege that the RPD used the female applicant's admission at the port of entry regarding her son's birth certificate to discredit other documents and evidence presented to prove her own identity. They point out that it is well known that statements made at the port of entry by an applicant are generally unreliable.

[16] First, it is important to note that the female applicant did not try to argue, either before the RPD or before the Court, that, on the contrary, her son's birth certificate is true. Since it is the only document attesting to the identity of the minor applicant, it must be noted that the RPD's finding with respect to him is reasonable and cannot be challenged.

[17] The RPD was not required to consider each piece of evidence out of context. According to the female applicant's testimony, she had no identification when she arrived in the United States. She asked her brother to provide her with new identification, based on a single photo she

gave him. As a result, in 2016, she allegedly received all the documents filed in support of her refugee protection claim in Canada. However, her birth certificate and her son's false birth certificate have the same serial number and are very similar. Statements of birth made on the same day, before the same registrar of civil status, most likely written in the same handwriting, bearing the same signature and the same blurred seals. In my view, it was quite reasonable for the RPD to conclude, in the absence of any explanation for these similarities, that the female applicant's birth certificate was probably also a forgery.

[18] The RPD also questioned the validity of the female applicant's national identity card, which was the only other document filed with the RPD that was seemingly issued by the Haitian authorities. According to the female applicant's testimony, she obtained this document in 2016, when she was in the United States. Confronted with the fact that it bears an issue date in 2010, the female applicant's only explanation was that it was probably a reissue, and that the lost card it was replacing was probably issued in 2010. When asked about the steps taken to obtain this identification, she responded that she had sent a photo of herself to her brother in Haiti, who arranged to obtain it for her.

[19] The applicants criticize the RPD for analyzing the evidence using North American standards. They also refer the Court to Tab 3.4 of the National Documentation Package on Haiti and argue that the female applicant's national identity card is consistent with the description given there.

[20] Tab 3.4 deals with the information normally found on a Haitian national identity card. It does not provide any information on how to obtain the issuance, or re-issuance, of such a lost or stolen card, particularly when the applicant is outside the country. Furthermore, the female applicant has not explained what steps she allegedly took to obtain this card, nor has she provided an acceptable explanation as to why the card was issued before the application was made. Finally, the mere fact that the card is in the format described in Tab 3.4 does not guarantee its validity or truthfulness.

[21] It was therefore not only the female applicant's admission about her son's birth certificate that allowed the RPD to give little or no weight to the female applicant's national identity card, but the whole of the evidence, including her testimony.

[22] Added to that is the fact that the female applicant never contacted the Haitian embassy to obtain any document whatsoever, even though she alleges no fear of the Haitian state.

[23] The applicants allege that the RPD failed to take into account the social security card, the notice of release and notice of departure that the United States authorities issued in her name, and the fact that her name appears on the list of Haitian citizens who were granted permanent resident status by Brazil in 2011.

[24] However, the female applicant admits that she had no identification when she arrived in the United States. The United States authorities could therefore rely only on her statements as to her identity or on the documents she received while she was already in the United States, the

very documents that the RPD analyzed. As a third country, the United States certainly could not attest to the female applicant's identity in the absence of any official identification from her country of citizenship. It was therefore reasonable for the RPD not to accept this evidence as proof of the female applicant's identity.

[25] It is true that the Minister's notice to intervene contains a list from the Brazilian authorities containing the name of the female applicant. Again, this document does not come from the female applicant's country of citizenship and I am of the opinion that it was reasonable, in the absence of any valid identification issued by the Haitian authorities, to conclude that this list was not sufficient to establish her identity on a balance of probabilities.

[26] Finally, the applicants complain that the RPD did not give sufficient weight to the testimony of the female applicant's friend who accompanied her on the day of the hearing. She is allegedly her cousin by marriage and had heard about the female applicant when she was about nine years old and still living in Haiti. However, she only met her for the first time when she arrived in Canada in 2017.

[27] In my opinion, it was also reasonable for the RPD not to find this evidence sufficient to establish the female applicant's identity; her friend was very vague about her childhood memories and she was not in a position to testify about the female applicant's life and identity in Haiti.

B. *Does the RPD's refusal to grant an adjournment of the hearing violate the principles of natural justice and procedural fairness?*

[28] The Minister provided his Notice to Intervene in the applicants' claim on May 15, 2018, 10 months before the hearing before the RPD on March 18, 2019. A copy of this notice was sent by priority mail to the applicants' former counsel. New counsel for the applicants appeared on the RPD record on July 16, 2018, eight months prior to the hearing before the RPD. The Ministers' Notice to Intervene clearly states that it is based [TRANSLATION] "on the fact that the claimants do not have acceptable identity documents, and cannot reasonably explain why they have not taken the reasonable steps to obtain them". The Minister states that there are no identity documents for the minor applicant, since the female applicant admitted that his Haitian birth certificate is a forgery, and the strong similarities between the two birth certificates seem to indicate that the female applicant's birth certificate is also a forgery.

[29] The applicants complain that their former counsel did not inform them of this notice. The female applicant adds that, despite this fact, she took every possible step to obtain, before the hearing before the RPD, a valid identity document for her son. According to her testimony before the RPD, she asked a friend in Brazil to provide her with the address where she lived in Brazil so that she could go to the Brazilian embassy to obtain her son's birth certificate. Unfortunately, she did not receive this information prior to the hearing.

[30] And it was only at the very end of the hearing that counsel for the applicants asked the RPD to adjourn the hearing to allow her to obtain sworn statements from the applicants' family members residing in Canada attesting to their identity.

[31] The RPD denied this request, relying on section 54 of the *Refugee Protection Division Rules*, SOR/2012-256, on the basis that there were no exceptional circumstances justifying an adjournment.

[32] The applicants argue that this refusal is a breach of the principles of natural justice and procedural fairness in that it denied them the right to adequately pursue their rights.

[33] I do not agree with the applicants. The applicants were entitled to all relevant information and they received it well before appearing before the RPD.

[34] First, the applicants cannot claim professional misconduct on the part of their former counsel, since their new counsel replaced him eight months before the hearing before the RPD. Any misconduct on the part of the former counsel would therefore be of no consequence.

[35] With respect to the current applicant's counsel, she argues that, although she appeared on the RPD file earlier, it was only a month before the hearing that she was able to review the documentation and meet with the female applicant for the first time. Aside from the fact that one month would have been sufficient to request and obtain sworn statements from the applicants' family members who reside in Canada, the RPD cannot be faulted for not giving the applicants an opportunity to know the Minister's position and the burden of proof that rested on them.

[36] Since the applicants did not request a postponement prior to the hearing, or even at the beginning of the hearing, and did not take any steps to obtain the testimony of the applicants'

family members in Canada or of the minor applicant's father, with whom the female applicant is still in contact, it is my opinion that the RPD did not violate any principles of natural justice and procedural fairness.

VI. Conclusion

[37] Since the RPD has considered all of the evidence before it, its decision is inherently logical and intelligible, and its conclusion as to the identity of the applicants is within the range of reasonable possible outcomes in fact and law, the applicants' application for judicial review is dismissed.

[38] The parties did not submit any issue of general importance for certification and no such issue arises from the facts of this case.

JUDGMENT in IMM-3049-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No question of general importance is certified.

"Jocelyne Gagné"
Associate Chief Justice

Certified true translation
This 5th day of May 2020.

Johanna Kratz, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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