

Federal Court



Cour fédérale

Date: 20200917

Docket: IMM-5237-19

Citation: 2020 FC 903

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Montréal, Quebec, September 17, 2020

PRESENT: The Honourable Mr. Justice Gascon

BETWEEN:

EDNA TERGANUS

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Ms. Edna Terganus, is a citizen of Haiti. Ms. Terganus is appealing a decision of the Refugee Appeal Division [RAD] dated August 12, 2019, [Decision] in which the RAD confirmed the rejection by the Refugee Protection Division [RPD] of her claim for refugee protection and the refusal to grant her refugee status or the status of a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. Both the RAD and the RPD rejected Ms. Terganus' claim on the basis that she had not established her identity.

[2] Ms. Terganus alleges that the Decision was unreasonable for two main reasons. First, she alleges that the RAD erred in its assessment of all of the evidence relating to her identity, including the contents of her birth certificate, her particular profile and the objective evidence available in the National Documentation Package [NDP] on Haiti. Second, she argues that the RAD failed in its duty to conduct an independent assessment of the evidence before it. As such, Ms. Terganus is asking the Court to set aside the Decision and return the matter to the RAD for a new hearing before a differently constituted panel.

[3] The only issue raised in this application for judicial review is whether the RAD's Decision on Ms. Terganus' failure to establish her identity was unreasonable.

[4] For the reasons that follow, I will dismiss Ms. Terganus' application. After reviewing the RAD's reasons and conclusions, the evidence before it and the applicable law, I can find no basis for overturning the Decision. The RAD's reasons possess the qualities that make its reasoning

logical and coherent within the relevant legal and factual constraints. There is nothing in this case that would warrant the Court's intervention.

II. Background

A. *Facts*

[5] The facts underlying Ms. Terganus' claim for refugee protection can be summarized as follows.

[6] While in Haiti, Ms. Terganus owned a small store in Saint-Louis-du-Nord. She claims that in February 2015, her cousin threatened to kill her in order to claim the store. A few weeks later, her cousin allegedly made the same death threat again. In April 2015, accompanied by three police officers, her cousin reportedly came to the store and attacked Ms. Terganus. On April 15, 2015, the cousin allegedly called Mrs. Terganus to tell her that she would be returning the following week, this time to kill her.

[7] As a result of these incidents, Ms. Terganus left Haiti by boat on April 20, 2015, for the United States, where she remained for a little over two years. On August 28, 2017, Ms. Terganus arrived in Canada and claimed refugee protection on the basis that she feared she would be killed by her cousin if she were to return to Haiti. The claim was heard by the RPD in October 2018. In a decision dated November 14, 2018, the RPD rejected Ms. Terganus' claim for refugee protection, based on her failure to establish her identity in addition to doubts about her credibility.

[8] In its decision, the RPD found that Ms. Terganus had failed to provide acceptable documentation to establish her identity, as the surname she had used in both her claim and her immigration forms was different from the one on her birth certificate, namely “Terganus” rather than “Tergénus”. She had also stated two different dates of birth in the documents supporting her refugee protection claim, neither of which corresponded to the date of birth on her birth certificate. Ms. Terganus had also testified that her mother was the applicant on her birth certificate, while it was in fact her father who was the applicant on the document. In addition, the RPD noted a signature on the registry seal, which it considered to be an irregularity. The RPD therefore determined that the birth certificate filed in evidence was not genuine, and that Ms. Terganus had therefore failed to establish her identity on a balance of probabilities.

[9] Ms. Terganus subsequently appealed that decision to the RAD.

B. *RAD Decision*

[10] In its August 2019 Decision, the RAD dismissed the appeal and upheld the RPD’s findings. The determinative issue for the RAD was whether the birth certificate filed by Ms. Terganus was acceptable evidence establishing her identity.

[11] The RAD stated that national identity was not at issue, but rather that it was Ms. Terganus’ personal identity that was problematic. Like the RPD, the RAD noted that, on its face, the birth certificate contradicted Ms. Terganus’ testimony by indicating that the applicant was her father, while Ms. Terganus had instead claimed that it had been her mother who had

applied for the document. Second, the RAD found multiple pieces of evidence suggesting that Ms. Terganus' surname and date of birth differed from what appeared on her birth certificate. According to the RAD, it would have been reasonable to expect Ms. Terganus to have requested a copy of the birth certificate from her country's national archives, since the 2016 birth certificate was not the first one she had received.

[12] The RAD pointed out that under section 106 of the IRPA, Ms. Terganus had the burden of establishing her identity by means of "acceptable documentation establishing identity". Thus, the RAD noted that Ms. Terganus had failed to meet this burden since her Florida identity card indicated that her last name was Terganus and that she was born in 1994, while the birth certificate referred to a Ms. "Tergénus" born on December 25, 1990. In addition, the name Terganus was used in her immigration forms and in her claim for refugee protection. Finally, the RAD noted that the year of birth alleged by Ms. Terganus varied widely, being 1994 according to her refugee protection claim, 1992 according to her immigration forms, and 1988 according to her testimony at the hearing (at which she claimed to be 29 years of age). Thus, the RAD concluded that "there is utter confusion with respect to [Ms. Terganus'] personal identity". The RAD also noted that "[o]ne would normally expect the documentary evidence to corroborate, not contradict, the information in the refugee protection claim".

[13] Further, the RAD noted that Ms. Terganus had been given the opportunity to amend her claim to correct any errors it may have contained, but that she did not do so. The RAD recalled that Ms. Terganus gave a solemn affirmation at the beginning of her hearing before the RPD, confirming that the information in her refugee protection claim was accurate.

[14] In light of the above, the RAD concluded that Ms. Terganus' birth certificate did not constitute sufficient acceptable documentary evidence to establish her identity, and dismissed her appeal.

C. Standard of Review

[15] It is well established, and not disputed by any party, that a reasonableness standard applies to the RAD's finding with respect to a refugee protection claimant's identity (*Edobor v Canada (Citizenship and Immigration)*, 2019 FC 1064 [*Edobor*] at para 6; *Daniel v Canada (Citizenship and Immigration)*, 2016 FC 1049 [*Daniel*] at para 13).

[16] Moreover, since *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the analytical framework for judicial review of an administrative decision is now based on a presumption that the standard of reasonableness is the applicable standard in all cases (*Vavilov* at para 16). This presumption can only be rebutted in two types of situations. The first is where Parliament has prescribed the applicable standard of review or provided a mechanism for appealing the administrative decision to a court of law; the second is where the issue under review falls into one of the categories of issues over which the rule of law requires that the standard of correctness be applied (*Canada Post Corporation v Canadian Union of Postal Workers*, 2019 SCC 67 [*Canada Post Corporation*] at para 27; *Vavilov* at paras 10, 17). None of the situations justifying a departure from the presumption of reasonableness applies in this case, either with respect to the RAD's conclusions on identity or its assessment of the evidence.

[17] Where the applicable standard of review is reasonableness, the role of a reviewing court is to examine the reasons given by the administrative decision maker and determine whether the decision is based on “an internally coherent and rational chain of analysis” and is “justified in relation to the facts and law that constrain the decision maker” (*Vavilov* at para 85; *Canada Post Corporation* at paras 2, 31). The reviewing court must consider “the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified” (*Vavilov* at para 15).

III. Analysis

[18] Ms. Terganus argues that the RAD erred in failing to give probative value to some of the evidence without justification. In particular, she argues that the RAD did not take into account her explanations to the effect that her birth certificate established her true identity despite the presence of irregularities attributable to the precariousness of the civil registry in Haiti. She asserts that the RAD ought to have considered tabs 3.11 and 3.2 of the NDP on Haiti, which explain the weaknesses afflicting the Haitian civil registry system. By failing to analyze her identity documents in light of the Haitian context, Ms. Terganus alleges that the RAD acted unreasonably.

[19] Ms. Terganus’ counsel further argues that the applicant was unable to reproduce the information in her birth certificate because of her low level of education and her [TRANSLATION] “disabilities”. Ms. Terganus also contends that, in the end, her case raised a question of credibility, not identity. She submits that the contradictions might have led the RAD to determine that she lacked credibility, but that the conclusion about her identity was unreasonable.

[20] Ms. Terganus also criticizes the RAD (and the RPD) for failing to consider the risk under section 97 of the IRPA. Relying on *Sanaei v Canada (Citizenship and Immigration)*, 2014 FC 402 [*Sanaei*], she argues that the RPD and the RAD have an obligation to consider a *sur place* claim for refugee protection, even where there are credibility concerns (*Sanaei* at para 51). Finally, relying on *Ali v Canada (Citizenship and Immigration)*, 2016 FC 396 and *Gabila v Canada (Citizenship and Immigration)*, 2016 FC 574, Ms. Terganus argues that the RAD failed to truly act as an appeal tribunal, failed to conduct an independent assessment of the evidence, and failed in its duty to reach its own conclusions. Instead, Ms. Terganus argues, the RAD showed complete deference to the RPD's findings as to her identity, thereby depriving her of the true appeal process to which she was entitled.

[21] I do not agree with the various arguments put forth by Ms. Terganus. Rather, I am of the view that in proceeding as it did, the RAD did not commit any error that would warrant the Court's intervention.

[22] The identity of a refugee protection claimant is a preliminary and fundamental issue, and failure to establish identity is fatal to a claim for refugee protection (*Daniel* at para 28; *Bah v Canada (Citizenship and Immigration)*, 2016 FC 373 [*Bah*] at para 7). As Justice Norris wrote in *Edobor*, “[i]t is incontrovertible that proof of identity is a pre-requisite for a person claiming refugee protection”; in the absence of such proof, “there can be no sound basis for testing or verifying the claims of persecution or, indeed for determining the Applicant's true nationality” (*Edobor* at para 8, citing *Jin v Canada (Minister of Citizenship and Immigration)*, 2006 FC 126 at para 26).

[23] A refugee protection claimant's identity, it should be recalled, remains the cornerstone of Canada's immigration system. Identity establishes the uniqueness of an individual. It is what sets a person apart and differentiates him or her from all others. Also, identity is the basis for issues such as admissibility to Canada, assessment of the need for protection, evaluation of potential threats to public safety, and the risks of a subject evading official examination by authorities (*Bah* at para 7, citing *Canada (Minister of Citizenship and Immigration) v Singh*, 2004 FC 1634 at para 38 and *Canada (Citizenship and Immigration) v X.*, 2010 FC 1095 at para 23).

[24] Both the IRPA and the *Refugee Protection Division Rules*, SOR/2012-256 [Rules] expressly state that, in order to be recognized as a refugee, a refugee protection claimant must first establish his or her identity on a balance of probabilities. This obligation is expressly set out in section 106 of the IRPA and section 11 of the Rules. Section 11 expresses the importance of establishing the identity of claimants as follows:

11. The claimant must provide acceptable documents establishing identity and other elements of the claim. A claimant who does not provide acceptable documents must explain why they were not provided and what steps were taken to obtain them.

11. Le demandeur d'asile transmet à la Section des documents acceptables pour établir son identité et les autres éléments de sa demande. S'il ne peut le faire, il en donne la raison et indique quelles mesures il a prises pour s'en procurer.

[25] For its part, section 106 of the IRPA creates a direct link between the requirement to produce acceptable documents to establish identity (or to explain why they were not produced) and the credibility of the claimant. It reads as follows:

106. The Refugee Protection Division must take into account, with respect to the

106. La Section de la protection des réfugiés prend en compte, s'agissant de crédibilité, le fait

credibility of a claimant, whether the claimant possesses acceptable documentation establishing identity, and if not, whether they have provided a reasonable explanation for the lack of documentation or have taken reasonable steps to obtain the documentation.	que, n'étant pas muni de papiers d'identité acceptables, le demandeur ne peut raisonnablement en justifier la raison et n'a pas pris les mesures voulues pour s'en procurer.
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[26] Ms. Terganus therefore had the burden of establishing her identity based on “acceptable documentation”.

[27] Here, however, the RAD identified a number of inconsistencies, anomalies and deficiencies between the identity document provided by Ms. Terganus (her birth certificate) and the evidence contained in the other documents filed by Ms. Terganus and in her testimony. Those inconsistencies were not minor or trivial, but rather related to two essential attributes of a person's identity: Ms. Terganus' name and date of birth. Ms. Terganus' evidence revealed three different birth dates (1994, 1992 and 1988 or 29 years of age), none of which matched the 1990 date on her birth certificate. Moreover, while the birth certificate identified her as Ms. Tergénus, Ms. Terganus' immigration and refugee protection claim forms bore the name “Terganus” for both her and several members of her family. Finally, the RAD also noted that the birth certificate contradicted Ms. Terganus' testimony as to the identity of the applicant appearing on the document, who was her father, while Ms. Terganus claimed that her mother had acted as the applicant.

[28] I am of the view that, in these circumstances, it was entirely reasonable for the RAD to question the authenticity of a birth certificate whose information was inconsistent with Ms. Terganus' testimony and other documents submitted by her in support of her claim for refugee protection, and not to give it probative value. I would add that the RAD came to this conclusion based on a careful analysis of the evidence, which is fully detailed in its reasons. Clearly, and contrary to what Ms. Terganus' counsel argued at the hearing, it is undeniable that the RAD could not have reasonably concluded, based on the evidence on the record, that Ms. Terganus' birth certificate could simply prove its contents. In sum, to echo what the RAD stated in its Decision, Ms. Terganus' claim for refugee protection was shrouded in total confusion as to her identity.

[29] In his submissions before the Court, counsel for Ms. Terganus argued that the reason for the inconsistencies and changing testimony of Ms. Terganus was that she is a person with low education, memory problems and [TRANSLATION] "disabilities". As compelling as this argument may be, it does not convince me. First, I note that Ms. Terganus has not provided any medical evidence to support those claims. Such evidence would have been necessary for the Court to consider an argument based on her intellectual or physical disabilities. Second, the inconsistencies related to two elements, Ms. Terganus' last name and date of birth, which seem to be quite difficult to justify on the basis of a lack of memory or little schooling. Moreover, Ms. Terganus was given the opportunity to amend her documents before the hearing before the RPD. Immigration authorities reminded her of this possibility, but she nevertheless chose not to avail herself of it.

[30] As for Ms. Terganus' criticism that the RAD failed to consider the birth certificate in light of the precariousness of the civil registry in Haiti, I would simply note that in its Decision, the RAD expressly referred to this argument made by Ms. Terganus, and therefore did not ignore it. However, the irregularities and inconsistencies noted between the birth certificate, the written evidence in the record and the testimony of Ms. Terganus were serious enough to cast doubt on her real name and age.

[31] With respect to the failure to assess Ms. Terganus' risk under section 97 of the IRPA, it is sufficient to note that since Ms. Terganus was unable to establish her identity, it was entirely open to the RAD not to address the issue. Indeed, the failure to prove identity alone is enough to reject a claim for refugee protection, and there is no need for the administrative decision maker to pursue further consideration of the merits of the claim (*Daniel* at para 28; *Diallo v Canada (Citizenship and Immigration)*, 2014 FC 878 at para 3; *Elmi v Canada (Citizenship and Immigration)*, 2008 FC 773 at para 4).

[32] According to Ms. Terganus, the RAD allegedly showed blind deference to the RPD's determination and failed to conduct its own independent assessment of the evidence, as nonetheless required by the case law following the Federal Court of Appeal decision in *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 [*Huruglica*]. That argument does not stand up to scrutiny, and even a cursory reading of the Decision is sufficient to defeat it.

[33] To begin with, the RAD expressly states in its Decision that it reviewed the RPD's findings "by applying the correctness standard" and by carrying out its own analysis of the

record. In doing so, the RAD certainly understood its role and followed the Federal Court of Appeal's teachings in *Huruglica* to the letter. Moreover, when one considers paragraphs 10 to 12 of the Decision pointed out by Ms. Terganus, I believe that they reflect not a complacent deference to the RPD but rather a thorough review by the RAD. One can see in its Decision that the RAD rigorously examined the various strands of evidence in the record and extracted all of the relevant evidence before concluding that there was "utter confusion with respect to [Ms. Terganus'] personal identity". It is clear from the reasons for the Decision that the RAD conducted its own independent and comprehensive assessment of the evidence and determined that Ms. Terganus had not established her identity. The fact that the RAD reached the same conclusion as the RPD at the end of its analysis does not mean that it failed to do its work as an appeal tribunal.

[34] Review on the standard of reasonableness must include a rigorous evaluation of administrative decisions. However, as part of its analysis of the reasonableness of a decision, a reviewing court must examine the reasons given with "respectful attention" and seek to understand the line of reasoning followed by administrative decision makers in reaching their conclusion (*Vavilov* at para 84). A reviewing court should adopt a deferential approach and intervene only "where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process" (*Vavilov* at para 13).

[35] As a result of *Vavilov*, the reasons given by administrative decision makers take on greater importance and become the starting point for analysis. They are the primary mechanism by which administrative decision makers demonstrate the reasonableness of their decisions, both

to the affected parties and to the reviewing courts (*Vavilov* at para 81). They serve to “explain how and why a decision was made”, to demonstrate that “the decision was made in a fair and lawful manner” and to guard against “the perception of arbitrariness in the exercise of public power” (*Vavilov* at para 79). In short, it is the reasons that establish the justification for the decision. They must be interpreted broadly and contextually in order to understand “the basis on which a decision was made” (*Vavilov* at para 97; *Canada Post Corporation* at para 31).

[36] In the case of Ms. Terganus, I am satisfied that the reasons for the RAD’s Decision provide ample justification for its conclusions in a transparent and intelligible manner and allow the Court to fully understand why the RAD found that Ms. Terganus had failed to establish her identity (*Canada Post Corporation* at paras 28-29; *Vavilov* at paras 81, 136; *Dunsmuir* at para 48). They demonstrate that the RAD followed rational, coherent and logical reasoning in its analysis and that the Decision conforms to the relevant legal and factual constraints (*Canada Post Corporation* at para 30, citing *Vavilov* at paras 105–7). There is nothing in the errors alleged by Ms. Terganus that causes me “to lose confidence in the outcome reached by the decision maker” (*Vavilov* at para 122). There are no serious deficiencies in the Decision that would restrict the analysis and that could undermine the requirements of justification, intelligibility and transparency.

IV. Conclusion

[37] For the foregoing reasons, Ms. Terganus’ application for judicial review is dismissed. I find nothing irrational in the decision-making process followed by the RAD or its findings. Rather, I find that the RAD’s analysis of Ms. Terganus’ failure to prove her identity on the

balance of probabilities has all the requisite attributes of transparency, reasonableness and intelligibility, and that the Decision is not tainted by any reviewable error. In all respects, the reasoning of RAD can be followed without a decisive flaw in rationality or logic.

[38] None of the parties has proposed any questions of general importance for certification, and I agree that none arise.

JUDGMENT in IMM-5237-19

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed, without costs.
2. No question of general importance is certified.

“Denis Gascon”

Judge

Certified true translation

Michael Palles, Reviser

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5237-19

STYLE OF CAUSE: EDNA TERGANUS v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: HEARING HELD VIA VIDEOCONFERENCE AT
MONTRÉAL, QUEBEC

DATE OF HEARING: SEPTEMBER 10, 2020

JUDGMENT AND REASONS: GASCON J.

DATED: SEPTEMBER 17, 2020

APPEARANCES:

Dorin Cosescu FOR THE APPLICANT

Isabelle Brochu FOR THE RESPONDENT

SOLICITORS OF RECORD:

Dorin Cosescu FOR THE APPLICANT
Montréal, Quebec

Attorney General of Canada FOR THE RESPONDENT
Montréal, Quebec