Federal Court  Cour fédérale

Date: 20201030

Docket: IMM-4418-19

Citation: 2020 FC 1017

Ottawa, Ontario, October 30, 2020

PRESENT: Madam Justice Pallotta

BETWEEN:

EMMANUEL DUKUZEYEZU, CLEMENTINE NYIRANEZA DUKUZEYEZU, MICHAEL LUKUNDO DUKUZEYEZU, MATTHEW KWIZERA DUKUZEYEZU and ETHAN NTWALI DUKUZEYEZU

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. and Ms. Dukuzeyezu and their three children are Rwandan refugees living in Zambia. They seek judicial review of the decision of a visa officer with the Canadian High Commission in Dar Es Salaam (Officer), dismissing their applications for permanent residence

as privately sponsored refugees. After interviewing the applicants in Zambia, the Officer found that the applicants did not meet the refugee resettlement requirements under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], on the basis that they failed to establish persecution in Rwanda and they have a "durable solution" in Rwanda and Zambia.

[2] Mr. and Ms. Dukuzeyezu separately fled Rwanda with their respective parents and siblings in 1994 during the Rwandan genocide. They allege that they cannot return to Rwanda because they would face persecution there. Although they have been living in Zambia for over 20 years, they claim there is no future in Zambia because they do not have a clear path to permanent residence or citizenship.

[3] The applicants submit that the Officer's decision was unreasonable. They submit that the Officer failed to properly consider their present and future risk of persecution in Rwanda, and they challenge the Officer's reasons for finding that the applicants had a durable solution in Rwanda and Zambia. In addition, they submit the Officer breached procedural fairness by failing to provide a reasonable opportunity to respond to concerns regarding their prospects for obtaining permanent residence in Zambia.

[4] The respondent argues that the Officer's decision was reasonable and procedurally fair, and the applicants simply failed to meet their onus.

[5] Although I find that the Officer did not breach procedural fairness, I agree with the applicants that the Officer's decision was unreasonable. Accordingly, this application for judicial review is allowed.

II. Issues and Standard of Review

[6] The issues on this application for judicial review are:

1. Was the Officer's decision to refuse the applications for permanent residence reasonable?

2. Did the Officer breach procedural fairness?

[7] The reasonableness standard of review that applies to the merits of the Officer's decision is a deferential but robust form of review: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 12-13, 75 and 85. A reviewing court must determine whether the decision bears the hallmarks of reasonableness—justification, transparency and intelligibility: *Vavilov* at para 99. A reasonable decision is based on an internally coherent and rational chain of analysis and it is justified in relation to the facts and law that constrain the decision maker: *Vavilov* at para 85. The party challenging the decision bears the onus of demonstrating that it is unreasonable: *Vavilov* at para 100.

[8] A standard of review that is akin to correctness applies to the issue of procedural fairness: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Vavilov* at para 23.

III. Preliminary Issue: Admissibility of the Officer's affidavit

[9] The applicants object to the admissibility of paragraphs 15-20 of an affidavit from the Officer, filed by the respondent, on the basis that these paragraphs supplement the Officer's reasons.

[10] The respondent counters that supporting affidavits may be used on judicial review to point out factual and contextual matters that are not evident in the record or to provide the reviewing court with general, orienting information, such as how a request for information was handled, how the documents were gathered, and how the task of assessment was conducted: *Leahy v Canada (Minister of Citizenship and Immigration)* 2012 FCA 227 at para 145 [*Leahy*]. The respondent submits that the Officer's affidavit does not stray beyond these applicable limits.

[11] I disagree. Paragraphs 15-20 of the Officer's affidavit are not limited to background information, and the information they provide does not fall within an exception to the general rule that judicial review of administrative decisions is to proceed on the basis of the information that was before the decision maker: *Henri v Canada (Attorney General)*, 2016 FCA 38 at para 39. In my view, the paragraphs in question impermissibly supplement the Officer's reasons: *Leahy* at para 145; *Ghirmatsion v Canada (Citizenship and Immigration)*, 2011 FC 519 at para 7 [*Ghirmatsion*]; *Dinani v Canada (Citizenship and Immigration)*, 2014 FC 141 at paras 6-7.

[12] It is not enough for an administrative decision to be justifiable—it must also be justified by way of the reasons: *Vavilov* at para 86. Furthermore, transparency is undermined if decision makers are able to supplement their reasons after the fact in affidavits: *Sellathurai v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 255 at para 46, citing *Simmonds v Canada (Minister of National Revenue)*, 2006 FC 130. No weight should be given to parts of an affidavit that attempt to remedy a defect in the decision by effectively presenting further and better reasons: *Ghirmatsion* at para 8. Accordingly, I have disregarded paragraphs 15-20 of the Officer's affidavit in determining whether the Officer's decision was reasonable.

[13] The applicants filed two affidavits in support of the application for judicial review—one from Mr. Dukuzeyezu and one from a legal assistant working with the applicants' counsel. The respondent did not object to the admissibility of these affidavits, and I considered them. Based on the certified record, it appears that the applicants' supporting affidavits include evidence that was not before the Officer. That evidence was not essential to my findings.

IV. **Analysis**

A. *Was the Officer's decision to refuse the applications for permanent residence reasonable?*

[14] The applicants sought permanent residence in Canada as members of the Convention refugee abroad class or the humanitarian-protected persons abroad (country of asylum) class. As such, they were required to establish (i) that they are in need of refugee protection, and (ii) that they do not have a reasonable prospect, within a reasonable period, of a durable solution in a country other than Canada, namely, voluntary repatriation in their country of nationality or habitual residence, or resettlement or an offer of resettlement in another country: section 139 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*].

[15] With respect to the need for refugee protection, Ms. Dukuzeyezu had alleged that she feared persecution based on her mixed Hutu-Tutsi ethnicity. Her brother, sister, and mother tried to return to Rwanda. Her brother was killed, and her sister and mother were forced to flee and are now French and Canadian citizens, respectively. Mr. Dukuzeyezu had alleged a fear of persecution related to a family dispute over land. He returned to Rwanda in 2005 with his sister and her husband, and found his uncle and other family members living on the farmland that he

inherited after his parents died. As a result of the ensuing land dispute, Mr. Dukuzeyezu's brother-in-law was beaten and imprisoned, and later fled to Uganda with his wife. Mr. Dukuzeyezu alleges that he quickly returned to Zambia because his uncle wanted to eliminate him as the eldest male and heir to the family property, and government officials were complicit.

[16] With respect to the durable solution, the applicants had alleged that they could not stay in Zambia because they have no clear path to permanent residence or citizenship. Mr. and Ms. Dukuzeyezu have been living in Zambia for over 20 years and Zambia does not have a policy to integrate refugees. Although their three children were born in Zambia, they are Rwandan citizens. The applicants' status as refugees is not permanent, limits their employment prospects, and subjects them to discrimination.

[17] The Officer found that the applicants are neither Convention refugees nor members of the country of asylum class pursuant to section 96 of the *IRPA* and section 147 of the *IRPR*, and that they do not meet the requirements for resettlement set out in the *IRPA* because they have a durable solution in Rwanda and in Zambia. The refusal letter outlines the following reasons:

> -Your basis of claim is due to land disputes over property that your family owned approximately 80 km from Kigali. This dispute took place in 2005 and as long as you don't get involved in the dispute, there appears to be no reason why you would face insecurity in Rwanda. Property disputes amongst family members does not amount to the definition of "persecution" as its [*sic*] understood in the refugee context.
>
> -The Rwanda of 2005 was different than the Rwanda of 2019: it has now been deemed to be a country where people can safely return and count on the protection of the state.
>
> -You were interviewed by the Zambian authorities and chose to maintain your refugee status in Zambia which appears self-serving because you had an application for immigration to Canada in

> progress. I note that you have completed advanced studies in Zambia and that you are currently financing university studies in medicine. It appears you have more than enough resources to apply for residency in Zambia and eventually for naturalization.

[18] Further reasons are recorded in the Global Case Management System (GCMS) notes, including:

> SELECTION DECISION: APPLICANTS HAVE FAILED TO DEMONSTRATE HOW THEY WOULD FACE ANY PERSECUTION IF THEY RETURNED TO RWANDA. [MR. DUKUZEYEZU] FITS THE CRITERIA FOR NATURALIZATION IN ZAMBIA AND HAS PURSUED A HIGH LEVEL OF EDUCATION. APPEARS A DURABLE SOLUTION WOULD BE AVAILABLE OR A RETURN TO RWANDA AWAY FROM THE FAMILY LAND WHERE HE PREVIOUSLY EXPERIENCED CONFLICT.

(1) **Present and future risk of persecution in Rwanda**

(a) *Ms. Dukuzeyezu's claim of persecution based on ethnicity*

[19] The parties agree that the Officer's reasons and GCMS notes did not specifically address Ms. Dukuzeyezu's allegations of persecution based on her ethnicity. According to the respondent, this was because Ms. Dukuzeyezu failed to raise ethnic-based persecution at the interview with the Officer. However, I find that Ms. Dukuzeyezu was not required to do so. She had already raised this basis in her application form and was entitled to assume that the Officer would consider the basis of persecution that was specifically raised. The obligation to consider all grounds for claiming refugee status rests with the Officer, and extends even to grounds the claimant may have failed to identify: *Vilmond v Canada (Minister of Citizenship and Immigration)*, 2008 FC 926 at para 18.

[20] Furthermore, while the applicants may not have raised Ms. Dukuzeyezu's fear of persecution based on her ethnicity at the interview, they did raise her fear of returning to Rwanda. The Officer's interview notes indicate that Mr. Dukuzeyezu told the Officer, "[M]y wife has a problem that can't make her come back." The Officer then asked Ms. Dukuzeyezu about the problem and she responded that her mother and sister returned to Rwanda in 1997, but were forced to flee again in 2004. She said, "The reason that made them run could happen to me." There is no indication that the Officer elicited further information about why Ms. Dukuzeyezu feared returning to Rwanda, in order to assess whether she had grounds for claiming refugee status as the Officer was required to do. The Officer only wrote, without citing a source, that subsequent to 1997 (when the mother and sister returned), the UNHCR "deemed Rwanda a safe country for everyone to return". The applicants argue that the Officer was referring to UNHCR cessation provisions that were invoked as of June 2013, and those provisions did not deem Rwanda safe for everyone to return but rather, stated that individuals who fled the genocide in the 1990s were no longer considered *prima facie* refugees. I agree. According to the UNHCR guidelines, international refugee protection grounds may still apply in individual cases:

> Continued international protection needs
>
> 19. Even when circumstances have generally changed to such an extent that refugee status would no longer be necessary, there may always be the specific circumstances of individual cases that may warrant continued international protection. It has therefore been a general principle that all refugees affected by general cessation must have the possibility, upon request, to have such application in their cases reconsidered on international protection grounds relevant to their individual case.
>
> …
>
> Post-declaration applications for refugee status

> ix. A declaration of general cessation cannot serve as an automatic bar to refugee claims, either at the time of a general declaration or subsequent to it. Even though general cessation may have been declared in respect of a particular country, this does not preclude individuals leaving this country from applying for refugee status. For example, even if fundamental changes have occurred in a State, members of identifiable sub-groups – such as those based on ethnicity, religion, race, or political opinion – may still face particular circumstances that warrant refugee status. Alternatively a person may have a well-founded fear of persecution by a private person or group that the government is unable or unwilling to control, persecution based on gender being one example.
>
> UNHCR Guidelines on International Protection No. 3: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees.
>
> (Emphasis added.)

[21] In fact, Zambia's Office of the Commissioner for Refugees (ZOCR) determined the applicants to be refugees, despite the general cessation invoked by the UNHCR, and certified the applicants' refugee status in November 2017 by issuing a Refugee Certificate. The Officer's GCMS interview notes record the following exchange between the applicants and the Officer:

> ...We went through interviews and they determined that we still faced persecution and as a result, we could not be naturalized since we are refugees. WHEN WAS YOUR INTERVIEW WITH THE ZAMBIAN GOV? 2017 I think, maybe 2016.

[22] The Officer did not distinguish the ZOCR's determination that the applicants were recognized as Rwandan refugees: *Ghirmatsion* at paras 58 to 59. In fact, the Officer mischaracterized the applicants' refugee status as a "choice", rather than a determination made by a Zambian authority, stating in the refusal letter, "You were interviewed by the Zambian authorities and chose to maintain your refugee status in Zambia which appears self-serving because you had an application for immigration to Canada in progress."

[23] The respondent correctly notes that the applicants' refugee status in Zambia was not determinative of the issues that were before the Officer; however, the general cessation that was invoked by the UNHCR was not determinative, either. The Officer was required to conduct an independent assessment of Ms. Dukuzeyezu's claim of persecution based on her ethnicity: *Gebrewldi v Canada (Citizenship and Immigration)*, 2017 FC 621 at para 28. In my view, the Officer failed to do so. As a result, the Officer's determination that the applicants failed to demonstrate a risk of persecution upon return to Rwanda was unreasonable.

(b) *Mr. Dukuzeyezu's claim of persecution based on land dispute*

[24] The applicants also challenge the Officer's findings regarding Mr. Dukuzeyezu's claims of persecution. The Officer found that the 2005 dispute over the farmland was not persecution "for reasons of race, religion, nationality, membership in a particular social group or political opinion" under section 96 the *IRPA*. The applicants argue that this finding was unreasonable because the Officer assumed that a land dispute could never amount to persecution based on a Convention ground, and did not consider whether Mr. Dukuzeyezu's statements during the interview—that his uncle wanted to kill him as the eldest male and heir to the property, and that the Rwandan government was complicit—were circumstances that could constitute persecution based on the grounds of membership in a particular social group (i.e. family association with his father), race, ethnicity, or perceived political opinion.

[25] I am not persuaded that the Officer assumed a land dispute could never amount to persecution based on a Convention ground. The Officer's statement that property disputes among family members do not amount to persecution in the refugee context cannot be read in

isolation, and must be considered in the legal and factual context of the overall decision: *Vavilov* at paras 89-90. This context includes the Officer's finding that the property dispute had occurred over a decade earlier in 2005, and that there was no apparent reason for insecurity as long as the applicants did not become involved in the dispute. In my view, the Officer considered whether the factual circumstances described by Mr. Dukuzeyezu gave rise to a well-founded fear of persecution based on a Convention ground, and the Officer made a reasonable finding that they did not.

(c) *Country Conditions*

[26] The applicants argue that the Officer's decision was unreasonable because the Officer demonstrated a lack of understanding or knowledge of the country conditions in Rwanda. They rely on the following underlined passage in *Saifee v Canada (Citizenship and Immigration)*, 2010 FC 589 at paragraph 30:

> In this case, even though the tribunal record shows no reference to any country conditions documentation concerning Afghanistan, it may be assumed that the officer was either knowledgeable of these country conditions or could easily access available country conditions documentation in order to carry out his duties properly. I would add further that if it can be showed that the officer made a decision without knowledge of country conditions, this in itself could constitute a valid reason to overturn the decision in judicial review. It would indeed be unconscionable if Canadian visa officers were making a refugee claim determination without any reference to or knowledge of country conditions.

[27] The repeated reference to Rwanda being a safe country for everyone to return was the only reference to country conditions in the Officer's refusal letter and GCMS notes. I have already considered this point and the effect of the UNHCR cessation provisions in the context of

Ms. Dukuzeyezu's claimed fear of ethnic-based persecution. With respect to the Officer's reasonable finding that Mr. Dukuzeyezu's factual circumstances did not give rise to a well-founded fear of persecution based on a Convention ground, the UNHCR cessation provision is not material, because Mr. Dukuzeyezu failed to meet the threshold requirement of persecution on a Convention ground. Therefore, I see no need to further elaborate on this issue.

(2) **Durable solution**

[28] The applicants challenge the Officer's determination that they had two durable solutions: returning home to Rwanda, or local integration in Zambia.

[29] I find that the Officer's determination of a durable solution in Rwanda was unreasonable, for the same reasons outlined above.

[30] A finding of a durable solution in Zambia would provide a sufficient basis for the Officer to refuse the applicants' application for permanent residence: subsection 139(1)(d) of the *IRPR*; *Karimzada v Canada (Citizenship and Immigration)*, 2012 FC 152 at para 25; *Salimi v Canada (Citizenship and Immigration)*, 2007 FC 872 at para 7. The issue on judicial review is whether the Officer's conclusion of a durable solution in Zambia was reasonable.

[31] The applicants submit the Officer's conclusion was based on unreasonable findings that the applicants have the resources to apply for residency in Zambia and eventually for citizenship, that Mr. Dukuzeyezu fits the criteria for naturalization in Zambia and has pursued a high level of education, and that the applicants chose, for self-serving reasons, to maintain refugee status rather than to apply for permanent residence and citizenship in Zambia. The applicants argue

there was no evidentiary basis to support the Officer's conclusion that the applicants would obtain permanent status in Zambia as long as the family were to abandon their refugee status. Furthermore, they argue that the Officer failed to address whether they could obtain permanent residency in Zambia within a reasonable period of time, and without risk of *refoulement* to Rwanda upon abandoning their status as refugees.

[32] The respondent submits that the applicants had the onus to establish their allegation that there was no clear path to naturalization in Zambia, and simply failed to meet their onus. The respondent also submits that a durable solution does not need to be perfect—it is sufficient, under subsection 139(1) of the *IRPR*, that it be durable: *Ntakirutimana v Canada (Citizenship and Immigration)*, 2016 FC 272 at para 16. The respondent argues that even if they cannot obtain permanent residence or citizenship in Zambia, the applicants continued to have their refugee status renewed periodically for the two decades that they have lived there and they have managed well—Mr. and Ms. Dukuzeyezu were able to obtain an education that they financed themselves. According to the respondent, the applicants appear to have a permanent solution in Zambia such that the impermanent nature of refugee status does not, in itself, render the Officer's conclusion unreasonable.

[33] In my view, the Officer's conclusion of a durable solution in Zambia was not justified and thus, it was unreasonable. I am not persuaded by the respondent's argument that the applicants have a durable solution based on continued status as refugees because the reasons do not provide that basis for the Officer's conclusion, and a reviewing court should not supply reasons that were not given: *Vavilov* at para 97. Rather, the Officer relied on the applicants' ability to become "naturalized" in Zambia. The Officer's refusal letter states that the applicants

have “more than enough resources to apply for residency in Zambia and eventually for naturalization,” and the GCMS notes state that Mr. Dukuzeyezu “fits the criteria for naturalization in Zambia and has pursued a high level of education”. However, the Officer did not refer to any evidence to support these statements, and the record did not include any evidence that having resources or an education would lead to permanent status in Zambia within a reasonable time. Furthermore, the applicants stated during the interview that they could not apply for citizenship or be naturalized because “we went through interviews and [the Zambian government] determined that we still faced persecution and as a result, we could not be naturalized since we are refugees”. There is no indication the Officer rejected the applicants’ evidence that they would have to abandon their status as refugees before applying for permanent residence or citizenship, and the Officer did not consider whether doing so would expose the applicants to a risk *refoulement* by being returned to Rwanda. In *Al-Anbagi v Canada (Citizenship and Immigration)*, 2016 FC 273 at paragraph 30, this Court noted that the durable solution offered in a third country must at least, on a balance of probabilities, amount to the reasonable possibility of attaining, within a reasonable delay, legal or *de facto* permanent status allowing for local integration in that country or of residing in that country without fear of *refoulement*. The Officer’s reasons did not justify the conclusion that Zambia offered a durable solution.

B. *Did the Officer breach procedural fairness?*

[34] The applicants submit that if the Officer had information that Rwandan refugees could obtain citizenship in Zambia, the Officer should have disclosed the source of the information and

provided an opportunity to respond. The applicants argue the Officer's failure to do so constituted a breach of procedural fairness.

[35] Generally, a visa officer is not required to apprise the applicants of concerns arising from or related directly to the requirements of the *IRPA* or the *IRPR*: *Ayyalasomayajula v Canada (Citizenship and Immigration)*, 2007 FC 248 at para 18; *Ali v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 7681 (FC) at para 19. However, a decision maker's failure to disclose extrinsic information upon which he or she relies, and that the applicant could not reasonably anticipate would be consulted, violates procedural fairness: *Qin v Canada (Minister of Citizenship and Immigration)*, 2013 FC 147 at para 38; *Qureshi v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1081 at paras 31-32.

[36] Here, the applicants have not established that the Officer relied on such extrinsic evidence. In any event, the Officer specifically raised concerns about the applicants' ability to obtain permanent resident status in Zambia during the interview, and gave the applicants an opportunity to respond to the concerns at that time. In my view, the Officer was not required to do more and the applicants have not established that the Officer breached procedural fairness.

V. **Costs**

[37] The applicants submit there are special reasons that warrant an award of costs in the present case. Specifically, the applicants state that costs may be awarded where a party has "unnecessarily or unreasonably prolonged proceedings or acted in a manner that may be characterized as unfair, oppressive, improper or actuated by bad faith": *Johnson v Canada*

(Minister of Citizenship and Immigration), 2005 FC 1262 at para 26; *Qin v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1154 at para 34.

[38] While I find that the Officer's decision was unreasonable, that alone does not warrant awarding costs to the applicants. I am not persuaded that the respondent has acted in a manner that would justify an award of costs in this case.

[39] No costs will be awarded.

VI. **Conclusion**

[40] For the reasons above, I find that the Officer's decision is unreasonable. Therefore, this application for judicial review is granted.

[41] Neither party proposed a question for certification, and none arises.

JUDGMENT in IMM-4418-19

THIS COURT'S JUDGMENT is that:

1. The decision is set aside and the matter referred back for redetermination by a different decision maker.
2. There is no question to certify.

"Christine M. Pallotta"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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