Federal Court  Cour fédérale

Date: 20211116

Docket: IMM-3796-20

Citation: 2021 FC 1241

[ENGLISH TRANSLATION]

Ottawa, Ontario, November 16, 2021

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

NENE AISSATA KAMANO

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Background

[1] The applicant is seeking judicial review of a decision of the Refugee Protection Division [RPD] setting aside the decision to allow her claim for refugee protection, pursuant to section 109 of the *Immigration and Refugee Protection Act*, SC 2001 c 27 [IRPA].

[2] The applicant alleged that she is a citizen of the Republic of Guinea [Guinea]. On August 4, 2011, she filed a refugee claim from Canada, in which she stated that she is a victim of sexual and domestic violence, in addition to fearing forced marriage, as decreed by her paternal uncle. In her refugee protection claim, she identified herself as Nene Aissata Kamano, a citizen of Guinea born in 1992 in a named city. She submitted as evidence a passport issued on June 17, 2011, under the same name. She stated that she never applied for a Temporary Resident Visa [TRV] to come to Canada. She also stated that she left Guinea on August 3, 2011. In November 2011, her claim was allowed without a hearing under the expedited refugee protection claim process then in effect.

[3] In 2014, an investigation by the Canada Border Services Agency [the Agency] revealed that a TRV application was received at the Canadian embassy in Dakar, Senegal, in March 2011. The application is in the name of Aissatou Barry, a Guinean citizen born in 1981 in the same city as the applicant. The application was approved on April 4, 2011, and was accompanied by a Guinean passport issued on March 14, 2011, in the same name. A check in the Integrated Customs Enforcement System shows that on May 8, 2011, a person entered Canada with the passport and TRV issued to Aissatou Barry.

[4] As part of this investigation, a senior analyst at the Agency [the Analyst] conducted a facial comparison between three different photos of the applicant from her immigration file and the photo attached to the TRV application form in the name of Aissatou Barry. The Analyst concluded, on the balance of probabilities, that the applicant and Aissatou Barry are the same person.

[5] In November 2015, the respondent filed an application to vacate the applicant's refugee status under section 109 of the IRPA. The respondent alleged, among other things, that the applicant entered Canada on May 8, 2011, under the identity of Aissatou Barry. She was therefore not present in Guinea at the time of the events she alleged to have experienced between May and August 2011. The respondent argued that the applicant misrepresented a material fact relating to a matter relevant to her refugee protection claim and her identity.

[6] In 2016, the applicant was granted permanent resident status by Immigration, Refugees and Citizenship Canada [IRCC]. The officer responsible for examining the application was satisfied with the answers provided by the applicant on her identity.

[7] On July 20, 2020, the RPD granted the respondent's application and set aside the initial decision to allow the applicant's claim for refugee protection. Relying on the test set out in *Canada (Public Safety and Emergency Preparedness) v Gunasingam*, 2008 FC 181 at paragraphs 7 and 8, the RPD found that, on a balance of probabilities, the applicant and Aissatou Barry are one and the same person. The RPD found that the applicant arrived in Canada on May 8, 2011, using a passport and TRV under the name Aissatou Barry. The RPD added that the applicant misrepresented herself in her refugee protection claim by stating that she never applied for a visa to Canada, never used an identity other than Nene Aissata Kamano, and left Guinea for Canada on August 3, 2011, with a French passport. The RPD believed that these misrepresentations concerned facts highly relevant to the claim, as the applicant was in Canada when the incidents on which her claim is based allegedly occurred. The RPD's decision would likely have been different had it known at the time that the applicant had obtained a TRV in

April 2011 under a different identity and that she had left Guinea for Canada in May rather than August 2011. The RPD found that the applicant's misrepresentations directly affected the outcome of her claim. Further, it found that there was insufficient evidence remaining from the original decision to support allowing the refugee protection claim.

[8] In particular, the applicant complained about the RPD's: (1) interpretation of the facial comparison report prepared by the Analyst; (2) naked-eye assessment of passport photos; (3) evaluation of the evidence submitted to support her presence in Guinea between May and August 2011; (4) treatment of other evidence that could support the claim, despite the misrepresentations; and (5) conclusion that she is not bound by the decision conferring permanent residence on the applicant in 2016.

II. Analysis

[9] It is well established that RPD decisions on applications for vacation under section 109 of IRPA are subject to the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 16–17 [*Vavilov*]; *Otabor v Canada (Citizenship and Immigration)*, 2020 FC 830 at paras 17–19; *Bafakih v Canada (Citizenship and Immigration)*, 2020 FC 689 at paras 19–23; *Abdulrahim v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 463 at paras 11–12).

[10] The same standard applies when determining whether the criteria for issue estoppel have been met (*Mangat v Canada (Citizenship and Immigration)*, 2019 FC 1299; *Dhaliwal v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 157 at para 22 [*Dhaliwal*]).

[11] When the standard of reasonableness applies, the Court is concerned with "the decision made by the administrative decision maker—including both the rationale for the decision and the outcome to which it led—was unreasonable" (*Vavilov* at para 83). It must consider whether the decision "bears the hallmarks of reasonableness—justification, transparency and intelligibility—and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99). Moreover, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov* at para 100).

A. *Facial comparison report*

[12] The RPD did not misinterpret the facial comparison report when it stated that the Analyst concluded that there is a "high likelihood" that the two individuals are the same. In so concluding, the RPD relied on an excerpt from the report in which the Analyst stated that it follows from his observations that the probability that the applicant and Aissatou Barry are not the same person "is very low, if not nearly non-existent".

[13] The applicant argued that the report's conclusions are inconsistent. She argued that the Analyst acknowledged the low resolution of the photo accompanying the TRV application, but also concluded that it was [TRANSLATION] "probably" the same person.

[14] The Court sees no inconsistency when the report is interpreted holistically and contextually. The Analyst did acknowledge the poor resolution of the photo. However, he stated that he had identified at least seven (7) general characteristics that are similar between the

photograph of Aissatou Barry and photographs of the applicant. Furthermore, no significant dissimilarities were found.

[15] The applicant also complained that the RPD placed a higher burden of proof on the applicant than on the respondent when it found that the applicant failed to present credible evidence to overcome the high probative value of the report.

[16] The Court again finds that the RPD's comments must be read in context. In its reasons, the RPD stated that it placed a high probative value on the facial comparison analysis, which was conducted in a detailed and rigorous manner by a specialist who had no interest in the outcome of the claim or the application to vacate. After carefully reviewing the contents of the report and the comparison images contained therein, the RPD was of the opinion that the findings are warranted and reasonable. It is precisely in this context that the RPD noted that, although the applicant challenged the report's conclusions, she did not present any credible evidence that would call them into question. The Court does not see this as imposing an undue burden of proof. It would have been open to the applicant to produce evidence that could have called into question the reliability of the Analyst's report. In the absence of such evidence, the RPD could reasonably place a high probative value on the report. Moreover, the Court notes that the applicant testified that she had no comment to make on the Analyst's assessment.

[17] While the applicant disagreed with the Analyst's findings and the weight the RPD gave to the report, it is not for this Court to reweigh and reconsider the evidence to reach a different

conclusion (*Vavilov* at para 125; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 64).

B. *Passport photographs*

[18] The Court also finds fault with the applicant's argument that it was unreasonable for the RPD to find a resemblance based on a naked-eye analysis. After examining the photo on the biographical page of Aissatou Barry's passport, the RPD found that it is very similar, almost identical, to the photo in the applicant's passport, issued two (2) months later. The RPD found that the similarities are striking, even to the naked eye. It could reasonably rely on its own observations of the photos, which supported the facial comparison analysis, to conclude that Aissatou Barry and the applicant were the same person, especially since their height and city of birth were the same.

C. *Presence in Guinea between May and August 2011*

[19] The applicant also criticized the RPD's assessment of certain evidence showing her presence in Guinea between May and August 2011. The applicant argued that the contradictions and inconsistencies raised by the RPD are unreasonable.

[20] The Court disagrees.

[21] The first contradiction identified by the RPD concerns the passport issued in the applicant's name in June 2011. It noted that the applicant testified twice that she arranged for the

passport in mid-June 2011 at the request of the smuggler, who told her she would need it for her refugee protection claim. The RPD then noted that the applicant also testified that at the time she applied for the passport, she had not yet been in contact with the smuggler. Asked to clarify, the applicant then stated that it was her aunt who had requested it. Rejecting the applicant's explanations, the RPD pointed out that her Basis of Claim Form states that her aunt had begun the process of helping her leave the country only after her uncle announced his intention to marry her to his son on July 2, 2011. Since the applicant's passport was issued in June 2011, the RPD could reasonably see a contradiction in the applicant's statements.

[22] The second inconsistency raised by the RPD relates to the applicant's vaccination record. Contrary to the applicant's argument, the RPD did not rely solely on the one-day discrepancy between her testimony and the vaccination record to conclude that the record lacks probative value. On the contrary, the RPD explicitly recognized that it must avoid engaging in a microscopic examination of the evidence and placing undue emphasis on dates. However, the RPD was not convinced by the applicant's far-fetched explanation for the inconsistencies between her testimony, her Basis of Claim Form and her vaccination record, which was that her vaccination record had been backdated. The RPD could reasonably conclude that the applicant's explanation further undermined her credibility.

[23] The third piece of evidence that the RPD considered was the letter from the attorney, which confirmed that the applicant and her aunt consulted him in July 2011. The RPD could reasonably give it no probative value because of the applicant's other credibility issues (*Gao v Canada (Citizenship and Immigration)*, 2021 FC 271 at para 22; *Alizadehvakili v Canada*

(Citizenship and Immigration) 2018 FC 165 at para 34). The Court notes that the letter was written more than a year after the alleged meeting and does not specify the date of the meeting.

[24] Upon reviewing the evidence, the Court is also not convinced that the RPD failed to consider the psychologist's letter and the Health Centre's medical visit certificate in its analysis under subsection 109(1) of the IRPA. Contrary to the applicant's argument, this evidence does not establish that she was in Guinea between May and August 2011.

D. *Subsection 109(2) of the IRPA*

[25] Under subsection 109(2) of IRPA, the RPD may reject an application to vacate if it is of the opinion that there remains sufficient credible and trustworthy evidence, from among those considered in the original decision, to justify refugee protection. The applicant argued that in assessing the future risk of persecution, the RPD should have taken into account the fact that she was a victim of female genital mutilation. She referred to United States case law to support the argument that the obligation to return to the country where such a practice is tolerated, after having been a victim of it herself, constitutes in itself a form of continuous and permanent persecution.

[26] The Court cannot accept this argument as it is not the current state of the law in Canada. In *Sow v Canada (Citizenship and Immigration)*, 2011 FC 1313 [*Sow*], this Court held that while it may indeed amount to persecution in the past, the fact of having undergone female genital mutilation is not relevant to an assessment of future risk (*Sow* at para 53). The applicant has not submitted any Canadian case law in support of her argument. In this case, the RPD could

reasonably conclude that it was insufficient for the applicant to rely on her previous female genital mutilation to establish a prospective risk of persecution.

E. *Inference from an already decided question*

[27] Finally, the applicant argued that the RPD erred in refusing to apply issue estoppel, a component of res judicata. She alleged that the issue of her identity was before the officer when her application for permanent residence was considered and that the officer was satisfied with her explanations. She claimed that the RPD was therefore bound by this decision.

[28] The Court disagrees.

[29] Having listened to the audio recording of the RPD hearing, the Court notes that the applicant did not directly raise the application of this principle. Rather, counsel for the applicant argued that the officer had granted the application for permanent residence despite being aware of the concerns raised in the application to vacate.

[30] It is recognized that the Court should not consider an issue raised for the first time on judicial review where that issue could have been considered before the administrative tribunal. This is particularly true where the issue relates to the area of expertise of the administrative tribunal. In addition to potentially prejudicing the opposing party, raising an issue for the first time on judicial review may deprive the Court of the evidentiary record necessary to decide the issue as well as the insight of the tribunal (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 22–26).

[31] Since the parties have not had an opportunity to respond to the Court's concern about the application of this rule in this case, the Court will rule on the applicant's argument.

[32] The purpose of issue estoppel is to prevent an unsuccessful party from litigating an issue that has already been unsuccessfully argued in another court. The three conditions for application are: (1) the same issue has been decided; (2) the decision already rendered is final; and (3) the parties are the same (*Angle v Minister of National Revenue*, [1975] 2 SCR 248 at p 254; *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 at para 25; *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52 at para 27).

[33] The Court recognizes at the outset that the two decisions involve the same parties (*Dhaliwal* at paras 48–49). However, it concludes that the first condition is not satisfied.

[34] As the RPD noted in its reasons, the applicant testified about her appointment to receive confirmation of permanent residence in 2016. At that appointment, the officer presented her with the copy of the passport under the identity of Aissatou Barry, told her about the vacation application, and asked her several questions about her identity. The applicant explained to the officer that she was not the person who appeared on Aissatou Barry's passport and TRV application. The interview lasted between 30 and 40 minutes. At the officer's request, the applicant submitted additional documents. At a second appointment, the officer gave her the confirmation of permanent residence.

[35] The issue of identity is indeed common to both the application for permanent residence and the vacation application. However, the officer was not required to rule on whether the applicant had made false representations in her refugee protection claim. He was only required to determine whether the applicant was in fact the person making the application for permanent residence.

[36] The RPD had a different role. Instead, it had to determine whether, on a balance of probabilities, the decision to allow the claim resulted, directly or indirectly, from misrepresentations of material fact on a relevant matter. In addition to determining whether Aissatou Barry and the applicant were the same person, it also had to confirm whether the applicant entered Canada on May 8, 2011 and, if so, what effect that conclusion had on the outcome of the claim. Based on all of the evidence in the record, the RPD found that the applicant entered Canada on May 8, 2011 and that she was not in Guinea at the time of the incidents on which her claim was based. Further, the RPD found that these misrepresentations directly affected the outcome of the claim. Nor were there sufficient items of evidence remaining from those considered in the original application to support refugee protection. Therefore, the Court cannot conclude that the two decisions dealt with the same issue or that the officer's decision could bind the RPD in the exercise of its jurisdiction under section 109 of IRPA.

[37] Furthermore, it should be noted that the respondent submitted before this Court two documents in order to demonstrate that the officer's decision was not a final decision. The applicant did not object to the admissibility of this evidence, despite the general principle that this Court should not admit new evidence in judicial review proceedings, except in certain

circumstances (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright*), 2012 FCA 22 at paras 19–20). Since the application of issue estoppel was not directly raised before the RPD, the Court finds that it may thus consider this evidence in its decision.

[38] The first document is an excerpt from the IRCC website, which contains policies, procedures and instructions for departmental staff. It states that a decision to vacate can be made after permanent residence has been granted and that "no requirement to suspend or delay the processing of an application for permanent residence simply because vacation is being contemplated or pursued".

[39] The second document contains the officer's notes. These notes show that the officer considered the above policy in analyzing the file and in making a decision. The officer explicitly states in his conclusion that departmental policy provides that there is no requirement to suspend or delay the application for permanent residence on the basis that an application for vacation is being considered or processed.

[40] This evidence establishes that the officer's decision was not a final decision. The second condition of issue estoppel is therefore not satisfied.

[41] In the circumstances, it is clear that granting permanent residence did not have the effect of binding the RPD on the determination of the vacation of the applicant's refugee status.

[42] Moreover, the Court finds that the RPD would likely have refused to apply issue estoppel if the issue had been before it. The RPD would have exercised its discretion to disregard this principle because of new evidence that was not before the officer. Indeed, there is no evidence in the record that the officer had access to the facial comparison report at the time permanent residence was granted.

[43] In conclusion, it should be remembered that judicial review is not a “line-by-line treasure hunt for error” (*Vavilov* at para 102). In the Court’s view, when the reasons for the RPD are interpreted holistically and contextually, they possess the characteristics of a reasonable decision, namely, justification, transparency and intelligibility (*Vavilov* at paras 97, 99). The Court therefore sees no reason to intervene in this case.

[44] For these reasons, the application for judicial review is dismissed. No questions of general application have been submitted for certification, and the Court is of the view that none are raised by this case.

JUDGMENT in IMM-3796-20

THE COURT ORDERS as follows:

1. The application for judicial review is dismissed.

2. No question of general importance is certified.

"Sylvie E. Roussel"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

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