Federal Court  Cour fédérale

Date: 20220503

Docket: IMM-4232-21

Citation: 2022 FC 638

[ENGLISH TRANSLATION]

Ottawa, Ontario, May 3, 2022

PRESENT: The Honourable Madam Justice Walker

BETWEEN:

JULIETTE KAYITESI
AMIN SAIDOV
AMIR SAIDOV
AMAN SAIDOV
ALAN SAIDOV

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicants, Juliette Kayitesi (the principal applicant) and her four minor-age children, are citizens of Rwanda. They are seeking a judicial review of a decision made by the Refugee Appeal Division (RAD) on May 27, 2021, rejecting their refugee protection claim. Like the Refugee Protection Division (RPD), the RAD found that the principal applicant was not credible

and that the documentary evidence was insufficient to independently corroborate her allegations. As a result, it was determined that the principal applicant and her allegation that she was sexually assaulted by a police officer were not credible.

[2] For the reasons that follow, the application for judicial review is allowed. The RAD admitted an affidavit from the principal applicant that addressed the RPD's significant concerns regarding new evidence under subsection 110(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 2 (IRPA). However, the panel did not address the issue of whether the admission of the affidavit as new evidence required a hearing under subsection 110(6) of the IRPA. I therefore find that the RAD decision is not justified in relation to the facts and law that constrain the panel within the framework established in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (*Vavilov*).

I. Background

[3] The principal applicant ran a food product business in Rwanda. She alleged that a police officer (N) sexually assaulted her when she went to a police station in Butare on November 11, 2019, to report one of her clients who owed her money. The principal applicant claimed that she went to a police station in Kigali the next day to file a complaint against police officer N. She also claimed that she was subjected to unjustified arrests and summons by the police when she tried to file her complaint.

[4] The applicants left Rwanda on December 18, 2019, for the United States. They entered Canada on December 20, 2019, and claimed refugee protection. The principal applicant feared

mistreatment by Rwandan police. In addition, she feared persecution as a “single woman” in Rwanda.

[5] On November 18, 2020, the RPD rejected the applicants’ refugee protection claim, finding that the principal applicant’s testimony was not credible. Specifically, the panel identified contradictions between the principal applicant’s testimony and the medical report that she filed in evidence, in addition to finding discrepancies in the medical report itself. Furthermore, her credibility was undermined because of her omission from her Basis of Claim of two visits made by her agents of persecution to her home. Subsequently, the RPD attributed no probative value to a police summons dated November 22, 2019, and did not consider the letter from the national prosecutor requiring the principal applicant to be brought in forcibly to be authentic. The panel also found that the photographs taken by her sister, showing the principal applicant in handcuffs, sitting in the outer backseat of a van that is not identified with a police emblem, were not likely to rehabilitate her credibility and did not prove that she was arrested. Lastly, the RPD determined that the principal applicant did not show that she was a member of the social group of “single women”.

[6] The applicants appealed the RPD’s decision.

II. The RAD’s decision

[7] The RAD found that the RPD breached a principle of procedural fairness by not giving them the opportunity to be heard regarding its determinative concerns about the documents submitted into evidence. However, the RAD found that it was able to render a correct decision

owing to its admission into evidence of an affidavit from the principal applicant in which she provided explanations about the significant inconsistences that the RPD identified in her documents.

[8] The determinative findings of the RAD are as follows:

1. The medical report filed into evidence does not corroborate that the principal applicant was the victim of a sexual assault in November 2019 and contradicts her main complaints upon arrival at the hospital. This affects the principal applicant's credibility.

2. The RPD was right to conclude that the medical report also lacked probative value because of an error in its letterhead and the date of the medical consultation, which contradicts the principal applicant.

3. The RPD failed to take into account *Chairperson's Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution* when considering the principal applicant's answers to the question about her amnesia. However, the RAD found that this error was not determinative in this appeal.

[9] For all these reasons, the RAD found, like the RPD, that the principal applicant was generally not credible. The RAD considered that the principal applicant failed to establish that she had been raped by a police officer in November 2019. Since she did not establish the facts behind her fear, the RAD did not believe that she filed a complaint against the police officer who had raped her and the events that ensued.

[10] The RAD examined the other written evidence submitted by the applicants. The panel considered: the police summons; the national prosecutor's letter; and the two photographs showing the principal applicant in handcuffs, sitting in the outer backseat of a van that is not identified with a police emblem. For a variety of reasons, the RAD submitted that these

documents did not have sufficient probative value to independently corroborate the principal applicant's allegations.

III. Analysis

[11] The issue in this case is whether the RAD's decision is reasonable. To do this, a preliminary and determinative question will need to be addressed: Did the RAD err by not providing an analysis of the possibility of holding a hearing under subsection 110(6) of the IRPA?

[12] The standard of review applicable to RAD decisions that involve credibility and assessing evidence is reasonableness (*Vavilov* at paras 10, 23; *Hundal v Canada (Citizenship and Immigration)*, 2021 FC 72 at para 16 (*Hundal*)).

[13] The applicants submit that the RAD made a significant mistake by not considering whether admitting the principal applicant's affidavit as new evidence required a hearing under subsection 110(6) of the IRPA. They claim that the onus of this determination rests with the RAD, even though they did not request such a hearing (*Zhuo v Canada (Citizenship and Immigration)*, 2015 FC 911 at para 11; *Tchangoue v Canada (Citizenship and Immigration)*, 2016 FC 334 at paras 12, 18 (*Tchangoue*). The applicants point out that the RAD's decision is silent about the application of subsection 110(6); the word "hearing" is not found anywhere in the decision. As a result, it is impossible to know why a hearing was not granted.

[14] However, the respondent points out that the applicants expressly stated that they did not require a hearing in their appeal case. In addition, they did not provide submissions explaining why the RAD had to hold a hearing in light of the admission of the principal applicant's affidavit (Rule 3(3)(d)(ii) of the *Refugee Appeal Division Rules*, SOR/2012-257 (Rules)). The respondent claims that the applicants therefore did not consider that their new evidence met the criteria of subsection 110(6) of the IRPA. According to the respondent, the decision revealed that the RAD determined that the new evidence did not raise an important issue regarding the principal applicant's credibility; it therefore did not err in failing to exercise its discretion to convoke an oral hearing (*Boyce v Canada (Citizenship and Immigration)*, 2016 FC 922 at paras 48–49).

[15] First, the applicants' specific argument must be identified. They argue that the RAD should have provided an analysis showing that it considered the possibility of granting a hearing; they do not argue that the RAD should have held a hearing.

[16] I agree with the applicants that the RAD has the burden of determining whether a hearing is justified under subsection 110(6). Once the principal applicant's affidavit was admitted as new evidence under subsection 110(4) of the IRPA, the panel should have discharged its burden by analyzing the possibility of granting the applicants a hearing.

[17] In *Tchangoue* (at para 18), my colleague, Justice Roussel (as she then was) found that the RAD erred "in failing to conduct a proper analysis of whether the criteria for holding an oral hearing set out in subsection 110(6) of the IRPA were met", even if the decision to hold a

hearing is a discretionary power. In this case, the RAD's decision is completely devoid of any analysis or mention of subsection 110(6) or the relevant criteria of that subsection.

[18] The respondent submits that the applicants in this case expressly stated that they did not require a hearing and that, in these circumstances, the Court cannot fault the RAD for failing to consider the possibility of granting a hearing to the applicants. To address this argument, I cite the applicants' written statement to the RAD under subparagraphs 3(3)(g)(ii) and 9(2)(f)(ii) of the Rules:

> [TRANSLATION]
> The appellants do not require a hearing. However, if the panel finds it necessary to hold a hearing in this case, the appellants and their designated representative commit to being available to attend the hearing.

[19] The Court recently addressed the issue of an applicant's obligation to request a hearing. In *Hundal* (at para 24), my colleague, Justice Diner, noted "that IRPA places no burden on either party to request or satisfy the RAD that an oral hearing should occur, and that the onus to address the discretion rests with the RAD (*Horvath* at para 18; *Zhuo* at para 11)".

[20] I acknowledge that the applicant in *Hundal* requested a hearing (*Hundal* at para 25). However, in *Horvath v Canada (Citizenship and Immigration)*, 2018 FC 147 at para 16 (*Horvath*), the Court stated that the applicants had indicated in their appeal statement that they would not ask for a hearing before the RAD "except if the RAD is unable to substitute its decision for that of [the RPD]". The Court found (*Horvath* at para 18):

> [18] …However, neither IRPA nor the RAD Rules impose a burden on appellants either to request, or to satisfy the RAD that the circumstances merit an oral hearing. The onus rests with the

> RAD to consider and apply the statutory criteria reasonably: *Zhou v Canada (Citizenship and Immigration)*, 2015 FC 911 at para 11; see also *Strachn v Canada (Citizenship and Immigration)*, 2012 FC 984 at para 34: *Boyce v Canada (Citizenship and Immigration)*, 2016 FC 922 at paras 47–48.

[21] In this case, the applicants did not request a hearing. However, they indicated that if the RAD considered it necessary to hold a hearing, they would be available to attend. In my view, by this statement, the applicants effectively acknowledged that it is the RAD's responsibility to determine whether a hearing is warranted in the circumstances. In accordance with the IRPA and the case law of this Court, it fell to the RAD to conduct its own analysis to determine whether the criteria for holding an oral hearing set out in subsection 110(6) of the IRPA were met and, if so, whether it should exercise its discretion to hold an oral hearing.

[22] I find that the RAD made a sufficiently significant error to render its decision unreasonable. This error in itself justifies the Court's intervention. The principal applicant's affidavit was directly linked to her general credibility and the determining factors of the RPD. Such a situation requires that the RAD clearly justify, using coherent and transparent reasoning, its decision not to hold a hearing (*Hundal* at para 28; *Vavilov* at paras 85, 128). However, the RAD did not even mention subsection 110(6) or the relevant criteria of the subsection in the decision.

[23] I do not agree with the respondent that it is [TRANSLATION] "clear" from the decision that that RAD found that principal applicant's affidavit does not raise a serious issue with respect to her credibility, which is one of the criteria of subsection 110(6). In the absence of any analysis of

the criteria contained in that subsection, it is not even possible to know whether the RAD considered holding a hearing, and if so, to know why a hearing was not granted.

[24] There is no need to examine the other arguments put forward by the applicants against the decision, since the RAD's failure to determine whether a hearing is warranted under subsection 110(6) is a fatal flaw. When the RAD reviews the case, if it finds that the criteria listed in subsection 110(6) have been met, this conclusion may influence the final outcome of the applicants' refugee protection claim.

[25] The parties have not proposed any questions for certification, and I agree that there are none.

JUDGMENT IN IMM-4232-21

THIS COURT ORDERS AS FOLLOWS:

1. The application for judicial review is allowed.

2. No question of general importance is certified.

"Elizabeth Walker"
Judge

Certified true translation
Daniela Guglietta

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4232-21
STYLE OF CAUSE:	JULIETTE KAYITESI, AMIN SAIDOV, AMIR SAIDOV, AMAN SAIDOV, ALAN SAIDOV v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	APRIL 26, 2022
JUDGMENT AND REASONS BY:	WALKER J.
DATED:	MAY 3, 2022

APPEARANCES:

Saïd Le Ber-Assiani	FOR THE APPLICANTS
Patrica Nobl	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Saïd Le Ber-Assiani Lawyer Montréal, Quebec	FOR THE APPLICANTS
Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT