

Federal Court



Cour fédérale

Date: 20231006

Docket: IMM-2238-22

Citation: 2023 FC 1336

[ENGLISH TRANSLATION]

Ottawa, Ontario, October 6, 2023

PRESENT: Mr. Justice Régimbald

BETWEEN:

UZIEL KILONGOZI NYEMBO

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Uziel Kilongozi Nyembo, is applying for judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of a decision rendered by an immigration officer [Officer] refusing the application for permanent residence of his adopted child, Jean-Lucien Kibondo [Jean-Lucien].

[2] The applicant arrived in Canada from the Democratic Republic of Congo [DRC] and was recognized as a person in need of protection. He is trying to reunite his family in Canada. His application for permanent residence includes his wife and her two adopted children. The application also includes a third child, adopted by the applicant and his wife before he had to leave the DRC, but whose adoption was not legally confirmed until after his departure for Canada. This child's application for permanent residence was refused by the Officer on the grounds that the child had never lived with the applicant, that the adoption had taken place for financial reasons, that there was nothing in the evidence to show an emotional and financial interdependence between the applicant and Jean-Lucien, and that it was not in the child's best interests to leave his original family circle. Thus, the applicant has not met his burden of proving that Jean-Lucien's adoption is not primarily for the purpose of acquiring a status or privilege under the IRPA, nor that there is a parent-child emotional relationship between the adoptee and the adopter.

[3] The applicant is seeking judicial review of the decision and argues that it was unreasonable for the Officer to conclude that the adoption was for the purpose of acquiring a privilege or that an emotional relationship had not been proven, and that it was not in the best interests of the child to allow him to leave the DRC to join his adoptive parents.

[4] For the reasons that follow, and in accordance with the role of the Court, I conclude that the Officer's decision is unreasonable. The application for judicial review is therefore allowed.

II. Facts

[5] The applicant, Mr. Nyembo, is a citizen of the DRC. He is the adoptive father of Jean-Lucien, born on August 12, 2009, who is also a citizen of the DRC. The applicant maintains that he and his wife took custody of Jean-Lucien two months after his birth, in 2009, because his biological family was in a precarious situation. He also alleges that he hired a lawyer to put the adoption into legal effect as early as 2009.

[6] In June 2010, before the legal status of the adoption was completed, the applicant had to leave the DRC after being arrested by Congolese government agents. He first travelled to Nairobi before arriving in Canada on August 7, 2010. He was also forced to leave his wife and two other children behind: Josué, aged 6, and Jeannette, aged 2 (these two children are the applicant's adopted children, but they are his wife's biological children).

[7] After his departure, Jean-Lucien's adoption proceedings took their course and the adoption decree was issued on December 31, 2012. The authenticity of the adoption is not in dispute. The applicant states that he has continued to support his family financially by sending them funds through his sister Josephine Muloye Kilongozi.

[8] In May 2016, the applicant applied for permanent residence in Canada and included his wife and three children as dependent children. Jean-Lucien was included as an adopted child.

[9] On October 18, 2018, the application for permanent residence status in the protected persons class was deemed eligible.

[10] On April 21, 2021, the Officer advised the applicant of certain concerns regarding the establishment of a genuine bond between the applicant and the adopted child, including the fact that the applicant had never lived with Jean-Lucien, that there was a lack of evidence that they shared a life, that the biological parents are both alive and have given their consent to the adoption, and that the adoption decree does not mention that Jean-Lucien is not an orphan. The applicant submitted answers explaining that:

- A. Jean-Lucien was entrusted to him two months after his birth in August 2009;
- B. A lawyer was retained in December 2009 to begin adoption proceedings, but the applicant's flight in June 2010 meant that the adoption did not take place until 2012;
- C. It was important for the adoption to take place in 2009 to allow the applicant to give Jean-Lucien benefits such as medical care and child benefits provided by his employer;
- D. The applicant has no photos with Jean-Lucien because his documents were ransacked, vandalized and taken away by the police when he was arrested and fled the DRC;
- E. The fact that Jean-Lucien's parents are still alive is not prohibited by Congolese law or by the International Children's Charter.

[11] On July 12, 2021, the Officer rejected Jean-Lucien's application for permanent residence (the decision was not sent until November 9, 2021). The Officer concluded:

- A. There was no evidence that Jean-Lucien lived with the applicant two months after his birth;
- B. The adoption was completed after the departure of the applicant, for financial reasons;
- C. Nothing in the documents submitted demonstrated an emotional or financial interdependence or evidence of living together with Jean-Lucien; and
- D. No exceptional circumstances existed to demonstrate that it is in Jean-Lucien's best interest to leave his original family circle (his biological parents), his only known family circle, to join the applicant in Canada.

[12] All of these findings led the Officer to the overall conclusion that the applicant had not met his burden of proving that the adoption was not primarily for the purpose of acquiring a status or privilege pursuant to the IRPA, nor that he had actually created a genuine parent-child emotional bond with Jean-Lucien.

III. Issues and standard of review

[13] Having considered the arguments of the parties, the evidence on record and the applicable case law, I find that the main issues in this case all ultimately concern the reasonableness of the Officer's decision.

[14] The applicable standard of review is reasonableness (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35; *Ali v Canada (Citizenship and Immigration)*, 2018 FC 688 at para 5; *Acikgoz v Canada (Citizenship and Immigration)*, 2018 FC 149;

Durojaye v Canada (Citizenship and Immigration), 2020 FC 700 at para 6). Thus, according to this standard, the burden is on the party challenging the decision to show that it is unreasonable (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 100).

[15] In order to determine whether a decision is reasonable, a reviewing court must develop an understanding of the decision maker’s reasoning process, and verify 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). Analysis under the standard of reasonableness is not a “rubber-stamping” process”, but a robust form of review (*Vavilov* at para 13).

IV. Relevant provisions

[16] The relevant provisions of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR] are as follows:

Interpretation	Définitions et interprétation
Definitions	Définitions
1 (1) The definitions in this subsection apply in the Act and in these Regulations.	1 (1) Les définitions qui suivent s’appliquent à la Loi et au présent règlement.
...	...
Definition of <i>family member</i>	Définition de <i>membre de la famille</i>

(3) For the purposes of the Act [...] *family member* in respect of a person means

(a) the spouse or common-law partner of the person;

(b) a dependent child of the person or of the person's spouse or common-law partner; and

(c) a dependent child of a dependent child referred to in paragraph (b).

Interpretation

2. The definitions in this section apply in these Regulations.

...

dependent child, in respect of a parent, means a child who

(a) has one of the following relationships with the parent, namely,

(i) is the biological child of the parent, if the child has not been adopted by a person other than the spouse or common-law partner of the parent, or

(ii) is the adopted child of the parent;

(3) Pour l'application de la Loi — exception faite de l'article 12 et de l'alinéa 38(2)d — et du présent règlement — exception faite de l'alinéa 7.1(3)a) et des articles 159.1 et 159.5 —, *membre de la famille*, à l'égard d'une personne, s'entend de :

a) son époux ou conjoint de fait;

b) tout enfant qui est à sa charge ou à la charge de son

c) l'enfant à charge d'un enfant à charge visé à l'alinéa b).

Définitions

2. Les définitions qui suivent s'appliquent au présent règlement.

...

enfant à charge L'enfant qui :

a) d'une part, par rapport à l'un de ses parents :

(i) soit en est l'enfant biologique et n'a pas été adopté par une personne autre que son époux ou conjoint de fait,

(ii) soit en est l'enfant adoptif;

...

Family Relationships

Bad faith

4 (1) For the purposes of these Regulations, a foreign national shall not be considered a spouse, a common-law partner or a conjugal partner of a person if the marriage, common-law partnership or conjugal partnership

(a) was entered into primarily for the purpose of acquiring any status or privilege under the Act; or

(b) is not genuine.

Adopted children

(2) A foreign national shall not be considered an adopted child of a person if the adoption

(a) was entered into primarily for the purpose of acquiring any status or privilege under the Act; or

(b) did not create a genuine parent-child relationship.

Sponsorship of adopted children

(3) Subsection (2) does not apply to adoptions referred to in paragraph 117(1)(g) and subsections 117(2) and (4).

...

Notion de famille

Mauvaise foi

4 (1) Pour l'application du présent règlement, l'étranger n'est pas considéré comme étant l'époux, le conjoint de fait ou le partenaire conjugal d'une personne si le mariage ou la relation des conjoints de fait ou des partenaires conjugaux, selon le cas :

a) visait principalement l'acquisition d'un statut ou d'un privilège sous le régime de la Loi;

b) n'est pas authentique.

Enfant adoptif

(2) L'étranger n'est pas considéré comme étant l'enfant adoptif d'une personne si l'adoption, selon le cas :

a) visait principalement l'acquisition d'un statut ou d'un privilège sous le régime de la Loi;

b) n'a pas créé un véritable lien affectif parent-enfant entre l'adopté et l'adoptant.

Parrainage de l'enfant adopté

(3) Le paragraphe (2) ne s'applique pas aux adoptions visées à l'alinéa 117(1)(g) et aux paragraphes 117(2) et (4).

V. Analysis

A. *The Officer's decision is unreasonable*

[17] An applicant for permanent residence may include an application for his or her dependent children, including adopted children. Under subsection 4(2) of the IRPR, a foreign national is not considered the adopted child of a person if the adoption (1) was entered into primarily for the purpose of acquiring a status or privilege under the IRPA; or (2) did not create a genuine parent-child relationship between the adoptee and the adopter.

[18] The applicant alleges that the Officer refused the application on the grounds that [TRANSLATION] “[t]he adoption judgment does not mention the circumstances or reasons for this adoption considering that [Jean-Lucien] is not an orphan.” Similarly, the applicant points out that the Officer also refused the application because Jean-Lucien’s parents are both alive and have given their consent to the adoption. The applicant relies on Congolese law to demonstrate that Jean-Lucien’s adoption is legal, since the law does not require a child to become an orphan if both biological parents consent.

[19] The applicant submits that the Officer’s decision is unreasonable in its conclusion that [TRANSLATION] “[t]his adoption was completed after your departure for financial reasons.” The applicant points out that he applied for the adoption well before his departure, but that it was approved after his arrival in Canada since he had to leave quickly in order to flee persecution.

[20] Finally, the applicant alleges that the Officer's decision is unreasonable regarding the analysis of the child's best interests because Jean-Lucien has lived with his adoptive mother (the applicant's wife) since 2009. Jean-Lucien has therefore not known any family circle other than the applicant's wife and the two other children.

[21] The respondent submits that the applicant had the opportunity to address the Officer's concerns, but failed to provide satisfactory evidence to establish the adoptive relationship, and in particular the emotional and financial bond that exists between him and Jean-Lucien. According to the respondent, the applicant provided the following exhibits and information, none of which relieved him of his burden of proof:

- Jean-Lucien's birth certificate;
- Testimonials from family and friends;
- Birth certificates for his wife's biological children;
- Adoption consent from Jean-Lucien's biological parents;
- Adoption judgment.

[22] The respondent alleges that the Officer even advised the applicant by letter of the lack of evidence establishing a genuine link between the applicant and the adopted child. The applicant was given the opportunity to respond, but failed to provide satisfactory evidence. He provided no evidence of an emotional relationship with the child. In his response, the applicant simply stated that the only evidence he could provide was letters from family members and neighbours attesting that Jean-Lucien grew up in the applicant's home.

[23] The respondent argues that given the lack of evidence, the Officer reasonably concluded that the applicant did not discharge his burden of proof, failing to establish that the adoption created a true adoptee-adopter bond. The applicant did not demonstrate that an emotional bond was maintained, despite his absence. A refusal based on lack of evidence is reasonable.

[24] In my opinion, the Officer's decision demonstrates certain shortcomings. While a decision maker is presumed to have considered all of the evidence submitted, and is not required to refer to every piece of evidence contrary to its conclusion, a decision maker must at the very least deal with relevant evidence that directly contradicts his or her conclusions. The Court may infer that a decision maker has reached an erroneous finding of fact when the reasons fail to take into account the evidence before him or her that was relevant to the conclusion, and that suggested a different outcome. As *Vavilov* explains at paragraph 126, “[t]he reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it” (see also *Allannah v Canada (Citizenship and Immigration)*, 2023 FC 408 at para 38; *Gill v Canada (Citizenship and Immigration)*, 2020 FC934 at para 40; *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC), [1998] FCJ No 1425 (QL) at para 15).

[25] In this case, the Officer concluded that [TRANSLATION] “[n]othing in the documents submitted demonstrates an emotional and financial interdependence . . . [emphasis added]”. However, the Officer does not mention or evaluate any of the aspects of the file that provide evidence of emotional and, especially, financial dependence:

- A. The fact that Jean-Lucien is also the adopted child of the applicant's wife and that he lived with her and the other children at the same address in the DRC (Certified Tribunal Record [CTR] at p 30).
- B. The funds that the applicant transferred to his sister, Josephine Muloye Kilongozi, from 2011 to 2012 (CTR at pp 35–44). The Officer was aware that the applicant was assisting his family financially through his sister (CTR at p 82, GCMS (Global Case Management System) note of December 2, 2020).
- C. The fact that the applicant explained that he could not present family photos with Jean-Lucien (or wedding photos with his wife) since his house was ransacked when he was arrested by the police, and he had to flee afterwards (CTR at p 82, GCMS note of December 2, 2020).

[26] This evidence contradicted the Officer's conclusion that [TRANSLATION] “[nothing in the documents submitted demonstrates an emotional and financial interdependence [emphasis added]”. On the contrary, the evidence submitted referred to the applicant's financial support of his family, through his sister, and explained why the applicant could not provide evidence of his relationship with Jean-Lucien. The Officer failed to consider, or justify, how this contradictory evidence was insufficient to allow the applicant to discharge his burden of proof.

[27] As for the Officer's conclusion that [TRANSLATION] “[t]here are no exceptional circumstances that can here reassure that it is in [Jean-Lucien's] best interest to leave his initial,

only known family circle to [join the applicant] . . . whom, ultimately, he does not know”, the Officer’s reasons are neither transparent nor intelligible. It is not clear which [TRANSLATION] “initial, only known family circle” the Officer is referring to.

[28] The only evidence in the file is that Jean-Lucien has always lived with his adoptive mother, brother and sister. There is no evidence in the file to suggest that Jean-Lucien ever lived with his biological family.

[29] Moreover, in her letter to the applicant dated April 21, 2021, which noted her concerns, particularly about a lack of evidence to establish a genuine link between the applicant and the adopted child, the Officer asks no questions about Jean-Lucien’s best interests, even though the decision particularly affects him. The letter specifically mentions some questions about the adoption, but none about where Jean-Lucien currently lives. In this case, neither the legal authenticity of Jean-Lucien’s adoption, nor his address identified in the application for permanent residence (identifying that Jean-Lucien lives at the same address as his adoptive mother), are in dispute.

[30] In her reasons, the Officer failed to clarify which [TRANSLATION] “family circle” she was referring to. On the one hand, if by [TRANSLATION] “family circle” the Officer means the applicant’s wife, there is no evidence that the wife will not be coming to Canada with her two other children and Jean-Lucien. In fact, the evidence shows that the applicant wants to reunite his entire family in Canada, including his wife and three children. Moreover, if by [TRANSLATION] “family circle” the Officer is referring to the biological parents, there is no evidence that

Jean-Lucien still lives with them. If the Officer had a concern in this regard, it was incumbent upon her to seek clarification from the applicant in her letter of April 21, 2021, or in a subsequent letter.

[31] The evidence before the Officer is to the effect that a) the applicant has applied for permanent residence for himself and his wife and children (including Jean-Lucien), noting that they all live at the same address; b) Jean-Lucien is his adopted child; and c) he lives with his wife and other children (as the applicant also states in his answers to the Officer, and just as his notes show). There is no evidence that Jean-Lucien lived with his biological parents.

[32] Consequently, the Officer's reasons do not demonstrate consideration of this contradictory evidence, namely that Jean-Lucien was already living with his adoptive family (while the applicant is in Canada) and that therefore Jean-Lucien will not go to live with a [translation] "family circle" he does not know. In fact, the evidence seems to show that if Jean-Lucien is not admitted to Canada with his mother, he will be removed from his current [translation] "family circle", and returned to his biological parents who cannot care for him.

[33] The Officer's decision is therefore unreasonable.

B. *The Officer failed to consider whether Jean-Lucien was a dependent child of the applicant's wife and therefore potentially eligible under paragraph 1(3)(b) and section 2 of the IRPR.*

[34] The Officer's decision is also unreasonable because she did not consider whether Jean-Lucien qualified as a "family member" under paragraph 1(3)(b), since he is a "dependent

child” of the applicant’s wife, having been adopted by her within the meaning of section 2 of the IRPR.

[35] Paragraph 1(3)(b) of the IRPR states that the term “family member” includes not only an applicant’s “dependent child” but also a “dependent child” of the applicant’s spouse. Section 2 of the IRPR goes on to state that a “dependent child” includes a child who is adopted.

[36] In this case, the parties agree that the marriage between the applicant and his wife is genuine, and that the adoption of Jean-Lucien by the applicant and his wife is also legal and genuine.

[37] Since the applicant’s wife was included as a “family member” in his application for permanent residence, and she also adopted Jean-Lucien, paragraph 1(3)(b) and section 2 of the IRPR indicate that any “dependent child” (which includes an adopted child) of the applicant’s wife was also to be considered a “family member”.

[38] Despite this, in the Officer’s letter of concern to the applicant, she did not ask whether or not Jean-Lucien was living with his adoptive mother, and she did not ask about the emotional bond between the applicant’s wife and Jean-Lucien. Moreover, in her reasons and notes, the Officer provides no analysis of the relationship between Jean-Lucien and the applicant’s wife. The Officer’s only analysis focused on Jean-Lucien’s relationship with the applicant.

[39] It is for the Officer, not the Court, to define the scope of paragraph 1(3)(b) and whether Jean-Lucien would qualify as a “family member” under paragraph 1(3)(b) and section 2 of the IRPR, since he is adopted by the applicant’s wife and is thus a “dependent child” of his adoptive mother, despite any connection, emotional or otherwise, with the applicant (*Vavilov* at paras 115–124).

[40] In other words, Jean-Lucien may qualify under paragraph 1(3)(b) and section 2 of the IRPR, because of his adoptive relationship with the applicant’s wife, even though he would have no relationship, legal or emotional, with the applicant himself. Although another reasonable interpretation of paragraph 1(3)(b) and section 2 might be possible, the Officer had to determine whether Jean-Lucien could qualify in this respect, which she did not do.

[41] The Officer’s Decision is therefore unreasonable, since the Officer did not consider whether Jean-Lucien could qualify, like his brother and sister, as a “dependent child” of the applicant’s wife under paragraph 1(3)(b) and section 2. The Officer should have analyzed this element and provided justification if she was not satisfied that the relationship between the adoptive mother and Jean-Lucien was not sufficient, which she did not do.

[42] If she had analyzed this element, the Officer could have reached a different conclusion on the application of subsection 4(2) of the IRPR. The Officer concluded that Jean-Lucien’s adoption was in bad faith and was primarily for the purpose of acquiring a status or privilege under the IRPA, and without having created a genuine parent-child bond between the applicant and Jean-Lucien. However, if Jean-Lucien qualifies as a “dependent child” of the applicant’s

wife, who also adopted him, then a finding that subsection 4(2) did not apply was possible on the facts of the case. The Officer had a duty to consider this aspect, which she failed to do.

VI. Conclusion

[43] The application for judicial review is allowed. The Officer's decision is unreasonable because her reasons lack the hallmarks of a reasonable decision — justification, transparency and intelligibility — regarding the contradictory evidence on the emotional and financial interdependence between the applicant and Jean-Lucien (*Vavilov* at para 99). Similarly, the Officer's reasons do not consider the question of whether Jean-Lucien could qualify as a “dependent child” of the applicant's wife. Finally, the Officer's reasons regarding Jean-Lucien's [TRANSLATION] “family circle” and best interests are neither transparent nor intelligible, since it is not clear to which [TRANSLATION] “family circle” the Officer is referring.

[44] The parties have proposed no issues for certification and I agree that there are none.

JUDGMENT in IMM-2238-22

THIS COURT'S JUDGMENT is as follows:

1. The applicant's application for judicial review is allowed.
2. The decision under review is set aside and the case is sent back for reconsideration by another decision maker.
3. There are no questions to certify.

“Guy Régimbald”

Judge

Certified true translation
Janna Balkwill

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2238-22

STYLE OF CAUSE: UZIEL KILONGOZI NYEMBO v MINISTER OF
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PLACE OF HEARING: VIA ZOOM VIDEOCONFERENCE

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