Federal Court  Cour fédérale

Date: 20240412

Docket: T-2548-22

Citation: 2024 FC 577

Ottawa, Ontario, April 12, 2024

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

STENSIA TAPAMBWA
RICHARD TAPAMBWA

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision of a delegate of the Minister of Citizenship and Immigration [Delegate] dated November 15, 2022 [Decision], refusing the Applicants' application for Canadian citizenship pursuant to subsection 5(4) of the *Citizenship Act*, RSC 1985, c C-29 [*Act*].

[2] As explained in greater detail below, this application for judicial review is allowed, because the Decision does not meaningfully engage with one of the principal arguments advanced by the Applicants in their application under subsection 5(4) of the *Act*.

II. Background

A. *Applicants' Immigration History*

[3] The Applicants are citizens of Zimbabwe. Between 1981 and 2001, both Applicants served in the Zimbabwean National Army [ZNA] in the Data Processing Unit as civilian employees primarily responsible for the army's payroll. After the male Applicant allegedly expressed political views hostile to the ruling party in March 2001, the Applicants left Zimbabwe and travelled to the United States with their two children. They lived in the United States for over 10 years but did not make an asylum claim or obtain permanent legal status in that country.

[4] In July of 2011, the Applicants came to Canada and claimed refugee protection. Their claims were denied by the refugee Protection Division [RPD] in November 2012, on the basis that they were excluded from refugee protection pursuant to section 98 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [*IRPA*], because there were serious reasons to consider they were complicit in crimes against humanity committed by the ZNA.

[5] In May of 2013, the Applicants appeared before the Immigration Division [ID] for an admissibility hearing. Based on the findings of the RPD, the ID found that there were reasonable grounds to believe that the Applicants were inadmissible pursuant to paragraph 35(1)(a) of *IRPA*

for violating human or international rights by committing an act constituting an offence referred to in sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24.

[6] In December of 2013, the Applicants submitted an application for a Pre-Removal Risk Assessment [PRRA] and requested relief from the Minister of Citizenship and Immigration [the Minister] against the *IRPA* provisions which entitled them to assessment only on the basis of section 97 and not section 96. On February 25, 2016, the Applicant's PRRA application was refused on the basis that they had failed to prove a personalized risk to their life or of cruel and unusual treatment or punishment upon return to Zimbabwe and were therefore not persons in need of protection [First PRRA Decision].

[7] The Applicants sought and obtained leave to commence a judicial review application of the First PRRA Decision. In a decision dated May 26, 2017, this Court dismissed their application for judicial review on the basis that the PRRA officer had not erred (*Tapambwa v Canada (Citizenship and Immigration)*, 2017 FC 522 [*Tapambwa FC*]). The Applicants appealed *Tapambwa FC*. The appeal was dismissed by the Federal Court of Appeal on February 21, 2019 (*Tapambwa v Canada (Citizenship and Immigration)*, 2019 FCA 34 [*Tapambwa FCA*]. The Applicants sought leave to appeal *Tapambwa* FCA to the Supreme Court of Canada [SCC], but their application for leave was dismissed on July 11, 2019 (*Tapambwa v Minister of Citizenship and Immigration*, 2019 CanLII 62557 (SCC)).

[8] In March of 2019, the Applicants submitted another PRRA application. This second PRRA application was refused on July 15, 2019, on the basis that the Applicants would not be subject to risk of torture, or face a risk to life or risk of cruel and unusual treatment or

punishment if returned to Zimbabwe [the Second PRRA Decision]. On July 31, 2019, the Applicants filed an application for leave and judicial review [ALJR] of the Second PRRA Decision and applied for a stay of removal. Justice McDonald granted the Applicant's motion for an order staying their removal on August 20, 2019 (*Tapambwa v Canada (Citizenship and Immigration)*, 2019 CanLII 77491 (FC) [Stay Order]) pending the determination of their ALJR of the Second PRRA Decision.

[9] Following the Stay Order, the judicial review of the Second PRRA Decision was discontinued upon consent of both parties on October 24, 2019, and the PRRA application was remitted back for reconsideration by a different officer. On October 29, 2020, a PRRA officer prepared a positive risk opinion, indicating that the Applicants would be subject to a risk to life, cruel and unusual punishment or treatment of torture [Risk Opinion]. The case was then referred to the Canada Border Services Agency [CBSA] for an assessment pursuant to paragraph 172(2)(b) of the *IRPA* based on the factors under paragraph 113(d)(ii) of the *IRPA*. On August 4, 2021, the CBSA determined that the Applicants do not constitute a danger to the security of Canada, nor does the nature and severity of their acts reach a high level of seriousness [Restriction Assessment].

[10] The Restriction Assessment noted, amongst other findings, that the SCC in *Ezokola v. Canada (Minister of Citizenship and Immigration)*, 2013 SCC 40 [*Ezokola*] found that previous interpretations of the concept of complicity (such as the interpretation used to exclude the Applicants from refugee protection and to find them complicit in the crimes of the ZNA) had overextended to the point of complicity by association. The CBSA conducted an *Ezokola* analysis of the Applicants' complicity in the crimes of the ZNA and found that their contribution

to the ZNA crimes or criminal purpose was not significant and did not meet a high enough threshold in severity for the purposes of subparagraph 113(d)(ii) of the *IRPA*.

[11] However, on November 5, 2021, a Senior Decision-Maker refused the Applicants' PRRA application, finding that, on balance, there was insufficient evidence to demonstrate that the Applicants are more likely than not to face risk to life or risk of cruel and unusual treatment and punishment or torture in Zimbabwe. As a result, the Senior Decision-Maker found that their removal from Canada should not be stayed [Third PRRA Decision]. The Applicants filed an ALJR of the Third PRRA Decision (in Court File No. IMM-8564-21), which was heard by Justice Elliot on March 20, 2024.

B. *Canadian Citizenship Application History*

[12] The Applicants signed their applications for Canadian citizenship on August 19, 2019. The Applicants sought discretionary consideration under subsection 5(4) of the *Act*, based on special and unusual hardship they will face if they are deported from Canada. The Applicants argued that they are subject to an erroneous removal order, which has prevented them from accessing refugee protection to which they are entitled. The Applicants provided additional submissions in support of their citizenship applications on September 14, 2020 and on October 1, 2021, the latter submissions explaining the analysis and results in the Risk Opinion and the Restriction Assessment.

[13] On November 15, 2022, in the Decision that is the subject of this application for judicial review, the Delegate refused to grant the Applicants' request for citizenship.

III. Decision under Review

[14] The Delegate began their analysis by noting that the discretionary grant of citizenship under subsection 5(4) of the *Act* is a very broad remedial power and one that is purely discretionary. The Delegate also noted that the onus is on the Applicants to satisfy the Minister or his delegate why they meet one or more of the following criteria: statelessness, cases of special and unusual hardship, or to reward cases involving services of an exceptional value to Canada.

[15] The Delegate noted the Applicants' submissions in support of their application for a discretionary grant of citizenship that:

A. They have been wrongfully denied refugee protection;

B. They were issued a removal order based on an erroneous application of the law;

C. They will suffer from special and unusual hardship should they be removed from Canada and returned to Zimbabwe (including as a result of separation from their adult children, one of whom suffers from schizophrenia and is highly dependent on them for support);

D. If their removal order is not carried out, then the Applicants will suffer from special and unusual hardship by not having access to permanent status in Canada; and

E. The female Applicant's employment as a personal support worker during the COVID-19 pandemic has provided services of an exceptional value to Canada.

[16] The Delegate first considered the Applicants' submission that they are deserving of discretionary citizenship because they were denied refugee protection. The Delegate noted that the RPD excluded the Applicants from claiming refugee protection under section 98 of the *IRPA*, because they were complicit in crimes against humanity pursuant to Article 1F(a) of the *Refugee Convention* based on the interpretation of "complicity by association". The RPD's decision was made shortly before *Ezokola*, where the SCC replaced the legal test for refugee exclusion of "complicity by association" with "complicity by contribution". The Applicants argued that they would not have been excluded by the RPD under the new legal test. The Applicants also argued that, based on the RPD's decision, they were limited in their PRRA application to an assessment under section 97 of the *IRPA* (and not section 96), such that they continue to face removal to Zimbabwe based on what they describe as "defunct law".

[17] The Delegate found that the Applicants' claim had been considered by the RPD and that an unfavorable finding by the RPD was not a basis on which the Applicants should be given a discretionary grant of Canadian citizenship. Given that the Federal Court dismissed the Applicant's ALJR of the RPD decision, the Delegate found the RPD decision stands and is final.

[18] The Delegate considered the risk assessments performed by the RPD and by the PRRA officers in the Applicants' three subsequent PRRA applications. In considering the First PRRA Decision, the Delegate noted that the Court in *Tapambwa FC* found that the *IRPA* does not permit a PRRA officer to review a prior exclusion finding and that the PRRA officer properly restricted the Applicants' risk assessment. The Delegate also noted *Tapambwa FCA*, which found that, because all of the decisions at issue took place prior to *Ezokola*, the Applicants'

exclusion was finally determined on the basis of the applicable law at that time (*Tapambwa FCA* at para 60). The Delegate also acknowledged the ongoing ALJR of the Third PRRA Decision.

[19] In considering the procedural history of the Applicants' refugee claim and PRRA applications, the Delegate described the RPD and Federal Court decisions as *functus* once they had been rendered, such that the questions of exclusion and inadmissibility made by those bodies were final. The Delegate found that the discretionary grant of citizenship under subsection 5(4) of the *Act* was not an avenue to re-litigate immigration matters that had already been settled, nor was it intended as an avenue to circumvent the procedures already well established under the *IRPA*. The Delegate therefore concluded that an unfavorable decision in the *IRPA* context was not a basis on which the Applicants should be given a discretionary grant of Canadian citizenship.

[20] Next, the Delegate considered the meaning of the term "special and unusual hardship" as used in subsection 5(4) of the *Act*. The Delegate noted that, while "special and unusual hardship" had not been defined in the citizenship context, the guidelines in the immigration context define "unusual and undeserved hardship" as hardship that is not anticipated by the *IRPA* or regulations and is beyond the person's control. Taking into account that definition and recognizing that such definition was not intended to be exhaustive or restrictive, the Delegate did not agree with the Applicants that the hardship they experienced by not being able to obtain status in Canada and being subject to removal proceedings constituted special and unusual hardship for the purpose of granting the Applicants discretionary Canadian citizenship.

[21] The Delegate also considered the Applicants' submission that they would have no stable access to protection against *refoulement* and faced removal to a country where they risk persecution. The Delegate was not satisfied that this submission warranted a discretionary grant of Canadian citizenship, citing the availability of extensive policies and procedures in place to provide refugee protection to people in Canada and the fact that a decision whether or not to confer refugee status to someone or whether or not a person would face persecution or risk if they were to return to their country of origin is made by highly trained officers. The Delegate again referenced the finality of the RPD's decision and did not agree with the Applicants' submission that they were not given a fair opportunity to receive access to protection against *refoulement* or to put forward a claim that they face a fear of persecution in Zimbabwe, finding that these arguments were not a basis on which they were deserving of a discretionary grant of Canadian citizenship.

[22] The Delegate considered the Applicants' submission that, given that their PRRA assessments were restricted to section 97 of the *IRPA*, this caused special and unusual hardship because it denied them access to protection against *refoulement* and from having a contemporaneous assessment of their fear of persecution. The Delegate was not satisfied that this was a basis on which the Applicants should be given a discretionary grant of Canadian citizenship, citing Canada's commitment to uphold international justice and respect for human rights by denying a safe haven to persons believed to have committed or been complicit in crimes against humanity, war crimes, or genocide. The Delegate found that, as section 98 and 112(3) of the *IRPA* were neutral and universally applicable laws, the Applicants' access to only a restricted PRRA did not represent special hardship.

[23] Considering the Applicants' submission that discretionary citizenship would alleviate the special and undue hardship they would suffer if they were removed from Canada and permanently separated from their children, the Delegate again found the alleged hardship was insufficient to warrant a discretionary grant of a Canadian citizenship. The Delegate considered the Applicants' submission that removal would be particularly harmful for their son, who has schizophrenia, and considered a letter from his physician. The Delegate also considered the physician's explanation that the Applicants play a central role in their son's care and that it would be extremely detrimental to his safety, well-being, and long-term functioning if the Applicants were removed from Canada.

[24] However, the Delegate noted that the Applicants' children were now adults and found that the children were expected to be able to establish their own lives. Although acknowledging their son's schizophrenia and his reliance on his parents for support, the Delegate found that he had other family members in Canada who could support him and that he had access to health care in Canada for support and treatment. The Delegate also noted that the children could choose to visit the Applicants in Zimbabwe or move back with them if the Applicants were removed.

[25] Given that the Applicants' ALJR of the Third PRRA Decision was still pending determination, the Applicants also argued that, if their PRRA was accepted and their removal was not ordered, they would be forced to reside in Canada without legal status. The Delegate considered the Applicants' submission that this would cause special and undue hardship, but noted that, to date, all of the PRRA's applications had been refused. As such, they were not in a situation where they were forced to reside in Canada without status after having been found to be at risk in Zimbabwe. The Delegate found the Applicants' submission about the future to be

unsupported by the evidence and speculative in nature, and therefore not a basis on which they could be granted Canadian citizenship.

[26] Finally, the Delegate considered whether the Applicants were deserving of a discretionary grant of citizenship on the basis that the female Applicant had rendered services of an exceptional value to Canada. The Delegate considered the letter of support from SPRINT Senior Care dated August 19, 2020, confirming that the Applicant had been employed by them since May 23, 2014, and that she had been working as a personal support worker [PSW] throughout the pandemic, visiting clients within the community.

[27] The Delegate found the evidence did not demonstrate that her work as a PSW provided services of an exceptional value to Canada. The Delegate noted the following lack of detail in the Applicants' submissions about the nature of the PSW work: the type of support the Applicant was providing her clients, how it was considered exceptional, how many clients she was seeing, the impact she was making on these clients' well-being, and whether she was working on a full-time or part-time basis. The Delegate acknowledged that work in the health care section *may* be of value, but found that it was the Applicants who were required to demonstrate why they should be granted discretionary citizenship on this basis, which they had not adequately done.

[28] As the Applicants did not satisfy the Delegate that they were stateless, had experienced special or unusual hardship, or provided services of exceptional value to Canada that warranted a discretionary grant of Canadian citizenship, the Delegate refused the Applicants' request for a grant of citizenship under subsection 5(4) of the *Act*.

IV. Issues and Standard of Review

[29] The sole issue in this matter is whether the Decision was reasonable.

[30] The parties submit, and I agree, that in assessing the merits of the Decision, the presumptive standard of reasonableness applies (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 23, 25 [*Vavilov*]).

V. Relevant Provision

[31] This application involves the following provision of the *Act*:

Grant of citizenship	**Attribution de la citoyenneté**
[…]	[…]
Special cases	**Cas particuliers**
(4) Despite any other provision of this Act, the Minister may, in his or her discretion, grant citizenship to any person to alleviate cases of statelessness or of special and unusual hardship or to reward services of an exceptional value to Canada.	**(4)** Malgré les autres dispositions de la présente loi, le ministre a le pouvoir discrétionnaire d'attribuer la citoyenneté à toute personne afin de remédier à une situation d'apatridie ou à une situation particulière et inhabituelle de détresse ou de récompenser des services exceptionnels rendus au Canada.

VI. Analysis

[32] My decision to grant this application for judicial review turns on the Applicants' argument that the Delegate failed to intelligibly address their principal argument that they had been "wrongly" excluded and "wrongly" found inadmissible and that, because the *IRPA*

provided no mechanism for relief against those circumstances, a discretionary remedy under subsection 5(4) of the *Act* was appropriate.

[33] In support of this argument, the Applicants note that, between the time they filed their subsection 5(4) application and the time of the Decision, the CBSA concluded in the Restriction Assessment that, upon application of the legal standard for complicity identified by the SCC in *Ezokola*, the Applicants were not complicit in crimes against humanity. They submit that the Delegate's reasons for denying the requested relief relate to general policies underlying the structure of the *IRPA* for addressing claims for protection by persons who have in fact committed crimes against humanity. As the Applicants observe, the Delegate explained their reasoning as follows:

> There is no special hardship in applying a neutral law which seeks to protect international justice and respect for human rights by limiting people who are found to be complicit in crimes against humanity from obtaining permanent status in Canada.

[34] The Applicants submit that the Delegate thereby failed to grapple with their main argument, that they face hardship resulting not from application of a neutral law intended to achieve the public policy objectives identified by the Delegate, but rather from that law having been "misapplied" through the use of the pre-*Ezokola* test.

[35] I find this submission compelling. The Applicants' argument, that relief under subsection 5(4) of the *Act* represented an appropriate remedy for their exclusion and inadmissibility, when they had been found by the CBSA not to have been complicit in crime against humanity, was clearly one of the principal bases for their citizenship application. I do not necessarily adopt the

Applicants' characterization of the RPD or ID having "misapplied" the law or having "wrongly" found them excluded and inadmissible. However, I understand their intended point, that those determinations were made based on the pre-*Ezokola* test for complicity and that, applying what is now considered to be the correct test for complicity, the Restriction Assessment has recently concluded that they were not in fact complicit in crimes against humanity.

[36] While the Delegate accurately captures this argument in the Decision's explanation of the Applicants' submissions, the analysis itself does not meaningfully engage with the argument. The Delegate reasons that the Applicants' circumstances are the result of application of neutral and universally applicable laws, which are intended to achieve legitimate public policy objectives. However, the Decision does not explain how those objectives are achieved in the Applicants' circumstances, where the CBSA's application of the *Ezokola* test resulted in a determination that they were not complicit.

[37] I emphasize that I am not concluding that the Delegate was obliged to accept the Applicants' argument. However, *Vavilov* explains that the principles of justification and transparency, which must be respected by administrative decision-makers, require that a decision-maker's reasons meaningfully account for the central issues and concerns raised by the parties (at para 127). The Decision in the case at hand does not respect those principles and therefore cannot withstand reasonableness review.

[38] Having identified this reviewable error in the Decision, I will allow this application for judicial review, the matter will be returned to another delegate of the Minister for

redetermination, and it is not necessary for the Court to address the other arguments raised by the Applicants. Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN T-2548-22

THIS COURT'S JUDGMENT is that this application for judicial review is allowed and the Applicants' citizenship application is returned to another delegate of the Minister for redetermination. No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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