Federal Court Cour fédérale

Date: 20240624

Docket: IMM-7022-23

Citation: 2024 FC 974

[ENGLISH TRANSLATION]

Ottawa, Ontario, June 24, 2024

PRESENT: The Honourable Madam Justice Ngo

BETWEEN:

VITAL TWIZEYUMUKIZA, CHANTAL NTUKABABARE MARIE, HUGO TWIZEYUMUKIZA and ARMAND TWIZEYUMUKIZA

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] The applicants are Vital Twizeyumukiza, Chantal Ntukababare Marie [associate applicant] and their two sons, Hugo Twizeyumukiza and Armand Twizeyumukiza [collectively, the applicants].

[2] The applicants have filed an application for judicial review of a decision rendered by the Refugee Appeal Division [RAD] on May 11, 2023 [Decision]. The RAD determined that the applicants had failed to meet their burden of establishing their identities. The applicants submit that the Decision was flawed because the RAD did not admit the new evidence introduced to compensate for their former counsel's ineffective assistance.

[3] Unfortunately, the arguments presented by the applicants do not persuade me that the RAD's decision was unreasonable, and for the reasons that follow, I must dismiss the application for judicial review.

II. Facts

[4] In August 2018, upon arriving in Canada, the applicants attended an interview conducted by an officer of the Canada Border Services Agency [Interview]. Following the Interview, the officer concluded that the applicants had been unable to confirm their identities.

[5] On February 22, 2022, while represented by their former counsel, the applicants appeared at a virtual hearing before the Refugee Protection Division [RPD]. The RPD first ruled on the applicants' identities for the purposes of hearing their testimony. Former counsel confirmed that the documents before the RPD constituted the complete record. At the RPD hearing, the applicants

answered questions about the credibility and authenticity of their documents, in particular the identity cards, passports, marriage certificate and birth certificates. The RPD also heard the applicants' testimony about the inconsistencies in the file, including those relating to the signatures, fingerprints and dates appearing on the identity documents.

[6] On March 8, 2022, the RPD rendered its decision after analyzing the applicants' evidence and testimony. The RPD concluded that the applicants had failed to meet their burden of proof for establishing their identities.

III. Decision at issue

[7] On May 11, 2023, the RAD rendered the reasons for its Decision confirming that the applicants did not meet the requirements set out in section 106 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], and the *Refugee Protection Division Rules*, SOR/2002-256 [Rules].

[8] The applicants changed counsel [new counsel] to submit their appeal record before the RAD. Their new counsel included new evidence that had not been in the record before the RPD. Among the arguments presented to the RAD, new counsel alleged an error resulting from former counsel's ineffective assistance.

[9] The applicants allege that former counsel neglected to inform the applicants of their obligation to provide identity documents to the RPD, in particular the associate applicant's birth certificate and the affidavit issued by the associate applicant's sister. New counsel argued that the

new evidence was admissible because it met the admissibility requirements set out in subsection 110(4) of the IRPA.

[10] The applicants also pleaded that in the event that the RAD questioned the credibility of the birth certificate, the RAD had an obligation to hold a hearing to allow the associate applicant's sister to testify, on the basis of subsection 110(6) of the IRPA, the provision governing hearings before the RAD.

[11] Ultimately, the new evidence presented by new counsel was found to be inadmissible because the RAD found that it did not comply with paragraph 110(4) of the IRPA. The RAD exercised its discretion to decline the request for a hearing under subsection 110(6) of the IRPA. Finally, the RAD held that the evidence on the record was insufficient to recognize that former counsel's conduct was incompetent.

IV. Issue

[12] The only issue is whether the RAD's decision is unreasonable.

A. *Relevant legislative provisions*

[13] The relevant provisions of the IRPA for determining whether to admit new evidence and whether to grant a hearing before the RAD are subsections 110(3), 110(4), 110(5) and 110(6) of the IRPA and are reproduced below:

Procedure

110 (3) Subject to subsections (3.1), (4) and (6), the Refugee Appeal Division must proceed without a hearing, on the basis of the record of the proceedings of the Refugee Protection Division, and may accept documentary evidence and written submissions from the Minister and the person who is the subject of the appeal . . . .

Fonctionnement

110 (3) Sous réserve des paragraphes (3.1), (4) et (6), la section procède sans tenir d'audience en se fondant sur le dossier de la Section de la protection des réfugiés, mais peut recevoir des éléments de preuve documentaire et des observations écrites du ministre et de la personne en cause . . . .

Evidence that may be presented

110 (4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.

Éléments de preuve admissibles

110 (4) Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenue depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessible ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet.

Exception

110 (5) Subsection (4) does not apply in respect of evidence that is presented in response to evidence presented by the Minister.

Exception

110 (5) Le paragraphe (4) ne s'applique pas aux éléments de preuve présentés par la personne en cause en réponse à ceux qui ont été présentés par le ministre.

Hearing

110 (6) The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3)

(a) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal;

(b) that is central to the decision with respect to the refugee protection claim; and

Audience

110 (6) La section peut tenir une audience si elle estime qu'il existe des éléments de preuve documentaire visés au paragraphe (3) qui, à la fois :

a) soulèvent une question importante en ce qui concerne la crédibilité de la personne en cause;

b) sont essentiels pour la prise de la décision relative à la demande d'asile;

(c) that, if accepted, would justify allowing or rejecting the refugee protection claim.	**c)** à supposer qu'ils soient admis, justifierait que la demande d'asile soit accordée ou refusée, selon le cas.

[14] The relevant provision that the RAD must take into account to determine whether a claimant for refugee protection has established his or her identity is section 106 of the IRPA and is reproduced below:

The Refugee Protection Division must take into account, with respect to the credibility of a claimant, whether the claimant possesses acceptable documentation establishing identity, and if not, whether they have provided a reasonable explanation for the lack of documentation or have taken reasonable steps to obtain the documentation.	La Section de la protection des réfugiés prend en compte, s'agissant de crédibilité, le fait que, n'étant pas muni de papiers d'identité acceptables, le demandeur ne peut raisonnablement en justifier la raison et n'a pas pris les mesures voulues pour s'en procurer.

[15] Finally, the relevant rule imposing the burden on the claimant to provide acceptable documents is section 11 of the Rules:

The claimant must provide acceptable documents establishing their identity and other elements of the claim. A claimant who does not provide acceptable documents must explain why they did not provide the documents and what steps they took to obtain them.	Le demandeur d'asile transmet des documents acceptables qui permettent d'établir son identité et les autres éléments de sa demande d'asile. Le demandeur d'asile transmet des documents acceptables qui permettent d'établir son identité et les autres éléments de sa demande d'asile.

B. *Standard of review*

[16] The applicants submit that the applicable standard of review is correctness, given their allegation that the RAD's Decision has violated their rights to procedural fairness and natural

justice. For the reasons that follow, I will not address the issues through the lens of procedural fairness.

[17] The Decision is therefore reviewable on the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 653 at paras 10, 25–17 [*Vavilov*]). To avoid judicial intervention, the decision must bear the hallmarks of reasonableness—justification, transparency and intelligibility: *Vavilov*, at para 99. A decision may be considered unreasonable if the administrative decision maker has misapprehended the evidence before it (*Vavilov* at paras 125, 126). The burden is on the party challenging the decision to show that it is unreasonable: *Vavilov* at para 100.

[18] First, the Federal Court of Appeal has confirmed that a review of the interpretation of subsection 110(4) of the IRPA attracts the reasonableness standard. In accordance with Parliament's intent, the Court will respect the discretion granted to the RPD and RAD to interpret their enabling statute (*Singh v Canada (Citizenship and Immigration)*, 2016 FCA 96, [2016] 4 FCR 230, *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385).

[19] Second, the case law currently recognizes that the reasonableness standard applies when the Court reviews a decision dealing with the ineffective assistance or incompetence of counsel (*Macias Vargas v Canada (Citizenship and Immigration)*, 2024 FC 736 at paras 16–17; *Rozas del Solar v Canada (Citizenship and Immigration)*, 2018 FC 1145 at para 24; *Tapia Fernandez v Canada (Citizenship and Immigration)*, 2020 FC 889 at para 21; *R v GDB*, 2000 SCC 22 at para 27).

V. Analysis

[20] The applicants are essentially raising three arguments before the Court.

[21] First, the applicants allege that the RAD erred in its application of the rules for determining the admissibility of new evidence under subsection 110(4) of the IRPA, especially with respect to the special travel document. Second, the applicants allege that the RAD erred in its application of the test for recognizing the ineffective assistance of former counsel. Finally, the applicants allege that the RAD erred in rejecting the request under subsection 110(6) of the IRPA that an oral hearing be held if the RAD questioned the new evidence presented to allow the applicant's sister to testify to corroborate the authenticity of the birth certificate that was presented for the first time before the RAD.

[22] According to the respondent, the RAD did not render an unreasonable decision because it made a factual finding on the basis of the whole of the evidence before the tribunal to conclude that the applicants had not met their burden of establishing their identities under section 106 of the IRPA.

A. *RAD's assessment of the evidence*

[23] At the hearing, the applicants explained that the special travel document is a pass between Burundi and bordering countries. The applicants argue that it was unreasonable for the RAD to have found this document not to be credible despite the RPD's error in not finding biometric data in the special travel document when such data existed. The applicants state that they fail to

understand why the RAD excluded that special travel document after seemingly recognizing the RPD's error.

[24] And yet, the RAD's reasons are clear. I agree with the applicants that the RAD recognized the RPD's error. I also note that the RAD made an independent assessment and concluded that the travel document was not evidence that could be considered in isolation, and that "this document [was] not sufficient, on its own, … to establish" Burundian citizenship. Finally, I also note that the RAD itself assessed this evidence and gave "some weight" to the special travel document.

[25] To satisfy the reasonableness standard, the reasons written by an administrative decision maker must make clear the line of reasoning that would allow the Court to understand the grounds on which the administrative decision maker based its conclusion. The Court should never have to guess how the decision maker arrived at its conclusion. On this basis, I conclude that the RAD issued clear reasons allowing the Court to understand that the special travel document was not the only piece of evidence considered in the assessment of the evidence that led to the outcome that the applicants were unable to establish their identities under section 106 of the IRPA (*Vavilov* at para 84). The Court will not intervene in this context because such an intervention would require the Court to reweigh the evidence, which is not open to me.

B. *Allegations against former counsel*

[26] The applicants criticize their former counsel for having neglected to submit documents before the RPD, resulting in a record that was missing pieces of evidence (namely, the birth certificate and the affidavit issued by the associate applicant's sister). The applicants submit that

the RAD erred in applying the legal test for recognizing former counsel's ineffective assistance. The applicants allege that the RAD should have taken into account that the ineffective assistance was the reason for the inadequate evidence that formed the record before the RPD.

[27] On judicial review before the Court, the applicants argue primarily that the RAD failed to examine the denial of justice angle in analyzing the subject of former counsel's ineffective assistance. The applicants rely on *Discua v Canada (Citizenship and Immigration)*, 2023 FC 137 [*Discua*]. The applicants maintain that former counsel's failure has had an impact on establishing their identity, which he should have recognized as a crucial component of their file.

[28] The Court in *Discua* summarized the principles relating to the identity of a claimant for refugee protection as "the very core of every refugee claim"; proof of identity is therefore an essential requirement. Without this, there can be no sound basis for verifying the claims of persecution or even for determining an applicant's true nationality. Failure to prove identity will be fatal to the claim (*Discua* at para 58; other citations omitted).

[29] According to the respondent, the lack of evidence is not entirely attributable to the applicants' former counsel. The respondent, like the RAD, argues that [TRANSLATION] "simply reading (the) BOC Form would have shown such an obligation (on the applicants) to obtain all (the) identity documents and submit them without delay", and that the applicants had the opportunity, during their hearing before the RPD, to explain the evidence relating to identity. In *Discua* at paragraph 30, the Court set out the applicable framework for analyzing an allegation that former counsel was incompetent.

[30] Relying on the RAD's reasons, it is clear that the RAD took into account the applicants' arguments about their former counsel's inadequate assistance, and that the RAD understood the test applicable to allegations of former counsel's incompetence. I am of the view that the RAD identified the determinative component of the test at issue, which required determining whether the applicants were able to demonstrate that there was a reasonable possibility that the outcome would have been different had it not been for their former counsel's incompetence (*Discua* at para 76).

[31] The test required by the case law is a cumulative one, which means that the applicants have the burden of proving all the components of the test for the Court to recognize incompetence. As the applicants were unable to prove one component of the required test, it can therefore not be concluded that former counsel's incompetence led to a denial of justice (*Guadron v Canada (Citizenship and Immigration),* 2014 FC 1092 at para 11; *Discua* at para 30). The RAD concluded that that even if it accepted the allegation of former counsel's ineffective assistance, providing the documents would not necessarily have resulted in the associate applicant's establishing her identity under section 106 of the IRPA. The RAD was not satisfied that this omission had an impact on the final decision.

[32] In reaching its conclusion regarding identity, the RAD considered that the evidence on the record before the RPD contained multiple contradictions. This included information provided by the applicants during the Interview and their testimony. The oral evidence that the applicants presented had confirmed that certain documents before the RPD had been obtained fraudulently or irregularly. The RPD and RAD had also considered other documents that were deficient and

that consequently undermined the credibility of all the evidence submitted by the applicants. The applicants had also confirmed that the digital signatures on the documents did not belong to them, and that the signature on the associate applicant's identification card did not correspond to the one found in her Basis of Claim Form [BOC Form].

[33] The RAD's reasons clearly supported its conclusion, and I cannot conclude that the RAD's decision was unreasonable in this respect.

C. *Specialized knowledge*

[34] The applicants allege that the RAD erred in setting aside the evidence on the basis of specialized knowledge, under section 24 of the Rules. According to the applicants, to set aside evidence presented for the very first time, including new evidence, the RAD should recognize the applicants' right to a hearing, or at least to notice, to give the associate applicant's sister an opportunity to corroborate the associate applicant's identity.

[35] The applicants have pointed the Court to paragraph 27 of the RAD's Decision. There, the RAD explains why the document is "not credible or reliable". On this basis, the applicants claim that the RAD relied on specialized knowledge. On the other hand, the respondent argues that the RAD did not rely on specialized knowledge, but rather on the fact that the evidence did not relate to facts that occurred after the claims for refugee protection were rejected.

[36] The Court's role on judicial review is to read the RAD's reasons as a whole to determine whether the reasoning that led to the decision was reasonable (*Vavilov* at para 85). The RAD

excluded the birth certificate both on the grounds that the document was neither credible nor reliable and the fact that the document was normally available before the RPD hearing and constituted evidence of events that occurred after the RPD rendered its decision. The accessibility of the birth certificate and the fact that the evidence described an event that occurred before the RPD's decision are undisputed.

[37] The RAD took into consideration the applicants' arguments regarding the incompetence of their former counsel, whom they blame for the missing evidence. The RAD also considered the other forms submitted by the applicants and the fact that the associate applicant had confirmed that she could read French and understood the content of the form.

[38] The RAD concluded that, even if former counsel had not informed the applicants of their obligation to provide this document to establish the associate applicant's identity, the BOC Form gave the applicants the opportunity to understand their obligation to provide documents corroborating their identities. For the reasons cited above, I do not accept the arguments of the applicants, who are asking me to reweigh the evidence and replace the RAD's conclusion with my own.

D. *Hearing before the RAD*

[39] I sympathize with the position of the applicants, who requested an oral hearing before the RAD. That said, on judicial review, I must consider the reasoning and reasons issued by the RAD to determine whether its application of subsection 110(6) of the IRPA with respect to holding an appeal hearing was unreasonable.

[40] Subsections 110(3), 110(4) and 110(6) of the IRPA describe the decision whether to hold a hearing when the RAD admits new evidence as discretionary. Accordingly, it can be said that the RAD is free to exercise its discretion, legally granted to it by the IRPA, to decide not to hold a hearing after the submission of new evidence. In this case, the RAD did not admit new evidence under subsection 110(4) of the IRPA, and considering the facts of the case, I find that it was not unreasonable for the RAD to decide that a hearing, under subsection 110(6) of the IRPA, was not appropriate in the circumstances.

E. *No procedural fairness issues*

[41] The applicants argue before the Court that the ineffective help of their former counsel before the RPD had the effect of depriving them of their right to submit a complete record before the RPD and the RAD. The applicants submit that the RAD erred in not recognizing the denial of justice due to the ineffective assistance of their former counsel.

[42] At the hearing before the Court, the applicants clarified that they were not exclusively challenging the reasons of the RAD's Decision, but also the manner in which the proceedings were conducted, depriving them of their rights to procedural fairness. In other words, the applicants submit that the RAD had raised new issues regarding credibility and that it had breached procedural fairness by identifying additional arguments and reasoning regarding identity documents (citing *Kwakwa v Canada (Citizenship and Immigration)*, 2016 FC 600 at para 21 [*Kwakwa*]).

[43] In *Kwakwa*, the Court confirmed that the RAD must give claimants the opportunity to respond to concerns being raised for the first time on appeal in the context of doubts regarding the credibility of identity documents. However, this case can be distinguished from *Kwakwa*.

[44] In this case, the RAD did not go beyond the RPD's conclusions or make additional implausibility findings adverse to the applicants. I therefore find that the proceedings before the RAD did not have the effect of infringing the applicants' rights of procedural fairness.

[45] The respondent maintains that the RAD's Decision dealt with the issues that were before the RPD and the RAD and that the applicants were aware that the credibility of the identity documents had been at stake from the beginning. Moreover, the RAD reiterated that the RPD had taken into account the evidence on the record and the testimony at the hearing in reaching its decision. According to the respondent, this is therefore not a "new issue" granting the right to notice or a hearing.

[46] I accept the respondent's argument. Although I have considered the reasoning as presented by the applicants' arguments, including the argument regarding the RAD's analysis that did not seem to take into account the RPD's error in failing to find biometric data in "the Burundian special travel document", when such data existed, I find that the facts in this case do not attract the correctness standard.

[47] It is clear that the RAD explained why the RPD's error with respect to this document could not be analyzed independently from the other identity documents that the applicants had presented

before the RPD. The RAD recognized that the RPD had given the document some weight, but that the document alone was not sufficient to establish the applicant's identity as a Burundian citizen and that it would not carry the same weight as a national identity card or a passport. The RAD held that the error was not sufficient to set aside the RPD's conclusion. The RAD's analysis responds to the allegations put forward by the applicants on appeal. I cannot conclude that this is a new issue or that there has been a breach of procedural fairness.

VI. Conclusion

[48] In conclusion, the RAD's Decision and reasons bear the hallmarks of a reasonable decision and allow the Court to understand the reasoning process adopted by RAD that led to its decision. I find that the RAD's Decision was justified in light of the relevant factual and legal constraints (*Vavilov* at para 99). For the reasons provided above, I am not persuaded that the Court's intervention is required, as the applicants have not demonstrated that the Decision was unreasonable. The application for judicial review must be dismissed.

[49] The parties did not submit a question for certification, and I am satisfied that none arises on the facts of this case.

<u>JUDGMENT in IMM-7022-23</u>

THIS COURT ORDERS as follows:

1. The application for judicial review is dismissed.

2. No question is certified.

"Phuong T.V. Ngo"

Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7022-23
STYLE OF CAUSE:	VITAL TWIZEYUMUKIZA ET AL v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MAY 28, 2024
JUDGMENT AND REASONS	NGO J
DATED:	JUNE 24, 2024

APPEARANCES:

Jacqueline Bonisteel	FOR THE APPLICANTS
Alexandre Petterson	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Corporate Immigration Law Firm Counsel Ottawa, Ontario	FOR THE APPLICANTS
Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT