Federal Court  Cour fédérale

Date: 20211214

Docket: IMM-2559-21

Citation: 2021 FC 1400

[ENGLISH TRANSLATION]

Ottawa, Ontario, December 14, 2021

PRESENT: The Honourable Justice St-Louis

BETWEEN:

LABWEL MALUNGU
JUVEN MALUNGU MUMBEMBE
BELOTE TIETE MUMBEMBE
AFONSINA TIETIE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Labwel Malungu, his minor children, Belote Tiete Mumbembe and Juven Malungu Mumbembe, and Afonsina Tietie, his wife's mother, [hereinafter collectively the applicants] are

seeking judicial review of a decision of the Refugee Appeal Division [RAD] dated March 24, 2021.

[2] At the time, the RAD confirmed the Refugee Protection Division's [RPD] decision, namely the conclusion that Mr. Malungu and Ms. Tietie had failed to establish their identity and that, therefore, they were neither Convention refugees under section 96 of the *Immigration and Refugee Protection Act*, RS 2001, c 27 [the Act], nor persons in need of protection within the meaning of section 97 of the IRPA. The RAD also confirmed the RPD's conclusion with respect to the rejection of the refugee protection claims of the minor children, who are American citizens.

[3] In the specific context of this application, and particularly in view of the grounds of appeal raised before the RAD, the Court is satisfied that the RAD committed a fatal error by failing to address the affidavits and statements the applicants submitted before the RPD. Accordingly, the Court will allow the application for judicial review.

[4] In short, on June 3, 2016, the applicants arrived in Canada illegally, from the United States, accompanied by Mr. Malungu's wife, Betty Dimbu Kiakanda, and two of their other children. After being intercepted in the woods, all family members sought refugee protection in Canada.

[5] Dimbu Kiakanda and two of the children had previously claimed refugee protection in Canada in 2009, but their claims were found to be ineligible at the time. Thus, in 2016, on their

second attempt, their claims were again found to be ineligible under paragraph 101(1)(c) of the Act. Dimbu Kiakanda and the two children who accompanied her in 2009 were not parties to this application for judicial review.

[6] The Minister intervened before the RPD to raise doubts or issues with respect to the applicants' the identity. Indeed, Mr. Malungu acknowledged before the RPD that he had used different identities in the Democratic Republic of Congo (DRC), in Angola, and in visa applications to British and American authorities. In the context of his application for asylum in the United States, Mr. Malungu admitted to having presented himself as a citizen of Angola and to having submitted an Angolan passport, which was considered authentic. The U.S. court denied Mr. Malungu's claim for asylum because he was unable to establish his identity. Mr. Malungu alleged that he had submitted false documents to U.S. authorities.

[7] Upon arriving in Canada, Mr. Malungu and Ms. Tietie produced DRC passports that they had obtained from the Embassy of the DRC in Ottawa. The RPD gave very little weight to these Congolese passports because of the contradictions between the information contained in the "supplementary judgments" issued in the DRC, which allowed for the issuance of subsequent identification documents, including the passports, and Mr. Malungu's testimony. Expert opinions also questioned the authenticity or integrity of various documents submitted by the applicants. Before the RPD, the applicants filed fourteen affidavits and Mr. Malungu was questioned about them during the hearing before the RPD. However, the transcript of the hearing does not reveal the member's conclusion as to these affidavits and the RPD's decision does not address them.

[8] On appeal before the RAD, the applicants mainly argued that the RPD erred by ignoring or failing to consider the evidence, namely the above-noted affidavits.

[9] After conducting its own analysis, the RAD arrived at the conclusion that the applicants' arguments to the effect that the RPD had committed errors in relation to their identity were without merit. The RAD indicated that the RPD had carefully assessed the testimony and documents in evidence before it and that the RPD had not committed any errors in finding that the applicants had failed to establish their identity, on a balance of probabilities. Although the RAD referred to the affidavits in paragraphs 31 and 53 of its decision, it did not draw any conclusions from them.

[10] I agree with the parties that the RAD's decision should be reviewed on a standard of reasonableness, as established by *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 [*Vavilov*].

[11] The applicants raised three arguments before the Court. Only one was determinative of the merits of the case, that is, that involving the above-noted affidavits, and there is therefore no need to address the other two arguments.

[12] The applicants contend that the RAD erred by disregarding the affidavits and statements they had presented to the RPD and which, in their view, corroborated the identity of the adult applicants. They cite paragraph 17 of *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration),* [1998] FCA No 1425 (FCTD) [*Cepeda-Gutierrez*] to point out that ". . . the

agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts". The applicants allege that the evidence that was not mentioned in the reasons for decision is so abundant, and of such relevance, that it is impossible to argue that the consideration of these documents could not have altered the tribunal's decision. Finally, the applicants cite paragraphs 24, 25 and 27 of *Mishel v Canada (Citizenship and Immigration)*, 2015 FC 226 to explain that the RPD must independently consider all of the documents submitted when such documents point to identity legitimacy.

[13] The Minister contends that the affiants were all persons who knew the applicant in Canada, with the exception of Joao Kudikubanza. He adds that the RPD and the RAD are not required to mention every piece of evidence considered (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [Newfoundland Nurses]) and that it is only where the non-mentioned evidence is critical and squarely contradicts the tribunal's conclusion that the Court is justified in intervening.

[14] The Minister submits that affidavits from the applicant's acquaintances or others that the applicants are citizens of the DRC cannot overcome the unreliability of the identity documents produced by the applicants and purportedly issued by the DRC authorities. The Minister adds that the applicant admitted to using false documents obtained with the help of friends for his multiple identities.

[15] I agree with the Minister's proposition that administrative tribunals are not required to mention all the evidence considered in their decision (*Basanti v Canada (Citizenship and*

Immigration), 2019 FC 1068 at paras 24 and 25 [*Basanti*]). The failure to mention all the affidavits submitted does not mean that they were ignored (*Basanti* at para 24 citing *Newfoundland Nurses* at para 16). In the case at bar and unlike the situation in *Basanti*, the applicants specifically cite the evidence that was not reviewed and, more importantly, that was their main ground of appeal.

[16] The Minister submits that affidavits from the applicant's acquaintances or others that the applicants are citizens of the DRC cannot overcome the unreliability of the identity documents produced by the applicants and purportedly issued by the DRC authorities. This conclusion does appear reasonable, but it is not the RAD's conclusion, it is the Minister's. The Court cannot infer from the RPD's decision, the RAD's decision, or the transcript of the hearing, the weight or consideration that the tribunal gave to these affidavits.

[17] I am aware that "[q]uestions of identity of a claimant are within the RAD's expertise and the Court should give it significant deference. The Court will only interfere if the decision under review lacks justification, transparency or intelligibility, and falls outside the range of possible, acceptable outcomes which are defensible on the particular facts of the case and in law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47)" (*Kagere v Canada (Citizenship and Immigration)*, 2019 FC 910 at para 11; see also *Woldemichael v Canada (Citizenship and Immigration)*, 2021 FC 1059 at para 25 [*Woldemichael*]).

[18] I am also aware that the RPD and the RAD are not required to mention each and every piece of evidence considered (*Newfoundland Nurses*) and that, as explained by the respondent,

only where the non-mentioned evidence is critical and squarely contradicts the tribunal's conclusion that the Court is justified in intervening.

[19] *Shang v Canada (Citizenship and Immigration),* 2021 FC 633 is apposite in this case, as is *Woldemichael.* As for *Vavilov*, at paragraph 127, it deals with the central concerns raised by the parties:

> The principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties. The principle that the individual or individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted in the right to be heard: *Baker*, at para. 28. The concept of responsive reasons is inherently bound up with this principle, because reasons are the primary mechanism by which decision makers demonstrate that they have actually *listened* to the parties.

[20] The Supreme Court adds that ". . . a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it" (*Vavilov* at para 128). In this case, the review of the affidavits was a principal argument made by the applicants on appeal to the RAD.

[21] In *Gomes v Canada (Citizenship and Immigration),* 2020 FC 506 at paragraph 62 [*Gomes*], Justice Pamel notes that "[r]esponsiveness requires that decision-makers make determinations in regard to the arguments or issues raised by the parties, especially when the arguments are detailed (*Canada Post Corp v Canadian Union of Postal Workers,* 2019 SCC 67 at para 60; *Rodriguez Martinez v Canada (Citizenship and Immigration)*, 2020 FC 293 at paras

12–16; *Mattar v The National Dental Examining Board of Canada*, 2020 ONSC 403 at paras 47–49)".

[22] In that case, the applicant challenged the decision of the RAD on the basis that the RAD upheld errors made the RPD and failed to address most of the key grounds of appeal (*Gomes* at para 30). Justice Pamel noted that "[t]he RAD did not elaborate further after stating that the RPD did not commit an error in the manner in which it reached its findings. The reasons provided by the RAD only make vague references to the grounds of appeal raised by the Applicant; that is problematic" (*Gomes* at para 55).

[23] I cite paragraphs 66 to 68 of *Gomes*:

> The Respondent argues that the RAD must simply state a minimal explanation, if only to show why the RAD is in agreement with the findings of the RPD. I disagree.
>
> It is not enough for the RAD simply to express agreement with the manner in which the RPD rendered its decision, or to simply express disagreement with the Applicant's argument. The RAD decision must also show that it "meaningfully grapple[d] with key issues or central arguments raised by the parties" (*Vavilov* at para 128), something which is done by way of explicit findings, whether such findings are in agreement or disagreement with the findings of the lower tribunal.
>
> Indeed, like any other administrative decision-maker, the RAD is required to provide responsive reasons that show that it "actually listened to the parties" (*Vavilov* at para 127; *Sadiq* at paras 13, 30.

[24] At paragraph 69 of *Gomes*, Justice Pamel cites paragraph 4 of *Ali c Canada (Citizenship and Immigration)*, 2016 FC 396. Justice Martineau writes that ". . . there must be some minimal

discussion in the RAD's reasons of the errors raised by an appellant and their respective merit, in light of the relevant parts of the documentary evidence that were not considered by the RPD".

[25] In addition, "[t]he failure of the RAD, in re-determining the appeal, to address the very issues raised by the applicants that were central to the appeal of the RPD's decision is a reviewable error that undermines the transparency of the RAD Redetermination Decision rendering it unreasonable" (*Green v Canada (Citizenship and Immigration)*, 2016 FC 698 at para 33).

[26] The application for judicial review will be allowed. However, the Court declines the applicants' invitation to render a particular verdict.

JUDGMENT in IMM-2559-21

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is allowed;

2. No question is certified; and

3. The style of cause is amended to name the Minister of Citizenship and Immigration as a respondent.

"Martine St-Louis"
Judge

Certified true translation
Sebastian Desbarats

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2559-21
STYLE OF CAUSE:	LABWEL MALUNGU, JUVEN MALUNGU MUMBEMBE, BELOTE TIETE MUMBEMBE, AFONSINA TIETIE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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