Federal Court  Cour fédérale

Date: 20240604

Docket: IMM-1866-23

Citation: 2024 FC 843

Toronto, Ontario, June 4, 2024

PRESENT: The Honourable Madam Justice Turley

BETWEEN:

YORDA TEKLAY
NOEL DANIEL
ELISA DANIEL

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS FOR JUDGMENT

I. Overview

[1] The Applicants seek judicial review of a decision by the Refugee Protection Division [RPD] vacating their refugee status pursuant to section 109 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The RPD determined that the Applicants had misrepresented and withheld material facts that called into question their identity and citizenship, as well as the

credibility of their account of fearing persecution in Eritrea. On that basis, the RPD vacated the Applicants' status as refugees.

[2] I am dismissing this application because the RPD's decision that the Applicants misrepresented material information was within the range of acceptable outcomes open to it based on the evidentiary record: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 86 [*Vavilov*]. Further, the Applicants failed to raise an issue with the Minister's delay in seeking to revoke their refugee status. In addition, while given the opportunity to adduce evidence and make post hearing-submissions about the Applicants' Eritrean citizenship, the Applicants failed to do so. The RPD cannot be faulted for not addressing issues that were never raised by the Applicants.

II. Background

[3] The Applicants claim that they are citizens of Eritrea who entered Canada on May 6, 2012 using fraudulent Swedish passports bearing the names Rahel Tesfai, Samson Efrem, and Selihon Efrem that they had obtained from a smuggler in Sudan. They successfully claimed refugee protection in 2012 based on a well-founded fear of persecution by the police in Eritrea.

[4] On November 25, 2021, the Minister brought an application under section 109 of the *IRPA* seeking to vacate the Applicants' refugee status. The Minister alleged that new evidence revealed that the Applicants had concealed their true identity from the original RPD panel. According to the Integrated Customs and Enforcement System [ICES], no individuals bearing the names Rahel Tesfai, Samson Efrem, and Selihon Efrem entered Canada between April 15, 2012 and May 15,

2012. However, an ICES travel history report revealed that a family composed of three individuals entered Canada on August 3, 2011 and again on April 26, 2012 using German passports: Yordanos Teklay Embaye, Noel Josias Teklay Embaye, and Elisabet Teklay Embaye.

[5] The Minister alleged that the similarities between the Applicants and the German citizens were not a mere coincidence. This included the similar names, identical dates of birth in the case of the Minor Applicants and a close date of birth in the case of the Principal Applicant, and the proximity between the last date of entry of the German citizens (April 26, 2012) and the date the Applicants claimed refugee protection (May 9, 2012).

[6] The Minister argued that the Applicants more likely than not concealed the details of their entry to Canada from the original RPD panel, and as such foreclosed the panel from inquiring into their identities and a possible alternative country of reference (Germany).

[7] By decision dated January 16, 2023, the RPD granted the Minister's application to vacate the Applicants' refugee status. After hearing the Principal Applicant's evidence and both parties' submissions, the RPD concluded that, on a balance of probabilities, the Applicants used German passports to enter Canada on April 26, 2012 and applied for refugee protection two weeks later.

[8] The RPD determined that the Minister had met the burden set out in section 109(1) of the *IRPA* and established that the Applicants had misrepresented or withheld material facts relevant to their identity and citizenship. Furthermore, the RPD held that these material facts were so fundamental as to call into question their identity, citizenship, and the credibility of their allegation

of persecution in Eritrea such that there could not be any remaining evidence to justify refugee protection.

III. Issues and Standard of Review

[9] The Applicants raise two issues on this application. First, they argue that the RPD erred in failing to consider the procedural fairness of the Minister's delay in filing the application to vacate the Applicants' refugee status. Second, the Applicants assert that the RPD erred in finding that the Minister had adduced sufficient evidence of misrepresentation to vacate their refugee status. The Applicants submit that reasonableness is the applicable standard of review for both issues.

[10] I note that there is a divergence in this Court's jurisprudence with respect to the appropriate standard of review on the question of whether the delay in bringing a vacation application constitutes an abuse of process. This Court has reviewed it against the reasonableness standard, framing the issue as whether the RPD reasonably interpreted or applied the test for delay: *Khan v Canada (Public Safety and Emergency Preparedness)*, 2022 FC 210 at para 20; *Akram v Canada (Citizenship and Immigration)*, 2021 FC 1024 at para 17. The Court has also reviewed it against the correctness standard, framing the issue as whether the RPD brought the administration of justice into disrepute by proceeding with the delayed vacation application: *Hassan v Canada (Citizenship and Immigration)*, 2023 FC 1422 at paras 20, 23; *Ganeswaran v Canada (Citizenship and Immigration)*, 2022 FC 1797 at para 25.

[11] I need not address this issue given that my determinative finding, as set out below, is that the Applicants are precluded from raising the issue of the Minister's delay in this judicial review application because they did not raise it before the RPD.

[12] With respect to whether the RPD erred in vacating the Applicants' refugee status, I agree with the parties that the applicable standard of review is reasonableness: *Otabor v Canada (Citizenship and Immigration)*, 2020 FC 830 at paras 17-19; *Bafakih v Canada (Citizenship and Immigration)*, 2020 FC 689 at paras 19-23; *Abdulrahim v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 463 at paras 11-12.

[13] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker": *Vavilov* at para 85; *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 8 [*Mason*]. A decision should only be set aside if there are "sufficiently serious shortcomings" such that it does not exhibit the requisite attributes of "justification, intelligibility and transparency": *Vavilov* at para 100; *Mason* at paras 59-61. Furthermore, the reviewing court "must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable": *Vavilov* at para 100.

IV. Analysis

A. *The proper respondent is the Minister of Public Safety and Emergency Preparedness*

[14] As raised with the parties at the hearing, on judicial review of a RPD decision to vacate an individual's refugee status under section 109 of the *IRPA*, the proper named respondent is the Minister of Public Safety and Emergency Preparedness, not the Minister of Citizenship and Immigration. The former Minister is designated as the responsible Minister for the purposes of subsection 109(1) of the *IRPA*, as set out in section 2 of the Governor in Council's *Ministerial Responsibilities Under the Immigration and Refugee Protection Act Order*, SI/2015-52. I dealt with this issue in further detail in *Omar v Canada (Public Safety and Emergency Preparedness)*, 2023 FC 1334 at paras 11-14.

B. *The issue of delay is not properly before this Court*

[15] The Applicants argue that the RPD erred in failing to consider the impact of the Minister's delay in bringing the vacation application on the Applicants, in accordance with this Court's decision in *Mella v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1587 [*Mella*]: Applicants' Further Memorandum of Argument at paras 25-26.

[16] The Applicants' reliance on *Mella*, however, is misplaced. In that case, the issue of delay was "squarely raised" by the applicants: *Mella* at para 42. One of the applicants testified about the prejudice caused by the Minister's delay, and the allegation of an abuse of process was "fully argued" by the parties: *Mella* at paras 38-40. On that basis, the Court concluded that it was

incumbent on the RPD to address the issue of delay and the decision was set aside: *Mella* at paras 41-42.

[17] In contrast, in this case the Applicants did not raise the issue of the Minister's delay before the RPD. Generally, a reviewing court will refuse to hear an issue that is raised for the first time on judicial review, where it could have been raised before the decision-maker: *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 6 at paras 22-23 [*Alberta Teachers' Association*].

[18] At the judicial review hearing, the Applicants' counsel acknowledged that the Applicants did not raise the Minister's delay before the RPD. The Applicants argue, however, that the nine-year delay was "evident on the face of the record", and that the RPD should have therefore addressed the issue and considered the impact of the delay on the Applicants, especially given the Principal Applicant's medical condition and that the two minor children have lived in Canada for the majority of their lives.

[19] Delay in an administrative proceeding may constitute an abuse of process in two ways. First, delay may adversely affect the fairness of a proceeding where it impairs a party's ability to answer a complaint against them. For example, where memories have faded, essential witnesses have died, or evidence has been lost: *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29 at para 41 [*Abrametz*]; *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 102 [*Blencoe*]. In such a case, the party must demonstrate they have been "prejudiced in an evidentiary sense": *Blencoe* at para 104.

[20] Second, an abuse of process may occur even where there is no prejudice to hearing fairness, but where inordinate delay has caused a party "significant prejudice": *Abrametz* at para 42; *Blencoe* at paras 122, 132. A three-part test is applicable to determining whether delay amounts to an abuse of process in this second category:

> First, the delay must be inordinate. Second, the delay must have directly caused significant prejudice. When these two requirements are met, courts or tribunals will proceed to a final assessment of whether the delay amounts to an abuse of process. Delay will amount to an abuse of process if it is manifestly unfair to a party or in some other way brings the administration of justice into disrepute.
>
> *Abrametz* at para 43.
>
> [Citation omitted]

[21] Under both categories, evidence of the alleged prejudice is required. As the Supreme Court emphasized, "[p]rejudice is a question of fact": *Abrametz* at para 69. The burden to adduce evidence is thus on the party alleging that delay caused prejudice.

[22] While I have sympathy for the Applicants' situation, it was incumbent on them to expressly raise the issue of delay before the RPD, adduce evidence of the prejudice that they alleged the delay caused, and seek a remedy. Had the Applicants properly raised the issue of delay and adduced evidence, the Minister would have had the opportunity to cross-examine the Applicants, adduce their own evidence, and make submissions. Allowing the Applicants to raise this issue for the first time on judicial review would be unfair to the Minister, and deprive the Court of a proper evidentiary record: *Alberta Teachers' Association* at para 26.

[23] I therefore decline to consider the issue raised by the Applicants concerning the Minister's delay in seeking to vacate the Applicants' refugee status.

C. *The RPD's decision is reasonable*

(1) The RPD did not fail to consider evidence adduced by the Applicants

[24] The Applicants argue that the RPD erred in failing to explain why it did not accept their documentary evidence concerning their identities, namely their Eritrean birth certificates: Applicants' Further Memorandum of Argument at para 24.

[25] A decision-maker's failure to account for the evidence before it may call into question the reasonableness of the decision: *Vavilov* at para 126. After carefully reviewing the record and the audiotapes of the RPD vacation hearing, I am satisfied that this is not the case here. The Applicants' Eritrean birth certificates were not before the RPD at the time it made their decision on the Minister's vacation application.

[26] The Applicants' birth certificates are included in the Certified Tribunal Record [CTR], which would indicate that they were before the RPD in the underlying matter in the vacation proceedings. However, as explained below, a review of the record supports that this was simply an administrative error. The birth certificates were only submitted as evidence before the original panel that determined the Applicants' refugee claim, and not before the RPD panel that heard the vacation application.

[27] Prior to the vacation proceeding, by letter dated June 1, 2022, the RPD disclosed to the Principal Applicant "the evidentiary documents of [her] original claim", which included the Eritrean birth certificates that the Applicants had submitted with their refugee claim. The Principal Applicant was advised that she must provide a copy of all documents that she intended to use at the vacation hearing to the RPD and the Minister "no later than 10 days before the hearing, or 5 days before the hearing if it is in response to another document provided by a party or the RPD": CTR at p 107.

[28] According to the audiotapes of the RPD vacation hearing, the RPD asked the Principal Applicant what identification documents she had provided to the RPD panel hearing her refugee claim. She told the panel that she had presented birth certificates. When asked why she did not provide them to this panel, the Principal Applicant replied that she was not sure that she could locate them. Later in the hearing, she advised the RPD that she was able to find them. At that juncture, the RPD addressed the Applicants' representative advising essentially that if they wish to pursue this issue, they can apply to submit post-hearing submissions, but that it was up to them to "make their case". The Applicants' representative responded that they would make oral submissions and then adduce the birth certificates into evidence. The Minister's representative then stated that if the birth certificates were accepted into evidence, they would make submissions at that time. The Applicants' counsel did not raise the issue of the birth certificates in their submissions.

[29] There is no evidence in the record that the Applicants sought to adduce the birth certificates into evidence and make any submissions post-hearing. This is supported by the RPD's

Consolidated List of Documents, which lists the documents that were filed by the parties for the vacation application: CTR at p 59.

[30] Based on the foregoing, there is no merit to the Applicants' argument that the RPD failed to engage with their documentary evidence. The Applicants were advised of the requirement to provide any relevant documents to the RPD and the Minister before the hearing. They were even provided copies of the evidence that they had submitted before the original RPD panel that heard their refugee claim, presumably in the event that the Applicants no longer had copies of these documents. Then at the vacation hearing, the RPD gave the Applicants an opportunity to submit post-hearing evidence and submissions concerning their identity documents, but they did not avail themselves of this opportunity.

(2) The RPD's analysis is coherent and rational

[31] The Applicants further argue that there was "insufficient evidence" to vacate their refugee status. Based on the evidence before the RPD, I find that the RPD reasonably found that, on a balance of probabilities, the Applicants misled the original RPD panel that they were citizens of Eritrea who had come from Sudan. As set out below, the RPD's chain of analysis is both coherent and rational: *Vavilov* at para 85.

[32] The RPD applied the three-pronged test relevant to determining whether there was a misrepresentation or withholding of material facts under subsection 109(1) of the *IRPA*, as established in *Canada (Public Safety and Emergency Preparedness) v Gunasingam*, 2008 FC 181, namely that (i) there is a misrepresentation or withholding of material facts; (ii) those facts relate

to a relevant matter; and (iii) there is a causal connection between the misrepresentation or withholding and the favourable result. In addition, the RPD considered whether there was sufficient evidence at the time of the refugee claim to justify refugee protection notwithstanding the misrepresentation: RPD Reasons and Decision dated January 16, 2023 at paras 12-13 [RPD Reasons].

[33] At their refugee determination hearing, the Applicants claimed that they arrived in Canada on May 6, 2012 using fraudulent Swedish passports, but that these passports were no longer in their possession. The evidence tendered by the Minister at the vacation proceeding revealed that there were no entries in the ICES system during the relevant time period of any individuals bearing the names in the passports that the Applicants claimed to have used to enter Canada. Based on this evidence, the RPD found that "the absence of a positive match on [the] ICES database for the alleged names shows that the [Applicants] did not use fraudulent Swedish passports to enter Canada, on a balance of probabilities": RPD Reasons at para 16.

[34] Next, the RPD considered the Minister's evidence that a German family of three with "striking similarities" entered Canada almost two weeks before the Applicants applied for refugee protection. The similarities were as follows: (i) the same family composition – a mother accompanied by two minor children; (ii) identical or very similar given names; and (iii) the same birth dates for the minor applicants and a very close date of birth for the Principal Applicant: RPD Reasons at para 17. The RPD reasonably characterized these as "unlikely coincidences": RPD Reasons at para 19. Based on this evidence, the RPD found that, on a balance of probabilities, the Applicants "used German passports to enter Canada on April 26, 2012": RPD Reasons at para 20.

[35] The RPD ultimately concluded that the Minister had met his burden under subsection 109(1) of the *IRPA* and satisfied the three-part test:

> [21] The Panel finds, on a balance of probabilities, that the Minister has met the burden set out in the IRPA 109(1) of establishing that there was actual misrepresentation or withholding of material facts (the Respondents' alternate names/alias'), and those facts are related to a relevant matter (identity is of central importance to a refugee claim). There is a causal connection between the misrepresentation on the one hand and the favourable result on the other (in cases where the claimant's identity is not proven, the claim must fail). Therefore, the three elements of subsection 109(1) are present.

[36] Finally, the RPD addressed whether there was any remaining evidence that could justify refugee protection. I am satisfied that, in the circumstances of this case, the RPD reasonably concluded that based on the very nature of the Applicants' misrepresentation (their identity and citizenship), this called into question the credibility of their claim of fearing persecution in Eritrea. On this basis, the RPD reasoned that there could be no remaining evidence that would warrant refugee protection: RPD Reasons at para 22.

[37] In my view, the RPD's analysis of the Minister's vacation application was wholly reasonable and open to it based on the evidentiary record and on the balance of probabilities. In essence, the Applicants' challenge to the RPD's decision amounts to a request for this Court to reweigh and reassess the evidence, which is beyond the role of a reviewing court: *Vavilov* at para 125.

V. Proposed Questions for Certification

[38] The Applicants propose two questions for certification that are both related to the issue of the Minister's delay in seeking to vacate their refugee status: (i) what constitutes an unreasonable delay in filing the vacation application, on the part of the Minister?; and (ii) should the Minister have an onus to explain an unreasonable delay?

[39] A certified question must be dispositive of the appeal, transcend the interests of the parties, and raise an issue of broad significance or general importance: *Canada (Immigration and Citizenship) v Laing*, 2021 FCA 194 at para 11; *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 36 [*Lewis*].

[40] As the Federal Court of Appeal explained, "the question must arise from the case" in order to be certified: *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at para 46. Finally, for a question to be of general importance, it cannot have been previously settled by decided jurisprudence. This is because "all properly certified questions lack decided binding authority": *Lewis* at para 39.

[41] I agree with the Respondent that the proposed questions do not "arise from the case". The issue of delay was not raised before the RPD and, as such, I declined to deal with the issue on its merits.

[42] Furthermore, the Supreme Court addressed the relevant legal framework for assessing delay in the administrative context in *Blencoe*, and then more recently in *Abrametz*. As such, the jurisprudence has sufficiently answered the proposed questions.

VI. Conclusion

[43] For these reasons, I dismiss the application for judicial review and refuse to certify either of the two proposed questions.

JUDGMENT in IMM-1866-23

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended so that the Minister of Public Safety and Emergency Preparedness is the respondent.
2. The application for judicial review is dismissed.
3. No question is certified for appeal.

"Anne M. Turley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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