Federal Court Cour fédérale

Date: 20240708

Docket: IMM-11260-23

Citation: 2024 FC 1067

[ENGLISH TRANSLATION]

Ottawa, Ontario, July 8, 2024

Present: The Honourable Madam Justice Ngo

BETWEEN:

MERVEILLE ASSAKA KALEMBA and
TRÉSOR BAKATUBIA KALEMBA

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] The applicants are seeking judicial review of a decision by the Refugee Appeal Division [RAD] dated August 16, 2023 [Decision], denying their application to reopen their appeal under rule 49 of the *Refugee Appeal Division Rules*, SOR/2012-257 [Rules].

[2] Having considered the parties' representations and the applicable law, I cannot conclude that the RAD made an unreasonable decision in light of the factual and legal constraints that bear on its decision. The application for judicial review is dismissed for the reasons that follow.

II. Facts

[3] The applicants submit that they are citizens of the Democratic Republic of the Congo [DRC]. On January 2, 2019, the applicants arrived in Canada with Angolan passports issued in the names of Nathaniel Prospero Unyembe and Kevino Prospero Unyembe. In their refugee protection claims, they admitted that the Angolan passports in their possession had been obtained fraudulently with the help of a friend.

[4] On September 1, 2022, the Refugee Protection Division [RPD] rejected their refugee protection claims, finding that they were not Convention refugees or persons in need of protection. The RPD gave little weight to the Angolan passports and considered that the applicants did not use those passports in their refugee protection claims to prove their identities. The RPD assessed other documents, including birth registrations, supplementary judgments, school documents, birth certificates, citizenship certificates and a voter card. The RPD also gave little weight to these other documents. The RPD concluded that, on a balance of probabilities, the applicants had not established their identities.

[5] In May 2023, the applicants received a new passport for Nathaniel Prospero Unyembe issued by the Congolese authorities [new passport]. On June 28, 2023, counsel for the applicants sent the Minister of Public Safety and Emergency Preparedness [Minister] an application to admit

the new passport [application to admit]. The Minister replied on July 4, 2023. However, counsel for the applicant did not submit the application to admit to the RAD.

[6] On July 7, 2023, the RAD rendered its decision on the appeal of the RPD decision. The RAD conducted its own analysis of the record to independently determine whether, on appeal, the alleged errors had merit. The RAD found that the RPD had not erred, as the applicants had not established their identities on a balance of probabilities.

[7] After reviewing the July 7, 2023, decision, counsel for the applicants realized that he had forgotten to file the application for admission and the new passport issued by the Congolese authorities in the record before the RAD. Counsel had only sent these items to the Minister on June 28, 2023, but had failed to submit them to the RAD. The applicants filed an application to reopen the appeal under rule 49 of the Rules so the RAD could render a new decision in light of the new passport.

[8] On August 16, 2023, the RAD issued its decision on the application to reopen and refused to reopen the applicants' appeal under rule 49 of the Rules. The RAD acknowledged that the applicants were claiming that the new passport was relevant for their refugee protection claims. In its analysis under rule 49 of the Rules, the RAD considered the representations filed concerning the relevance of the new passport, and counsel's failure to file the application.

[9] The RAD acknowledged that it was only after reviewing the RAD decision dated July 7, 2023, that counsel for the applicants realized that he had failed to submit the application

and new passport to the RAD. The RAD determined that more than one month had passed between the time when the applicants received the new passport and when their counsel indicated that he had submitted the application to the Minister. The RAD determined that the applicants did not provide an explanation in their application to reopen to clarify the reasons for the one-month delay. The RAD noted that, since the RPD's decision of September 1, 2022, it was clear that the first issue to be decided was that of the applicants' identities. The RAD explained that the applicants had had an opportunity to provide evidence and that they had had a real opportunity to persuade the RAD to allow the appeal. In these circumstances, the RAD concluded that there was no breach of natural justice or procedural fairness.

[10] The RAD decision denying the application to reopen is the subject of this judicial review.

III. Issues and standard of review

[11] The issue before the Court is whether it was unreasonable for the RAD to deny the application to reopen under rule 49 of the Rules. Case law recognizes that the applicable standard when a decision maker interprets its enabling statute is that of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 7 [*Vavilov*]).

[12] The applicants also allege a breach of procedural fairness in respect of the manner in which the RAD decided their application to reopen. The Federal Court has held that the standard of review applicable to decisions on applications to reopen is that of reasonableness (*Brown v Canada (Citizenship and Immigration)*, 2018 FC 1103 [*Brown*] at paras 24–26; *Khakpour v Canada (Citizenship and Immigration)*, 2016 FC 25 at para 20). In following the case law, the Decision

will therefore be considered against a standard of reasonableness (*Vavilov* at para 10, 25; *Imafidon v Canada (Citizenship and Immigration)*, 2023 FC 1592 at paras 22–25).

[13] On judicial review, the Court must determine whether a decision bears the hallmarks of reasonableness—justification, transparency and intelligibility (*Vavilov* at para 99). A reasonable decision in a given case will always depend on the relevant factual and legal constraints that bear on the decision under review (*Vavilov* at para 90). A decision could be unreasonable if the administrative decision-maker misapprehended the evidence on the record (*Vavilov* at paras 125, 126). The burden is on the party challenging the decision to show that it is unreasonable (*Vavilov* at para 100). To be reasonable, a decision must be based on reasoning that is both rational and logical, but the standard of reasonableness is not a "line-by-line treasure hunt for error" (*Vavilov* at para 102).

IV. Analysis

[14] The relevant provision is found in rule 49 of the Rules, reproduced below:

Application to reopen appeal	**Demande de réouverture d'un appel**
49 (1) At any time before the Federal Court has made a final determination in respect of an appeal that has been decided or declared abandoned, the appellant may make an application to the Division to reopen the appeal.	**49 (1)** À tout moment avant que la Cour fédérale rende une décision en dernier ressort à l'égard de l'appel qui a fait l'objet d'une décision ou dont le désistement a été prononcé, l'appelant peut demander à la Section de rouvrir cet appel.
…	…
Allegations against counsel	**Allégations à l'égard d'un conseil**
(4) If it is alleged in the application that the person who is the subject of the appeal's counsel in the proceedings that	**(4)** S'il est allégué dans sa demande que son conseil, dans les procédures faisant

are the subject of the application provided inadequate representation,

(a) the person must first provide a copy of the application to the counsel and then provide the original and a copy of the application to the Division, and

(b) the application provided to the Division must be accompanied by proof that a copy was provided to the counsel.

…

Factor

(6) The Division must not allow the application unless it is established that there was a failure to observe a principle of natural justice.

Factors

(7) In deciding the application, the Division must consider any relevant factors, including

(a) whether the application was made in a timely manner and the justification for any delay; and

(b) if the appellant did not make an application for leave to apply for judicial review or an application for judicial review, the reasons why an application was not made.

l'objet de la demande, l'a représentée inadéquatement :

a) la personne en cause transmet une copie de la demande au conseil, puis l'original et une copie à la Section;

b) la demande transmise à la Section est accompagnée d'une preuve de la transmission d'une copie au conseil.

…

Élément à considérer

(6) La Section ne peut accueillir la demande que si un manquement à un principe de justice naturelle est établi.

Éléments à considérer

(7) Pour statuer sur la demande, la Section prend en considération tout élément pertinent, notamment :

a) la question de savoir si la demande a été faite en temps opportun et la justification de tout retard;

b) si l'appelant n'a pas présenté une demande d'autorisation de présenter une demande de contrôle judiciaire ou une demande de contrôle judiciaire, les raisons pour lesquelles il ne l'a pas fait.

[15] The applicants submit that the RAD made an unreasonable decision in denying their application to reopen, as it did not find that their counsel's error breached a principle of natural justice thereby tainting the July 7, 2023, decision on the appeal.

[16] The respondent submits that the Decision was reasonable as the RAD reasonably concluded that there had been no breach of natural justice and the RAD had also considered subrule 49(7) of the Rules requiring consideration of any relevant factors in deciding the application to reopen. Since the RAD concluded that natural justice had not been breached, it could not allow the application to reopen.

[17] The applicants allege that the RAD should have considered rule 29 of the Rules and subsection 110(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. In response to this argument, the respondent correctly noted that the representations made during the proceedings related to the decision dated July 7, 2023, are not the representations made as part of the application to reopen. I agree that the Court should only considers the representations that were made as part of the application to reopen under rule 49 of the Rules.

[18] The applicants submit that, in extraordinary circumstances, the RAD may allow an application to reopen based on a breach of natural justice due to the incompetence of counsel (*Brown v Canada (Citizenship and Immigration)*, 2012 FC 1305 at paras 30, 55–56, 59; *Mahadjir Djibrine v Canada (Citizenship and Immigration)*, 2020 FC 1036 at para 18). According to the applicants, counsel's error deprived the RAD from an opportunity to examine the new passport as part of the evidence to establish the identity of one of the applicants.

[19] The respondent submits that, even though counsel accepted full responsibility, natural justice was not breached, as the Decision would not have been different had it not been for counsel's error.

[20] The RAD had considered ample evidence, other than the new passport, before denying an appeal of the RPD decision. The RAD considered other factors that the applicants had submitted to the RPD, including birth registrations, supplementary judgments, school documents, birth certificates, citizenship certificates and a voter card, as well as the testimony of the applicants' mother at the hearing. In its decision of August 16, 2023, the RAD assessed the evidence and gave weight to each of the identification documents on the record before concluding on the basis of the evidence as a whole that the applicants had not established their identities.

[21] The applicant cited *Nijjer v Canada (Citizenship and Immigration)*, 2009 FC 1259 [*Nijjer*], to suggest that the RAD should give greater weight to the new passport than to other evidence when weighing the evidence to establish the applicant's identity. In *Nijjer*, at paragraph 27 [of the French version of *Nijjer*, but paragraph 26 of the English version], the Court reiterated the principles set out by the Federal Court of Appeal recognizing that dismissing evidence that merely repeats a version of the facts considered to be not very credible and improbable does not breach the general rule that all evidence must be considered before ruling on credibility (*Sheikh v Canada (Minister of Employment and Immigration)*, 1990 CanLII 13057 (FCA); *Rahaman v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 89).

[22] At the hearing before the Court, the applicants submitted that a passport is a document that essentially takes precedence over all other evidence. The applicants relied on *Farah v Canada (Citizenship and Immigration)*, 2023 FC 760 at para 20 [*Farah*]. The case law confirms that documents in evidence that were issued by a foreign authority are presumed to be authentic unless there is a valid reason to doubt their authenticity.

[23] Respectfully, *Farah* does not undermine the RAD’s analysis given that the RAD assessed a series of documents and testimony from the applicants, that is, evidence aside from the new passport, to address the issue of the applicants’ identities. As submitted by the respondent, the RAD analyzed all the evidence on the record and the testimony concerning the applicants’ identities as a whole. The RAD took into consideration the fact that the new passport was obtained using an altered nationality certificate. All the inconsistencies and irregularities in the record could not have been overcome merely by the new passport.

[24] In light of the record as a whole, it was not unreasonable for the RAD to conclude that the new passport alone could not establish the identity of one of the applicants. Therefore, counsel’s error would not have changed the outcome on the determinative issue of the applicants’ identities. Given the clear language of rule 49 of the Rules, since the RAD concluded that natural justice had not been breached, it could not allow the application to reopen.

[25] Moreover, the RAD also considered the other factors under subrule 49(7) of the Rules, including the delay between the date the applicant received his new passport in May 2023 and the submission date of June 28, 2023, the applicants’ opportunity to provide evidence and the applicants’ opportunity to persuade the RAD that their appeal should have been allowed.

V. Conclusion

[26] On reading the Decision as a whole, the RAD did not make an unreasonable decision in denying the application to reopen, as the reasons for the Decision are internally coherent and

justified in light of the factual and legal constraints (*Vavilov* at para 91). The application for judicial review must be dismissed.

[27] The parties have confirmed that there was no question to certify. I agree that, in the circumstances, there is no question to certify.

<u>JUDGMENT IN IMM-11260-23</u>

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.

2. There is no question for certification.

"Phuong T.V. Ngo"

Judge

Certified true translation
Johanna Kratz

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-11260-23
STYLE OF CAUSE:	MERVEILLE ASSAKA KALEMBA ET AL v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JUNE 19, 2024
JUDGMENT AND REASONS:	NGO J
DATED:	JULY 8, 2024

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