Federal Court  Cour fédérale

Date: 20210901

Docket: IMM-4707-20

Citation: 2021 FC 911

Ottawa, Ontario, September 1, 2021

PRESENT: Mr. Justice Pentney

BETWEEN:

JEAN PAUL NIYONGIRA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Mr. Jean Paul Niyongira says that he fled Rwanda to claim refugee status in Canada because he had been tortured by soldiers who killed his associate during the same torture session. The Refugee Protection Division (RPD) dismissed his claim on June 6, 2019. On appeal, the Refugee Appeal Division (RAD) upheld that decision on August 31, 2020. The Applicant now seeks judicial review.

[2] The core of the RAD's decision is that it did not believe Mr. Niyongira's claim to have been tortured. It found the contradictions and gaps in his testimony gave rise to doubts about his credibility that were sufficient to warrant dismissing his claim.

[3] I find that the RAD engaged in a microscopic analysis of peripheral details. I also find that it doubted the credibility of the Applicant's testimony based on gaps and omissions without explaining how it considered and applied the guidance documents that indicate that torture victims may have difficulty giving evidence about their ordeal. In addition, the RAD appears to have failed to consider the further affidavit Mr. Niyongira provided in support of his appeal. Because of these flaws, the RAD decision is unreasonable.

[4] Based on the evidence Mr. Niyongira provided, the RAD may well have had reason to doubt his claim. However, its reasons and reasoning do not stand up to scrutiny, given the nature of the case, the potential impact on the individual, and the requirements of reasonableness review. This is exactly the kind of situation discussed in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], at paragraph 86:

> In short, it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies. While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis.
>
> [Emphasis in original.]

[5] It is not necessary to discuss all of the Applicant's submissions about the shortcomings in the decision. A few examples will suffice.

[6] Starting with the affidavit, the RAD decision states [TRANSLATION] “the appellant does not request new evidence under subsection 110(4)…” (RAD Decision, para 6). The problem with this is that Mr. Niyongira had submitted an affidavit before the RAD, which explained certain concerns about how the hearing had unfolded before the RPD. These concerns included problems with the translation of his evidence. He also stated: [TRANSLATION] “I present a new piece of evidence, namely the copy of my pass to answer the question raised in the room about my trips to Uganda”.

[7] There is no doubt that Mr. Niyongira’s affidavit was part of the record before the RAD. In light of this, the RAD’s statement that he had not requested to present new evidence is incomprehensible. This is not to say that the RAD was duty-bound to accept the new evidence. All that it was required to do was to acknowledge it, and then consider whether it was admissible pursuant to the legislation (*Immigration and Refugee Protection Act*, SC 2001, c 27, s 110(4)) and pertinent case-law (in particular, *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96). The RAD’s failure to do this is unreasonable.

[8] In addition, there are two key problems with the RAD’s assessment of the Applicant’s credibility: (i) it focused on some peripheral details, and (ii) it failed to consider whether or how Mr. Niyongira’s experience of torture affected the way in which he gave his evidence.

[9] Mr. Niyongira said that he was subjected to torture due to his association with Mr. Mutunzi, a lawyer accused of being a political dissident because he had previously defended a participant in the genocide in Rwanda, Leon Mugesera (see *Mugesera v Canada (Minister of*

Citizenship and Immigration), 2005 SCC 40). He says that his troubles began on April 13, 2018, when he met Mr. Mutunzi and they were abducted.

[10] The RAD found Mr. Niyongira's evidence lacked credibility because of inconsistencies about who had called whom on that day. It noted that while this [TRANSLATION] "imbroglio is not fatal to an entire testimony", it was an indication that he could not accurately describe how his problems started. This is an unduly microscopic analysis of a peripheral point and the RAD acted unreasonably in failing to discount this in its assessment of his credibility.

[11] The same is true regarding the RAD's concerns about when he obtained his passport and its critique of the medical report (which, on reading it, is not a report about Mr. Niyongira's medical condition or treatment in any meaningful way). It is unreasonable to base credibility findings on such peripheral elements of the narrative, and this is not a case where the RAD's analysis was simply "comprehensive" (see *Mirzaee v Canada (Citizenship and Immigration)*, 2020 FC 972 at para 45). Instead, it descended into a detailed review of trivial elements of the evidence, which is sometimes described as the error of engaging in a "microscopic analysis".

[12] While these problems alone may not have been sufficiently serious to make the entire decision unreasonable, they are not the only basis for overturning the RAD's decision. A more substantial concern relates to the RAD's complete failure to mention the possible impact the torture may have had on the quality or accuracy of Mr. Niyongira's testimony.

[13] As noted earlier, his entire refugee claim rested on his narrative that he had been tortured, that his torturers had killed his associate, and that he feared returning to Rwanda because he

could link his torturers to the killing of his associate, giving them a further reason to harm him. In light of this, the RAD was required to consider the possible impact of torture on his testimony.

[14] The Immigration and Refugee Board has rightly acknowledged the duty on decision-makers to consider whether torture or other mistreatment has affected the individual's capacity to give evidence, through Guideline 8 on Procedures with Respect to Vulnerable Persons Appearing before the IRB (the Guideline), as well as the RAD's Training Manual on Victims of Torture (the Manual).

[15] The *Vavilov* framework for reasonableness review includes examining how a decision-maker treated any binding precedents, or policy or guidance documents that have been issued, to assist in dealing with certain matters (*Vavilov* at paras 129-131).

[16] The RAD in this case failed to discuss how Mr. Niyongira's evidence may have been affected by his experience of torture. Prior decisions of this Court have acknowledged that the experience of torture – and its profound impacts on the physical, moral, and psychological integrity of an individual – must be taken into account in assessing credibility of testimony, whether or not the Guideline or the Manual apply: "torture victims may have difficulty with memory, consistency and coherence", (*Wardi v Canada (Citizenship and Immigration)*, 2012 FC 1509 [*Wardi*] at para 15). As explained in *Wardi*, the root of the error in failing to consider the impact of torture on a person's ability to testify "lies in the general principles governing the assessment of the evidence, and not in the deviation from policies" (*Wardi* at para 25).

[17] In my view, the RAD fell into the exact error that the Manual counsels against, because the RAD did not explain how it assessed the impact of the claimed torture on the Applicant's testimony. The RAD discounted the Applicant's testimony because of discrepancies between his written narrative and oral testimony about the number of soldiers that tortured him, the precise devices used in his last torture session, and about the shredding of his t-shirt just before the last incident of torture. The Applicant's explanations for all of these discrepancies were discounted, but the RAD did not discuss whether or how the experience of torture might have affected this evidence. This is unreasonable.

[18] Finally, *Vavilov* underlines that one factor in assessing a decision's reasonableness is a consideration of the impact of the decision on the individual: "Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to the individual must reflect the stakes" (para 133). It is difficult to imagine a greater impact than the possibility of being sent back to face one's torturers (see *Suresh v Canada (Minister of Citizenship and Immigration),* 2002 SCC 1 at para 118). In this respect, the RAD's reasons simply fail to measure up to the standard that is required: to justify the exercise of public power it is exercising in respect of such fundamentally important interests, both for Mr. Niyongira and for Canada as a whole.

[19] I therefore find the decision to be unreasonable. The application for judicial review is granted, the decision is set aside, and the matter is remitted back to a differently constituted panel for re-consideration.

[20] There is no question of general importance for certification.

[21] One final matter relates to the style of cause in this proceeding. The Applicant originally named “The Minister of Immigration, Refugees and Citizenship” as the Respondent, but the parties agreed at the hearing that the proper respondent is the Minister of Citizenship and Immigration (*Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, rule 5(2)(a)). The style of cause is amended accordingly, with immediate effect.

JUDGMENT in IMM-4704-20

THIS COURT'S JUDGMENT is that:

1. The Application for Judicial Review is granted.
2. The Refugee Appeal Division's decision dated August 31, 2020, is set aside.
3. The matter is remitted back for re-consideration by a differently constituted panel of the Refugee Appeal Division.
4. There is no question of general importance for certification.
5. The style of cause is amended to name The Minister of Citizenship and Immigration as the Respondent.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4704-20
STYLE OF CAUSE:	JEAN PAUL NIYONGIRA V THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	JUNE 30, 2021
JUDGMENT AND REASONS:	PENTNEY J.
DATED:	SEPTEMBER 1, 2021

APPEARANCES:

Heather Neufeld	FOR THE APPLICANT
Julie Chung	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Heather Neufeld Law Ottawa, Ontario	FOR THE APPLICANT
Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT