Federal Court  Cour fédérale

Date: 20220907

Docket: IMM-5036-21

Citation: 2022 FC 1266

Montréal, Quebec, September 07, 2022

PRESENT: Madam Justice St-Louis

BETWEEN:

JANET MENSAH TURKSON
MICHAEL TURKSON

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants Ms. Janet Mensah Turkson and her minor son, Mr. Michael Turkson, seek judicial review of a decision of the Refugee Protection Division [RPD] which allowed the application filed by the Minister of Public Safety and Emergency Preparedness [the Minister]

presented under section 109 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] and vacated the Applicants' refugee protection.

[2] I must determine if the RPD made a reviewable error when it examined the Minister's application to vacate the Applicants' refugee protection. In doing so, I am guided by the principles set out in *Canada* (*Minister of Citizenship and Immigration*) *v Wahab*, 2006 FC 1554 [*Wahab*], principles fully endorsed by the Federal Court of Appeal in Canada (Public safety and Emergency preparedness) v Bafakih, 2022 FCA 18 [*Bafakih*].

[3] In *Wahab*, Justice Gauthier provided a jurisprudential review of the principles governing applications made pursuant to section 109 of the Act and, at paragraph 29 of her decision, listed five principles. The fifth principle states that "When carrying out the analysis set out in s. 109(2), the RPD can refer to its findings under section 109(1) but only to identify what "old" evidence remains untainted by the withholding or misrepresentation. The RPD cannot reassess the "old" evidence in light of new evidence adduced by the Minister or the claimant pursuant to section 109(1).The RPD cannot give any weight or even consider the new evidence produced by either party when exercising its discretion pursuant to section 109(2)".

[4] I am satisfied that the RPD erred when it reassessed the old evidence as part of its analysis under subsection 109(2) of the Act. This contravenes the afore-mentioned principle set out by Justice Gauthier in *Wahab*, endorsed by the Federal Court of Appeal in *Bafakih*. Consequently, this Application for judicial review will be granted, the RPD decision will be quashed, and the file will be remitted to the RPD for a new determination by a different panel.

II. Context

[5] In or about August 2014, the Applicants applied for and obtained Canadian Visitor's Visas from the Canadian authorities in Ghana. The Applicants then identified themselves as Ms. Janet Mensah Turkson, born in Accra, Ghana on June 11, 1975, and as Michael Turkson, born in Accra, Ghana on July 14, 2006. Ms. Turkson then identified her spouse as Mr. Raymond Turkson, who was also applying for a Canadian Visitor's Visa, and she confirmed that they had been married since September 2, 2005. On her Canadian Visitor's Visa application, Ms. Turkson confirmed that she had never been refused a visa from Canada or from any other country, that she had not used other names or aliases, and that she had never been married before her current union.

[6] On or about September 24, 2014, the Applicants entered Canada as visitors. Ms. Turkson claimed refugee protection for her and her minor son based on the domestic abuse and violence she alleged she suffered at the hands of her spouse, Mr. Raymond Turkson, in Ghana. She then stated that her marital problems had started in August 2014. When they claimed refugee protection, the Applicants identified themselves as Ms. Janet Mensah Turkson and Michael Turkson as they had done on their Canadian Visitor's Visa applications. Again, on the forms that Ms. Turkson's completed in order to seek refugee protection, she confirmed having never been refused a visa from Canada or from any other country, having never used any aliases or having been previously married.

[7] On June 9, 2015, the RPD heard the Applicants' refugee claim and denied the Applicants' claim based upon the issue of identity [the first RPD decision], having determined that the birth certificates that had been used to obtain the passports from Ghana casted doubt on their authenticity and were not reliable. The Applicants appealed this first RPD decision before the Refugee Appeal Division [RAD] and filed additional evidence, namely letters from the Ghanaian birth and death registry, which provided verification of the birth certificates they had initially presented. The RAD allowed the appeal and referred the matter back to the RPD. The RAD noted that the Ghanaian authorities had confirmed that the birth registry documents were authentic and that the Applicants had provided identity documents with greater probative value. It determined that the first RPD decision on identity was wrong when assessed in light of the new evidence admitted on appeal and that the Applicants had established their civil identity. On April 25, 2018, after re-determination, the RPD found that the Applicants were Convention refugees or persons in need of protection [the second RPD decision]. The RPD noted that the identity issues which were of concern in the first RPD decision had been resolved by the RAD, that Ms. Turkson alleged that her son and herself were abused by her husband and that she feared harm at her husband's hands should she return to Ghana.

[8] Four years later, on November 5, 2019, Ms. Turkson applied for a B1B2 tourist visa for the United States. This triggered the disclosure, by the American authorities, of conflicting information in regards to the Applicants' identity after the facial recognition software identified a match to an individual with a different name, date of birth, country of citizenship and husband, who had been part of an application for a US diversity visa back in 2010 [the US diversity visa]. A Ms. Janette Njapdounke from Cameroun, born on June 11, 1980, was named in this 2010 US

diversity visa application and it is not contested that this is the same person as Ms. Turkson. The same US diversity visa application also names the minor Applicant as Michael Junior Imprim. On this US diversity visa application, Ms. Janette Njapdounke's husband is named as Mr. Anthony Agyin from Ghana, born on October 2, 1986.

[9] The documents released by the American authorities also reveal that on April 7, 2014, Ms. Turkson submitted a B1B2 tourist visa for the United States at the US visa post in Accra, Ghana as Ms. Turkson. Facial recognition then identified a match between Mr. Turkson and a Ms. Janette Njapdounke, named on the 2010 US diversity visa application. The American authorities interviewed Ms. Turkson, and she admitted that she had indeed been added to a US diversity visa application back in 2010. The American authorities denied Ms. Turkson her visa application.

[10] In December 2019, having been informed of the existence of these other identities, the Minister applied before the RPD to vacate the Applicants' refugee protection. The Minister then argued that the new documentary evidence suggested that the Applicants directly or indirectly misrepresented or withheld material facts relating to relevant matters before the RPD per subsection 109 of the Act. The Minister alleged that, given that the Applicants were previously known under a different identity, the Applicants foreclosed the original panel from inquiring into their identity, which is a material element of their claim and relevant matter. The Minister also submitted that, on a balance of probabilities, the Principal Applicant is a citizen of the Cameroon, which the Applicants concealed in order to advance a fabricated refugee claim only against Ghana.

[11] The Applicants responded to the Minister's application to vacate their refugee protection and submitted documents and an affidavit. On June 29, 2021, the RPD heard the Minister's application to vacate the Applicants' refugee protection and Ms. Turkson testified. On July 16, 2021, the RPD granted the application to vacate the Applicants' refugee protection.

[12] In its decision, the RPD summarized the facts, noted that Ms. Turkson gave an oral testimony and that she submitted an affidavit to give explanations. The RPD found the explanations she provided neither credible nor reasonable. The RPD further noted the contradiction between (1) Ms. Turkson's testimony that she made the US diversity visa application in 2010 because she wanted to leave Ghana with her son as herself and her husband were undergoing serious marital issues; (2) the statement she made in her Basis of Claim form [BOC] in 2015 that the problems in the marriage started in or about August 15, 2014; and (3) her subsequent testimony that the marital issues of 2010 were actually not that serious.

[13] The RPD stated that, under section 109 of the Act, it had to examine whether there was direct or indirect misrepresentation, or withholding of material facts relating to a relevant matter, and whether at the time of the first determination, there was sufficient evidence to justify refugee protection not withstanding the misrepresentation.

[14] On the first prong of the test, the RPD concluded that there was a pertinent, important misrepresentation or withholding of material facts, and underlined that the misrepresentation alleged by the Minister was not contested by the Applicants. At page 7 of its decision, the RPD accepted the contention by the Minister that protection had been granted as a result of direct or

indirect misrepresentation or withholding of material facts by the respondents (subsection 109(1) of the Act).

[15] The RPD then examined the second prong of the test (subsection 109(2) of the Act) and outlined it had to determine whether at the time of the first determination, there was sufficient evidence to justify refugee protection, notwithstanding the misrepresentation. The RPD concluded that, in summary, when the Minister's evidence and the respondent's testimony were considered conjunctively, there was not sufficient evidence remaining to justify the retention of refugee protection. The RPD went on and stated that, having assessed all the evidence before it, there was no credible or trustworthy evidence to justify refugee protection in respect of the respondents. The RPD vacated the status of the respondents pursuant to section 109 of the Act.

III. Analysis and decision

[16] The Applicants raised a number of issues. As one issue allows me to dispose of the matter and grant the application for judicial review, I will not examine the other ones.

[17] Reasonableness is the presumptive standard of review of the merits of an administrative decision and nothing warrants a departure from this presumption. The Court must thus determine if the Applicants have shown the Review Panel Decision to be unreasonable per the teachings of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]). On a reasonableness review, the focus of the inquiry "[…] must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" (*Vavilov* at para 83). Ultimately, the reviewing court must be satisfied

that the administrative decision is "based on an internally coherent and rational chain of analysis and […] is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). Subsection 109(1) of the Act reads as follows:

Immigration and Refugee Protection Act	*Loi sur l'immigration et la protection des réfugiés*
109. (1) The Refugee Protection Division may, on application by the Minister, vacate a decision to allow a claim for refugee protection, if it finds that the decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter.	**109.** (1) La Section de la protection des réfugiés peut, sur demande du ministre, annuler la décision ayant accueilli la demande d'asile résultant, directement ou indirectement, de présentations erronées sur un fait important quant à un objet pertinent, ou de réticence sur ce fait.
(2) The Refugee Protection Division may reject the application if it is satisfied that other sufficient evidence was considered at the time of the first determination to justify refugee protection.	(2) Elle peut rejeter la demande si elle estime qu'il reste suffisamment d'éléments de preuve, parmi ceux pris en compte lors de la décision initiale, pour justifier l'asile.
Immigration Act, R.S.C., 1985, c. I-2	*Loi sur l'immigration, L.R.C. (1985), ch. I-2*

[18] The analysis the RPD conducted under subsection 109(2) is the one raising concerns in these proceedings. In response to questions from the Court, the Applicants submitted that the RPD improperly reassessed the old evidence before it as part of its analysis under subsection 109(2) of the Act and in doing so, committed a reviewable error. The Respondent asserts on the contrary that the RPD properly conducted its assessment pursuant to subsection 109(2) of the Act. He adds that the RPD did not then reassess the evidence on identity but rather examined the evidence in the context of whether there was any remaining evidence to support the positive determination. The Respondent asserts that ultimately, the RPD properly concluded that in light of the evidence and the credibility concerns raised by the Applicant's testimony, there was no untainted evidence to support the positive determination.

[19] I agree with the Applicants. At paragraph 29 of the *Wahab* decision, endorsed by the Federal Court of Appeal in *Bafakih*, the Court confirms that when carrying out the analysis set out in subsection 109(2), the RPD can refer to its findings under section 109(1) but only to identify what "old" evidence remains untainted by the withholding or misrepresentation. In order to go on with the second prong of the test per subsection 109(2) of the Act, the RPD must identify what is the untainted evidence and, *a contrario*, what is the tainted evidence, in order to "[set] aside the tainted evidence" (*Canada (Citizenship and Immigration)* v *Singh Gondara*, 2011 FC 352 at para 35).

[20] I have found no indication, in the RPD decision, of any reference to either tainted or untainted evidence; the RPD did not identify what evidence, if any, remained untainted by the misrepresentation it found did occur under the 109(1) analysis. As part of its analysis under subsection 109(2) of the Act, the RPD relied *on Navqi v Canada* (*Minister of Citizenship and Immigration*) 2004 FC 1605 for the proposition that the evidence from the original hearing may be reweighed (..). The RPD confirmed having assessed all of the documentation before it (page 10 and 11 of the impugned decision), and found, on balance of probabilities, that the other documents referred to from Ghana were more likely than not fraudulent documents in the same way that the birth documents were found to be by the initial RPD member.

[21] As part of its analysis under subsection 109(2) of the Act, the RPD did not merely identify which evidence remained untainted by the misrepresentation. It reassessed the old evidence on identity, in this case the Ghanaian ID documents, and ultimately found them fraudulent. The RPD reassessed the "old" evidence in light of new evidence adduced by the

Minister pursuant to section 109(1) when it exercised its discretion pursuant to section 109(2) and in doing so; it contravened the teachings of the Federal Court of Appeal in *Bafakih*. This warrants the intervention of the Court.

[22] I agree with the Applicants that the decision is not justified in relation to the facts and law that constrain the decision maker. The RPD's error is fatal and renders the decision unreasonable.

JUDGMENT in IMM-5036-21

THIS COURT'S JUDGMENT is that:

1. The application is granted.
2. The RPD decision is quashed.
3. The matter is remitted to the RPD for a new determination by a different panel.
4. No question is certified.
5. No costs are awarded.

"Martine St-Louis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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