Federal Court  Cour fédérale

Date: 20140723

Docket: T-1967-10

Citation: 2014 FC 736

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, July 23, 2014

Present: The Honourable Madam Justice Gagné

BETWEEN:

DÉOGRATIAS NKUNZIMANA,
IRIKUJIJE BELLANCILLE,
EVELINE IRADUKUNDA,
MÉDIATRICE IRAKOZE,
ALYVERA IRAMBONA,
ERIC MUHIZI-IRAKOZE

Applicants

and

HER MAJESTY THE QUEEN

Respondent

JUDGMENT AND REASONS

Overview

[1] Médiatrice, Bellancille, Eveline, Alyvera and Eric (the first names of the applicants are used to facilitate the reading of this judgment and not by lack of respect for them) are young

orphans from Burundi, of Hutu ethnicity, who took refuge in Rwanda in September 2000, following the death of their parents under atrocious conditions. They were respectively 17, 16, 14, 12 and 11 years old when they arrived in Rwanda and moved into a makeshift house of one bedroom, where they lived alone under very difficult conditions, until they could be accepted as refugees in Canada in December 2008, sponsored by the Canadian government.

[2] However, as of February 2001, their uncle and guardian, the principal applicant Déogratias Nkunzimana, a Canadian citizen of Burundian origins, had filed a sponsorship application on their behalf, which was refused twice between 2001 and 2008.

[3] Today, the applicants are pursuing an action in extra-contractual liability against the federal Crown and claim the amount of $300,000 in damages stemming from delays in processing the children's application for permanent residence and the alleged faults by its servants who twice refused the uncle's sponsorship application and the children's application for humanitarian and compassionate exemption.

Factual background

[4] Since the processing of the principal applicant's sponsorship application and the application for humanitarian and compassionate exemption is at the heart of this dispute, a chronology of events that took place between 2001 and 2008 is required.

[5] Before the death of one of Mr. Nkunzimana's sisters and her husband in 2000, this couple had taken in the three orphan children of another of his deceased sisters in 1995 (Médiatrice, Alyvera and Eric), along with their two children (Bellancille and Eveline).

[6] Following a family council held in Bujumbura on February 18, 2000, Mr. Nkunzimana was appointed the guardian of his orphan nieces and nephew.

[7] In September 2000, the children took refuge in Kigali, Rwanda, in a small house owned by Mr. Nkunzimana's sister-in-law.

[8] On February 17, 2001, Mr. Nkunzimana signed a sponsorship application regarding the children, then recognized as refugees by the United Nations High Commission for Refugees.

[9] On August 29, 2001, the children signed an application for permanent residence in Canada.

[10] On July 23, 2002, a visa officer from the Nairobi office refused this application for permanent residence in the family class, for the reason that there was not sufficient evidence of the blood relationship between the principal applicant and those he wanted to sponsor and because there was no evidence of their parents' death. The officer also found that there were no humanitarian and compassionate considerations or reasons of public policy justifying a deviation.

[11] In the meantime, on July 10, 2002, Mr. Nkunzimana was informed of the rejection of his sponsorship application.

[12] On appeal before the Immigration Appeal Division (IAD) of the Immigration and Refugee Board, Mr. Nkunzimana presented new evidence, i.e. a letter from the Burundi Ambassador in Ottawa stating that he is indeed the uncle of his nieces and nephew.

[13] On June 28, 2004, the IAD allowed the appeal. It found that this letter from the Burundi Ambassador was a civil act issued by the consular post and, consequently, an authentic act. Therefore, the content of the Ambassador's letter must be accepted as fact, except if improbation or a similar procedure was used. Considering the authenticity of the Ambassador's statement, the IAD stated that it was satisfied that the five children in question were the principal applicant's nieces and nephew and that they were part of the family class within the meaning of subparagraph 117(1)(*f*)(ii) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations).

[14] On January 13, 2005, Justice Lemieux of this Court dismissed the application for judicial review submitted by the Minister of Citizenship and Immigration.

[15] The judge found that the IAD erred in law by considering himself bound by the legal or technical rules of evidence of the *Civil Code of Quebec*, SQ, 1991, c 64 (CCQ) and the *Code of Civil Procedure*. According to the judge, the IAD introduced in the administration of the *Immigration and Refugee Protection Act* (the Act), through the concept of authentic act in civil

law, an evidentiary regime that removes the panel's primary mission to assess the probative value of a document in light of all the evidence before it.

[16] However, Justice Lemieux opined that the IAD decision should not be set aside regardless of the error in law committed. He recalled that judicial review is a discretionary remedy and that, in the circumstances, he did not see the need to ask for another panel of the IAD to reassess Mr. Nkunzimana's sponsorship application because it would reach the same conclusion as the one drawn previously, i.e. on the balance of probabilities, the children are covered by the family class under the Act.

[17] In the interim, Médiatrice gave birth to a little girl named Laissa. Although counsel for the applicants argued that Médiatrice was the victim of rape, this evidence was not submitted before the Court. Further, the reaction of the principal applicant, who testified that he had considered withdrawing Médiatrice from his sponsorship application when he learned of the pregnancy, is rather surprising and seems inconsistent with rape.

[18] However, the arrival of a new child to sponsor significantly complicated the file at the time and resulted in some delays in processing.

[19] On April 19, 2006, a visa officer again refused to issue a permanent resident visa under the family class to the principal applicant's nieces and nephew. The visa officer found that Mr. Nkunzimana had been on social assistance during four periods in 2004 and 2005, which

makes him ineligible to sponsor his nieces and nephew (section 120 and paragraph 133(1)(*k*) of the Regulations). However, he informed him that he could appeal this decision.

[20] The same day, a manager from the immigration program dismissed the application for humanitarian and compassionate exemption under subsection 25(1) of the Act. The CAIPS notes state that this application was dismissed specifically because [TRANSLATION] "the five claimants plus the child form a family abroad. They live in a United Nations refugee camp where they are given food and sheltered and have access to medical care. It cannot be concluded that they are in a worse situation than that of hundreds of thousands of other refugees in the world …" (Trial Record, Tab 57, p. 35).

[21] The principal applicant again appealed before the IAD.

[22] In a decision dated November 20, 2008, the IAD determined that the decision made by the visa officer is valid in law. However, the IAD was of the view that the principal applicant discharged his burden of proving the existence of sufficient humanitarian and compassionate considerations considering all the circumstances of the case. Paragraph 20 of the decision reads: [TRANSLATION] "the panel is also persuaded that the claimants live in a state of insecurity and poverty in Rwanda, with no hope for a better life. Their desire to be reunited with their uncle is understandable, especially considering that they are orphans. The panel is persuaded that they deserve the panel's compassion". Therefore, the appeal was allowed.

[23] On December 4, 2008, the principal applicant's nieces and nephew arrived in Canada as refugees sponsored by the Canadian government.

[24] On November 22, 2010, the applicants brought their case against the federal Crown in extra-contractual liability.

Issues

[25] Taking into account an order issued following the pre-hearing conference presided by Richard Morneau, Prothonotary, the issues to be determined in this case can be summarized as follows:

1. Did the servants of the federal Crown commit such a fault resulting in its extra-contractual liability toward the applicants under article 1457 of the *Civil Code of Québec*?
2. Is the action resulting from the facts alleged against the visa officer that were committed in July 2002 prescribed?

Analysis

[26] As I am of the view that a part of the claim is prescribed, I will deal with the issue in the reverse order.

Prescription of the action resulting from the facts alleged against the visa officer that took place in July 2002

[27] The applicants criticize the respondent for the two negative decisions made by her servants on July 23, 2002, and April 19, 2006.

[28] Section 32 of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50 and subsection 39(2) of the *Federal Courts Act*, RSC 1985, c F-7 provides that when the cause of action arising from the damage did not occur in one of the Canadian provinces, as in this case—the two decisions of the visa officers made in Nairobi, Kenya—the limitation period for the claim is six years. Consequently, the respondent argues, since the applicants' action was started in November 2010, the claim for damages arising from the negative decision of July 2002 would be prescribed.

[29] I agree with the respondent that the action taken more than eight years after the facts is late in respect of the negative decision of July 23, 2002.

[30] Moreover, I also agree with the respondent that this decision is well founded and that it could not be a source of liability for either the perpetrator or the government. Mr. Nkunzimana chose to file a sponsorship application for his five minor nieces and nephew; he had the burden of persuading the visa officer of the existence of a family relationship and the death of the parents of these minor children. His appeal of the visa officer's decision allowed by the IAD specifically because new persuasive evidence was submitted by the principal applicant.

[31] Given the reasons for the decision made in 2005 by Justice Lemieux of this Court, the respondent cannot be criticized for applying for the judicial review of the IAD's decision. Although the respondent's application for judicial review was dismissed, Justice Lemieux nevertheless said that he was of the view that the IAD's decision contained a significant error in law, which, in itself, justified initiating the action.

[32] However, it was following the decision made in 2005 by this Court that the conduct of the respondent's servants, in my view, deviated from the standard of competency and diligence that could be expected from them in the circumstances.

Fault of the servants of the federal Crown resulting in extra-contractual liability under article 1457 of the Civil Code of Québec

[33] The respondent argued that [TRANSLATION] "the action arose in the Province of Quebec" and, thus, that Quebec law applies, at least in a suppletive manner, to this matter (*Canadian Food Inspection Agency v. Professional Institute of the Public Service of Canada*, 2010 SCC 66 at para 25 and 26). The applicants take no position in this regard and remain vague as to the source of the respondent's liability.

[34] Although the respondent's position may seem contradictory—he argued at times that the cause of action arose in Kenya and at times that the action arose in the Province of Quebec—the scope of article 3126 of the CCQ is sufficiently broad to allow a finding that since the applicants are now all residents of Quebec, the law of this province applies to their action.

[35] Paragraph 3(*a*) of the *Crown Liability and Proceedings Act* provides that the Crown is liable for the damages for which, if it were a person, it would be liable, in the Province of Quebec, for the damage caused by the fault of servants of the Crown. Section 10 of the CLPA specifies that no proceedings lie against the Crown unless the extra-contractual liability of the servant committing the fault may be incurred.

[36] Article 1457 of the CCQ provides, in these terms, the basis for the fault that may incur the extra-contractual liability of a person in Quebec:

Every person has a duty to abide by the rules of conduct incumbent on him, according to the circumstances, usage or law, so as not to cause injury to another.	Toute personne a le devoir de respecter les règles de conduite qui, suivant les circonstances, les usages ou the Act, s'imposent à elle, de manière à ne pas causer de préjudice à autrui.
Where he is endowed with reason and fails in this duty, he is liable for any injury he causes to another by such fault and is bound to make reparation for the injury, whether it be bodily, moral or material in nature.	Elle est, lorsqu'elle est douée de raison et qu'elle manque à ce devoir, responsable du préjudice qu'elle cause par cette faute à autrui et tenue de réparer ce préjudice, qu'il soit corporel, moral ou matériel.
. . .	[…]

[37] So that extracontractual civil liability of a person may be used, the victim must demonstrate the fault, damages and the causal link between the fault and the damage.

The fault

[38] To find that a fault exists, there must be a discrepancy between the conduct of the officer at fault and that of a reasonable, careful and diligent person placed in the same s circumstances (J.L. Baudouin, P. Deslauriers, *La responsabilité civile*, 7th edition, Éditions Yvon Blais, page 152).

[39] In matters of government administration, an illegal decision of one of its officers or a decision containing an error of fact or law is not necessarily a source of civil liability for the Crown, since the fault of the harmful act must also be proven (*Entreprises Sibeca Inc v Frelighsburg (Municipality),* 2004 SCC 61; *Quebec (Procureur général)* c *Deniso Lebel inc,* 1996 CanLII 5765 (QC CA)). In other words, the violation of a legislative standard is not in itself a civil fault. The burden is instead on the Court to determine the applicable standard of conduct, with respect to the law, usage or circumstances of each case (*St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64 at para 36).

[40] Médiatrice, Bellancille, Eveline, Alyvera and Eric were all minor orphans at the time that they made their first application for permanent residence sponsored by their guardian uncle, a Canadian citizen. Although the visa officer's decision dismissed Mr. Nkunzimana's sponsorship application on the ground that he had received social assistance was well founded, that which rejected for the second time the application for humanitarian and compassionate exemption is clearly not. Not only is it unfounded, but it goes against Canada's international commitments and the main objective of the Act, i.e. family reunification.

[41] There is more. In circumstances where the life, safety and well-being of five young orphans are involved, it seems to me that it could have been expected for the officer to adequately analyze their situation. Moreover, in its short decision, it found that [TRANSLATION] "the five claimants plus the child form a family abroad. They lived in a United Nations refugee camp where they are given food and sheltered and have access to medical care. It cannot be concluded that they are in a worse situation than that of hundreds of thousands of other refugees in the world …".

[42] This in no way corresponds to the applicants' situation during the seven years passed in Kigali. Rather, the evidence showed that they lived in fear as Hutu refugees in Rwanda following the genocide of the Tutsis orchestrated by the Hutus, in a small house loaned by Mr. Nkunzimana's sister-in-law, that five of them shared a small bedroom (six when Médiatrice's baby arrived), that they generally had only enough food for one meal per day and that in the circumstances, they were not able to continue going to school. The representatives of the United Nations High Commissioner for Refugees who went to visit them said that they were shocked by their living conditions. In their steps to obtain help, they regularly faced refusal because of the fact that they had an uncle in Canada, able to help them. Their uncle sent them $100 per month, but this amount was quite insufficient to ease their difficulties.

[43] The respondent's officer did not seek to know the applicants' real situation, he did not even consider the fact that these children were, for more than five years, waiting to be reunited with their guardian, a Canadian citizen. He did not give the processing of the applicants' application for exception, in the circumstances of this case, the attention and diligence required

and his conduct is not that of a reasonably cautious and diligent person placed in the same circumstances.

[44] The discrepancy between the processing of the applicants' application and the decision of the respondent's officer, on the one hand, and the conduct of the reasonably cautious and diligent person placed in the same circumstances, on the other hand, is sufficient to incur the respondent's extra-contractual liability toward the applicants. Although, generally, the Court must show great deference to the decision of an officer processing an application for humanitarian and compassionate exemption before drawing a conclusion regarding the officer's fault, the exceptional facts of this case do not allow me to conclude otherwise.

The damages

[45] Mr. Nkunzimana and Bellancille testified about the damages experienced.

[46] Mr. Nkunzimana alleged health and psychological problems related to all the stress that caused the situation of his nieces and nephew in Rwanda. He also alleges that he lost two jobs because of his involvement in the different proceedings that he had to conduct during those many years to finally be reunited with his nieces and nephew.

[47] Bellancille delivered a dignified and very moving testimony. She told how she, who was not the eldest of the family, assumed leadership of the group, and how she had to fight to obtain the bare necessities of life for her sisters and brother and for herself. The applicants lived in a way that no child should have to live, even less so young minor orphans whose guardian is a

Canadian citizen who showed in a sustained manner his desire to help them and see them all reunited in Canada.

[48] During these years, the applicants missed many opportunities, if only the possibility of experiencing a normal childhood/adolescence and being educated. Although it is difficult, even impossible, to quantify such damage, nevertheless they are damages that must be compensated.

The causal link

[49] Since the respondent's fault took place in April 2006 and that the applicants obtained their permanent residence in Canada in December 2008, only the damages experienced during this period are logical consequences of the fault.

[50] Mr. Nkunzimana did not demonstrate the link that may exist between the fault committed in 2006 and the loss of his job. He also did not show the link existing between this fault and the work that he had to refuse in Burundi that, according to his testimony, was to begin in September 2008.

[51] Moreover, an important part of the steps taken by Mr. Nkunzimana were necessary if he wished to sponsor his nieces and nephew. This decision, to his credit, required that he dedicate resources, time and energy. The situation was not easy for him, all the more so that he had his own family problems at the time.

[52] Mr. Nkunzimana also did not show that his health problems were related to some fault of the respondent, as no medical evidence was produced.

[53] Nevertheless, I am satisfied that the negative decision of April 19, 2006, had a significant impact on Mr. Nkunzimana and that it unduly added to the stress he was then experiencing. For that, I will award Mr. Nkunzimana the sum of $10,000.

[54] With respect to the children, I will give them $10,000 per year in damages, for the period from April 2006 to December 2008, i.e. the amount of $27,500 each.

[55] Indeed, they established that the respondent's fault is the direct cause of the damages that they experienced during this period of two years and nine months. The applicants should have arrived in Canada in 2006, after the decision of this Court and the new processing of their application for humanitarian and compassionate exemption. They then would have been able to begin making up for lost time in terms of their education and their training, which they would have done. As evidence, we have the fact that they all work today, while completing their high school education, for some, and that they are well integrated in their new life.

Conclusion

[56] In light of the reasons stated above, I am of the view that the applicants' action for damages should be allowed in part, with costs.

JUDGEMENT

THE COURT ORDERS AND ADJUDGES that

1. The applicants' action is allowed in part;

2. The respondent is ordered to pay the applicant Déogratias Nkunzimana the sum of $10,000, with interest at the legal rate and the additional indemnity provided at article 1619 of the CCQ as of November 22, 2010;

3. The respondent is ordered to pay the applicant Irikujije Bellancille the sum of $27,500, with interest at the legal rate and the additional indemnity provided at article 1619 of the CCQ as of November 22, 2010;

4. The respondent is ordered to pay the applicant Eveline Iradukunda the sum of $27,500, with interest at the legal rate and the additional indemnity provided at article 1619 of the CCQ as of November 22, 2010;

5. The respondent is ordered to pay the applicant Médiatrice Irakoze the sum of $27,500, with interest at the legal rate and the additional indemnity provided at article 1619 of the CCQ as of November 22, 2010;

6. The respondent is ordered to pay the applicant Alyvera Irambona the sum of $27,500, with interest at the legal rate and the additional indemnity provided at article 1619 of the CCQ as of November 22, 2010;

7. The respondent is ordered to pay the applicant Eric Muhizi-Irakoze the sum of $27,500, with interest at the legal rate and the additional indemnity provided at article 1619 of the CCQ as of November 22, 2010;

8. The costs are awarded in favour of the applicants.

"Jocelyne Gagné"
Judge

Certified true translation
Catherine Jones, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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