

Federal Court



Cour fédérale

Date: 20220308

Docket: IMM-5104-20

Citation: 2022 FC 316

Ottawa, Ontario, March 8, 2022

PRESENT: Mr. Justice Norris

BETWEEN:

PERIS WANGECI MBURU

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] Peris Wangeci Mburu, the applicant, is a citizen of Kenya. She claimed refugee protection in Canada on the basis of her fear of persecution because of her membership in the Orange Democratic Movement (“ODM”) party and her support for the National Super Alliance (“NASA”) party. These are opposition parties in Kenya. The Refugee Protection Division (“RPD”) of the Immigration and Refugee Board of Canada (“IRB”) rejected the claim because

the applicant was not credible and because she had failed to establish her subjective fear of persecution.

[2] The applicant appealed this decision to the Refugee Appeal Division (“RAD”) of the IRB. The RAD dismissed the appeal in a decision dated September 12, 2020. The RAD agreed with the RPD’s findings that the applicant had not established with credible evidence that she was a member of the ODM or that she subjectively feared persecution in Kenya. The RAD also concluded that the applicant had not established a forward-looking risk of harm. Accordingly, the RAD confirmed the RPD’s determination that the applicant is not a Convention refugee or a person in need of protection.

[3] The applicant now seeks judicial review of the RAD’s decision under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (“IRPA”). She argues that the decision is unreasonable because the RAD erred in its credibility assessment and in its assessment of the applicant’s forward-looking risk. For the reasons that follow, I do not agree. This application must, therefore, be dismissed.

II. BACKGROUND

[4] The applicant was born in Kenya in April 1993.

[5] At the time of the events in question, the Jubilee Party was the ruling party in Kenya. It is generally supported by the Kikuyu majority.

[6] The applicant, who is herself Kikuyu, states that she joined the NASA in January 2017 as a volunteer because she believed the Jubilee Party was corrupt and because she believed the NASA was the best party to move Kenya forward. She claims that she became a member of the ODM, which is part of the NASA, a few months later.

[7] According to the applicant, while she was distributing flyers in the town of Kitale a few weeks after joining the NASA, she was approached by two men wearing Jubilee t-shirts and threatened for supporting the NASA opposition alliance. They claimed to be part of the Mungiki gang. (The Mungiki gang is an armed faction of Jubilee Party supporters.) The applicant was wearing an ODM party name tag at the time. She did not report what had happened to anyone. She continued distributing flyers but on a different schedule than before.

[8] The applicant claims that in July 2017 she received a telephone call threatening her with death for her continued support for NASA. The caller claimed to be part of the Mungiki. The applicant states that she then hid at the home of her friend Agnes in another town until the election (which took place on August 8, 2017) had concluded.

[9] At the RPD, the applicant filed an undated letter from Agnes to which was attached a handwritten note threatening to kill the applicant unless she “changes”. The note concluded with the words “Mungiki Mungiki”. Agnes states in her letter that the note was left in her compound by unknown persons but does not say when this happened. In an amendment to her Basis of Claim form, the applicant states that Agnes had been targeted after she (the applicant) arrived in Canada and that this was when the note had been left in her compound.

[10] In September 2017, the applicant left Kenya for the United Kingdom on a visitor visa. She stayed with a friend until January 2018, when she returned to Kenya, believing that the turmoil of the recent election had subsided and that she would no longer be at risk. According to the applicant, she did not seek refugee protection in the United Kingdom because it had always been her intention to return to Kenya after the election.

[11] Shortly after returning to Kenya, and while she was staying with her cousin in Nairobi, a friend of the applicant's told her she had been approached by a group of men who knew she was the applicant's friend. The men told her friend to tell the applicant that they would kill her if she "did not stop what she is doing."

[12] The applicant left Kenya for Canada on February 10, 2018. She entered Canada on a temporary resident visa ("TRV") that she had obtained using what she now admits was a fraudulent written confirmation of a volunteer opportunity here. She had applied for the TRV on December 18, 2017. The TRV was issued on January 8, 2018.

[13] The applicant submitted her claim for refugee protection in Canada in March 2018.

[14] The applicant supported her claim with a number of documents including a copy of an ODM membership card (dated February 10, 2017), an application for membership in the ODM (dated March 16, 2017), a letter appointing the applicant as an ODM volunteer (dated April 3, 2017), and an undated handwritten note threatening to kill the applicant.

III. DECISION UNDER REVIEW

[15] On her appeal to the RAD, the applicant did not seek to file any new evidence nor, as a result, did she request a hearing. She contended that the RPD had erred in assessing her credibility, subjective fear and risk profile. The RAD found that the RPD was correct in all three respects.

[16] The RAD made the following key determinations.

[17] First, the RPD had correctly found that the applicant had not credibly established her membership in the ODM party. The RAD agreed with the RPD that the ODM membership card presented by the applicant is not authentic. There was an obvious error on the card – the acronym for the party was repeatedly misspelled as “OMD” instead of “ODM” – that the applicant could not explain. Nor could the applicant explain why there was an Adobe software watermark over the image of an orange on the card, something which the RAD took to indicate, on a balance of probabilities, that the document is fraudulent. While the RAD was prepared to accept that the applicant supported the ODM, and while it found that the RPD had erred in not assessing other documents relating to the applicant’s alleged membership in the ODM party independently, it agreed with the RPD that the applicant had not presented credible evidence of her membership in the ODM party.

[18] Second, the RAD confirmed the RPD’s finding that the applicant had not established a subjective fear of persecution. The RAD supported this conclusion with the following findings:

- Despite claiming to have fled to the United Kingdom in September 2017 because of the threat to her life, the applicant did not seek asylum there. If, as she claimed, she had a subjective fear of persecution when she left Kenya, she would have sought protection in the United Kingdom shortly after arriving there rather than planning all along to return to Kenya.
- If, as she claimed, the applicant had a subjective fear of persecution because of events that occurred after she returned to Kenya, she would have returned to the United Kingdom on her visitor visa (which was still valid) as opposed to applying for a TRV for Canada. Further, the applicant would not have delayed her departure from Kenya until February 11, 2018; rather, she would have left for the United Kingdom immediately after receiving the death threat. The RAD agreed with the RPD that the applicant was asylum-shopping and that this was inconsistent with a genuine subjective fear. In any event, the fact that the applicant waited for a month after receiving her Canadian TRV before she left Kenya was also inconsistent with her claim to be in fear for her life.
- Finally, the RAD made a negative credibility finding against the applicant because she chose to rely on fraudulent documents to obtain a Canadian TRV when she could have returned to the United Kingdom on a valid travel visa and sought protection there.

[19] Third, the RAD confirmed the RPD's conclusion that the applicant had not established an ongoing risk in Kenya due to her Kikuyu ethnicity or her political identity. The RAD supported this conclusion on the following grounds:

- The applicant had provided inconsistent testimony about the political involvement of her family members.
- While the RPD had erred in giving no weight to support letters provided by the applicant, they were insufficient to overcome the problems with the applicant's credibility generally or with respect to her subjective fear in particular. Importantly, for the most part the letters simply repeated information that the applicant herself had provided to the writers. They did not provide independent support for her claim.
- The RAD accepted that country condition evidence established that there had been political violence in Kenya after the 2017 election but it did not establish that there was an ongoing risk of persecution within the meaning of section 96 of the *IRPA* or a risk of harm within the meaning of section 97 of the Act for someone like the applicant – i.e. a female Kikuyu supporter of the ODM.

[20] Accordingly, the RAD dismissed the appeal and confirmed the RPD's determination that the applicant is neither a Convention refugee nor a person in need of protection.

IV. STANDARD OF REVIEW

[21] It is well-established that the substance of the RAD's decision (including credibility determinations) is reviewed on a reasonableness standard: see *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35; see also *Koffi v Canada (Citizenship and Immigration)*, 2016 FC 4 at para 27. That this is the appropriate standard of review has been reinforced by *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65. Reasonableness

is now the presumptive standard of review for administrative decisions, subject to specific exceptions “only where required by a clear indication of legislative intent or by the rule of law” (*Vavilov* at para 10). There is no basis for derogating from this presumption here.

[22] Relying on the pre-*Vavilov* case of *Aldarwish v Canada (Citizenship and Immigration)*, 2019 FC 1265, the respondent submits that the appellate standard of palpable and overriding error applies to the RAD’s factual inferences and resulting findings of fact. Post-*Vavilov*, the application of this standard in the judicial review context has been rejected repeatedly by this Court: see *Liao v Canada (Citizenship and Immigration)*, 2021 FC 857 at paras 21-22 and the cases cited therein; see also *Gurung v Canada (Citizenship and Immigration)*, 2021 FC 1472 at paras 6-10; *Jackson v Canada (Citizenship and Immigration)*, 2022 FC 83 at para 6; and *Peshlikoski v Canada (Citizenship and Immigration)*, 2022 FC 154 at paras 13-16. The respondent’s position is without merit.

[23] 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). A decision that displays these qualities is entitled to deference from the reviewing court (*ibid.*). When applying the reasonableness standard, it is not the role of the reviewing court to reweigh or reassess the evidence considered by the decision maker or to interfere with factual findings unless there are exceptional circumstances: see *Vavilov* at para 125. At the same time, reasonableness review is not a rubber-stamping process; it remains a robust form of review: see *Vavilov* at para 13.

[24] The onus is on the applicant to demonstrate that the RAD's decision is unreasonable. To set aside a decision on this basis, the reviewing court must be satisfied that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100). The 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" (*ibid.*).

V. ANALYSIS

[25] The applicant advances two main arguments to show that the RAD's decision is unreasonable. First, the RAD erred in its assessment of the applicant's credibility, particularly as it relates to her subjective fear of persecution. And second, the RAD erred in its approach to the issue of forward-looking risk for the applicant. As I will explain, I am not persuaded by either argument.

[26] Looking first at the RAD's credibility determinations, the applicant has not demonstrated that any of them are unreasonable. The RAD's finding that the ODM membership card was not authentic was supported by the record and explained in the RAD's reasons. This, in turn, reasonably supported an adverse finding concerning the credibility of the applicant's claim that she feared persecution on the basis of her political opinion. The RAD also reasonably drew an adverse inference from the applicant's willingness to submit a fraudulent application for a TRV given that she had another viable option available to her (i.e. to return to the United Kingdom).

[27] In any event, the RAD was prepared to find that the applicant supported the ODM and the opposition alliance, even if she was not actually a member of the party. The critical problem with the claim from the RAD's point of view was that the applicant did not act in a way that was consistent with the subjective fear she claimed to hold, particularly in light of the totality of the events that (according to the applicant) had occurred before she left Kenya for a second time. This finding was reasonably open to the RAD on the record and is explained in its reasons. There is no basis to interfere with it.

[28] I am also satisfied that the RAD's forward-looking assessment of risk is reasonable. The RAD accepted the evidence that there had been political violence after the 2017 election. It also determined, however, that that evidence did not establish that the applicant herself was at risk by virtue of her cumulative profile. This finding was reasonably open to the RAD and is explained in its reasons. Contrary to the applicant's submission, the RAD did not ignore the individual facets of the applicant's profile, nor did it hold the applicant to an unreasonable standard in assessing risk. The RAD properly focused on the cumulative risk profile for the applicant in response to the submission on appeal that the RPD had "erred by failing to consider the totality of the factors that make up the Appellant's risk profile" (Appellant's Memorandum of Argument, paragraph 38). There is no basis to interfere with the RAD's determination.

VI. CONCLUSION

[29] For these reasons, the application for judicial review is dismissed.

[30] Neither party suggested a serious question of general importance for certification under paragraph 74(d) of the *IRPA*. I agree that none arise.

JUDGMENT IN IMM-5104-20

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.
2. No question of general importance is stated.

“John Norris”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5104-20

STYLE OF CAUSE: PERIS WANGECI MBURU v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: SEPTEMBER 13, 2021

JUDGMENT AND REASONS: NORRIS J.

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