Federal Court  Cour fédérale

Date: 20230505

Docket: IMM-2802-22

Citation: 2023 FC 656

Ottawa, Ontario, May 5, 2023

PRESENT: The Honourable Mr. Justice Régimbald

BETWEEN:

NDIAGIEN KINGSLEY NDI

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision [the Decision] rendered on February 23, 2022, by the Refugee Protection Division [RPD] allowing the Minister's Application to vacate a prior decision granting the Applicant refugee status, pursuant to section 109 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] The Applicant is a 47-year-old citizen of Cameroon who obtained refugee status in Canada on July 16, 2010, under section 96 of the *IRPA*, based on his political opinion and his membership in the Southern Cameroon National Council [SCNC].

[3] In 2016, the Minister of Public Safety and Emergency Preparedness [the Minister] received new evidence suggesting that the Applicant had misrepresented material facts in his Personal Information Form [PIF] narrative. The Minister brought an application to vacate the Applicant's refugee claim.

[4] For the following reasons, the application is dismissed. In my view, the RPD properly applied section 109 of the *IRPA* and reasonably found that the Applicant had made material misrepresentations in his refugee claim; and that there was not sufficient evidence to justify refugee protection notwithstanding the misrepresentations.

II. Background

[5] The Applicant arrived in Canada in 2008 and sought refugee protection due to an alleged fear of persecution in Cameroon. On July 19, 2010, the RPD granted his claim finding him to be a Convention refugee based on his political opinion and because of his alleged membership in the SCNC.

[6] In his PIF narrative for refugee protection, the Applicant identified himself as Ndiagien Kingsley Ndi and declared that he had arrived in Canada from Cameroon via Yaoundé and Paris.

He also declared that he had been persecuted in Cameroon between 2001 and 2008 because of his membership in the SCNC.

[7] More specifically, the Applicant claimed that in October of 2001, while he was attending an SCNC annual independence celebration, he was beaten by the police and arrested. The Applicant was later brought to a prison where he was tortured for weeks. When he got out, he claimed to have gone to the Bamenda provincial hospital where he was treated for malaria, diarrhea, and typhoid. Moreover, the Applicant claimed that he was beaten and arrested by the Cameroonian security forces in 2005 and 2007, was the object of a manhunt by the police in 2007, and fled his village in 2008 to avoid arrest.

[8] On March 20, 2012, the Applicant became a permanent resident of Canada.

[9] After the granting of the Applicant's refugee protection and permanent Canadian residency, the Minister received new evidence that showed that the Applicant had misrepresented material facts relating to his application for refugee protection. Fingerprints and biometric data received in May 2016 revealed a match between the Applicant and an individual known as Ndi NDI, who had entered the United States in 2003, had sought refugee protection, and had faced a removal procedure in 2006.

[10] Based on this new evidence, the Minister determined that the Applicant's narrative could not be true, as he was in the United States from 2003 until 2008 and therefore could not have been subject to the alleged events occurring in 2005 and 2007.

[11] When faced with the new evidence, the Applicant admitted to having entered the United States on December 22, 2003, under the false name Ndi NDI. The Applicant alleges having relied on this false identity to leave Cameroon and to make his refugee claim in the United States.

[12] Mr. Ndi's refugee claim in the United States was ultimately denied on May 2, 2007. At that point, the Applicant claims to have been advised to go to Canada and make a refugee claim there.

[13] The Applicant entered into Canada in March 2008, and made his refugee claim on March 17, 2008, using his real name.

[14] In his PIF narrative, Mr. Ndi stated that he had travelled from Cameroon to France and then to Canada. The Applicant admits to having changed the dates of his personal history including omitting the period of time he lived in the United States from 2003 and 2008. He also changed the dates for the events that caused him to flee Cameroon, stating they occurred between 2001 and 2008, when they allegedly really occurred between 2001 and 2003, before he fled to the United States.

[15] On May 30, 2016, the Minister commenced an application under section 109 of the *IRPA* to vacate the Applicant's refugee status. The application was based on the fact that the Applicant had made material misrepresentations on central elements of his refugee claim during the refugee determination process and thus undermined the credibility of his claim. The Minister submitted

that in doing so, the Respondent omitted to present an exact portrait of his situation, on crucial elements concerning his claim.

III. The RPD Decision

[16] In a decision dated February 23, 2022, the RPD allowed the Minister's application and vacated the Applicant's request for refugee status.

[17] The RPD held that the first element of the section 109 was met, since the Applicant admitted to having misrepresented material facts in support of his claim for refugee status.

[18] On the second element, the RPD held that, on a balance of probabilities, the events that the Applicant now alleged having occurred between 2001 and 2003 could not be established because his credibility had been seriously undermined by the false statement made in his PIF narrative, but also repeated in affidavits. Therefore, the RPD ruled that there was not sufficient evidence to justify refugee protection notwithstanding the misrepresentations.

[19] The RPD also found that the presumption of credibility of the Applicant was rebutted by the misrepresentations. Relying on *Otabor v Canada (Citizenship and Immigration)*, 2020 FC 830 at paragraph 41 [*Otabor*], the RPD held that it could not "consider a new version of events in which the Applicants had simply changed the dates of the incidents that had happened to them."

[20] Further, the RPD found that because the dates of key events discussed in the narrative were supported by affidavit evidence, yet those dates were admitted to being false, all of his affidavit evidence was therefore tainted by the misrepresentations and no weight could be attributed to them.

[21] Finally, the RPD held that because the Applicant's evidence demonstrated that he was able to obtain fraudulent documents to support his claim, none of his corroborating evidence on events predating 2003 could be relied upon.

[22] The Applicant now seeks judicial review of the RPD decision dated February 23, 2022, vacating his refugee status pursuant to section 109 of the *IRPA*.

IV. Issues and Standard of Review

[23] The overall question is whether the RPD's findings were reasonable. Two issues arise for consideration in this application:

a) Did the RPD make an unreasonable decision in determining that the initial decision granting refugee protection was obtained as a result of a material misrepresentation?

b) Did the RPD make an unreasonable decision in determining that there was no other sufficient evidence to justify refugee protection?

[24] In this case, the Applicant conceded that material misrepresentations were made. He argues that the RPD unreasonably found that there was not sufficient evidence that, without taking into consideration the misrepresentations, could justify protection.

[25] The parties agree that the standard of review for an application to vacate under section 109 of *IRPA* is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65) [*Vavilov*]). 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).

[26] As held by the Supreme Court of Canada in *Vavilov*, reasonableness review requires a deferential approach to the decision maker and the reviewing court must read the reasons holistically and contextually (at para 97). The Court must consider the outcome of the decision and its rationale in order to ensure that the decision as a whole is transparent, intelligible and justified (*Vavilov* at paras 15, 95, 136). Judicial review is not a "line-by-line treasure hunt for error" (at para 102). The decision maker does not have to respond to each argument nor refer to all the evidence – indeed, the decision maker is presumed to have considered all of the evidence and the arguments on the record (at paras 127-128).

V. Statutory Scheme – Section 109 of the *IRPA*

[27] Subsection 109(1) of the *IRPA* allows the RPD to vacate a decision allowing refugee protection if it finds that the decision was obtained as a result of misrepresenting or withholding material facts relating to a relevant matter. Subsection 109(2) of the *IRPA* indicates that the RPD may reject an application to vacate if it is satisfied that other sufficient evidence was considered at the time of the first determination to justify refugee protection:

Vacation of refugee protection	**Demande d'annulation**
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.
Rejection of application	**Rejet de la demande**
(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.
Allowance of application	**Effet de la décision**
(3) If the application is allowed, the claim of the person is deemed to be rejected and the decision that led to the conferral of refugee protection is nullified.	**(3)** La décision portant annulation est assimilée au rejet de la demande d'asile, la décision initiale étant dès lors nulle.
[Emphasis added.]	[Je souligne.]

[28] As such, in considering an application to vacate under section 109 of the *IRPA*, the RPD must first conclude that the decision granting refugee protection was obtained as a result of a misrepresentation, or of withholding material facts relating to a relevant matter. The burden of proof on this first element of section 109 is on the Minister (*Nur v Canada (Minister of*

Citizenship and Immigration), 2005 FC 636 at para 21; *Begum v Canada*, 2005 FC 1182 at para 8).

[29] If the RPD finds that the Minister discharged its burden and proved that there were in fact misrepresentations, the RPD may nevertheless deny the application to vacate if there remains sufficient evidence existing at the time of the determination of the refugee claim to justify refugee protection. The burden of proof for this second element rests with the Applicant, as would be the case in a refugee claim (*Ghorban v Canada (Minister of Citizenship and Immigration)*, 2010 FC 861 at paragraph 5; *Mansoor v Canada (Minister of Citizenship and Immigration)*, 2007 FC 420 [*Mansoor*] at para 23)

VI. The RAD's decision is reasonable

[30] In *Canada (Public Safety and Emergency Preparedness) v Gunasingam*, 2008 FC 181 at paragraph 7 [*Gunasingam*], the Court set out a three-part test applicable on a motion to vacate refugee status under section 109 of *IRPA.* The RPD:

a) must find a misrepresentation or withholding of material facts;

b) that misrepresentation must relate to a relevant matter;

c) there must be a causal connection between the misrepresentation and the favourable outcome.

[31] Even if the RPD finds such misrepresentations, the Minister's application can still be dismissed, as set out under subsection 109(2), if the RPD is "satisfied that other sufficient evidence was considered at the time of the first determination to justify refugee protection."

[32] In conducting that inquiry, the person seeking refuge may not provide a new or revised version of facts by changing dates in his or her PIF narrative (*Gunasingam* at paras 15-16; *Otabor* at para 41). Moreover, as held in *Coomaraswamy v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 153 at paragraph 15, the person seeking refuge is not allowed to submit new evidence at the vacation hearing:

> [15] Any possible doubt about the interpretation of subsection 69.3(5) is resolved by asking what legislative purpose would be served by affording to claimants who succeed in deceiving the Board an opportunity to submit additional evidence in an attempt to prove *de novo* at the vacation hearing that their claims were genuine. No such opportunity is available to either truthful or deceptive claimants whose claims for refugee status are dismissed. To allow a claimant who succeeded in deceiving the Board a second bite at the cherry by introducing new evidence at the vacation hearing would reward deception and remove an incentive to tell the truth.
>
> [16] For these reasons, subsection 69.3(5) should be interpreted as limiting the material that the Board may consider at a vacation hearing to what was before it when it allowed the refugee claim. Hence, I agree with the Applications Judge in this case and with earlier decisions of the Trial Division to similar effect, including: *Guruge v. Canada (Minister of Citizenship and Immigration)* (1998), 1998 CanLII 8979 (FC), 160 F.T.R 297 (F.C.T.D.); *Sayed v. Canada (Minister of Citizenship and Immigration)* (2000), 2000 CanLII 16399 (FC), 195 F.T.R. 121 (F.C.T.D.); and *Maheswaran v. Canada (Minister of Citizenship and Immigration)* (2000), 2000 CanLII 16432 (FC), 195 F.T.R. 254 (F.C.T.D.).
>
> [Emphasis added.]

[33] Finally, in *Hailu v Canada (Citizenship and Immigration)*, 2021 FC 15 [*Hailu*] at paragraph 24, this Court found that when a refugee claimant supplies false documents or statements, the resulting damage to the claimant's credibility can reasonably impact other aspects of the evidence (see also *Shahzad v Canada (Citizenship and Immigration)*, 2011 FC 905 at para

39; *Maldonado v Canada (Minister of Employment and Immigration)*, (1980) 1979 CanLII 4098 (FCA), 2 FC 302 (CA) at p 305).

[34] In this case, the issue only relates to the RPD's decision in relation to the second element of the test, because the Applicant conceded that he made a number of misrepresentations and that his refugee claim was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter. In other words, the only issue is whether there was sufficient remaining "untainted evidence" to justify refugee protection. However, that "untainted evidence" must come from the Applicant's original PIF narrative and evidence. Indeed, the "other sufficient evidence… considered at the time of the first determination to justify refugee protection" as provided under subsection 109(2) must have existed and have been presented at the initial hearing.

[35] Therefore, the revised version of events provided by the Applicant during the vacation hearing cannot be considered, as these were not originally before the initial decision maker.

[36] The Applicant argues that there is ample evidence explaining why he made misrepresentations, and also supporting his allegations that the events alleged in his narrative did occur, albeit between 2001 and 2003, and not between 2001 and 2007 as stated. Indeed, it is conceded that all events discussed in the narrative between 2003 and 2008 cannot have occurred on those dates, as the Applicant was in the United States during that period.

[37] The evidence that the Applicant relies upon includes a membership card with the SCNC dated 2000, a medical report from Dr. Djokam Liapoe Jules on a hospital admission in 2001, as well as a letter by Dr. Gilles de Margerie, dated June 23, 2010. The Applicant argues that this evidence is authentic, in no way fraudulent, and corroborates his claim.

[38] The Applicant submits that in *Babar v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 216 [*Babar*] at paragraphs 5, 9, the Court held that the RPD must conduct a fair process to determine which evidence is really tainted by the misrepresentation. Therefore, the RPD ought to have conducted a careful analysis of this evidence and "re-evaluate[d] the view the Applicant is not to be believed on his entire story" (*Babar* at para 6). In his view, the RPD "was so dominated by the Applicant's misrepresentations" that it unreasonably decided "there was no point in engaging in an earnest evaluation exercise" (*Babar* at para 8). Rather, and putting aside the misrepresentations, there were other sufficient untainted evidence considered at the time of the first determination to justify his refugee claim for protection.

[39] The Respondent argues that contrary to the Applicant's assertions, the review of the evidence conducted by the RPD, both prior to and after 2003, was consistent with the requirements of subsection 109(2) of the *IRPA*. In concluding that "there remain no elements that might have justified the 2010 decision notwithstanding the misrepresentation" (Decision at para 22), the RPD held that that there was no evidence left to consider that could have supported the original 2010 decision. In other words, the RPD did not, contrary to what the Applicant alleges,

automatically discount any “remaining” evidence that was originally before the 2010 decision maker.

[40] The RPD questioned the reliability of all of the affidavit evidence filed by the Applicant (other than to establish his true identity), because the evidence as a whole demonstrated that the Applicant was able to obtain affidavit evidence including false statements and forged documents. The RPD held that none of the Applicant’s evidence was reliable.

[41] In the end, the RPD held that the evidence did not establish the Applicant’s credibility. Indeed, as was the case in *Hailu*, the RPD found concerns about the documents submitted by the Applicant. The Applicant’s false statements, including the same false representations being part of the affidavits he submitted in evidence (and including in his psychological evidence), damaged his credibility and impacted the other aspects of his evidence.

[42] In my view, the RPD’s decision is reasonable in this regard. The RPD carefully reviewed the documents that were allegedly not “fraudulent” and found that because the Applicant’s affidavits in support of his claim contained a narrative that included his false representations, none of the evidence could be relied upon conclusively.

[43] Indeed, because the false statements are found throughout the substantive evidence that was adduced by the Applicant in support of his claim before the original decision maker, the evidence is mostly hearsay in nature, false, or insufficient to ground a claim for refugee status. For example, some of the evidence adduced (including the psychological assessment) mentions

that the Applicant was persecuted between 2003 and 2007. As it is now admitted that the Applicant was in the United Stated during that period, that evidence is false. The affiants stating that those events occurred could therefore not have been witnesses to the events (as they did not occur), which means that their evidence is unreliable because it is hearsay. In the alternative, as mentioned by the RPD, the affidavits at the very least demonstrate that their authors agreed to alter the dates of key events to produce fraudulent declarations to support the Applicant (Decision at para 19).

[44] The Applicant submits that only paragraphs 20-21 of the RPD decision demonstrate an engagement with these pieces of evidence, which according to him is not enough. In my view, the RPD clearly did engage in an earnest and careful evaluation of all the evidence. The RPD's analysis was not so dominated by the Applicant's misrepresentations that it unreasonably decided that there was no point in engaging in an earnest evaluation exercise.

[45] To justify his claim before the initial decision maker, the Applicant relied on four different pieces of evidence. The first is a SCNC membership card with the Applicant's real name and dated 2000. It is included as an exhibit to an affidavit of Asha Collins Ndoh, dated November 7, 2008. However, that affidavit also includes allegations of key events in 2005 and thereafter that are now known to be false. Moreover, in relation to the Applicant's membership in the SCNC, there is evidence that the Applicant had a SCNC membership card with a false name, for the purposes of his refugee application in the United States. This led the RPD to conclude that it was possible for the Applicant to obtain forged documents in a complex and

elaborate scheme to justify refugee protection. Therefore, on a balance of probabilities, the RPD could not find that the Applicant was indeed a member of the SCNC (Decision at para 21).

[46] The second piece of evidence is an affidavit from Prince Mbinglo H. Humphrey and signed October 29, 2008. That affidavit also refers to the Applicant's membership in the SCNC, but includes events occurring in 2005. Those events either did not occur, or did not occur in 2005.

[47] In my view, it was reasonable for the RPD to dismiss the credibility of the Applicant's evidence in relation to his membership in the SCNC. Clearly, it was possible for the Applicant to forge a membership card, as he did at least for his entry in the United States. The RPD reasonably assessed the content of the evidence and it was open to it to determine that it was not credible because it was tainted by misrepresentations, especially because those misrepresentations also formed part of the affidavit evidence.

[48] The third piece of evidence is a letter written by Dr. Gilles de Margerie, dated June 23, 2010, which included a psychological assessment. However, that psychological assessment was made on the basis of the Applicant's own statements, which also misrepresented key events alleged to have occurred between 2001 and 2005 that did not happen (or did not occur at the dates suggested but many years earlier). Therefore, Dr. de Margerie's own evidence and diagnosis was based on false information and is tainted by misrepresentation. In my view, the RPD's finding on Dr. de Margerie's letter is reasonable. The Applicant provided information to Dr. de Margerie that was false as he was in the United States when those alleged events causing

him trauma occurred. Therefore, even though it might be true that these events did truly happen before 2003, it may have impacted Dr. de Margerie's diagnosis and the RPD's finding that the evidence lacked credibility is reasonable.

[49] Finally, the Applicant relies on a medical certificate from a doctor, discussing a hospital admission in 2001 following the Applicant's alleged participation in the annual independence celebration, which led to his arrest, detention, and mistreatment. At paragraph 21 of the Decision, the RPD specifically refers to the medical report of 2001 and indicates that it does constitute corroborating evidence pre-dating 2003. However, the RPD finds that, considering that the Applicant has demonstrated that "he can quite easily obtain fraudulent documents" and that the "documents pre-dating 2003 are also of concern," the RPD therefore "give[s] none of the documents submitted by the Respondent to corroborate past incidents of persecution any weight as I find that the Respondent has produced several fraudulent documents in a complex and elaborate scheme meant to lead the initial tribunal in error… and cannot be presumed to be accurate." In other words, the RPD held that even if the medical report of 2001 may have some credibility, it is not sufficient, on a balance of probabilities, to allow the Applicant to meet his burden and justify refugee protection.

[50] In my view, and because most of the evidence that was before the initial decision maker included details of key events that did not occur, or at least not at the time stated, it was open to the RPD to find that the evidence was tainted by the misrepresentations and not credible. In addition, it was reasonable for the RPD to find that the Applicant's credibility in relation to

evidence pre-dating 2003 was also damaged as a result of his submission of false documents or statements (*Hailu* at para 24).

[51] Finally, the Applicant also relies on *Canada (Citizenship and Immigration) v Davidthamby Chery*, 2008 FC 1001 [*Davidthamby Chery*], a case very similar to this one and that also included a misrepresented timeline tainting much of the evidence. In that case, the subsection 109(2) analysis was conducted and the remaining untainted evidence, which originated prior to the misrepresented timeline, was found to be sufficient to justify refugee protection. The Applicant further submits that even though he was not permitted to present a "corrected version of events" as set out in *Gunasingam*, there was sufficient independent and untainted evidence before the original decision maker that "the general story" of the persecution that the Applicant faced was true, as it was for example in *Sethi v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1178 [*Sethi*] at paragraph 25. Moreover, relying on *Mansoor* at paragraph 32, the RPD had to provide clear reasons on why the remaining evidence was insufficient to support the initial determination and it failed to do so.

[52] In my view, and contrary to *Mansoor*, *Babar*, *Sethi*, and *Davidthamby Chery*, in this case the RPD did conduct a "careful and cautious evaluation" (*Babar* at para 9) and reasonably found that there was not sufficient remaining untainted and credible evidence that could support the Applicant's original claim for protection. The RPD reasonably held that given the false statements, the Applicant's credibility was so impacted by the misrepresentations that it impacted the other evidence that he filed.

[53] Further, despite the similarities with *Davidthamby Chery*, in my view, the RPD reasonably held that the remaining evidence in this case was tainted or not sufficiently credible to dismiss the Minister's vacation application. As discussed above, the RPD properly applied the case of *Gunasingam* by considering the medical and psychological evidence, along with the Applicant's SCNC membership card. The RPD reasonably found that all of the evidence submitted by the Applicant was tainted, or that it was not reliable because the Applicant demonstrated that he was able to obtain fraudulent evidence.

VII. Conclusion

[54] The RPD's determination under subsection 109(2) of the *IRPA* that there were was no other sufficient and credible evidence to justify refugee protection is reasonable.

[55] The RPD's finding that the evidence produced by the Applicant was tainted by misrepresentation and insufficient to justify a claim for refugee status was based on a logical and coherent chain of reasoning.

[56] For the reasons above, the application for judicial review is dismissed.

[57] Neither party proposed the certification of a question of general importance, and none arises.

JUDGMENT in IMM-2802-22

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. No question for certification was argued, and I agree none arise.

"Guy Régimbald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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