

Federal Court



Cour fédérale

Date: 20160209

Docket: IMM-1967-15

Citation: 2016 FC 167

Ottawa, Ontario, February 9, 2016

PRESENT: The Honourable Mr. Justice Bell

BETWEEN:

ARNAULD CHRISS NGANJI

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

(Delivered orally from the Bench in Toronto, Ontario, on December 7, 2015)

UPON hearing this application for judicial review in Toronto, Ontario on December 7, 2015;

UPON reviewing the materials filed with the Court and hearing counsel on behalf of the parties;

AND UPON observing as follows:

[1] Arnauld Chriss Nganji seeks judicial review of a decision of the Immigration and Refugee Board, Refugee Protection Division [RPD] made on March 31, 2015, in which the RPD dismissed his claim for refugee status under s 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] and his claim for status as a person in need of protection under s 97 of the Act.

[2] Mr. Nganji was born in Burundi on January 27, 1993, and belongs to the Tutsi ethnic group. In 1993, his mother and three of his brothers were killed by Hutu rebels during the genocide. The National Council for the Defence of Democracy-Forces for Defence and Democracy [CNDD-FDD] became the ruling party in Burundi. Hussein Radjabu [Mr. Radjabu], a key leader and a high-ranking politician within the CNDD-FDD, demanded that Mr. Nganji's sister, Ms. Kwizera, be engaged to him. Since Ms. Kwizera did not wish to marry Radjabu, she fled to Canada in September 2006 and obtained refugee status in 2007. Mr. Nganji contends government forces are seeking to obtain information about Mr. Radjabu through him (Mr. Nganji) because he is a sibling of Ms. Kwizera.

[3] In 2007, Mr. Radjabu was arrested. In 2009, he was sentenced to 13 years' imprisonment. According to public documentation, he continued to have supporters in Burundi. Tensions between the current government and the CNDD-FDD have re-emerged since his arrest. Since Ms. Kwizera's departure, Mr. Nganji claims the police have visited his home on several occasions, where they raped two of his sisters (August 2007) and beat his father (in 2008). One of his sisters was able to leave Burundi in December 2007. She, like her sister, travelled to Canada and obtained refugee status. On December 27, 2013, Mr. Nganji claims he was abducted

and detained by police officers. Mr. Nganji claims the police officers recognized him as Ms. Kwizera's brother and threatened him with forced enlistment with the Imbonerakure, a youth militia loyal to the President of Burundi. Mr. Nganji claims he escaped from the improvised detention room on December 30, 2013 and hid at friends' homes until he was able to obtain a passport and an American visa in 2014. He arrived in Seattle, Washington, on August 7, 2014, and entered Canada on the same day. He immediately claimed refugee protection.

[4] Before the RPD, Mr. Nganji claimed fear of extra-judicial persecution by the police and the Imbonerakure militia should he return to Burundi. At the hearing, the Board member asked Mr. Nganji about the reasons for Mr. Radjabu's arrest in 2007. Mr. Nganji answered that Mr. Radjabu was arrested and charged with embezzlement. This answer, according to the RPD, conflicted with public documentation which contended Mr. Radjabu was accused of threatening national security. As a result, the RPD concluded that Mr. Nganji's testimony was neither credible nor trustworthy. Based in part upon the credibility finding against Mr. Nganji, the RPD concluded it was unlikely the police arrested, detained and mistreated Mr. Nganji for reasons related to Mr. Radjabu since his (Mr. Radjabu's) trial was finalized in 2009.

[5] While Mr. Nganji raises several grounds for judicial review, I would grant the application based upon the RPD's approach to assessing his credibility. I am cognizant that questions of credibility must be assessed on the reasonableness standard of review (*Zhou v Canada (Minister of Citizenship and Immigration)*, 2013 FC 619, [2013] FCJ No 687 at para 26; *Wu v Canada (Minister of Citizenship and Immigration)*, 2009 FC 929, [2009] FCJ No 1143 at para 17; *Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732, 160 NR

315) and that the RPD is owed deference with regard to its credibility findings. I am also cognizant of the requirements of *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*] that to be reasonable, a decision must fall “within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” and demonstrate “justification, transparency and intelligibility within the decision-making process” (*Dunsmuir*, above at para 47). I find the RPD’s decision does not meet the standard of reasonableness in several respects.

[6] Here the RPD made a negative credibility finding based upon Mr. Nganji’s apparently “incorrect” answer to why Mr. Radjabu had been arrested. Mr. Nganji was fourteen years old at the time of Mr. Radjabu’s arrest. Although Mr. Nganji testified as an adult, he is entitled to have his evidence considered as a child witness. The record is silent as to whether the RPD took that approach. Justice McLachlin, as she then was, explained in *R v W (R)*, [1992] 2 SCR 122 at pp 133-134 that evidence related to an event which occurred when an adult witness was a child should be considered in the context of the age of that witness at the time of the event. She opined:

The second change in the attitude of the law toward the evidence of children in recent years is a new appreciation that it may be wrong to apply adult tests for credibility to the evidence of children. One finds emerging a new sensitivity to the peculiar perspectives of children. Since children may experience the world differently from adults, it is hardly surprising that details important to adults, like time and place, may be missing from their recollection.

[7] While I consider the decision on credibility to be unreasonable given the failure to apply the law with respect to the testimony of children, I would make two additional observations which in my view result in an unreasonable decision. First, it is unclear whether the RPD

considered the claim to be based upon the four-day detention and apparent threat of forced enlistment into a militia, or the contention by Mr. Nganji that he was threatened by police in a search for information about Mr. Radjabu. Second, the RPD failed to pronounce upon whether it believed the evidence of arrest and plans for forced enlistment into the militia. I find the lack of clarity on both of these latter issues results in a decision that is neither transparent nor intelligible.

[8] Mr. Nganji has requested this Court make an Order with respect to the timeliness with which the RPD must rehear this matter. I respectfully decline the invitation to make such an Order.

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.
2. The matter is remitted to another Board member of the RPD for redetermination.
3. There will be no order of costs.
4. There is no question certified.

“B. Richard Bell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1967-15

STYLE OF CAUSE: ARNAULD CHRISS NGANJI v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: DECEMBER 7, 2015

JUDGMENT AND REASONS: BELL J.

DATED: FEBRUARY 9, 2016

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