Federal Court Cour fédérale

Date: 20100106

Docket: IMM-525-09

Citation: 2010 FC 17

Ottawa, Ontario, January 6, 2010

PRESENT: The Honourable Mr. Justice Pinard

BETWEEN:

MINISTER OF CITIZENSHIP
AND IMMIGRATION

Applicant

and

Ibrahim HABIMANA

Respondent

<u>REASONS FOR JUDGMENT AND JUDGMENT</u>

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) of a decision made by the Refugee Protection Division of the Immigration and Refugee Board (the panel). The Minister of Citizenship and Immigration (the Minister) is seeking review of the panel's determination that Ibrahim Habimana (the respondent) is a person in need of protection in a decision dated December 4, 2008.

* * * * * * * *

[2] The respondent is a Rwandan citizen of Hutu origin.

[3] He states that he reported Hutu members of the Interahamwe militia who had committed acts of genocide to a traditional court called Gacaca. He allegedly refused to testify when he was summoned by that court a second time, out of fear of revenge by militia members who were released, and came to Canada. The panel found the respondent’s testimony on that point to be “direct and plausible”.

[4] After the respondent made his refugee protection claim, members of the Royal Canadian Mounted Police (the RCMP) traveled to Rwanda to obtain information about him. They contacted members of the Gacaca and concluded that the document proving that he had been summoned was a forgery.

[5] The respondent seems to have explained that the documents proving the summonses are drawn up in advance and exchanged among the various courts when necessary, and so the seals and signatures appearing on a document issued to a person who is summoned do not always correspond to the person’s district of residence.

* * * * * * * *

[6] The panel identified revenge by the Interahamwes as the basis for the respondent’s fear. Because revenge is not a ground of persecution recognized in the *United Nations Convention*

Relating to the Status of Refugees (the Convention), the panel concluded that section 96 of the Act did not apply to the respondent and examined his claim on the basis of paragraph 97(1)(*b*).

[7] On the question of the respondent's credibility, the panel stated that it was "of the opinion that these explanations are reasonable when the local culture of mutual suspicion between ethnic groups, as described by documentary evidence, is taken into consideration". Although the panel did not state it expressly, it thus seems to have believed the respondent and rejected the submissions made by the Minister, which were that the evidence submitted by the respondent had been falsified.

[8] The panel further concluded that the respondent was a "refugee *sur place*", and therefore a person in need of protection, because of the actions by the RCMP investigators. The investigators "spoke about the claimant to the very same people the claimant believed were the persecuting agents and showed them the disputed notice to appear".

[9] Based on the documentary evidence concerning Rwanda, the panel noted that human rights are not always respected in that country, that members of the public may be arbitrarily arrested and that the government attempts to influence the courts, in particular the Gacaca.

[10] The panel concluded that it was "reasonable to believe that the authorities would take revenge on the claimant, who tarnished the regime's reputation abroad with dubious documents. The panel [was] of the opinion that the situation would be aggravated due to the fact that the claimant is a Hutu dealing with a repressive Tutsi political regime." For that reason, "it is not unreasonable to think that the claimant would be persecuted for what the state alleges is his political opinion. In light

of this, the panel is of the opinion, on the balance of probabilities, that a reasonable possibility of persecution" of the respondent exists in Rwanda.

* * * * * * * *

[11] The Minister contends that the panel did not conduct its decision-making process properly and thus violated the requirements of procedural fairness, by stating inadequate reasons and issuing a decision that was incoherent, unintelligible and not based on the evidence.

[12] In my opinion, the panel's stated reasons for its decision are insufficient for it to be considered reasonable, in terms of both the primary reason and the alternative reason.

[13] On the question of the primary reason, the fear of the Interahamwe militia, the panel's conclusion that the respondent's testimony was "direct and plausible" is not intelligible, in view of the brevity of that testimony. When the respondent was asked what he feared in Rwanda, he simply stated that he was [TRANSLATION] "afraid [he] might be imprisoned and killed". He stated that he did not know the names of people who were threatening him, but that [TRANSLATION] "they were people in the Gacacas, peasants and the people I testified against." He then recounted the problems his wife had experienced since the RCMP members travelled there, but those facts are not relevant to the respondent's claimed fear of the militia.

[14] Although the panel has the authority to assess the respondent's testimony, that assessment must still be transparent and intelligible (see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1

S.C.R. 190, at paragraph 47). The respondent's testimony was so vague that he did not even know whether he had been threatened by the militia he was going to testify against, as the panel concluded, or by [TRANSLATION] "people in the Gacacas [or] peasants". Given this context, the panel's statement that the respondent's testimony regarding his fear was "direct" seems to me to be hardly transparent and is not intelligible.

[15] In addition, the panel did not explain intelligibly why it rejected *holus-bolus* all of the allegations in the RCMP report concerning the summons to the Gacaca introduced by the respondent. The only explanation given by the panel is that the respondent's allegations that the members of the Gacaca had lied to the Canadian officers "are reasonable" in the context of "mutual suspicion between ethnic groups" in Rwanda. Not only should the panel have decided not whether the allegations were "reasonable", but whether they were true, on a balance of probabilities, but it also failed to explain how ethnic suspicion would motivate the Gacaca to slander the respondent. Although the respondent is a Hutu, he was, according to him, supposed to testify against militia members who had committed acts of genocide and who were also Hutu. It seems logical to assume that the members of the court, who were Tutsi, would not be hostile to him.

[16] Regarding the alternative reason for the decision, the possibility that the respondent had become a "refugee *sur place*", I agree with the Minister that the use of the concept of "refugee *sur place*" by the panel to grant protection under section 97 of the Act was not strictly speaking appropriate, because that concept is closely associated with the concept of Convention refugee. This is confirmed by the reference at paragraph 96 of the *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the*

Status of Refugees to a “well-founded fear of persecution” that justifies granting “refugee *sur place*” status to a claimant.

[17] However, section 97 of the Act does not provide that the events that cause a refugee status claimant to fear that they would be subject to a risk to their life or safety if they were returned to their country of origin must have occurred before the person left that country. For that reason, in my opinion, the discussion of the concept of “refugee *sur place*” has no practical consequence in this case.

[18] If the panel had concluded that the respondent would be subject to a risk to his life or safety if he were returned to Rwanda, it could have granted him status as a person in need of protection.

[19] To do that, however, as the Minister argues, the panel would have had to consider the case carefully and provide clear reasons for its decision. It did not do that.

[20] The panel’s analysis of the impact of the RCMP investigation was summary. The only fact accepted by the panel in its reasons is that the RCMP members disclosed the respondent’s identity to “the very same people the [respondent] believed were the persecuting agents”. As the Minister argues, the panel’s reasoning was improper, since it had stated earlier in its reasons that the respondent feared persecution by Hutu militia, not the Rwandan authorities.

[21] That is not all, however. The panel did not state whether the authorities were already aware of the respondent’s situation or if the officers disclosed the fact that he had made a refugee protection

claim in Canada. An analysis of those factors is crucial to the decision as to whether the respondent was endangered by the actions of the RCMP (see *Minister of Citizenship and Immigration v. Mbouko*, 2005 FC 126, at paragraphs 31 to 33).

[22] The panel also did not conclude that refugee claimants who were returned to Rwanda were more likely to be prosecuted or threatened than ordinary Rwandan citizens. In fact, it did not even consider the question.

[23] The panel therefore could not have concluded that the respondent would be subject to a risk in Rwanda that "is not faced generally by other individuals in or from that country" as required by subparagraph 97(1)(*b*)(ii) of the Act. The panel's reasons in no way establish that this statutory requirement was met in the respondent's case. The panel's "conclusion" on that point is purely speculative.

[24] The panel's decision that the respondent is a person in need of protection is therefore not transparent and intelligible. The Court therefore cannot conclude that it is reasonable (see *Dunsmuir*, *supra*, at paragraph 47).

* * * * * * * *

[25] I would therefore, for the foregoing reasons, allow the application for judicial review and order that the respondent's case be completely reconsidered by a different panel.

JUDGMENT

The application for judicial review is allowed. The decision made by the Refugee Protection Division of the Immigration and Refugee Board (the panel) on December 4, 2008, is set aside and the matter is referred back to a different panel for redetermination.

"Yvon Pinard"
Judge

Certified true translation
Brian McCordick, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-525-09
STYLE OF CAUSE:	MINISTER OF CITIZENSHIP AND IMMIGRATION v. Ibrahim HABIMANA
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	November 25, 2009
REASONS FOR JUDGMENT AND JUDGMENT:	Pinard J.
DATED:	January 6, 2010

APPEARANCES:

Jocelyne Murphy	FOR THE APPLICANT
Stéphanie Valois	FOR THE RESPONDENT

SOLICITORS OF RECORD:

John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE APPLICANT
Stéphanie Valois Montréal, Quebec	FOR THE RESPONDENT