

Federal Court



Cour fédérale

Date: 20120612

Docket: IMM-8630-11

Citation: 2012 FC 732

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, June 12, 2012

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

JUSTIN, NIYONKURU

Applicant

and

**MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] Credibility is the primary issue in this case. Absent a finding made in an unreasonable manner, this Court should not intervene. Its role is not to reassess the evidence or to substitute its factual assessment for that of the decision-maker, which has its own expertise as well as the

advantage of hearing refugee claimants (*Bergeron v Canada (Minister of Citizenship and Immigration)*, 2008 FC 456).

[2] However, this Court, as in this case, must intervene where the crux of the claim may not have been adequately identified.

II. Legal proceeding

[3] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), for judicial review of a decision by the Refugee Protection Division [RPD] of the Immigration and Refugee Board, issued October 21, 2011, that the applicant is neither a Convention refugee as defined in section 96 of the IRPA nor a person in need of protection under section 97 of the IRPA.

III. Facts

[4] The applicant, Justin Niyonkuru, is a citizen of Burundi.

[5] The applicant claims that his brother, Nicaise, died in their house on December 25, 2007, murdered by Tobi Havyarimana.

[6] The same day, the applicant went to the police to file a report against the person who had murdered his brother, but he had already fled.

[7] The applicant says that he was targeted by Tobi Havyarimana in January 2009 because he had gone to the police. He and his accomplices went to the applicant's home, but he was not there. They searched the house and beat his father. The applicant states that they returned to the neighbourhood three times to look for him.

[8] The applicant left Burundi on July 4, 2009, and arrived in Canada, via the United States, on July 8, 2009. He claimed refugee protection the same day.

IV. Decision that is the subject of this application for judicial review

[9] The RPD found the applicant's narrative not plausible on the basis of the following factors:

- (i) an inconsistency between the applicant's testimony at the hearing and the information in the Personal Information Form [PIF]; he testified that Tobi Havyarimana had seen the applicant, who was at the house during the attack, contrary to what he had stated in the PIF;
- (ii) inconsistencies in his testimony regarding the number of times the applicant was threatened;
- (iii) a year went by without the applicant receiving any threats;
- (iv) a period of three months between the last threat and the applicant's departure;
- (v) the applicant's lack of effort to obtain evidence explaining the circumstances surrounding his brother's death.

[10] The RPD also rejected the possibility of persecution based on the applicant's Tutsi ethnic background because he did not mention that in his written narrative.

V. Issue

[11] Is the RPD's decision reasonable?

VI. Relevant statutory provisions

[12] The following provisions of the IRPA apply to this case:

Convention refugee

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

Person in need of protection

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

Définition de « réfugié »

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques:

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Personne à protéger

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle,

exposée:

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant:

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Person in need of protection

Personne à protéger

(2) A person in Canada who is a

(2) A également qualité de

member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

VII. Position of the parties

[13] The applicant contends that he is not required to recite the content of his PIF, which was, moreover, minimal. Accordingly, he submits that the additions at the hearing should not have undermined his credibility. The applicant maintains that the RPD disregarded the death certificate evidence without providing reasons. He says that the RPD should have given him the benefit of the doubt.

[14] Furthermore, the applicant submits that the RPD erred when it refused to apply section 97 of the IRPA.

[15] The respondent submits that many factors detrimental to the applicant's credibility support the RPD's negative decision. Having determined that the applicant was not credible, the RPD was not required to conduct a separate analysis under section 97 of the IRPA in the absence of credible evidence to support the applicant's argument.

VIII. Analysis

[16] Assessing credibility is a question of fact that falls within the RPD's specialized expertise. Accordingly, a significant degree of judicial deference is called for. This Court should not intervene if the decision is reasonable. An error of law is, however, reviewable on a correctness standard

(*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708).

[17] Sufficient factors noted by the RPD support a negative credibility decision. The RPD's decision would not be unreasonable if it had taken into account the crux of the claim underlying the applicant's narrative: persecution based on social group.

[18] This Court refers to paragraphs 66 and 67 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* HCR/1P/4/Eng/Rev.1 [Handbook], which contains the following clarifications on the examination role that is incumbent on those hearing refugee claimants:

(3) “for reasons of race, religion, nationality, membership of a particular social group or political opinion”

(a) General analysis

66. In order to be considered a refugee, a person must show well-founded fear of persecution for one of the reasons stated above. It is immaterial whether the persecution arises from any single one of these reasons or from a combination of two or more of them. Often the applicant himself may not be aware of the reasons for the persecution feared. It is, however, his duty to analyze his case to such an extent as to identify the reasons in detail.

67. It is for the examiner, when investigating the facts of the case, to ascertain the reason or reasons for the persecution feared and to decide whether the definition in the 1951 Convention is met with in this respect. It is evident that the reasons for persecution under these various headings will frequently overlap. Usually there will be more than one element combined in one person, e.g. a political opponent who belongs to a religious or national group, or both, and the combination of such reasons in his person may be relevant in evaluating his well-founded fear. [Emphasis added]

[19] Ethnic persecution by reason of social group was dealt with as a factor in the credibility assessment rather than as the subject of a separate analysis that requires particular attention considering the applicant's circumstances and the objective evidence on the conditions in the country of origin:

[35] This new omission undermines the claimant's credibility with regard to the nature of his fears. The panel does not believe that there is a reasonable chance or a serious possibility that the claimant would face persecution because of his Tutsi ethnic background, because he did not mention this in his narrative.
[Emphasis added]

[20] On the contrary, the applicant alleged that he was persecuted by [TRANSLATION] "a demobilized member of the FNL" (Tribunal Record [TR] at page 96). The PIF also indicated a fear of persecution by reasons of membership in a particular social group; the applicant mentioned his Tutsi background. (TR at pages 26-27).

[21] The Supreme Court stated that the RPD must consider all the alleged possibilities of persecution, in particular, ethnicity, even if it is not raised during a hearing (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689; *Viafara v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1526). Furthermore, in the case before this Court, the applicant's PIF clearly specified ethnicity with a particular attention to persecution by a demobilized FNL member.

[22] Upon review of the entire record, the factors that, according to the RPD's decision, undermined the applicant's credibility do not affect the crux of the claim.

[23] Persecution by reason of ethnic background should have been the subject of an analysis given the history that is an essential part of this record, i.e. the subjective and objective evidence should be assessed together.

[24] The assessment of the record, if viewed in its entirety, gives the RPD the opportunity to apply its expertise.

[25] Given that the RPD did not view the record in its entirety, this Court's intervention is warranted.

IX. Conclusion

[26] For all the above reasons, the applicant's application for judicial review is allowed.

[27] An extensive analysis of the applicant's fear of persecution by reason of his social group must be undertaken to ensure that the entire record is assessed, taking into account the generally known historic facts at the very crux of this case in accordance with paragraphs 66 and 67 of the Handbook:

66. In order to be considered a refugee, a person must show well-founded fear of persecution for one of the reasons stated above. It is immaterial whether the persecution arises from any single one of these reasons or from a combination of two or more of them. Often the applicant himself may not be aware of the reasons for the persecution feared. It is not, however, his duty to analyze his case to such an extent as to identify the reasons in detail.

67. It is for the examiner, when investigating the facts of the case, to ascertain the reason or reasons for the persecution feared and to decide whether the definition in the 1951 Convention is met with in this respect. It is evident that the reasons for persecution under these various headings will frequently overlap. Usually there will be more than one element combined in one person, e.g. a political opponent who

belongs to a religious or national group, or both, and the combination of such reasons in his person may be relevant in evaluating his well-founded fear. [Emphasis added]

[28] The matter is therefore remitted for reconsideration by a differently constituted panel.

JUDGMENT

THE COURT ORDERS that the application for judicial review is allowed, and the matter is remitted for reconsideration by a differently constituted panel. No question of general importance to certify.

“Michel M.J. Shore”

Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT
SOLICITORS OF RECORD

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