Federal Court  Cour fédérale

Date: 20111014

Docket: IMM-1566-11

Citation: 2011 FC 1141

Ottawa, Ontario, October 14, 2011

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

JOSEPH GATARE, AGNES MUKARUSINE, MADELEINE GATARE, SIMON PIERRE GATARE, ZACHARIE GATARE, SARA GATARE, JEAN PAUL GATARE, JOLIE JOSEPHINE GATARE, BELLA-LOUISE GATARE, JORDAN GATARE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 26 [the Act] of the decision rendered by an officer [the Officer] based at the High Commission of Canada in Nairobi, Kenya. By letter dated December 30, 2010, the Officer found that the applicants are not members of the Convention Refugees Abroad class or the Humanitarian-Protected Persons Abroad designated class pursuant to the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations].

[2] For the reasons that follow the application shall be allowed.

Facts

[3] The applicants, Mr. Joseph Gatare [Mr. Gatare], his wife Agnes Mukarusine [Ms. Mukarusine] and their nine children are citizens of Rwanda. They fled to Kenya and have been residing there since 2005.

[4] Mr. Gatare was a member and a local organizer with the Democratic Republican Movement [MDR] in Rwanda. He supported and worked for former Prime Minister Faustin Twagiramungu, the MDR's candidate in the 2003 Presidential elections. The MDR was banned by general Kagame's ruling government in 2003.

[5] Mr. Gatare was imprisoned on three occasions and beaten because of his involvement with the MDR. Ms. Mukarusine and Madeleine Gatare were also attacked, beaten and threatened by the Local Defence Forces.

[6] In 2003, the applicants moved to Kigali, Rwanda and fled to Kenya in 2005.

[7] On June 28, 2005, while in Kenya, the applicants sought refugee status determination with the United Nations High Commissioner for Refugees [UNHCR]. On March 30, 2006, Mr. Gatare received notification of the UNHCR's negative decision "[…] based on the fact that the claim that he will be persecuted upon return to his country of origin is not well-founded […]" (Applicant's

Record [AR], tab 2, p 11). Appeals of the UNHCR determination proved unsuccessful (AR, tab 2, p 11).

[8] In 2006, the Roman Catholic Archdiocese of Vancouver, a Sponsorship Agreement Holder approved by the respondent, filed an application to sponsor the applicants as refugees at the High Commission of Canada [HCC] in Nairobi, Kenya. Mr. Gatare was interviewed on January 27, 2010. The applicants' application was refused by letter dated February 3, 2010. In his refusal letter, Officer H. Michaud indicated not being satisfied that Mr. Gatare had a well founded fear of persecution in Rwanda (AR, tab 2, p 19).

[9] Leave and judicial review of Officer H. Michaud's refusal was sought. The respondent consented to a reconsideration of the decision and a Notice of Discontinuation was filed September 9, 2010. As such, Mr. Gatare, Ms. Mukarusine, Madeleine Gatare, Simon Pierre Gatare and Zacharie Gatare were interviewed on October 22, 2010 at the HCC in Nairobi (AR, tab 2, pp 21-28). Ms. Mukarusine and Madeleine Gatare were interviewed once more on December 2, 2010.

Impugned Decision

[10] The Officer was not satisfied that the applicants have a well-founded fear of persecution or that they have been and continues to be seriously and personally affected by civil war, armed conflict or massive violations of their human rights.

[11] The determination was based on the Officer's finding that neither Mr. Gatare nor his family were able to provide corroborative evidence to support that they feared for their life while in Kigali. He drew a negative credibility finding as the applicants lived without incident for two years – between 2003 and 2005 – while in that city.

[12] Based on country conditions in Rwanda, the Officer concluded that certain opposition political party members' fear do not constitute reasonable grounds to fear persecution in Rwanda. The Officer articulated that Mr. Gatare no longer has a well-founded fear of persecution in Rwanda, as he has not been politically involved since 2003 and as the MDR was disbanded in 2003.

[13] The decision is also based on the fact that the applicants do not have any connection to the MDR in Rwanda today. The Officer noted that Mr. Gatare was unable to provide an example of any threat received since 2003 on account of his association with the MDR, confirmed by Ms. Mukarusine and Madeleine Gatare's interviews.

Issues

[14] The Court finds that the main issue in the present case is:

- Did the Officer ignore key pieces of documentary evidence which contradict his findings in connection with the situation in Rwanda?

Standard of Review

[15] The applicants suggest that the failure to adequately assess and explain the importance of relevant objective evidence is an error of law, subject to review on a standard of correctness (*Chavi v Canada (Minister of Citizenship and Immigration)*, [2008] FCJ 63 [*Chavi*]).

[16] The respondent contends that the Officer's decision regarding Mr. Gatare turned on findings of fact. He urges that such findings are owed considerable deference on judicial review, and ought only to be set aside if they are "unreasonable," as defined by the Supreme Court of Canada in *Dunsmuir v New-Brunswick*, [2008] SCJ 9 [*Dunsmuir*].

[17] In *Dunsmuir*, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question" (confirmed by *Khosa v Canada (Minister of Citizenship and Immigration)*, [2009] SCC 12 at para 53).

[18] Past jurisprudence has determined that an officer's decision about whether an applicant falls within the Convention Refugee Abroad or Country of Asylum classes is a question of fact and mixed fact and law, therefore, reasonableness should be applied (*Qarizada v Canada (Citizenship and Immigration)*, [2008] FCJ 1662 para 15; confirmed by *Adan v Canada (Minister of Citizenship and Immigration)*, [2011] FCJ 830 para 23).

[19] The Court cannot agree with the applicants that the standard of review is correctness. It was recently confirmed in *Diaz v Canada (Minister of Citizenship and Immigration)*, [2011] FCJ 914 para 14, that issues concerning the analysis of evidence is a factual finding that should be given significant deference and should be reviewed on the standard of reasonableness. Accordingly, the Court will not intervene unless it is shown that the "decision does not fall within a range of acceptable outcomes that are defensible in respect of the facts and the law" (*Dunsmuir*, above at para 47).

Did the Officer ignore key pieces of documentary evidence which contradict his findings in connection with the situation in Rwanda?

Applicants' Arguments

[20] The applicants submit that the Officer failed to address important, relevant, objective and independent documentary evidence pertaining to the conditions in Rwanda, contradicting his findings as to whether it was safe for the applicants to return to Rwanda (*Chavi*, above).

[21] The applicants contend that the Officer disregarded the documentary evidence in finding that the MDR was disbanded. The applicants maintain that the MDR did not disband voluntarily, but was forced to dissolve and banned by the ruling government in Rwanda (AR, tab 2, pp 7, 25, 34).

[22] The applicants submit that the Officer erred by relying on an unsubstantiated quote from a single, outdated source which alleges that "[t]here is no objective evidence to show that members of political parties are at risk of mistreatment by the state authorities." In fact, the applicants underscore having provided a substantial amount of important and relevant evidence of continuing persecution of opposition party leaders, candidates, members and supporters of the MDR. As such, they allege that the Officer ignored and misread the following filed documentary evidence:

a. Immigration and Refugee Board, *Rwanda: Treatment by government authorities of Faustin Twagiramugu and supporters of his candidacy during the presidential election campaign in August 2003* (2006) (AR, tab 2, p 16);

b. *United Kingdom: Home Office, Operational Guidance Note: Rwanda* (2009) (AR, tab 2, pp 16-17, 33);

c. Human Rights Watch, *The Power of Horror in Rwanda* : *Rwanda: Protection* (2009) (AR, tab 2, p 34; tab 4, p 44 at note 13, p 45 at note 14);

d. US State Department, *2009 Human Rights Report: Rwanda* (2009) (AR, tab 4, p 45 at note 18);

e. Human Rights Watch, *Rwanda: A president in Crisis* (2009) (AR, tab 4, p 46 at note 19);

f. Human Rights Watch, *Rwanda: Protect Rights and safety of Opposition Leaders* (2009) (AR, tab 2, p 34; tab 4, p 46 at note 20).

Respondent's Arguments

[23] The respondent asserts that the Computer Assisted Immigration Processing System [CAIPS notes] reference to various country condition documents and as such, the Officer did not fail to consider the submitted documentary evidence.

[24] Further, the respondent contends that the Officer was aware that Mr. Gatare "had a relatively minor position, as a 'sensitiser' as he referred to himself, in the MDR and that he was a supporter based in a rural town" (AR, tab 2, p 13).

[25] Finally, the respondent affirms that the fact that the applicants lived in Kigali for a period of two years without incident prior to leaving for Kenya was considered in both assessing the credibility of the applicants and the risk they faced if they returned to Rwanda.

Analysis

[26] The Court is of the opinion that the Officer committed a reviewable error in its treatment of evidence concerning the continuing persecution of opposition party members and supporters. Notwithstanding the fact that the Officer's analysis was reasonable in some aspects, there are serious deficiencies with his decision.

[27] The Officer's treatment of evidence concerning the continuing persecution of opposition party members and supporters is troublesome. In the refusal letter, the Officer notes that he was not "able to find any evidence that Twagiramungu's supporters, or members of the opposition parties or former political parties, are currently at risk of persecution by Rwandan government authorities […] low – or medium-level supporters or party members such as yourself, are not" (AR, tab 2, p 19).

[28] First, the CAIPS notes disclose that Mr. Gatare was almost certainly not at a "low – or medium-level" supporter of the MDR (AR, tab 2, p 7), but had a much higher profile as a political activist. Mr. Gatare was appointed as local leader and recruiter for the MDR in his village, and his "[…] position was different because the people from the HQ of the party came and appointed [him] to rally people in [his] my village, so [his] status is different from other people. [He is] more vulnerable" (AR, tab 2, p 14). As consequence, he is of the view that his role was of sufficient concern to supporters of the MDR that he was specifically targeted by Rwandan government authorities.

[29] Second, in the refusal letter, the Officer states the following: "I have done extensive research into open source information on the country conditions in Rwanda. I have also carefully examined and considered the information contained in the reports and affidavit submitted in support of your application" (AR, tab 2, p 7). A review of the CAIPS notes indicates that the Officer relied upon the following submitted documentary evidence in support of his conclusion:

a. Immigration and Refugee Board, *Rwanda: Treatment by government authorities of Faustin Twagiramugu and supporters of his candidacy during the presidential election campaign in August 2003* (2006) (AR, tab 2, p 16);

b. *United Kingdom: Home Office, Operational Guidance Note: Rwanda* (2009) (AR, tab 2, pp 16-17, 33);

c. Freedom House, *Freedom in Sub-Saharan Africa 2009*, (2010) (AR, tab 2, p 34);

d. Human Rights Watch, *2010 World Report for Rwanda* (2010) (AR, tab 3, p 34);

e. New York Times, *American Lawyer for Opposition Figure is Arrested in Rwanda*, (2010) (AR, tab 2, p 34).

[30] A review of the refusal letter and CAIPS makes no mention of the corroborating information that members of the opposition parties or former political parties are currently at risk of persecution by Rwandan government authorities. This was critical evidence which directly contradicted the Officer's finding that Mr. Gartare did not have a well-founded fear of persecution.

[31] It was therefore evidence which the Officer had to consider and the failure to do so constitutes the same error considered by this Court in *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ 1425 para 16 [*Cepeda-Gutierrez*] and confirmed by *Hinzman v Canada (Minister of Citizenship and Immigration)*, [2010] FCJ 838 at para 38. In *Cepeda-Gutierrez*, above, it was held that the greater the importance of the evidence not specifically mentioned and analyzed by the decision maker, the more willing a court may be to infer from the silence that the decision maker made an erroneous finding of fact without regard to the evidence.

[32] In the case at bar, the Officer had to consider the evidence describing the persecution of members of the opposition parties in Rwanda. The US State Department, *2009 Human Rights Report: Rwanda*, observes that "police arbitrarily arrested opposition members […] Parties were not able to operate freely, and parties and candidates faced legal sanctions if found guilty of engaging in divisive acts" (AR, tab 6**,** p 80 para 28). Further, Human Rights Watch, *2010 World Report for Rwanda*, indicates that "Two new political parties […] had meetings broken up by the police and party members arrested" (AR, tab 6, p 80 at para 28). The article entitled *American Lawyer for Opposition Figure is Arrested in Rwanda* featured in the New York Times observes that "some opposition supporters have been attacked inside government offices; others have been jailed" (AR, tab 6, p 80 at para 28).

[33] No question for certification was proposed and none arise.

[34] The applicants are seeking costs for an amount of $3500 citing a case that its counsel argued in 2005 and *Latif v Canada (Minister of Citizenship and Immigration)*, [2009] FCJ 93 (*Latif)*. The respondent opposes such a remedy. The applicants' counsel conceded that the Minister agreed to pay costs for an amount of $1500 in the case he pleaded in 2005. In *Latif*, Justice Campbell granted $7000 for costs.

[35] The Court is of the view that the facts in the present case can be distinguished from the ones cited by the applicants. Here, the Minister consented to a redetermination following the first decision; accordingly, the applicants discontinued their application for judicial review. The contested decision at hand has been determined in a timely matter after interviews with the applicants.

[36] The Court does not share the applicants' view that the facts in the present case are so special that an award for costs be granted. Therefore, the exception provided at Rule 22 of the *Federal Court Immigration and Refugee Protection Rules*, SOR/93-22 does not apply.

JUDGMENT

THIS COURT ORDERS that:

1. The application for judicial review be allowed. The matter is remitted back for redetermination by a different Officer.
2. No question is certified.
3. No costs are awarded**.**

"Michel Beaudry"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1566-11
STYLE OF CAUSE:	**JOSEPH GATARE, AGNES MUKARUSINE, MADELEINE GATARE, SIMON PIERRE GATARE, ZACHARIE GATARE, SARA GATARE, JEAN PAUL GATARE, JOLIE JOSEPHINE GATARE, BELLA-LOUISE GATARE, JORDAN GATARE and MCI**
PLACE OF HEARING:	Vancouver, BC
DATE OF HEARING:	September 29, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	BEAUDRY J.
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APPEARANCES:

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Mr. Edward Burnet	FOR THE RESPONDENT

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