Federal Court  Cour fédérale

Date: 20070913

Docket: IMM-6161-06

Citation: 2007 FC 915

[ENGLISH TRANSLATION]

Ottawa, Ontario, September 13, 2007

PRESENT: The Honourable Madam Justice Johanne Gauthier

BETWEEN:

MUHIRE ALBERT

Applicant

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Muhire Albert is asking the Court to set aside the decision of the Immigration and Refugee Board, Refugee Protection Division (the RPD), which dismissed his claim under sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. (the Act).

[2] For the reasons that follow, the Court is satisfied that this decision must indeed be set aside.

Background

[3] Muhire Albert is a Rwandan citizen born of a mixed marriage (Tutsi mother and Hutu father). In his file, he identifies as a Hutu in accordance with the Rwandan practice whereby ethnic affiliation is determined by the paternal line. The RPD accepted his passport issued on April 20, 2005, as sufficient evidence of his identity.

[4] In his Personal Information Form (PIF), in particular in his narrative, the applicant indicates that his family was separated in 1994 at the beginning of the Rwandan genocide. The applicant, who was then six years old,[1] Took refuge with his father in a camp in the Democratic Republic of the Congo,[2] while his mother and his sisters took another route. In 1996, father and son were separated when the conflict between the Rwandan army and the Interahamwes — paramilitary Hutus — extended to this camp. The applicant was then taken in by the Kanobayata family which, like many others, took in orphans of the genocide. He was taken to Cyangugu, a city in the southwest of Rwanda where he lived until 2001. In 2001, Zéna, a former friend of his mother's, visited the Kanobayota family in Cyangugu. Recognizing him, she offered to care for him, and brought him to Kivugaza, the neighborhood in Kigali where his family lived before the genocide began.

[1] According to his PIF and his testimony, the applicant was six years old. However, at the hearing, the respondent noted that according to the birthdate indicated on his passport, Mr. Albert would have been eight years old.
[2] Mugunga Camp located on the border between Rwanda and the DRC.

[5] Mr. Albert then learned that his family's former property was currently occupied by the alleged killers of his mother's family.[3]

[6] Mr. Musonera and Mr. Nazrambe, the alleged killers of his mother's family, in turn learned of the applicant's existence, his presence in the neighborhood, and his desire to report them to the police.[4]

[7] In 2002, Mr. Musonera sent death threats to the applicant and sent youths to beat him up on several occasions. In March 2004, the applicant decided to inform the police.

[8] According to his testimony and his narrative, the police allegedly had little interest in his complaint and were more interested in the fact that he was born of a mixed marriage and that he had lived with his father (Hutu) in the DRC.

[9] In April 2004, the applicant was summoned for a second interview with the police, who interrogated him about his familiarity with the Forces Démocratiques de Libération du Rwanda (FDLR), a paramilitary group based in the Congo that opposed the Rwandan government. The FDLR was largely composed of former members of the Interahamwes involved in the 1994 genocide. This interrogation lasted for about two hours, but Mr. Albert was apparently not mistreated.

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[3] It should be noted that the applicant's mother and sisters left Rwanda in 2001 believing that the applicant and his father were dead. They were granted refugee status in Canada in 2003. However, the applicant testified that he did not learn that they were in Canada until October 2005.

[10] On July 4, 2004, the applicant says that he was attacked and severely beaten by strangers. He did not dare to report the incident to the police given the tone of the previous interviews.

[11] In March 2005, Mr. Albert was once again summoned by the police. According to the notice to appear filed into evidence in the record, he had to report for an [TRANSLATION] "interview regarding facts that he would be informed of." The applicant states that he was afraid that they suspected that he was associated with the FDLR and that he would be detained or even disappear if he were to go to that interview.

[12] On September 21, 2005, Zéna advised him to flee the country and promised to help him financially.[5]

[13] On June 17, 2005 (one-day visit) and on August 31, 2005 (three-day visit), the applicant went to Uganda with Zéna to help her with some things (purchasing merchandise). He came back with her to Kigali.

[14] On September 21, 2005, he did not go to the police station and instead hid at the homes of various friends.

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[4] According to the applicant's testimony, he had told his friends in the neighborhood that he intended to make such a report.

[5] At the hearing, it was never clarified when he and Zéna had this discussion. However, the applicant clearly testified that it was only in September that he decided not to go to the interview.

[15] In the beginning of October 2005, he learned from Zéna that his mother and his sisters were in Canada. On October 20, 2005, he applied for an American student visa ostensibly to undergo training at a college in Pittsburgh. He obtained a visa on October 27, 2005, and on November 27, he left Rwanda with his passport that was issued on April 20, 2005.[6] He arrived in the United States the next day; the route taken included a change of plane in Italy.

[16] In the United States, he first stayed with one of Zéna's friends known as Papa Clémentine in Buffalo, and then stayed in Viva La Casa, a refugee shelter.[7]

[17] Having managed to locate his family in Ottawa with the help of Papa Clémentine, he crossed the border on February 8, 2006, and immediately filed his refugee claim.

[18] In his PIF, the applicant states that his claim is based on a fear of persecution and/or mistreatment based on his race (mixed blood), his social group (genocide survivor)[8] and his alleged political opinions (spy for the FDLR).

[19] At the hearing before the RPD, the applicant's counsel pointed out that the documentation in on Rwanda in the record corroborates the applicant's testimony and [TRANSLATION] "proves" the children of mixed marriages are persecuted.[9]

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[6] There is no evidence as to when the passport application was filed.
[7] At the hearing, the applicant stated that the shelter is genuinely frequented by refugees who are waiting to file their claims with Canada. However, there is no evidence on this point in the record.
[8] Documentation in the record indicates that survivors who testify against those who committed acts of genocide were subjected to violence.

[20] In its brief two-page decision, the RPD describes the basis of the claim simply as follows:

> [TRANSLATION]
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> In support of his claim, he claims to have recognized the executioners of his family during the genocide. Having told friends that he would report these individuals to the police, one of them allegedly threatened to kill him, in January 2002, and sent youths to beat him up on several occasions. He allegedly filed a complaint with the police in March 2006 (sic). The police that allegedly extensively interrogated him. The police allegedly summoned him to come in on April 8, 2004, for further investigation.
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> Indeed, the claimant alleges that he was beaten on July 4, 2006 by strangers, but did not report these facts to the police. Summoned by the police on March 21, 2005, he did not respond, preferring exile.

[21] The RPD then stated that the claim was dismissed because the panel did not find the applicant's [TRANSLATION] "allegations' credible for the following reasons:

> [TRANSLATION]
>
> (i) The claimant left the country with his own passport and,
>
> > The panel finds that a government that persecutes its citizens does not issue passports and let them travel abroad.
>
> (ii) The applicant returned freely and voluntarily to Rwanda following his two short trips to Uganda when his problems started. It is implausible that "the adults who were making decisions for him did not think to keep the minor in Uganda".
>
> (iii) The applicant did not make a refugee claim when he transferred in Italy or in the United States when he was trying to find his mother's address in Canada.

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[9] Although his mother is a Tutsi, the applicant stated that she was part of the Lindiros clan that opposed the existing Rwandan regime.

[22] With respect to the claim under section 97, the panel simply states:

> [TRANSLATION]
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> It should be noted that the application of subsection 97(1) of the *Immigration and Refugee Protection Act* did not make it possible to identify elements of credibility that would support a positive finding.

[23] The decision does not contain any reference to the documentary evidence on Rwanda or to the documentary evidence filed to corroborate the applicant's story, such as a prescription from a Rwandan hospital and the notice to appear from March 2005.

Analysis

[24] In his factum, the applicant raises several arguments that need not be addressed in detail, as for example the RPD's failure to refer to Guideline 8 (vulnerable persons), as it is admitted that this Guideline was not in effect during the relevant period.

[25] With regard to the RPD's failure to consult his mother's record, which the applicant referred to at least twice in his PIF, as well as at the hearing, in order to corroborate important elements of his narrative, the applicant submits that neither he nor she had a copy of it and that he could not provide it to the RPD or to the Court. He claims that he was entitled to trust that, according to its practice, the RPD would consult the immigration record that he referred to specifically. The failure to do so in this case would amount to a breach of natural justice. However, in the absence of

evidence demonstrating the existence of such a practice, the Court cannot accept this argument.[10]

[26] With regard to the allegation that the decision-maker in this case was biased, the applicant did not raise this at the hearing, and a careful review of the transcript does not persuade the Court that there is a reasonable apprehension of bias according to the requirements identified by the Supreme Court of Canada in *Committee for Justice and Liberty v. Canada (National Energy Board),* [1978] 1 S.C.R. No. 369.

[27] There remains the question of whether the RPD provided sufficient reasons for its decision, in particular with regard to the application of section 97 of the Act and the validity of its finding on the applicant's credibility, which is analyzed according to the standard of patent unreasonableness.

[28] The voluntary return and the failure to file a refugee claim elsewhere are certainly relevant elements in evaluating a claimant's credibility, in particular with regard to the existence of a subjective fear (section 96). It was up to the RPD to determine what weight to assign to them given the context and the Court.

[29] However, in this case, after and despite reading this short decision several times, the Court is not satisfied that the RPD considered all the evidence before it. First, the description of the risks alleged by the applicant is deficient. The RPD does not refer anywhere to the applicant's alleged political opinions based on his father's ethnicity, his presence in the DRC, or his mother's clan (mixed blood). To the

[10] The applicant had the opportunity to formally request that the RPD provide him with a copy of his mother's narrative before the next hearing. The RPD could then determine whether it corroborated his narrative in part.

contrary, the RPD appears to take for granted that the applicant was summoned to appear on September 21 regarding his complaint against Mr. Musonera and Mr. Nazrambe. Even though the applicant testified that he was not interrogated on this subject in April 2004 during the previous summons and that the notice to appear in the record does not refer at all to this complaint.

[30] This element is essential since the applicant clearly stated that when he was in Uganda to shop with Zéna, he had not yet decided not to go on September 21. Until the moment that he failed to comply with the notice to appear, there is nothing to indicate that he had to fear that the police were actively looking for him. According to the evidence, it was indeed only after that date that he sought shelter at his friends' homes.

[31] Given the applicant's explanations, the allegations in support of his claim, and the documentary evidence in the record, the RPD had to specifically refer to this risk and explain how it addressed the issue of voluntary return in this respect, (*Cepeda-Guierrez v. Canada (Minister of Citizenship and Immigration*), [1998] F.C.J. No. 1425).

[32] Also, the RPD's finding that a government that persecutes its citizens does not issue passports to them or let them travel is puzzling. This issue was not at all addressed at the hearing and there is no evidence in the record on this point. We do not know whether the Rwandan immigration service had access to the technology necessary to support such a finding regarding Rwanda.

[33] In its decision, the RPD does not say what it relied on to make such a generalization. As Justice Richard Mosley stated in *Sadeghi-Pari v. Canada (Minister of Citizenship and Immigration),* [2004] F.C.J. No. 316, the Court finds

that even if the RPD is entitled to take notice of recognized facts that are within its specialized knowledge (paragraph 170(i) of the Act), it cannot make a finding on this basis unless it advises the claimant of its position and gives the claimant the opportunity to comment and to file evidence to the contrary (Section 18 of the *Refugee Protection Division Rules*, SOR/2002-228, see Schedule A). So, in this case, given the lack of evidence in the record and the absence of discussion on this point, this finding by the RPD is patently unreasonable.

[34] Since the RPD did not give any other reasons for its non-credibility finding, by referring for example to inconsistencies or contradictions in the evidence, and since the applicant's failure to claim refugee status in United States was clearly not a decisive factor but rather an accessory factor simply adding to the reasons vitiated by the errors described above, the Court cannot disregard these errors.

[35] It is also important to point out that the absence of subjective fear is not determinative in the analysis of a refugee claim under section 97 of the Act (*Bouaouni v. Canada* [2003] F.C.J. No. 1540, *Kandiah v. Canada* (*Minister of Citizenship and Immigration)*, [2005] F.C.J. 275). The RPD must assess all the objective risks raised by the applicant in the light of the documentary evidence, if there is any. In this case, since the Court is not satisfied that the RPD considered, *inter alia*, the risk tied to mixed blood (Hutu-Tutsi) or the alleged political opinions, it is clear that the laconic statement contained in the decision regarding the application of section 97 is insufficient. The lack of analysis and reasons that would allow this Court and the applicant to assess the validity of this finding is in itself another reviewable error.

[36] The parties did not propose a question for certification, and the Court is satisfied that this matter does not raise a question of general importance.

[37] The application is allowed.

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JUDGMENT

THE COURT ORDERS AND ADJUDGES that:

1. The application is allowed and the decision set aside. Albert Muhire's application should be reconsidered at a new hearing.

"Johanne Gauthier"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**IMM-6161-06**
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