Federal Court  Cour fédérale

Date: 20100106

Docket: IMM-5616-08

Citation: 2010 FC 16

Ottawa, Ontario, January 6, 2010

PRESENT: The Honourable Mr. Justice Pinard

BETWEEN:

MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

Djuma HABIMANA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) for judicial review of a decision 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 Djuma Habimana (the respondent) is a person in need of protection in a decision dated October 3, 2008.

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

[3] He states that he fled Rwanda and went to Burundi in 1994, because of the civil war and genocide. When he returned in 1996, he found his house occupied by Tutsi soldiers. When he tried to regain possession, he was imprisoned for no reason. However, he was released a week later, without being charged, and eventually recovered his house.

[4] He states that in 2006 he was summoned by a traditional court called Gacaca to face charges that he said resulted from a conspiracy by the Tutsi soldiers to take his house back from him. He was acquitted, and then charged again. Following the second charge he fled his country and came to Canada.

[5] After he made his refugee protection claim, members of the Royal Canadian Mounted Police (the RCMP) traveled to Rwanda to obtain information about the charges the respondent stated he was facing. They contacted members of the Gacaca, and established that the court had no file on the respondent and had never summoned him. The document that the respondent submitted in evidence showing that he had been summoned is apparently a forgery.

[6] However, the respondent testified that his account of being summoned by the Gacaca was true. The panel found the respondent's testimony "direct and plausible". It took into account the ethnic tension in Rwanda and concluded that "it is reasonable to conclude that a tribunal primarily

composed of one of the two ethnic groups could be perceived as partial". The respondent argued that the Rwandan authorities had lied to the RCMP members.

[7] However, the panel found that "this answer only refutes the Minister's allegations in part and does not permit the panel to determine the claimant's credibility".

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[8] The panel first identified revenge by the Tutsi soldiers as the basis for the respondent's fear. Given that 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*).

[9] The panel did not make a finding as to the respondent's credibility, and thus the truth of his allegations, and concluded that in any event he was a "refugee *sur place*", and therefore a person in need of protection, because of the actions of the RCMP investigators. The investigators disclosed the respondent's name to the Rwandan authorities and showed them the summons, the authenticity of which they doubted, "even though, according to the claimant, the Rwandan authorities are the persecuting agents".

[10] 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.

[11] The panel concluded that "it is reasonable to believe that the authorities would seek retribution against the claimant, who had tarnished the image of their regime abroad by using dubious documents. The claimant's situation would be aggravated by the fact that he is a Hutu dealing with a Tutsi regime."

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[12] 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.

[13] 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.

[14] However, section 97 of the Act does not provide that the events that cause a refugee protection 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.

[15] 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.

[16] 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.

[17] The panel's analysis of the impact of the RCMP investigation can be described as summary at best. The only fact accepted by the panel in its reasons is that the RCMP members disclosed the respondent's identity to the Rwandan authorities "even though, according to [him], the Rwandan authorities are the persecuting agents". The panel did not state whether the authorities were already aware of the respondent's situation or if the agents 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).

[18] I am also of the opinion that the panel could not have concluded that the respondent would be subject to a risk to his safety or life without concluding that he would be arbitrarily charged or that refugee protection claimants who were returned to Rwanda were more likely to be prosecuted or threatened than ordinary Rwandan citizens. In either case, the panel could conclude that the respondent would face 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.

[19] Regarding the panel's conclusion that the respondent was likely not to be treated fairly because of his Hutu origin, I note, as did the Minister, that the panel did conclude that section 96 of the Act did not apply to the respondent, and thus that his nationality was not sufficient ground to make him a refugee.

[20] 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 v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraph 47).

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[21] 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 October 3, 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

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