Federal Court  Cour fédérale

Date: 20130529

Docket: IMM-7489-12

Citation: 2013 FC 566

Ottawa, Ontario, May 29, 2013

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

JOSEPHINE MUKAMUGANGA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision of the Immigration and Refugee Board, Refugee Protection Division (the Board), dated June 28, 2012, wherein the applicant was determined to be neither a Convention refugee within the meaning of section 96 of the Act nor a person in need of protection as defined in subsection 97(1) of the Act.

[2] The applicant requests that the Board's decision be set aside and the application be referred back to the Board for redetermination by a different panel.

Background

[3] The applicant is a survivor of the genocide in Rwanda in 1994. Her parents, one of her sons and husband, Tutsi like her, were killed in that genocide. In the same attack that killed her husband, she suffered serious injury. She recognized two of her attackers.

[4] In 1996, when these attackers returned to Rwanda from the Congo, the applicant's daughter and stepson made complaints against them. They were arrested and jailed for seven years and freed in 2003.

[5] The applicant alleges that upon release, these two genocidaires waged a campaign of violence on her family. Her stepson was killed in November 2003, on the same day he received a notice to testify at the gacaca courts (a post-genocide community justice mechanism in Rwanda) regarding the killing of the applicant's husband. Her daughter was attacked in 2004, resulting in a miscarriage. Her son was killed in 2004 in a knife attack and the perpetrators were never found. Her house was destroyed. She reported these matters to the police to no avail. In 2011, grenades exploded near her house on two occasions. The police concluded terrorists from outside the country engaging in random acts of terror were to blame.

[6] Her daughter fled Rwanda in 2005 and was accepted as a refugee in Canada. Another son fled in 2011. The applicant suffered from high blood pressure and headaches due to the stress associated with this persecution.

[7] The applicant had a chance to attend a church conference in the United States and planned to use this trip to flee Rwanda. When the applicant arrived in the United States, she contacted her daughter in Canada. She arrived in Canada on July 25, 2011 and claimed refugee protection.

Board's Decision

[8] The Board heard the applicant's claim in two days of hearings on April 26, 2012 and June 14, 2012. The Board made its decision on June 28, 2012 and sent the decision to the applicant on July 5, 2012.

[9] The Board rejected the applicant's claim on the basis of credibility and the existence of state protection.

[10] The Board described the applicant's testimony at the first sitting as evasive and not responsive to questions about contemporary events, as opposed to the 1994 genocide. The Board indicated it had adjourned the matter to allow the applicant to secure medical evidence explaining her evasive testimony or make an application for accommodation under the *Guideline on Procedures with Respect to Vulnerable Persons Appearing Before the IRB*. The applicant

introduced a medical report at the second sitting, but it was largely speculative and outside the author's area of expertise. No application under the Guideline was made.

[11] The Board noted the applicant had produced no police reports to support her claim she had sought police protection. Given the applicant was still in touch with her children in Rwanda, the Board concluded it was reasonable to expect her to introduce such evidence.

[12] The Board concluded the agents of persecution had not caused the applicant or her family harm since 2003 or 2006 and therefore only posed a remote threat that did not rise to the level of serious possibility.

[13] The Board rejected counsel's argument that the applicant belonged to the particular social group of "gacaca witness" as she had been adamant she never considered testifying. The Board acknowledged the applicant was HIV positive but noted no one had argued persecution based on this claim.

[14] The Board questioned the applicant's claim that the church conference in the United States was a ruse to facilitate fleeing Rwanda on the basis she did in fact attend the conference. The Board drew a negative inference against the applicant's credibility due to her having failed to claim refugee protection in the United States. The Board noted her children who remained in Rwanda had not been harmed.

[15] Finally, the Board rejected the applicant's allegation she had been raped as it had not been raised in her Personal Information Form (PIF), amendments to the form, or in her medical evidence.

[16] The Board then turned to state protection. The Board discussed the principles of state protection and indicated that Rwanda was in effective control of its territory. The Board quoted from a United States Department of State Human Rights Report regarding Rwanda's civilian control of security forces and the investigation and prosecution following security force killings. The report indicated the government investigated and prosecuted individuals accused of threatening or harming genocide survivors. Other reports indicated varying levels of success in protection of such witnesses. The Board concluded the applicant had not rebutted the presumption of adequate state protection. The Board further concluded there were no compelling reasons for the applicant not to return to Rwanda as contemplated by subsection 108(4) of the Act.

Issues

[17] The applicant submits the following points at issue:

1. Did the Board err in law in determining that the applicant is not a Convention refugee or person in need of protection?

2. Did the Board act without jurisdiction, act beyond its jurisdiction or refuse to exercise its jurisdiction?

3. Did the Board fail to observe a principal of natural justice, procedural fairness or other procedure it was required by law to observe?

4. Did the Board err in law making its decision or order whether or not the error appears on the face of the record?

5. Did the Board base its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it?

6. Did the Board act in any way that was contrary to law?

[18] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the Board violate procedural fairness?

3. Did the Board err in rejecting the applicant's claim?

Applicant's Written Submissions

[19] The applicant argues the Board failed to analyze whether she was at risk based on those parts of her profile that had been accepted by the Board.

[20] The applicant argues she was denied a full and fair hearing on the basis of poor translation. The Board engaged in microscopic analysis of details concerning the dates she moved from one house to another and both the applicant and the interpreter were confused. The Board was chiefly concerned with the length of the hearing and it is not known what was lost in translation. The applicant also argues that a portion of her testimony is missing from the recording of the hearing.

[21] The applicant argues the Board was wrong to characterize her as an uncooperative witness given the language barrier that resulted in her not having a proper understanding of what was being asked. She argues the Board was right to adjourn the hearing but should have also disregarded her testimony up to that point, given her difficulty in testifying. The Board should have considered that the letter from a physician indicated an evaluation of her mental state would have been possible. The stress and stigma of being HIV positive along with the language barrier resulted in her inability to give a perfect accounting of the facts of her claim.

[22] The applicant argues the Board was wrong to draw a negative credibility inference from the failure to provide police reports. A failure to produce supporting documentation cannot reflect adversely on a claimant's credibility in the absence of evidence which contradicts her testimony. The applicant's daughter's narrative corroborates her version of events. The Board concluded the applicant's children could have helped her obtain documentary evidence, but only because the Board refused to admit emails from them indicating they fear leaving their house.

[23] The applicant submits the standard for the refugee definition is not certainty of death but rather persecution. The applicant argues she suffered persecution based on the threats and violence described above.

[24] The applicant argues the Board should not have rejected her claim based on being a gacaca witness on the basis that she never testified, since she is still a gacaca witness in the eyes of her persecutors. The Board did not question the fact that the applicant had been called to testify.

[25] The applicant further argues the Board should not have concluded her failure to claim in the United States reflected negatively on her credibility. Her evidence was that she contacted her daughter immediately upon coming to the United States. Staying in accommodations paid for by her church while she waited for her daughter was reasonable. The Board was required to assess why there was a delay in the application and failed to do so.

[26] The applicant argues the Board's state protection analysis was dependent on its credibility finding, because it did not consider the applicant's claim that she had approached the state for protection numerous times. The applicant argues the Board's analysis was concerned with serious efforts at state protection instead of the proper test of adequacy of state protection.

[27] Finally, the applicant argues that because her right to a fair hearing was compromised, the Board's decision must be quashed regardless of whether it appears that the unfairness would have resulted in a different decision.

Respondent's Written Submissions

[28] The respondent argues the relevant standard of review is reasonableness and that the Board's decision falls within the range of possible acceptable outcomes.

[29] The respondent argues the Board clearly analyzed the applicant's risk profile as a Tutsi genocide survivor. The Board explicitly considered the daughter's successful refugee claim but distinguished it from her mother's on the basis of being a gacaca witness. The respondent points out

the applicant has submitted no evidence that the translator misinterpreted the applicant's testimony and the transcript indicates the Board repeated questions and used different wording in attempts to clarify. The applicant affirmed to the Board that she understood the translator and counsel himself informed the Board he had no concerns about how the hearing was being conducted in its first sitting but that he was having difficulty communicating with his client. It was the Board who took the initiative to adjourn the matter, while the applicant and her counsel failed to provide the evidence suggested by the Board.

[30] It was reasonable for the Board to give little weight to the doctor's letter given its explicit uncertainty concerning the applicant's mental state. Given the lack of evidence presented explaining the poor testimony of the first sitting, it was reasonable for the Board to rely on this testimony.

[31] The respondent argues the applicant's argument concerning the missing transcript portion is without merit. The transcripts appear complete. Furthermore, the applicant's memorandum is inconsistent with her counsel's affidavit as to whether the alleged missing portion is from the first or second day. Incomplete transcripts do not in themselves warrant judicial review and the applicant has not made out how she was prejudiced by this omission.

[32] The respondent argues that seeking corroborating evidence where an applicant's credibility is in doubt is a matter of common sense supported by case law. The Board did not accept that she was recently threatened or require her to prove with certainty that she would be killed. The applicant was inconsistent between her port of entry claim and her oral testimony as to whether she had

testified at the gacaca tribunal. It was reasonable for the Board to question her failure to seek protection in the United States.

[33] The respondent points out the Board's state protection analysis is determinative in addition to the negative credibility finding. The Board did not rely on serious efforts analysis. It found the Rwandan state willing and able to protect genocide survivors.

Analysis and Decision

[34] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[35] It is established jurisprudence that credibility findings, described as the "heartland of the Board's jurisdiction", are essentially pure findings of fact that are reviewable on a reasonableness standard (see *Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at paragraph 7, [2003] FCJ No 162; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 46, [2009] 1 SCR 339; *Demirtas v Canada (Minister of Citizenship and Immigration)*, 2011 FC 584 at paragraph 23, [2011] FCJ No 786). Similarly, the weighing of evidence and the interpretation and assessment of evidence are reviewable on a standard of

reasonableness (see *Oluwafemi v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1045 at paragraph 38, [2009] FCJ No 1286).

[36] In reviewing the Board's decision on the standard of reasonableness, the Court should not intervene unless the Board came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47; *Khosa* above, at paragraph 59). As the Supreme Court held in *Khosa* above, it is not up to a reviewing court to substitute its own view of a preferable outcome, nor is it the function of the reviewing court to reweigh the evidence (at paragraph 59).

[37] It is trite law that no deference is warranted on matters of procedural fairness (see *Dunsmuir*, above at paragraph 50).

[38] **Issue 2**

Did the Board violate procedural fairness?

The applicant argues that faulty interpretation compromised the fairness of the hearing, but provides no evidence of such errors. The argument offered by her counsel seems to be that this Court must infer from the obviously difficult flow of questions and answers that translation was the source of the problem. Unfortunately, such an inference cannot be drawn because it is equally possible that the translation was perfectly adequate but that the applicant was simply not answering the Board's questions properly. As the respondent points out, the applicant's counsel himself expressed difficulty interacting with his client, which did not involve the use of the Board's interpreter.

[39] Given that the onus is on the applicant to make out violations of procedural fairness, I cannot find it was breached on the basis of poor translation.

[40] There may very well have been other legitimate reasons that explained the poor communication between the applicant and the Board at the hearing. However, since the applicant's counsel failed to act upon the Board's suggestion of introducing psychological evidence or making an application for procedural accommodations, there is simply no evidence on this point in which a finding that the fairness of the hearing was compromised can be rooted.

[41] The applicant submitted that a portion of the transcript was missing. A review of the record shows that at the beginning of the second day of hearings, the recording device apparently was not turned on. Some of the examination by her counsel was not recorded. It is not explained how this affects the applicant's claim. I am not of the view that on these facts, a breach of procedural fairness occurred.

[42] In my experience, when an adjudicator suggests on his own motion a particular form of evidence or procedural strategy, the suggestion should be acted upon, if possible. This is particularly true where there is a suggestion of psychological difficulties that may interfere with a party's ability to instruct her counsel. To this day, there is no evidence in the record as to the applicant's psychological state despite the concern expressed by the Board and now endorsed by this Court and her experience as a survivor of one of the world's worst traumas in recent memory. Nor has there been an explanation of why such evidence is lacking.

[43] **Issue 3**

Did the Board err in rejecting the applicant's claim?

As the case law cited above makes clear, this Court is loath to interfere with credibility determinations made by the Board given the importance of oral testimony. A review of the transcript in this case confirms the Board's difficulty in extracting basic information about the applicant's claim. Subject to my concerns described above about the paucity of evidence that might explain the applicant's difficulty in answering such questions, it was reasonable for the Board to doubt her credibility based on inconsistencies between written and oral evidence and her inability to provide any detail regarding the recent or forward-looking threats against her. Given those doubts, it was similarly reasonable for the Board to inquire into documentary evidence regarding the police complaints alleged by the applicant.

[44] Contrary to the applicant's submissions, the Board did accept that she was a survivor of the 1994 genocide and analyzed her risk on that basis, as shown by the excerpts from country conditions concerning exactly that risk. While I agree with the applicant that the "serious efforts" test is a flawed approach to state protection analysis, this was not the approach taken by the Board. The excerpts relied on by the Board described the Rwandan state's willingness and ability to protect genocide survivors.

[45] I am in agreement with the Board and the respondent that the applicant is deserving of tremendous sympathy. The grounds specified in sections 96 and 97, however, do not assist even the most sympathetic of applicants when they do not fall into the particular criteria of those provisions.

The applicant and her counsel were unable to persuade the Board she fell into those definitions and have been unable to persuade this Court there was any reviewable error in that determination.

[46] Given the evidence before the Board, its finding was transparent, justifiable, intelligible and within the range of acceptable outcomes. I would therefore dismiss the application for judicial review.

[47] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

***Immigration and Refugee Protection Act*, SC 2001, c 27**

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
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,	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) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	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) 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.	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.
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	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 themself 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.

FEDERAL COURT

SOLICITORS OF RECORD

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