Federal Court Cour fédérale

Date: 20150217

Docket: IMM-1401-14

Citation: 2015 FC 196

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, February 17, 2015

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

SONIA MUKAMUSONI
BLESSING NISHIMWE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

<u>JUDGMENT AND REASONS</u>

I. <u>Foreword</u>

Don't go far off, not even for a day, because -- because -- I don't know how to say it: a day is long and I will be waiting for you, as in an empty station when the trains are parked off	Ne sois pas un seul jour loin de moi, il est long si long le jour, je n'arrive pas à le dire, ou bien je t'attendrai comme on fait dans les gares lorsque les trains se sont

somewhere else, asleep.	endormis quelque part.
Don't leave me, even for an hour, because then the little drops of anguish will all run together, the smoke that roams looking for a home will drift into me, choking my lost heart.	Ne t'en vas même pas pour une heure: en elle alors s'unissent les gouttes de l'insomnie et toute la fumée qui cherche une maison pour tuer mon cœur perdu viendra peut-être encore.
Oh, may your silhouette never dissolve on the beach; may your eyelids never flutter into the empty distance. Don't leave me for a second, my dearest, because in that moment you'll have gone so far I'll wander mazily over all the earth, asking, Will you come back? Will you leave me here, dying?	Que ne se brise ton portrait sur le sable, que ne s'envolent pas tes paupières sans moi: ne t'en va pas une minute, bien-aimée, un instant suffirait, tu t'en irais si loin que je traverserais la terre en demandant si tu vas revenir ou me laisser mourant.
(Pablo Neruda, Chilean Poet, 1904-1973)	(Pablo Neruda, poète chilien, 1904-1973)

[1] This case revolves around a woman who is looking for her missing husband, and entails determining the reasonableness of the decision made by the Refugee Protection Division (RPD) regarding the applicant's credibility.

[2] If the story is credible, it is difficult to imagine any greater suffering than the one resulting from the disappearance of someone you love. Thousands of women and men who are looking for answers about the disappearance of their loved ones share not only the pain of silence, inertia and anguish, but also the courage required for perseverance, patience and hope.

[3] Every application for protection before a court in Canada presents its own unique and distinct anatomy, and demands that attention be paid to cultural, historical, socio-political and socio-economic factors.

[4] Applicants' testimonies are coloured not only by the evidence, but also by human nature, which, at first glance, may sometimes seem incomprehensible and paradoxical, as revealed by the whole file and the person's narrative. Careful attention must be paid to the inherent logic of every human being, which can at times, from certain points of view, appear to surpass the limits of reason, but which, in reality, is entirely reasonable if one looks at all of the information flowing from the evidence.

[5] From this perspective, determinations of fact must be drawn with regard to the applicants' own points of reference, while remaining anchored in evidence. This kind of consideration for cultural distinctions helps establish a true dialogue between the tribunal and the parties in a case:

> Bits and pieces of thread of a narrative, together, weave a story for it to live. Separately, scrutinized, they remain stillborn. Nevertheless, just as each ship needs, at the very least, an anchor by which to moor, so does an individual need, at the very least, an anchor to corroborate the inherent logic of his narrative, no matter how different the country condition landscape, cast of characters, encyclopedia of references and dictionary of terms, appear.
>
> (*Borate v Canada (Minister of Citizenship and Immigration)*, 2005 FC 679 at para 1).

II. Introduction

[6] This is an application for judicial review pursuant to the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of a decision by the RPD, dismissing the claims for protection by the applicant and her daughter under sections 96 and 97 of the IRPA.

III. Facts

[7] The applicant in this case, Sonia Mukamusoni [the applicant] and her daughter, Blessing Nishimwe, who is six years old, are citizens of Burundi and allege a fear of persecution based on their imputed political opinion. Blessing's application is based on that of her mother.

[8] The applicant's husband, Emery Ndikumana, is a member of the country's opposition party, the Movement for Solidarity and Democracy [MSD], where he was the treasurer in the commune of Ngagara. Because of his activities in the MSD, the applicant's husband was targeted and received threats from the Imbonerakure militia and the National Intelligence Service [SNR].

[9] On October 19, 2012, the applicant's husband was ambushed, and shots were fired. The applicant's husband was allegedly kidnapped, and the applicant has not seen him since.

[10] On November 21, 2012, a member of the Imbonerakure militia came to the applicant's home, seeking information about her husband's whereabouts. He allegedly slit the throat of a duck in front of the applicant and her daughter, while making death threats against them.

[11] Following this incident, the applicant went into hiding at a friend's place, south of Bujumbura. In December 2012, the applicant obtained visas for the United States, and passports for herself and her daughter. However, they did not have enough money to leave immediately.

[12] The applicant set out four times to find her husband in Kampala, Uganda, in January, February and March 2013.

[13] On February 23, 2013, as she was returning to Burundi from Kampala, the applicant was detained and interrogated by the SNR about her trips to Uganda and her husband's activities. The applicant was imprisoned in Bujumbura for two weeks. She was then released as a result of pressure by the Burundi Association for the Protection of Human Rights and Detained Persons [APRODH].

[14] The applicant continued to receive threats from the Imbonerakure militia, coinciding with the return from exile of the President of the MSD in March 2013. The applicant hid at the home of a friend in Uvira, in the Democratic Republic of the Congo [DRC], where she became the victim of extortion, prompting her to return to Burundi.

[15] With financial assistance from a priest, the applicant left Burundi on May 26, 2013, and arrived in Canada through the US border with her daughter on May 31, 2013, to seek refugee protection.

[16] A hearing was held before the RPD on July 31, 2013.

IV. Impugned decision

[17] In its reasons dated January 28, 2014, the RPD concluded that the applicant generally lacked credibility. The RPD found that the applicant did not meet her burden of proving a reasonable chance of persecution or risk were she to return to Burundi.

[18] Regarding the evidence, the RPD concluded as follows:

> [The applicant's story] is not supported by any other document corroborating the facts about the persecution, or even the fact that her husband disappeared or fled, other than his MSD membership card and a statement signed by the president of the MSD communal council in Ngagara that simply indicates that he was a member of the party and acted as treasurer and leader within the party. This document, which does not outline any specific problems, was signed in Bujumbura on June 20, 2013.
>
> (Tribunal Record at p 12, RPD decision at para 43).

V. Issues

[19] There are two issues raised in this application:

(i) Are the RPD's credibility findings reasonable; and

(ii) Did the RPD err in failing to conduct a separate analysis under section 97 of the IRPA?

VI. Statutory provisions

[20] The following statutory provisions are relevant to this application:

Convention refugee	**Définition de réfugié**

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.
Person in need of protection	**Personne à protéger**
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,	(i) elle ne peut ou, de ce

because of that risk, unwilling to avail themself of the protection of that country,	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.
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	(2) A également qualité de 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.
Exclusion – Refugee Convention	**Exclusion par application de la Convention sur les réfugiés**
98. A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.	**98**. La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.

VII. Applicant's arguments

[21] The applicant argues that the RPD based its findings on peripheral considerations in determining her lack of credibility, without regard for all of the evidence.

[22] Specifically, the applicant claims that the RPD erred in disregarding many elements in her testimony, such as those related to her two-week arbitrary imprisonment, her attempts to seek asylum in the DRC, and the threats made by members of the Imbonerakure against the applicant and her daughter. Moreover, the RPD disregarded the evidence about her husband's involvement in the MSD, the way members of the opposition party are treated in Burundi, and the fact that her husband is still missing.

[23] In addition, the applicant claims that the RPD's decision is based on a microscopic analysis of her application and on unreasonable inferences (*Afonso v Canada (Minister of Citizenship and Immigration)*, 2007 FC 51).

[24] Finally, the applicant submits that the RPD erred in failing to conduct a separate analysis under section 97 of the IRPA (*Odetoyinbo v Canada (Minister of Citizenship and Immigration)*, 2009 FC 501).

VIII. Respondent's arguments

[25] The respondent bases its position on the deference owed to the RPD.

IX. Analysis

A. *Are the RPD's credibility findings reasonable?*

[26] The RPD's findings on credibility are reviewed on a standard of reasonableness. Consequently, the Court's owes deference to the RPD given that the assessment of the applicant's credibility is at the very heart of the task Parliament has chosen to leave to the RPD (*Rahal v Canada (Minister of Citizenship and Immigration)*, 2012 FC 319 at paras 22, 31 and 60 [*Rahal*]; *Dunsmuir v New Brunswick*, [2008] 1 SCR 190; and *Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 at para 4 [*Aguebor*]).

[27] The RPD determined that the applicant's testimony was tainted by omissions, inconsistencies and implausibilities that the RPD deemed to be compounded by a lack of reasonable explanations that could compensate for these weaknesses. The cumulative impact of the gaps in key aspects of the applicant's testimony, having regard to all of the evidence, led the RPD to find a general lack of credibility on the part of the applicant.

[28] On the one hand, it is appropriate for the RPD to take into consideration factors such as the plausibility of the applicant's testimony, her hesitations and her lack of precision, and to assign a corresponding weight to these (*Rahal*, above, at para 45; *Hassan v Canada (Minister of*

Citizenship and Immigration), 2010 FC 1136 at para 12; *A.M. v Canada (Minister of Citizenship and Immigration)*, 2005 FC 579 at para 19; *Aguebor*, above, at para 4; *Yousef v Canada (Minister of Citizenship and Immigration)*, 2006 FC 864 at para 19).

[29] On the other hand, as indicated by Justice Luc Martineau in *Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 [*Lubana*], not every kind of inconsistency or implausibility will reasonably support the RPD's negative findings on an applicant's credibility:

> [11] It would not be proper for the Board to base its findings on extensive "microscopic" examination of issues irrelevant or peripheral to the applicant's claim [citations omitted].
>
> . . .
>
> [14] Finally, the applicant's credibility and the plausibility of testimony should be assessed in the context of her country's conditions and other documentary evidence available to the Board. Minor or peripheral inconsistencies in the applicant's evidence should not lead to a finding of general lack of credibility where documentary evidence supports the plausibility of the applicant's story [citations omitted].
>
> (*Lubana* at paras 11 and 14).

[30] All of the nuances and consequences of a story should be analyzed:

> A tribunal must be careful when rendering a decision based on a lack of plausibility because refugee claimants <u>come from diverse cultures, and actions which appear implausible when judged from Canadian standards might be plausible when considered from within the claimant's milieu</u>. [Emphasis added.]
>
> (*Valtchev v Canada (Minister of Citizenship and Immigration)*, [2001] FCJ No 1131 at para 7).
>
> [T]he Board should not be quick to apply <u>the North American logic and reasoning to the claimant's behaviour: consideration should be given to the claimant's age, cultural background and previous social experiences</u>. [Emphasis added.]

(*R.K.L. v Canada (Minister of Citizenship and Immigration)*, [2003] FCJ No 162 at para 12).

> [P]lausibility findings involve a distinct reasoning process from findings of credibility and can be influenced by cultural assumptions or misunderstandings. Therefore, implausibility determinations must be based on clear evidence, as well as a clear rationalization process supporting the Board's inferences, and should refer to relevant evidence which could potentially refute such conclusions. [Emphasis added.]

(*Santos v Canada (Minister of Citizenship and Immigration)*, [2004] FCJ No 1149 at para 15).

> [W]hile the sworn testimony of a claimant is to be presumed to be true in the absence of contradiction, it may reasonably be rejected if the RPD finds it to be implausible. However, a finding of implausibility must be rational and must also be duly sensitive to cultural differences. It must also be clearly expressed and the basis for the finding must be apparent in the tribunal's reasons [citations omitted]. [Emphasis added.]

(*Rahal*, above at para 44).

> [I]t is accepted that a tribunal rendering a decision based on a lack of plausibility must proceed with caution. I find it useful to reproduce the following passage from L. Waldman, *Immigration Law and Practice* (Markham: Butterworths Canada Ltd. 1992) at page 8.10, paragraph § 8.22 which deals with plausibility findings and the impact of documentary evidence that may be before the tribunal:
>
> > § 8.22 Plausibility findings should only be made in the clearest of cases – where the facts as presented are either so far outside the realm of what could reasonably be expected that the trier of fact can reasonably find that it could not possibly have happened, or where the documentary evidence before the tribunal demonstrates that the events could not have happened in the manner asserted by the claimant. Plausibility findings should therefore be "nourished" by reference to the documentary evidence. Moreover, a tribunal rendering a decision based on lack of plausibility must proceed cautiously, especially when one considers that refugee claimants come from diverse cultures, so that actions which might appear implausible if

> judged by Canadian standards might be plausible when considered within the context of the claimant's background. [Emphasis added.]
>
> (*Divsalar v Canada (Minister of Citizenship and Immigration)*, [2002] FCJ No 875 at para 24).

[31] A deeper examination of the RPD's reasons and of the transcript of the hearing reveals that the RPD to a large extent relied on the implausibility of the applicant's travels to Uganda to find her husband. The RPD noted that it was implausible that the applicant would have made the trip between Bujumbura and Kampala several times without any reliable information or certainty as to her husband's whereabouts. The RPD also considered it to be implausible that the applicant would have remained without information about her husband despite the fact that she spoke to him on the phone for one minute. Specifically, the RPD indicated as follows:

> The panel is of the opinion that it is implausible that, based on such limited information, the claimant would travel to Kampala, a city of over one and a half million people no less, to find her husband, with so little information. The panel considers that the claimant's explanation is not very reasonable, thus undermining her credibility.
>
> (Tribunal Record at p 9, RPD decision at para 29).

[32] Among other things, the RPD also drew a negative inference from the fact that the applicant did not mention that it was the APRODH that helped get her out of prison, despite the fact that the applicant testified that she was released thanks to the intervention of a human rights organization.

[33] In addition, the RPD drew a negative inference from the fact that the applicant mentioned that her husband was in Uganda, whereas she had also testified that he was in Kampala. At the

hearing, the applicant and her counsel explained that the applicant used Kampala and Uganda interchangeably because Kampala is the capital of Uganda, and its most populated city. Counsel for the applicant further explained that this form of expression is a typical style of communication in the applicant's culture. The Court accepts that such a negative inference is unreasonable inasmuch as the applicant's statements are consistent and can coexist.

[34] Often, the oral testimonies and explanations of applicants are the only available evidence in support of their refugee protection claims. With this in mind, explanations given by the applicant which are not obviously implausible must be taken into account by panels (*Lubana*, above at para 20; *Owusu-Ansah v Canada (Minister of Employment and Immigration)*, [1989] FCJ No 442).

[35] Moreover, the documentary evidence before the RPD addresses the applicant's allegations regarding her husband's persecution and disappearance. Specifically, the document prepared by the Research Directorate of the Immigration and Refugee Board entitled *Burundi: Movement for Solidarity and Democracy (MSD)*, describes the way the party and its members are treated by the authorities:

> [I]n a telephone interview with the Research Directorate, an independent consultant in Burundi, who has been working with NGOs and international organizations for more than 25 years and who writes about the political situation in the country, stated that the party in power considers the MSD [translation] "a threat," and that the party is "is the government's second target, after the FNL [National Liberation Forces]" (28 Jan. 2013).
>
> . . .
>
> According to the independent consultant, MSD members are [translation] "targeted" by the regime and may be intimidated, imprisoned and, "in extreme cases, they may even be killed"

> (independent consultant 28 Jan. 2013). He added that, in particular, the association of youths with the ruling party [translation] "operates as a sort of paramilitary militia" on behalf of the regime (ibid.).
>
> (*Burundi: Movement for Solidarity and Democracy (MSD)*, 22 February 2013, Tribunal Record at pp 248-250).

[36] An article in *Human Rights Watch* (May 2012) describes the widespread impunity regarding violence against political party members in Burundi:

> Scores of people have been killed in political attacks in Burundi since the end of 2010, Human Rights Watch said in a report released today. The killings, some by state agents and members of the ruling party, others by armed opposition groups, reflect widespread impunity, the inability of the state to protect its citizens, and an ineffective judiciary.
>
> . . .
>
> The report also highlights numerous cases in which individuals were threatened, forced into hiding, and murdered as a result of their perceived political leanings. For example, Audace Vianney Habonarugira, a demobilized FNL combatant, was killed in July 2011. Days before he was killed he gave *Human Rights Watch* a step-by-step description of how he was being hunted across the country by police, military, and intelligence agents.
>
> (*Burundi: Escalation of Political Violence in 2011*, Human Rights Watch, Tribunal Record at pp 239-240).

[37] In addition, as described in a report published by *Human Rights Watch* in 2013:

> Political killings diminished significantly in 2012, but there were sporadic attacks by armed groups as well as killings of members or former members of the opposition National Liberation Forces (FNL). Despite repeated promises to deliver justice for these crimes, the government failed to take effective action to do so. In the vast majority of politically motivated killings, thorough investigations were not carried out, and there were no arrests or prosecutions. Impunity was particularly pronounced in cases where

> the perpetrators were suspected to be state agents or members of the Imbonerakure, the youth league of the CNDD-FDD.
>
> (*Country Chapter "Burundi*", Human Rights Watch, Tribunal Record at p 234).

[38] At the core of the applicant's claim are her subjective fear and the objective basis for this fear, stemming from the applicant's alleged persecution on the ground of the political opinion attributed to her by her persecutors.

[39] The Court finds that the elements related to this subjective and objective fear were not reasonably addressed by the RPD.

[40] In view of the above, the Court concludes that the RPD's findings are unreasonable.

B. *Did the RPD err in failing to conduct a separate analysis under section 97 of the IRPA?*

[41] The RPD concluded that the risk alleged by the applicant had no basis under section 97 of the IRPA. It appears that the RPD conducted an integrated analysis of the considerations in the applicant's claim for refugee protection status, under both sections 96 and 97 of the IRPA.

[42] According to the case law, a separate or detailed analysis under section 97 is not always required, and depends on the particular circumstances of each claim (*Brovina v Canada (Minister of Citizenship and Immigration)*, 2004 FC 635 at para 17).

[43] As indicated by Chief Justice Paul S. Crampton in *Kaur v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1379:

> [50] The Board is not obliged to conduct a separate analysis under section 97 in each case. Whether it has an obligation to do so will depend on the particular circumstances of each case (*Kandiah v Canada (Minister of Citizenship and Immigration)*, 2005 FC 181 at para 16, 137 ACWS (3d) 604). Where no claims have been made or evidence adduced that would warrant such a separate analysis, one will not be required (*Brovina v Canada (Minister of Citizenship and Immigration)*, 2004 FC 635 at paras 17 and 18, 254 FTR 244; *Velez*, above at paras 48-51.
>
> [51] Given that the allegations made by Ms. Kaur in support of her claims under section 97 were the same as those that she advanced in support of her claims under section 96, the Board was under no obligation to undertake a second analysis of those claims under section 97, once it had found that her allegations were not credible.
>
> (*Kaur* at paras 50 and 51).

[44] In view of the Court's conclusions on the unreasonableness of the findings concerning the applicant's credibility, the question of a separate analysis under section 97 is not determinative.

X. Conclusion

[45] In view of the reasons set out above, the Court finds that the RPD's decision is unreasonable.

[46] The Court considers that the applicant's claim that the RPD breached its duty of procedural fairness by issuing a decision six months after the hearing was held is without merit.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review is allowed and that the file is referred back for re-determination by a differently constituted panel. There is no question of general importance to be certified.

"Michel M.J. Shore"
Judge

Certified true translation
Johanna Kratz, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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