Federal Court Cour fédérale

Date: 20150429

Docket: IMM-5746-14

Citation: 2015 FC 544

Ottawa, Ontario, April 29, 2015

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

TRIPHINE IYARWEMA
ANAIS LISA NTAGUNGIRA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Triphine Iyarwema (the Applicant) and her minor daughter Anais Lisa Ntagungira have brought an application for judicial review pursuant to s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the IRPA) of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board). The Board determined that the Applicants are neither Convention refugees within the meaning of s 96 of the IRPA, nor persons in need of protection as defined in s 97(1) of the IRPA.

[2] Before the Board the Applicants' counsel sought to withdraw the claim for refugee protection on behalf of Anais, given that she is a citizen of the United States. The Board declined to permit the withdrawal on the ground that it had received insufficient notice. Before this Court the parties proceeded on the understanding that Anais' claim for protection is no longer being advanced.

[3] For the reasons that follow, the Applicant's application for judicial review is allowed and the matter is remitted to a differently-constituted panel of the Board for re-determination.

I. Background

[4] The Applicant is a citizen of Rwanda. Her claim for protection was based on the following contentions.

[5] The Applicant is a Tutsi who survived the atrocities of the 1994 genocide in Rwanda. Her mother and six of her siblings also survived, but her father and two of her brothers were killed. The Applicant was kidnapped and held as a "sex slave" for approximately one month in May, 1994 by a man named Ndahayo Gaspard (Ndahayo). In 2003, the Applicant brought a charge of rape against Ndahayo before the Gacaca courts. Based on testimony that was provided by the Applicant and by another witness named Ngendahayo Onesphore (Ngendahayo), Ndahayo, who was then in the Congo, was sentenced *in absentia* to 15 years in prison.

[6] On April 15, 2009, the Applicant realised that Ndahayo was riding on the same minibus as she was. She screamed loudly to the bus driver to go to the nearest police station. At the police

station, Ndahayo was taken into custody and the Applicant was told that she would be summoned to testify against him. Two months later, she learned that Ndahayo had been set free. The Applicant discovered that government authorities had decided not to imprison those who voluntarily returned from the Congo in order to encourage people to come back to Rwanda.

[7] In January, 2010, the Applicant learned that Ngendahayo, the man who had supported her testimony against Ndahayo, had been murdered together with his wife.

[8] On July 26, 2010, the Applicant was driving home from a friend's wedding with her husband when rocks were thrown through the car's window. This caused serious injury to her husband's elbow. The next day, the Applicant received an anonymous phone call warning her that the next time they would not escape alive.

[9] During the night of July 21, 2012, the Applicant's home was attacked by unknown people who tied up her guard and tried to break into the house. She and her husband screamed for help, alerting the neighbours, whereupon the intruders fled. The Applicant and her husband then made the decision to leave Rwanda. On November 23, 2012, the Applicant departed Rwanda with her youngest child, Anais, for the United States. They entered Canada by car on November 26, 2012 and claimed refugee status upon arrival.

[10] The Board refused the Applicant's refugee claim based on an adverse finding of credibility. The Board accepted that the Applicant had survived atrocities during the genocide and had given evidence against Ndahayo before the Gacaca courts. However, the Board did not

accept that the Applicant faces an ongoing risk of persecution today. The Board's conclusion was based on the following findings:

- There was a contradiction between the Applicant's testimony that she had seen Ndahayo on a minibus in 2009 and caused him to be arrested and a letter that she wrote to the police in 2010. In the letter she made no reference to that incident and indicated only that Ndahayo was "at large" and "it is known that he is in the country".

- The fact that Ndahayo had been freed after two months' imprisonment in 2009 indicated that he had received some kind of amnesty, and the Applicant could not therefore cause him to be re-arrested or re-tried. Accordingly, there was no longer any reason for Ndahayo to want to harm her.

- There was no link between the murder of Ngendahayo and his previous testimony against Ndahayo, since the police had arrested a prime suspect. This was an individual who had been acquitted of all charges relating to the genocide for lack of evidence, and whose case Ngendahayo was petitioning the Gacaca Secretariat to reopen.

- There was no evidence that Ndahayo was responsible for the attack on the Applicant's car or the attack on her home. Furthermore, there was a contradiction between the Applicant's allegation that she had received a threatening phone call from a stranger or a person whom she thought was Ndahayo, and the report she

filed with police in which she said the phone call had specifically been from Ndahayo.

II. Issue

[11] The sole issue raised in this application for judicial review is whether the Board's assessment of the Applicant's credibility and its treatment of the evidence were reasonable.

III. Analysis

[12] The Board's findings of credibility and its treatment of the evidence are subject to review against the standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9). This Court owes deference to the Board with respect to matters of credibility and its evidentiary findings (*Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at paras 35-38; *Trevino Zavala v Canada (Citizenship and Immigration)*, 2009 FC 370 at para 5; *Hernandez Cortes v Canada (Citizenship and Immigration)*, 2009 FC 583 at para 28; *Kurkhulishvili c Canada (Citoyenneté et Immigration)*, 2015 CF 7 at para 4).

[13] The Applicant says that the Board's adverse credibility findings were based on a microscopic analysis of the evidence (*Attakora v Canada (Minister of Employment and Immigration)*, [1989] FCJ No 444, (FCA) at page 200). She points as an example to the finding that there was a contradiction between the Applicant's testimony regarding her encounter with Ndahayo in 2009 and her letter to the police in 2010 in which she said that Ndahayo was at large and she did not know his whereabouts. In addition, the Board's findings were made without

regard to the evidence. The Board concluded that Ndahayo had received some kind of amnesty, but the Applicant had not said this in her testimony nor was there any documentary evidence to support it. The Board's finding was pure speculation, as was its inference that the Applicant no longer had any reason to fear Ndahayo. More fundamentally, the Board erred in relying on evidence that it had previously rejected to impeach the Applicant's credibility with respect to other matters.

[14] The Respondent argues that there were several contradictions and inconsistencies in the Applicant's testimony and evidence, including with respect to her encounter with Ndahayo in 2009. This was not mentioned in her letter to the police in 2010, and it was contradicted by other statements such as "Until now, I don't know where he is, even though it is known that he is in the country". It was open to the Board not to accept the Applicant's explanation for this discrepancy. In addition, the Applicant's testimony regarding the threatening phone call was contradictory, and the Applicant did not provide any evidence to support her claim that the attacks on her car and her home were linked to Ndahayo. Based on the Applicant's testimony regarding the early release of convicted perpetrators of the genocide, and the fact that Ndahayo had not been re-arrested after his release in 2009, it was reasonable for the Board to conclude that Ndahayo had been granted some form of amnesty. Although not determinative, it was also reasonable for the Board to consider the fact that Ndahayo had never attempted to harm the Applicant since the genocide in 1994 despite apparently knowing where she lived.

[15] It is not necessary to address all of the grounds advanced on behalf of the Applicant. I am satisfied that the Board committed a serious error by relying on evidence that it had previously

rejected to impeach the Applicant's credibility with respect to other matters. The Board rejected the Applicant's assertion that she had encountered Ndahayo on a minibus in 2009 and caused him to be detained. Nevertheless, the Board relied on this very assertion to conclude that Ndahayo had received some form of amnesty, given that he had been released after only two months.

[16] Justice Mandamin addressed a similar issue in *Warnakulasuriya v Canada (Citizenship and Immigration)*, 2008 FC 885:

> [16] While other errors and irrelevancies exist, the most serious error is the Board's method of analysis. Upon a careful review of the Reasons and the Transcript, I find that the Board engaged in a piecemeal analysis. On many of the evidentiary issues, the Board decided not to accept the fact or evidence in question and then moved on to examine another issue in the alternative. The Board would use the preceding disbelieved evidence to decide that next evidentiary issue.
>
> […]
>
> [18] One cannot use evidence it disbelieves to support a finding that other evidence is unbelievable. In doing so, the Board makes no finding at all. The Board's approach to credibility findings in the alternative is an error.

[17] The finding by the Board in this case that Ndahayo had been granted some form of amnesty was not peripheral. It was central to the Board's conclusion that there was no longer any reason for Ndahayo to harm the Applicant. The error in the Board's analysis renders its decision unreasonable, and the Applicant's application for judicial review must therefore be allowed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review of Triphine Iyarwema is allowed, and the matter is remitted to a differently-constituted panel of the Board for re-determination. It is not necessary to decide the application for judicial review of Anais Lisa Ntagungira. No question is certified for appeal.

"Simon Fothergill"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5746-14
STYLE OF CAUSE:	TRIPHINE IYARWEMA, ANAIS LISA NTAGUNGIRA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	APRIL 7, 2015
JUDGMENT AND REASONS:	FOTHERGILL J.
DATED:	APRIL 29, 2015

APPEARANCES:

Laïla Demirdache	FOR THE APPLICANTS
Suzanne Trudel	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Laïla Demirdache Community Legal Services Ottawa Centre Barristers and Solicitors Ottawa, Ontario	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT