Federal Court  Cour fédérale

Date: 20150526

Docket: IMM-5052-13

Citation: 2015 FC 678

Ottawa, Ontario, May 26, 2015

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

BEATRICE NYIRAMAJYAMBERE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant's claim for refugee protection was denied by the Refugee Protection Division of the Immigration and Refugee Board of Canada (the Board). She now applies for judicial review of that decision pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[2] The applicant seeks an order setting aside the negative decision and returning the matter to a different member of the Board for redetermination.

I. Background

[3] The applicant is a citizen of Rwanda. She alleged that she was at risk from the authorities in Rwanda due to her perceived political opinion.

[4] In July 1998, when the applicant was seventeen years old, she was imprisoned for two weeks by soldiers and military intelligence in Rwanda. During that time, she was tortured and raped.

[5] In August 1999, the applicant was sent by her mother to live in Kenya.

[6] In December 2003, the applicant returned to her home in Rwanda.

[7] In November 2009, the applicant moved to Kigali to take computer instruction to prepare for the management of her own business. Her instructor was her friend Chantal's brother. He was a member of the Unified Democratic Forces political party (UDF-Inkingi), a coalition of Rwandan opposition parties. The applicant was sympathetic to the party, but did not join as a member.

[8] In February 2010, the applicant's instructor was detained due to suspicion of organizing a group of people responsible for tossing grenades in Kigali. The applicant and Chantal were

detained, questioned and tortured. The applicant was released a week later upon three conditions: i) she was not to leave Kigali before the final decision about her involvement was rendered; ii) she was to report to the police station every Friday; and iii) she was to provide names of members of the UDF-Inkingi. The applicant only complied with the first two conditions.

[9] In May 2010, the applicant fled Kigali because she was afraid that her failure to provide names had angered the authorities. Also, she suspected that her friend Chantal might have implicated her. Shortly after she left, the local defence guard went to her mother's house and her sister's house, looking for her.

[10] In July 2010, the applicant relocated to Uganda, where she stayed for approximately eight months. She was advised to seek refuge further away from Rwanda. She remained in hiding until an agent made plans to bring her to a safe country.

[11] On March 20, 2011, the applicant took an airplane to Amsterdam and then to Montreal. Next, she took a bus to Ottawa where she claimed refugee protection on March 23, 2011.

II. Decision Under Review

[12] In a decision dated June 18, 2013, the Board made a negative decision ruling that the applicant was neither a Convention refugee nor a person in need of protection.

[13] The Board found under subsection 97(1), "on a balance of probabilities, more likely than not, the claimant would not be subject personally to a risk to her life or to a risk of cruel and

unusual treatment or punishment if she were to return to Rwanda." Under section 96, it found "on an objective basis, on a balance of probabilities, there is no reasonable chance or serious possibility that the claimant would be persecuted should she return to Rwanda." The Board determined that the country's changed circumstances were the main issue. It also found the applicant was credible.

[14] The Board found the applicant's detention during the month of February 2010 was in the context of the run-up to the presidential election to be held on August 9, 2010. It noted the applicant was released because the police authorities did not consider her to be a member of UDF-Inkingi or a person responsible for the civil unrest; otherwise, she would not have been released.

[15] It also noted after the month of May 2010, there was no indication that the authorities were still looking for the applicant. The applicant attributed the lack of information to the concern that the telephone calls with her sister were being monitored. However, the Board was of the view that the applicant's sister would have advised the applicant if authorities were still looking for her.

[16] The Board then reviewed the documentary evidence on Rwanda's changed country circumstance due to the election of President Paul Kagame to a second seven-year term and senate election being won by the ruling party, RPF. Here, the Board was of the opinion that the applicant did not possess the profile of a person who would be considered to be a traitor.

[17] Therefore, the Board found the applicant was neither a Convention refugee nor a person in need of protection.

III. Issues

[18] The applicant raises three issues for my consideration in her written submissions:

1. What is the standard of review?
2. Did the Board err in failing to consider the "compelling reasons" exception?
3. Did the Board err by applying the incorrect test under section 96?

[19] However, at the hearing of the matter, the applicant stated that the key issue was compelling reasons and only submitted argument on this issue. The respondent stated there was only one issue which was compelling reasons.

[20] I prefer the applicant's separation of issues as stated at the hearing and rephrase them as follows:

A. What is the standard of review?

B. Did the Board err in not considering the "compelling reasons" exception?

IV. Applicant's Written Submissions

[21] The applicant submits that the standard of review of the Board's findings with respect to the reliability of evidence is reasonableness (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*]).

[22] First, the applicant submits the Board failed to consider the compelling reasons exception under subsection 108(4) of the Act. She argues it has been established that she suffered horrific acts at the hands of the Rwandan authorities as demonstrated in her detainments in 1998 and 2010. Her psychological report showed that she continued to suffer from these past incidents of persecution.

[23] Here, the Board did identify the compelling reasons exception as an issue at the outset of the hearing, but it failed to conduct an analysis in its decision.

[24] Further, the applicant submits an assessment under the compelling reasons exception is mandatory in certain circumstances (see *Yamba v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 457, 96 ACWS (3d) 289 [*Yamba*]). She sets out the test in *Suleiman v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1125, [2005] 2 FCR 26 that "it is the state of mind of the refugee claimant that creates the precedent" (at paragraph 19). The applicant argues the Board was required to assess whether she, who had suffered greatly from past incidents of persecution, ought to be forced to return. Here, the Board failed to conduct this assessment and hence made an unreasonable decision.

[25] Second, the applicant submits the Board applied an incorrect test under section 96. She argues in order to meet the definition of a Convention refugee under section 96 of the Act, a claimant must establish that they face "more than a mere possibility of persecution" which has been held to be less than a balance of probabilities. For support, she cites *Adjei v Canada*

(Minister of Employment and Immigration), [1989] 2 FC 680 [*Adjei*] and *Fi v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1125, [2006] FCJ No 1401.

[26] The applicant argues the standard of balance of probabilities is only applicable to a section 97 analysis (see *Li v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1514, [2003] FCJ No 1934).

V. Respondent's Written Submissions

[27] The respondent submits the issue of whether the Board ought to have considered the compelling reasons exception is reviewable on a standard of reasonableness (see *Decka v Canada (Minister of Citizenship and Immigration)*, 2005 FC 822 at paragraph 5, [2005] FCJ No 1029; and *Alharazim v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1044 at paragraphs 17 to 25, [2010] FCJ No 1519).

[28] As for the issue of the proper test for section 96, the respondent submits it is reviewable on the standard of correctness (see *Ospina v Canada (Minister of Citizenship and Immigration)*, 2011 FC 681 at paragraph 20, [2011] FCJ No 887) [*Ospina*]; *Mugadza v Canada (Minister of Citizenship and Immigration)*, 2008 FC 122 at paragraph 10, [2008] FCJ No 147 [*Mugadza*]; and *Rahman v Canada (Minister of Citizenship and Immigration)*, 2009 FC 768 at paragraph 36, [2009] FCJ No 945 [*Rahman*]).

[29] Insofar as the issue of compelling reasons exception is concerned, the respondent submits the Board did not have an obligation to conduct this assessment. In order to engage in a

compelling reasons analysis, the Board must first find that an applicant was a refugee or protected person and that they no longer have that status due to a change in circumstances (see *Luc v Canada (Minister of Citizenship and Immigration)*, 2010 FC 826 at paragraphs 32 and 33, [2010] FCJ No 1023 [*Luc*]). It argues the present case is similar to *Naivelt v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1261, [2004] FCJ No 1543. In that case, this Court found despite the "horrific treatment" that the female applicant had previously endured, it was not persuaded that the Board had an obligation to consider the compelling reasons exception.

[30] Here, the precursors for a compelling reasons analysis under subsection 108(4) were not present. The respondent submits the applicant failed to demonstrate that the Board had an obligation to conduct a compelling reasons analysis.

[31] Insofar as the test for section 96 is concerned, the respondent submits the Board applied the correct test. It argues "[t]he case law is clear that the test for section 96 is whether the Applicant has established, on a balance of probabilities, that there is a reasonable chance or serious possibility that the Applicant faces a prospective risk of persecution." For support, it cites *Adjei, Lopez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1156 at paragraph 20, [2006] FCJ No 1452 [*Lopez*]; and *Ndjizera v Canada (Minister of Citizenship and Immigration)*, 2013 FC 601 at paragraph 26, [2013] FCJ No 668 [*Ndjizera*].

VI. Applicant's Written Reply

[32] In response to the respondent's submissions with respect to the analysis of compelling reasons, the applicant submits the Federal Court of Appeal in *Yamba* at paragraphs 4 and 5,

confirmed that the analysis of compelling reasons forms part of the determination process, rather than being an analysis conducted after a determination of refugee status.

[33] She argues the cases cited by the respondent are distinguishable. In *Luc*, the Board found the applicant had not established past persecution because she had not been personally persecuted (at paragraphs 25 to 27). In the case at bar, the Board accepted the facts establishing past persecution from the applicant's perceived political opinion.

VII. Respondent's Further Written Submissions

[34] The respondent submits in order to make a successful claim, an applicant must demonstrate a well-founded fear of persecution, establishing both subjective and objective fears. Here, the applicant's allegations were not based on her 1998 detainment. It argues the present case resembles the case of *Henry v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1084 at paragraph 44, [2013] FCJ No 1222. The onus is on the applicant to show that she has a well-founded fear of persecution in the future to support her claim.

VIII. Analysis and Decision

A. *Issue 1 - What is the standard of review?*

[35] 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* at paragraph 57).

[36] Insofar as the issue of the consideration for compelling reasons is concerned, this is a question of mixed fact and law, not a pure error of law, and is therefore reviewable on the standard of reasonableness (see *IBS v Canada (Minister of Citizenship and Immigration)*, 2011 FC 777, [2011] FCJ No 976; and *Adel v Canada (Minister of Citizenship and Immigration)*, 2010 FC 344 at paragraph 22, [2010] FCJ No 398).

[37] The standard of reasonableness means that I should not intervene if the Board's decision is transparent, justifiable, intelligible and within the range of acceptable outcomes (*Dunsmuir* at paragraph 47). Here, I will set aside the Board's decision only if I cannot understand why it reached its conclusions or how the facts and applicable law support the outcome (see *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraph 16, [2011] 3 SCR 708). As the Supreme Court held in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59 and 61, [2009] 1 SCR 339, a court reviewing for reasonableness cannot substitute its own view of a preferable outcome, nor can it reweigh the evidence.

[38] As for the issue of what is the proper test for section 96, it concerns a question of law and it is reviewable on the standard of correctness (*Ospina* at paragraph 20; *Mugadza* at paragraph 10; and *Rahman* at paragraph 36).

B. *Issue 2 - Did the Board err in not considering the "compelling reasons" exception?*

[39] Here, I find the Board did not commit a reviewable error in not considering the compelling reasons exception.

[40] I have previously reviewed the jurisprudence on whether or not a Board should consider the compelling reasons exception under subsection 108(4) of the Act. In *IBS*, I stated at paragraphs 31 and 32:

> 31 The jurisprudence on subsection 108(4) is clear that the Board must first find a refugee claimant to be a Convention refugee or person in need of protection at the time of persecution before the compelling reasons exception applies. In *Nadjat v Canada (Minister of Citizenship and Immigration)*, 2006 FC 302, Mr. Justice James Russell held at paragraph 50 that there must be "... a finding that the claimant has at some point qualified as a refugee, but the reasons for the claim have ceased to exist".
>
> 32 As I held in *John v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 1088 at paragraph 41:
>
> > This requires a clear statement conferring the prior existence of refugee status on the claimant, together with an acknowledgement that the person is no longer a refugee because circumstances have changed.

[41] In the present case, there was no such conferment on the applicant or an acknowledgement that the person is no longer a refugee because circumstances have changed.

Therefore, I find the Board was reasonable to not conduct an analysis under subsection 108(4) of the Act.

[42] I need not deal with Issue 3 because of the parties' statement of the issue at the hearing. However, had it been necessary to deal with the issue, I am of the view that the Board was correct with respect to the test it applied under section 96.

[43] For the reasons above, I would deny this application.

[44] The applicant proposed that I certify as serious questions of general importance, the questions proposed (but not certified) in *Soto v Canada (Minister of Citizenship and Immigration)*, 2014 FC 622, [2014] FCJ No 683. The questions were stated at paragraph 33 of the decision:

> 33 Counsel for the Applicants proposed two questions for certification:
>
> For the compelling reasons provision in *Immigration and Refugee Protection Act* section 108(1)(e) to be considered by the Refugee Protection Division of the Immigration and Refugee Board, does the Board have to make an express finding
>
> a) of past persecution or is evidence of past persecution which the Board accepts as credible sufficient?
>
> b) that the refugee protection claimant was at one time a Convention refugee with a well founded fear of persecution or is either a finding of past persecution or evidence of past persecution which the Board accepts as credible sufficient?

[45] The respondent opposes the certification of the questions.

[46] I am not prepared to certify the questions as the questions would not be determinative of the appeal.

JUDGMENT

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

"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.
108.(4) Paragraph (1)(e) does	108. (4) L'alinéa (1)e) ne

not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment.

s'applique pas si le demandeur prouve qu'il y a des raisons impérieuses, tenant à des persécutions, à la torture ou à des traitements ou peines antérieurs, de refuser de se réclamer de la protection du pays qu'il a quitté ou hors duquel il est demeuré.

FEDERAL COURT

SOLICITORS OF RECORD

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