Federal Court  Cour fédérale

Date: 20150721

Docket: IMM-7224-14

Citation: 2015 FC 889

Toronto, Ontario, July 21, 2015

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

EDDY WAMAHORO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] This is an application for judicial review of an Immigration and Refugee Board [Board, Member] decision [Decision] refusing the Applicant's refugee status based on a lack of credibility and subjective fear. The Applicant argues that the Decision was flawed by procedural unfairness, in addition to being unreasonable. I agree with the Applicant and will allow this application for judicial review, for the reasons set out below.

II. BACKGROUND

[1] I begin by noting these facts are unusual, and this decision is thus particular to its unique set of circumstances.

[2] The Applicant, Mr. Eddy Wamahoro, is a citizen of Burundi and a Tutsi. He has been a part of the Urucaca drum band since 1998, including serving as its president from 2005-2008 and again from 2010 until he claimed refugee status. He contends that the following took place, which led to his claim.

[3] On January 15, 2014, Mr. B [last names of third parties kept confidential], secretary of the militia group Imbonerakure, visited the Applicant. The group is the youth wing of Burundi's ruling party, the National Council for the Defence of Democracy-Forces for Defence and Democracy, or Conseil national pour la défense de la démocratie-Forces de défense et de la démocratie [CNDD-FDD]. Mr. B suggested members of Urucaca join Imbonerakure, and that the Applicant assist in this recruitment. The Applicant refused, saying that politics did not interest him, and he rather concentrate on his studies and his music. One week later, the Applicant received a threatening phone call.

[4] On February 5, 2014, Mr. B returned to the Applicant's home to ask him if he changed his mind about joining Imbonerakure. As he had not, Mr. B started recruiting members from Urucaca himself. The Applicant dissuaded members of the group from joining.

[5] On March 11, 2014, the Applicant was assaulted by a regional leader of Imbonerakure, Mr. N, along with armed men from the militia group. They accused him of being a part of the opposition, since he refused to cooperate. Then, on March 24, 2014, the Applicant received a letter convoking him to the office of the National Intelligence Service [Service] on April 2, 2014. The notice did not contain a reason for the pending convocation, which resulted in the Applicant's fear of what was next. The Applicant consequently sought refuge at a friend's house.

[6] On the night of April 2, 2014, the Applicant's family home was attacked by four armed men looking for him. The Applicant remained in hiding at his friend's house until May 8th, 2014 when he left with Urucaca for the United States to participate in in the Dayton International Festival, for which he had already obtained a U.S. visa. When he arrived in the U.S. on May 9, 2014, the Applicant called his Canadian uncle, who suggested he make his way to Canada.

[7] After the music festival ended, the Applicant travelled from Dayton, Ohio to Buffalo, New York, where he sought assistance from Vive La Casa [Vive], a non-governmental organization which helps individuals in the refugee claim process. Upon arriving at Vive on May 22, 2014, the Applicant was advised to obtain documents from Burundi to prove the uncle's relationship before making his claim. Acting on this advice, the Applicant delayed his entry into Canada.

[8] The Board refused the claim, finding the Applicant not to be a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act], because he lacked credibility and did not establish subjective fear. The

Board also found it implausible that the Imbonerakure would seek out a group of musicians: according to the documentary evidence and the Board's specialized knowledge, the Imbonerakure are a group of delinquents who steal from and harass individuals in Burundi, and intimidate political opponents. The Board found that the Imbonerakure could have recruited Urucaca members directly without going through the Applicant, had it so desired.

[9] In response to the Board's question of whether there might be other reasons to target him, the Applicant responded that one reason could be to recruit more Tutsi members, given that he was a Tutsi. The Board found that this explanation based on ethnicity was speculative.

[10] Finally, the Board found the Applicant exhibited behaviour inconsistent with a subjective fear of persecution, and pointed to (i) his failure to leave his home for a period of three weeks (from March 11 – April 1, 2014), (ii) his convocation for an interview by the intelligence service on March 24, (iii) his delay in leaving Burundi until May 2014, in light of his U.S. visa valid since March 5, 2014, and (iv) the two months spent in the U.S. before entering Canada.

III. ISSUES

A. *Did the Board breach the Applicant's right to procedural fairness by relying on its own purported specialized knowledge?*

[11] The Applicant submits that the Board relied on specialized knowledge regarding recruitment by Imbonerakure without giving the Applicant an opportunity to respond to this knowledge, contrary to Rule 22 of the *Refugee Protection Division Rules*, SOR/2012-256 [Rules]. This is a breach of procedural fairness which impacted the Decision because, given the

opportunity, the Applicant could have referred to evidence to address the concerns (*Bitala v Canada (MCI),* 2005 FC 470, para 19).

[12] The Respondent counters that specialized knowledge used by the Board was consistent with the Applicant's description of Imbonerakure. The Board simply disagreed with the Applicant that Imbonerakure would pursue the Applicant and his group. Additionally, the Board notified the Applicant of the specialized knowledge at the hearing and thus provided him with an opportunity to address it (*Munir v Canada (MCI),* 2012 FC 645, at para 17 [*Munir*]). In any event, this is not a sufficient basis on which to set aside the Decision because it was not determinative (*Toma v Canada (MCI),* 2014 FC 121, at paras 29-31 [*Toma*]). Further, given that the Board did not find the Applicant's allegations with regard to the Imbonerakure's recruitment credible, it was open to it to attribute little weight to that evidence.

B. *Did the Board overlook or ignore evidence, and make unreasonable implausibility and credibility findings in so doing?*

[13] The Applicant submits that the Board's findings that it was implausible the Imbonerakure needed the Applicant's assistance, and would recruit musicians, were made without regard to the documentary evidence. The evidence shows that the Applicant had influence over members of his group and that there was no reason why Imbonerakure would not recruit musicians.

[14] The Respondent argues that the Board is best placed to make implausibility and credibility findings (*Aguebor v Canada (MEI)* (1993), 160 NR 315, at para 4 (FCA)). The Board

reasonably found that it would be implausible for Imbonerakure to recruit musicians and to do so through the Applicant.

[15] The Applicant further submits that the Board ignored evidence that corroborated his fear of persecution should he return to Burundi. The documentary evidence shows there is a link between Imbonerakure and the National Intelligence Service. Where evidence is submitted by the Applicant that is contrary to the conclusion reached, the decision-maker must refer to it in the decision (*Mahanandan v Canada (MEI),* [1994] FCJ No 497 [*Mahanandan*]; *Cepeda-Gutierrez v Canada (MEI),* [1998] FCJ No 1425, para 17 [*Cepeda-Gutierrez*]).

[16] The Respondent argues that the Board considered the evidence, and need not mention every item in its reasons.

C. *Were the subjective fear findings reasonable?*

[17] The Applicant states that there were two reasons why he remained in the U.S. for a short period before seeking refugee status in Canada, and did not make an asylum claim in the U.S. He had family (his uncle) in Canada and was advised to get documentation to prove the relationship. Family aside, he perceived Canada to be a better place for refugees.

[18] The Applicant submits that having family in Canada alone is a valid reason for not making a claim in the U.S., and instead waiting to make a properly documented claim in Canada (*Rajadurai v Canada (MCI),* [2013] FCJ No 566, at para 65 [*Rajadurai*]).

[19] The Respondent contends that that the Board reasonably found the Applicant could have left Burundi earlier. Similarly, he could have left the U.S. earlier if he did not intend to make a claim there. The Board properly considered the evidence before it, and reached a reasonable conclusion on subjective fear.

IV. ANALYSIS

[20] As a preliminary issue, the parties are agreed, and I concur, that the standard of review for procedural fairness is correctness. For other issues raised above, it is reasonableness. (*Dunsmuir v New Brunswick*, 2008 SCC 9, at paras 47-51; *Mission Institution v Khela*, 2014 SCC 24, para 79).

[21] I have concerns with all three issues raised by the Applicant, any of which are significant enough to require reconsideration of the claim, given that each could have changed the outcome.

A. *The Board breached the Applicant's rights to procedural fairness by relying on "specialized knowledge"*

[22] The Board assessed the Imbonerakure as a group of delinquents who steal from and harass individuals. The Member factored in his "specialized knowledge" in coming to this assessment. I do not find it clear where he came to his finding that the group would not target musicians. Given that this specialized knowledge finding led directly to credibility and implausibility concerns, the claimant should have been given an opportunity to rebut it (*Isakova v Canada (MCI)*, [2008] FCJ No 188, para 16). The Board did not inform the Applicant of the specialized knowledge on which it was relying; it simply asked the Applicant why the

Imbonerakure would have attempted to recruit musicians. To then rely on the knowledge to impugn credibility was unfair to the Applicant, and breached Rule 22.

[23] The Respondent relied on two specialized knowledge cases, but both involve different facts. In *Munir*, the panel provided applicant's counsel with a copy of the evidence on which it relied for its specialized knowledge on the morning of the hearing, and gave 15 minutes for counsel to consult the applicant. In this case, the Board neither provided Mr. Wamahoro with notice of the issue on which it would be relying, nor of any documentary evidence on which its specialized knowledge was founded.

[24] Similarly, in *Toma*, the panel itemized documentary evidence on which it would be relying, so the applicant was put on notice. Here, the Board did not provide the Applicant with any notice of its knowledge of the Imbonerakure recruitment methods. The importance of giving notice of specialized knowledge is precisely to be fair to claimants so they know the case against them. A lawyer would have known what specialized knowledge was, had the Board mentioned it during the hearing, and since it failed to do so, counsel had no opportunity to respond.

[25] In fact, the evidence on the record does not support the findings of the Board, to the extent it employed specialized knowledge in arriving at its conclusions. The evidence shows that the Imbonerakure is a youth wing, numbering some 20,000, which recruits young men throughout the country, primarily in the 18-35 age range. (AR at pages 61, 151). The evidence does not specify exactly what type of individuals Imbonerakure recruits, other than ex-military

personnel. Certainly, ex-military do not form the totality of its members. There is no evidence that beyond ex-military, Imbonerakure is selective. It needs members.

[26] The evidence also shows that the Imbonerakure members chant and sing songs (AR, page 152). The Urucaca musicians fit this profile, both in terms of age and gender, being young men who are musically inclined.

[27] In short, the Member used his specialized knowledge assumptions of who the Imbonerakure would and would not recruit, which was not based on any evidence, and of which neither the Applicant nor counsel was put on notice. This led directly to crucial implausibility findings. Improperly relying on specialized knowledge without providing the Applicant an opportunity to respond violated procedural fairness. I would note that even without the use of specialized knowledge problem, implausibility findings should be supported by the evidence, and only be made in the clearest of cases (*Yu v Canada,* 2015 FC 167, at para 10; *Ansar v Canada (MCI),* 2011 FC 1152, at para 17; *Rahal v Canada (MCI),* 2012 FC 319, at para 44).

B. *The Board overlooked key evidence such that it made unreasonable implausibility and credibility findings*

[28] The Board overlooked evidence when it impugned the credibility of the Applicant fleeing Burundi on account of the National Intelligence Service (AR at p 43). The Board never questioned the genuineness of the summons. The summons is a centrepiece of the Applicant's claim, which cannot be ignored. Furthermore, the Service, according to the documentary evidence, is linked to Imbonerakure, and can be very violent (see Certified Tribunal Record at p.

143). The Board should have, at minimum, referenced this evidence regarding the links between the organizations, and explained why it gave no relevance or weight to the Applicant's testimony, with which the documentary evidence was consistent: *Cepeda-Gutierrez* at para 17; *Mahanandan* at para 8.

C. *The subjective fear findings were unreasonable*

[29] The Applicant provided detailed explanations and oral testimony regarding his subjective fear and what transpired at Vive in Buffalo. Specifically, the Applicant testified that he arrived in Buffalo shortly after the Dayton music festival, which appears to be reflective of his desire to claim refugee status in Canada. As he explained, there would be no other reason for him to have travelled from Dayton to Buffalo. While in Buffalo, the Applicant lived at Vive.

[30] In addition to failing to address the above explanation of the Applicant's time spent in the U.S., the Board did not mention the fact that the Applicant made immediate inquiries of staff at Vive to determine what documentation and evidence he would require in order to make a claim in Canada, and/or that he was advised by Vive's staff to obtain proof of his relationship to his uncle. The Applicant immediately set about this task, and described in testimony his efforts to obtain proof, because he had no documentation to prove the relationship. The Applicant testified that he had to obtain the proof via his mother in Burundi, and while she was able to supply him with the requisite birth certificates, that process took nearly three weeks. Upon receipt of this identity documentation, it took another two weeks for the Applicant to get an appointment with the Canadian authorities.

[31] This Court has accepted delays due to legitimate efforts to claim status. The Board was obliged to at least consider the explanation for the delay, even if it ultimately chose to reject it: *Kannuthura v Canada (Citizenship and Immigration)*, 2012 FC 1288, paras 5-6; *Gopalarasa v Canada (MCI)*, 2014 FC 1138, paras 34-35. Justice Rennie's words in *Valencia Pena v Canada (Citizenship and Immigration)*, 2011 FC 326 are particularly apt:

> [4] The failure to claim elsewhere is not, in and of itself, determinative. However, the Board must carefully consider any explanation provided by the applicant and give reasons for rejecting it…In this case, the explanation before the Board was consistent with the existence of subjective fear, and its unilateral dismissal, was, without more, in error. The Board's rejection of this explanation informed much of its approach to the balance of the applicant's testimony and cannot be considered immaterial to the outcome. (emphasis added)

[32] In addition, the Board failed to acknowledge that one can legitimately claim status where a family member lives. This exception to the usual rule -- that delay or a failure to claim can give rise to an adverse credibility finding -- is also consistent with the *Safe Third Country Agreement* between Canada and the United States: see *Rajadurai*, at para 65; and *Ay v Canada (Citizenship and Immigration)*, 2010 FC 671 at paras 39-40).

V. CONCLUSION

[33] Given that the Board's findings on both credibility and subjective fear were unreasonable, the application for judicial review is allowed. The matter will be returned to the RPD for reconsideration by a differently constituted panel.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. This application for judicial review is allowed.

2. The matter is to be returned to the RPD for reconsideration by a differently constituted panel.

3. No questions for certification were raised.

4. There is no award as to costs.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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