

Federal Court



Cour fédérale

Date: 20160620

Docket: IMM-5565-15

Citation: 2016 FC 692

Ottawa, Ontario, June 20, 2016

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

**ALINE KARIYO
PROSPER NGENDAKURIYO
BENI-CAEL IRAKOZE
MATT TANGY INGABIRE
DON MOREL DUSHIME**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the November 20, 2015 decision of the Refugee Protection Division of the Immigration Review Board [RPD], denying refugee or person in need of protection status to the Applicant, her husband, and their three minor children under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

I. Background

[2] The Principle Applicant, Aline Kariyo, and her family are citizens of Burundi, who traveled to Canada on August 28, 2015, claiming refugee or person in need of protection status at the Douglas border crossing. The Kariyos fled their home after a series of attacks against the Applicant and her oldest son, resulting from her position as an investigative judge with an anti-corruption body in Burundi. According to the Applicant's testimony and basis of claim [BOC] narrative, these attacks were perpetrated by various individuals from the Port of Bujumbura, who were the subject of one of her investigations. The Applicant also experienced discrimination and harassment at work as a result of her findings on this particular file.

[3] The Applicant claims that after she took on the Port of Bujumbura file in December of 2012, she began receiving threats by telephone at her place of work. She did not report these threats to an outside authority, as she believed they would stop when her work on the file was done.

[4] She also believed that her immediate supervisor was complicit in the fraud and corruption at the Port, as he had accused her of leaking information to the media, and threatened her with work-related sanctions if she would not let up in her investigation. The Applicant's supervisor continued to threaten and harass her as the political situation in Burundi worsened throughout 2014. In early 2015, the supervisor sexually harassed the Applicant, telling her he would make her problems go away if she had sex with him. The Applicant reported the incident to the Vice-President of the court where she worked, but was told to keep quiet.

[5] In April of 2015, the Applicant's oldest son was the subject of two attempted kidnappings from his school. These incidents were reported to the police, and a letter from the school regarding the attempts is included in the documentary evidence. The Applicant believes these incidents were connected to her work on the Port file, as the vehicle seen in connection with the attempts had a Port of Bujumbura logo on the door.

[6] Also in early 2015, the Applicant noticed a car following her on her way home, which she reported to police; the report is included in the documentary evidence. Nothing came of this incident. However, in May of 2015, the Applicant was kidnapped from her home by individuals threatening to harm her if she did not stop her investigation. The assailants attempted to rape the Applicant while she was captive. The Applicant reported this incident to a police officer, but was refused assistance due to her position with the anti-corruption court.

[7] Following the above incidents, the family moved approximately 100 km away to live with the Applicant's mother. They made arrangements to come to Canada where the Applicant's brother resides.

[8] By decision dated November 20, 2015, the RPD rejected the Applicant's claim on grounds of credibility: it found inconsistencies and misrepresentations in the Applicant's testimony which were not sufficiently remedied by the documentary evidence [the Decision].

[9] The RPD also found the claim unsuccessful under section 97 on the basis that the tumultuous political circumstances in Burundi did not amount to a nexus or basis of claim, did not overcome credibility concerns, and the evidence was inadequate to establish a sufficient risk.

[10] The RPD accepted the family's identity and citizenship, and found there was an established nexus between the claims and the enumerated grounds of membership in a particular social group or political opinion. In assessing the claim, the RPD reviewed the *Chairperson's Guidelines on Woman Refugee Claimants Fearing Gender-Related Persecution* [*Chairperson's Guidelines on Women Refugee Claimants*].

[11] The RPD drew a negative inference from the fact the Applicant did not quit her job during the period of the claimed threats. Though the Applicant explained that she liked and respected the job and needed the income to provide for her family, the RPD found this insufficient to amount to a deeply held belief or life mission. Thus, it concluded it was unreasonable for her to have stayed in her position if she truly was under the threat she claims.

[12] As well, the RPD found the Applicant's testimony regarding her son's attempted kidnapping inconsistent with her BOC narrative. The Decision states that "[a]ccording to her oral testimony, the attempted kidnappings of the son took place in April 2015. However, in the Declaration, the principal claimant refers to them in the context of 2013". The RPD did not accept the Applicant's protestation this was not the case, nor her explanation the date must have been a mistake due to fatigue after a 13-plus hour wait at the border which had her writing the narrative at 3 am. Given that the neatness of the handwriting on the BOC narrative, and the

proper grammar and sentence structure, the RPD rejected the Applicant's fatigue as an explanation for any inconsistencies.

[13] As the RPD had concluded the attempted kidnappings took place in 2013, it drew a further negative inference due to the Applicant's failure to claim refugee status in France or Belgium when she visited in 2014. The Applicant stated she did not feel the need to flee until the attempted kidnappings and attempted rape took place, which she had consistently testified took place in 2015.

[14] The RPD also pointed to omissions in the BOC documentation. Specifically, the RPD drew a negative inference from the husband's omission of his son's kidnapping in his declaration, and did not accept his explanation that he knew they would be relying on his wife's claim and there would be a hearing to expand on the narratives. Moreover, the Applicant's failure to mention her own kidnapping and attempted rape in her narrative was also problematic. The RPD found her explanation that she referred to this incident as sexual harassment inadequate, particularly since the Applicant is a judge in Burundi and should know the legal difference between attempted rape and sexual harassment.

[15] The RPD found the inconsistencies to be unreasonable, as the claim was made following a deliberate decision by the couple to apply for United States visas to get to Canada to make a refugee claim.

[16] Finally, the RPD found the Applicant, as a judge, should have known how to better utilize state protection, and concluded it was unreasonable for her, as someone who worked with the anti-corruption squad to have stopped at a police officer's refusal to help her with persecution. The RPD drew a negative inference, finding the Applicant's testimony on the matter lacked spontaneity.

II. Issue

[17] Was the RPD's credibility assessment reasonable?

III. Standard of Review

[18] The standard of review for credibility findings is reasonableness (*Kamau v Canada (Minister of Citizenship and Immigration)*, 2016 FC 413 at para 22; *New Brunswick (Board of Management) v Dunsmuir*, 2008 SCC 9 at para 51).

IV. Analysis

[19] The Respondent argues the Decision was reasonable due to the multiple negative credibility findings. Specifically, it was fair for negative inferences to be drawn on the basis of: the Applicant's commitment to her job, the timing and details of her son's attempted kidnapping, her failure to make a refugee claim in Belgium or France, inconsistencies in the narratives, omissions in both the Applicant and her husband's declarations, and the evidence regarding state protection efforts.

[20] Further, the Respondent argues that the RPD properly considered the *Chairperson's Guidelines on Women Refugee Claimants* as applicable, and the presumption a claimant is being truthful unless there is reason to doubt. Thus, the Respondent claims this Court should defer to the RPD's credibility findings, as they attract great deference.

[21] I agree that the Court should be cautious in second guessing the RPD in matters of credibility; as such findings lie at the very heart of the RPD's expertise. However, the Court's intervention is warranted if there is no evidence to support the RPD's assertion, or if there is a glaring inconsistency between the Decision and the evidence in the record (*Rahal v Canada (Minister of Citizenship & Immigration)*, 2012 FC 319 at para 60 [*Rahal*]).

[22] I find that notwithstanding this deferential standard, this is a case where the RPD's credibility determination was unreasonable on several counts. The Decision demonstrated a zeal for finding contradictions and errors in the Applicant's testimony that simply are unreasonable based on the record before me.

[23] First, while contradictions in the evidence generally afford the RPD a reasonable basis for making a negative credibility finding, such contradictions must be real, as opposed to illusory (*Rahal*, above, at para 43). The very basis for the RPD's negative credibility finding, which infected various other credibility determinations in the Decision, was that the Applicant's testimony on the year of the attempted kidnappings of her son was inconsistent. This is not so on the record before me: the Applicant's testimony consistently held that the attempted kidnappings took place in 2015, even when probed. Yet, the RPD concluded they took place in 2013.

[24] This alleged contradiction in the evidence is illusory: nowhere in the BOC narrative does the Applicant state the attempted kidnappings of her son took place in 2013. Though they were described before an event occurring in 2014, it is clear that these incidents were addressed in the context of threats to the Applicant's family, as opposed to chronologically. The RPD's emphasis on this alleged inconsistency as a basis for finding the Applicant lacked credibility – which also appears to have tainted and served as the underpinning for the RPD's other findings of lack of credibility - was unreasonable.

[25] Accordingly, the other negative credibility findings emanating from this purported contradiction are equally unreasonable. Though this alleged contradiction appeared to colour various findings throughout the Decision, specifically, the RPD's negative inference derived from the Applicant's failure to make a refugee claim in Belgium or France in 2014 was also unreasonable.

[26] Moreover, the negative inference drawn by the RPD from the Applicant's alleged omission in her BOC narrative of her kidnapping and attempted rape is unreasonable. The Applicant's narrative states that she experienced sexual harassment, which she explained at the hearing was what she had later referenced as "attempted rape". In classifying this as an omission in the Applicant's BOC, the RPD appears to be seizing on trivial discrepancies in the Applicant's use of terms that describe on a continuum assaults of a sexual nature, which evidently refer to the same event. This finding is not reflective of the *Chairperson's Guidelines on Women Refugee Claimants*, which describe the particular sensitivity to be applied in assessing women refugee

claimants who have suffered sexual violence, and the issues they face in demonstrating their claims are credible.

[27] I also find that it was unreasonable for the RPD to have drawn a negative inference from the fact the Applicant did not include the detail of the Port of Bujumbura logo on the car involved in the attempted kidnapping of her son, given that her oral testimony is corroborated in the school letter regarding the incident. Again, in my view, to find this to be an error is indicative of a microscopic analysis and zeal for finding errors (*Attakora v Canada (Minister of Employment & Immigration)*, [1989] FCJ No 444 at paras 2, 6, 9 (FCA)).

[28] The RPD appears to hold the Applicant to a higher standard because of her position as an investigative judge in Burundi. For instance, it found she omitted important details, as she should have known the difference between sexual harassment and attempted rape. It also found this above-described failure to mention the logo on the car in her BOC as indicative of poor credibility, despite its corroboration elsewhere in the record. The RPD provides no analysis as to why the Applicant's profession justifies any differential treatment, and it is unreasonable based on the facts in this case (see *Sandoval v Canada (Minister of Citizenship and Immigration)*, 2008 FC 211 at paras 22 and 26).

[29] Moreover, the RPD held the Applicant to a higher standard in citing her position as an investigative judge with the anti-corruption court as a reason to discount the Applicant's state-protection efforts. The RPD's conclusion that it was unreasonable for the Applicant to have stopped at the police officer's refusal to help her with persecution fails to account for the

evidence before it. The Applicant's evidence was that she had reported incidents of persecution to the police, but was refused assistance due to her position. As well, the country condition documentary evidence before the RPD – not assessed in the Decision – indicates the police, government and legal system in Burundi are largely corrupt and follow politicized instruction.

[30] I also find the RPD's finding that the Applicant should have brought the claim of kidnapping and attempted rape before the anti-corruption court unreasonable: there is no indication such non-monetary forms of assault and harassment fall within the anti-corruption court's mandate. Furthermore, the Applicant had before reported the sexual harassment she experienced by her supervisor to the Vice-President of the court, but was told to keep quiet. In light of this evidence, and absent any discussion of it in the RPD's state protection analysis, its finding on the Applicant's state protection efforts was unreasonable.

[31] The RPD's credibility concerns surrounding the date of the Applicant's son's kidnapping and the attempted rape of the Applicant proved to be the central elements of its rejection of the claim, and thus she should have been given the opportunity to address these credibility concerns.

[32] I also find that the RPD's statement that being a judge is not a deeply held belief going to the core of the Applicant's being is arbitrary and appears to have been made without regard to the evidence before the decision-maker. The Applicant testified that she was deeply devoted to her job, which requires courage and integrity, and she explained that she hoped the threats would end once the file was completed.

[33] Accordingly, I must consider whether the cumulative effect of the above credibility issues raised by the RPD, render the Decision unreasonable (*Iyombe v Minister of Citizenship and Immigration*), 2016 FC 565 at para 14; *Cienfuegos v Minister of Citizenship and Immigration*, 2009 FC 1262).

[34] In sum, I find that the RPD's findings were not justified and did not fall within the range of reasonable outcomes given the record before the RPD. Specifically:

- i. the RPD's reliance on the Applicant's supposed contradictions surrounding the attempted kidnappings of her son as occurring in 2013 as opposed to 2015, without an actual contradiction in the Applicant's evidence, serves as an underlying negative credibility approach on other issues, and was unreasonable;
- ii. the negative inference drawn by the RPD due to the Applicant's reference to sexual harassment as opposed to attempted rape is also unreasonable, and demonstrates an unreasonable search for trivial and minute errors that also does not appear to be reflective of the *Chairperson's Guidelines on Women Refugee Claimants*;
- iii. the negative inference drawn from the Applicant's lack of detail concerning the Port of Bujumbura logo being on the car involved in her son's kidnapping in her BOC narrative, but not within her oral testimony, and which was corroborated in the evidence;
- iv. the lack of adequate state protection given the Applicant's intimate knowledge of the anti-corruption brigade and the futility of trying to approach authorities on this front.

[35] Given my findings on the RPD's cumulative unreasonable reliance on credibility findings that were unjustified on the record before me, the overall effect of these numerous errors rendered the RPD's credibility assessment, and the Decision as a whole, unreasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is allowed and the matter is referred to a different member for reconsideration;
2. There is no question for certification.

"Michael D. Manson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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