Federal Court  Cour fédérale

Date: 20201211

Docket: IMM-614-20

Citation: 2020 FC 1147

Montréal, Quebec, December 12, 2020

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

RUZIBUKIRA CLAUDE MUGANIZI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant seeks judicial review of the decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board, upholding the earlier decision of the Refugee Protection Division [RPD] which held that the applicant is not a Convention refugee or a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], respectively.

Context

[2] The applicant, of Congolese Tutsi ethnicity, was born in the Democratic Republic of Congo [DRC] in 1972 and obtained Rwandan citizenship in 1998. In April 2012, the Rwandan-backed M23 rebellion in DRC began. In 2012 and 2013, M23 fighters committed widespread war crimes in eastern Congo.

[3] The applicant alleges that on January 17, 2013 and again a few days later, two members of M23 came to the applicant's door in Kigali, Rwanda to recruit him. The applicant refused to join. The applicant's house was subsequently broken into and he received a telephone call asking if he had changed his mind about joining M23. The applicant said that he was afraid to approach the police because he believed that the Rwandan government supported M23. The applicant went into hiding and was contacted by the friend who had given his name to M23 as a potential recruit. He told the applicant that his life was in danger and helped him to flee Rwanda. The applicant left Rwanda on January 27, 2013 and made his way to the United States where he submitted an asylum application; his claim was denied. On March 14, 2017, the applicant sought protection from Canada.

[4] On May 24, 2018, the RPD denied the claim. The RPD held that the applicant had made false statements on his U.S. asylum application and his credibility had been negatively affected as a result. However, the RPD nevertheless gave him the benefit of the doubt and accepted the rest of his evidence. Be that as it may, the RPD concluded that the applicant had not established that if he returned to Rwanda there would be a serious possibility of persecution or that he would be at risk of torture, death, or cruel and unusual punishment. In particular, the RPD found that

M23 was defeated and disarmed in 2013 and that the evidence before it did not establish that it continued to exist. It also found that the applicant's claim that the Rwandan government was involved in M23 recruitment was only speculation.

[5] The applicant filed an appeal with the RAD. Same was dismissed on November 13, 2019 (with reasons for the decision released on January 10, 2020), leading to the present judicial review application.

Standard of Review

[6] The determinative issue in the appeal was whether the RPD erred in determining that the applicant did not have a reasonable fear of persecution or would face a risk to his life if he returned to Rwanda. The RAD determined that the RPD's denial of the applicant's claim was correct because the applicant failed to establish that M23 still exists or that there was a risk of persecution by the Rwandan government for his (imputed) political opinion based on his refusal to be recruited by M23 in January 2013 or his asylum claims in the United States and Canada.

[7] The reasonableness standard applies to the review of the conclusion of the RAD dismissing the appeal. As the Supreme Court of Canada noted in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]), the new revised framework "starts with a presumption that reasonableness is the applicable standard whenever a court reviews administrative decisions" (at para 16), except where legislative intent or the rule of law suggests otherwise (at para 23). There are no factors here that suggest a reasonableness standard should not apply. In applying the reasonableness standard, the Court must ask if the decision

under review “bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision” (*Vavilov* at para 99).

[8] That being said, the correctness standard still applies to issues of procedural fairness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Mission Institution v Khela*, 2014 SCC 24 at para 79).

Analysis

[9] The present application for judicial review must fail, as this Court finds that no reviewable error has been made by the RAD and the impugned decision is reasonable. This is not an appeal. The issue is not whether this Court would have reached the same conclusion. In the case at bar, the reasons provided by the RAD are transparent and intelligible and provide a rational justification supported by the documentary evidence. Moreover, there was no breach of procedural fairness.

A. *New evidence*

[10] The applicant submitted two documents to the RAD as new evidence: 1) a March 2017 report of the United Nations Organization Stabilization Mission in the DRC; and 2) an article from the Command Post website dated June 20, 2019. The RAD refused to admit both documents. Before this Court, the applicant only challenges the RAD’s refusal to admit the second document.

[11] The applicant notes that the RAD refused to admit the Command Post article because its submission did not meet the formal requirements of Rule 29 of the *Refugee Appeal Division Rules*, SOR/2012-257 [RAD Rules], and subsection 110(4) of the IRPA, and because the information was not reliable. The applicant argues that the covering letter submitted by his counsel on October 2, 2019 satisfied the essential requirements of the Rules and the Act by requesting admission and explaining the document's relevance. As the article was not published until June 2019, it was clear why it could not have been submitted earlier. Any issue with respect to reliability and relative weight should have been addressed once the document was admitted as new evidence.

[12] The respondent replies that the applicant did not ask for the RAD's permission to file the document late, did not clearly explain its relevance, and did not provide information on the source of the article. After all, it is the applicant who bears the burden of convincing the RAD that the article should be admitted as new evidence. Indeed, the respondent claims that in her further written submissions addressed to the RAD on November 4, 2019 the applicant's counsel admitted there were problems with the reliability and probative value of the information in the Command Post web article. The Respondent also argues that the article only repeated facts that were already considered by the RPD.

[13] Paragraphs 29(2) and (3) of the RAD Rules provide that an appellant who wants to use a document not previously provided must make an application in writing without delay that includes an explanation of how the document meets the requirement of subsection 110(4) of the IRPA – namely that the applicant could not reasonably have been expected to present the

document before the rejection of the claim. Paragraph 29(4) of the RAD Rules sets out three relevant factors: 1) the document's relevance and probative value; 2) any new evidence the document brings to the appeal; and 3) whether the document could have been provided with reasonable effort with the appellant's record or reply record.

[14] In the case at bar, while the letter submitted by the applicant's counsel was not a formal application, it expressed the desire to submit the Command Post article and stated that it pertained to the issue of whether M23 was still active. The letter was in writing and submitted in a timely manner. The article was published in June 2019 and clearly could not have been adduced before the RPD's rejection of the applicant's claim in May 2018. The procedural defects of the application should not be fatal in themselves.

[15] Be that as it may, it is apparent that the RAD, prior to exercising its discretion, considered all relevant factors mentioned in subsection 110(4) of the IRPA and paragraphs 29(3) and (4) of the RAD Rules. I fail to see any reviewable error in the Board's reasons in this respect (see paras 6 to 15). In passing, I note that the Command Post article relates only to the recruitment of former M23 members by the Rwandan government and does not provide clear evidence that M23 continues to exist or has had any recent activity, in 2018 and 2019 notably. Accordingly, the Court finds that the RAD's rejection of the document in question was reasonable.

B. *Procedural Fairness*

[16] In its decision, the RAD stated that the applicant's explanation of the fabricated incident included in his United States asylum claim – that the incident alleged could have happened to him, but did not – was not acceptable and undermined the applicant's credibility before the RPD (para 26 of the RAD reasons). The applicant argues that this statement demonstrates that the RAD revisited the issue of the applicant's credibility. As the applicant was not informed that credibility would be at issue in the appeal, the applicant argues that this was tantamount to the RAD raising a new issue without notice (*Isapourkhoramdehi v Canada (Citizenship and Immigration)*, 2018 FC 819 [*Isapourkhoramdehi*]). Therefore, there was a breach of procedural fairness.

[17] The respondent replies that the RAD did not raise a new credibility issue and only repeated the RPD's conclusion of the negative effect the discrepancy in the applicant's United States application had on his credibility. He also argues that credibility was not determinative in the RAD's decision. Indeed, with respect to the situation with M23 (paras 21 to 27), in the paragraph just following the comment about credibility (para 26), the RAD concluded that the RPD made no error and that considering all the evidence, the applicant had not established that he has a well-founded fear of persecution or would face a risk to his life because of the M23 movement.

[18] I agree with the respondent. It is true that, in *Isapourkhoramdehi*, this Court found that the RAD raising new grounds of attack on the appellant's credibility amounted to the RAD raising a new issue without notice. However, in the present case, the RAD did not raise a new ground of attack on the applicant's credibility; it simply reiterated the RPD's finding of

dishonesty in the U.S. application and the negative affect that had on his credibility. Moreover, the issue of credibility was not determinative in this appeal. Objectively speaking, the RAD upheld the RPD's conclusion that the applicant is not a Convention refugee or a person in need of protection on the basis that the M23 rebel movement no longer exists and the applicant had not established facts on which a fear of persecution by the Rwandan government could be based.

[19] Accordingly, the Court finds that the RAD did not breach its duty of procedural fairness.

C. *Reasonableness*

[20] The applicant argues that the RAD's decision to uphold the RPD's finding that the applicant did not have a prospective fear of persecution was unreasonable for two reasons: 1) the RAD ignored evidence of the continued existence of M23; and 2) the RAD erroneously required the applicant to establish that Rwandan authorities were aware of his political opposition.

(1) Did the RAD ignore evidence with respect to the M23 movement?

[21] The evidence the applicant claims the RAD ignored notably includes: 1) Responses to Information Requests COD104769.E, published February 2014 [the 2014 document]; and 2) the Human Rights Watch, "Special Mission: Recruitment of M23 Rebels to Suppress Protests in the Democratic Republic of Congo" document, published December 2017 [the 2017 document]. The first document states that "credible reports" claimed that M23 continued its recruitment after its military defeat until at least January 2014. The second document states that Congolese security forces recruited former M23 fighters from Rwanda and Uganda in December 2016 and between May and July 2017.

[22] The applicant readily admits that there is evidence on record supporting the finding made by the RPD in the first place that M23 was defeated in November 2013 and that a cease-fire was concluded. Nevertheless, the applicant argues that the 2014 and 2017 documents show that M23 was still in operation beyond its 2013 military defeat. The applicant further argues that the RAD found that these documents were irrelevant on the basis that the applicant was confusing M23's conflict and post-conflict activities. Following the end of the conflict, M23's focus changed from a rebel movement to a force employed by the DRC government to quell demonstrations against President Kabila. The applicant says that this change of focus is irrelevant to its potential threat to the applicant and that without an explanation of this purported relevance the RAD's decision is unintelligible and not responsive to the evidence.

[23] The respondent argues that M23 has been inactive and disarmed since 2013. He further argues that the documentary evidence discusses the activities of former M23 members and does not establish the continued existence of the M23 rebel movement. The reasons provided by the RAD are clear and intelligible. They provide a rational justification. Joseph Kabila is no longer the president of the DRC and there is no reason to believe that the former M23 combatants would again be used by the new government of the DRC. There was no indication that in 2019 (or today) M23 would pursue recruitment or persecution of the applicant if he were to return to Rwanda.

[24] There is no reason to intervene or disturb the finding made by the RPD and the RAD with respect to the M23 movement and its threat to the applicant's life or security in the future.

[25] The RPD considered the 2014 document and noted that, in addition to citing "credible reports" of continued recruitment by M23, it also stated that M23 itself denied the recruitment claims (RPD decision at para 31). The RPD also considered the 2017 document and found that it did not establish that M23 continues to exist and is recruiting new members by force, as alleged by the applicant (RPD decision at paras 34–36, 39). On the other hand, the RAD based its finding on its analysis of the record and found that the most recent documentary evidence (United States Department of State, "Rwanda: Country Report on Human Rights Practices in 2018" (13 March 2019), in Immigration and Refugee Board of Canada, *National Documental Package: Rwanda* (31 July 2019), Tab 2.1; United Nations Security Council, "United Nations Organization Stabilization Mission in the Democratic Republic of the Congo: Report of the Secretary-General", S/2019/218 (7 March 2019), in Immigration and Refugee Board of Canada, *National Documental Package: Congo, Democratic Republic of the* (31 July 2019), Tab 2.3) does not support the conclusion that M23 exists and would want to recruit the applicant if he returned to Rwanda.

[26] The Court finds that the 2014 and 2017 documents relied upon by the applicant were not ignored by the RAD. At best, the evidence shows that M23 may have been recruiting members in January 2014. There is no indication that that has continued since. The evidence also shows that DRC security forces recruited former M23 fighters in 2016 and 2017. This does not show that M23 continues to exist or actively recruit new members. The reasoning of the RAD is transparent and intelligible. Consequently, the RAD reasonably upheld the conclusions of the RPD on this issue.

(2) Did the RAD apply the wrong standard to the political opposition claim?

[27] The applicant's refugee application was also grounded on his claim that "his refusal to be recruited by M23 constituted imputed political opposition to the Rwandan government itself". While the RPD dismissed this claim on the basis that there was no symbiotic relationship between M23 and the Rwandan government, the applicant argues that the RAD dismissed it on the basis that the applicant had not established concrete facts to show that the Rwandan government was aware of the applicant's refusal or his statement against the Rwandan government in his asylum applications (see paras, 28 and 29 of the RAD's decision). Indeed, the applicant argues that there is no requirement that a government be aware of an applicant's political opposition for Convention refugee status to be recognized (*Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/1P/4/ENG/REV. 4, UNHCR (2019) at para 83; James C Hathaway & Michelle Foster, *The Law of Refugee Status*, 2nd ed (Cambridge University Press: 2014) at 408). He argues that the RAD should have considered instead whether the Rwandan government could reasonably become aware of this fact upon his return.

[28] The respondent argues that the burden is on the applicant to adduce evidence supporting his claims of a prospective fear of persecution upon his return to Rwanda and that he has failed to adduce such evidence here. He further argues that there is no credible and objective evidence that the Rwandan government would become aware of his recruitment refusal six years ago or that he would be persecuted for it. As far as the statements made in the asylum claims are concerned, the RAD did not err in law in respect of the applicable standard of proof.

[29] This last ground of attack made by the applicant with respect to the reasonableness of the dismissal or his claim based on imputed political opinion is dismissed by the Court.

[30] The RPD found that the applicant's claim that the Rwandan government was involved in M23 recruitment to the extent that it would consider refusal to be recruited political opposition was only speculation (RPD decision at para 40). The RPD also found that asylum applications are confidential and the information contained therein would not be disclosed to the Rwandan government (RPD decision at para 45). On the other hand, the RAD found that the applicant had failed to show that the Rwandan government "would know" that he had refused recruitment (RAD decision at para 29). It is not clear to the Court that this is inconsistent with the standard proposed above by the applicant or the case law.

[31] In any event, the applicant has not shown to the satisfaction of this Court that the result would have been different. The applicant did not adduce evidence or present argument to show that the Rwandan government could reasonably have become aware of his refusal of recruitment. While there is evidence that the Rwandan government persecutes political dissidents, the applicant has failed to show how his refusal of M23 recruitment could be viewed as political opposition by the Rwandan government, how the Rwandan government could reasonably become aware of the fact that he refused recruitment seven years ago, how his statements that the Rwandan government supported M23 could be viewed as political opposition, or how the Rwandan government could become aware of the contents of his asylum applications.

[32] Consequently, the RAD's finding with respect to the situation with the Rwandan authorities was reasonable.

Conclusion

[33] For these reasons, the application is denied. No question of general importance has been proposed by counsel and none is certified by the Court.

JUDGMENT in IMM-614-20

THIS COURT'S JUDGMENT is that the present application for judicial review is dismissed. No question is certified.

"Luc Martineau"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Me Pia Zambelli	FOR THE APPLICANT
Me Anne-René Touchette	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Joseph W. Allen & Associates Montreal, Quebec	FOR THE APPLICANT
Attorney General of Canada Montreal, Quebec	FOR THE RESPONDENT