Date: 20090206

Docket: IMM-2753-08

Citation: 2009 FC 125

Montréal, Quebec, February 6, 2009

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

Elsie KERANDA
Eunice GATEKA

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] The applicants commenced an application for judicial review of the decision by the Refugee Protection Division (the RPD) dated May 26, 2008. Members Hadaya, Forest and Delisle determined that the applicants were not Convention refugees.

[2] Counsel for the applicants did not challenge the substance of the decision; she only took issue with the legality of the constitution of the panel. For the following reasons, I cannot accede to her submissions.

FACTS

[3] The principal applicant, Eunice Gateka, is 17 years old, and her sister, Elsie Keranda, is 14. They are both citizens of Burundi and are of Tutsi origin. Since they are minors, a legal representative was appointed for them for the RPD proceedings.

[4] They claimed that their paternal uncle was killed by young Hutus from the neighbourhood, who subsequently joined the rebel forces. When these young men returned to live near the applicants' family a few years later, their father decided to report them to the authorities for the murder they had committed.

[5] Following this report, the applicants' father was allegedly harassed, and the applicants themselves were threatened a number of times by persons associated with the government in power. Fearing for their lives, the applicants decided to flee their country with their father's assistance.

IMPUGNED DECISION

[6] Essentially, the panel refused the applicants' refugee claim on credibility grounds. The panel identified a number of major contradictions, omissions or implausibilities in the principal applicant's testimony, which her sister Elsie confirmed. Since the arguments of counsel for the

applicants against this decision do not deal with the panel's reasons but its constitution, I will summarize the reasons briefly.

[7] First, the RPD noted major discrepancies between the applicants' narrative in their Personal Information Form (PIF) and their testimony at the hearing. They stated at the hearing that some soldiers had asked their father to pay a monthly ransom, failing which the applicants would be kidnapped; yet they said nothing about this in their response to question 31 of the PIF. Furthermore, the RPD believed that it was implausible that the ransom demand did not include the applicants' sister.

[8] The applicants' testimony also deviated from their narrative at question 31 of the PIF regarding the identity of their uncle's killers: in her testimony, the principal applicant stated that they were young men from the neighbourhood but did not specify that they belonged to a specific group, while in her written narrative she had described these young men as being of Hutu ethnicity and members of the party in power. However, the identity of the agents of persecution was fundamental to their refugee claim.

[9] The RPD also noted that the principal applicant knew nothing about the prosecution begun by her father: she did not know where or when it was initiated or its outcome. This lack of information, together with the lack of documents that could corroborate these allegations, seemed suspect to the panel, especially since the applicants confirmed that they spoke to their father twice a month. Because the applicants were minors, the RPD allowed them two weeks to submit documents

to support their application. Since no document was produced by the end of this period, the tribunal officer sent a copy of the uncle's death certificate that had been filed in the applicants' brother's case. On that basis, the panel said it was prepared to acknowledge their uncle's death but did not believe that the applicants' father had initiated a prosecution against their uncle's killers.

[10] For all these reasons, the RPD found the applicants' refugee claim not credible. The members acknowledged that discrimination, violence and crime are part of the country's social and cultural landscape and were sensitive to the applicants' wish to not return to Burundi. But they determined that the objective evidence did not establish that the mere fact of being of Tutsi ethnicity or of being young female minors in Burundi provides a basis for a reasonable fear of persecution within the meaning of section 96 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the IRPA). Likewise, the RPD was of the view that the applicants would not be subjected personally to a risk to their lives or to a risk of cruel or unusual treatment or punishment.

ISSUE

[11] As stated previously, the applicants did not challenge the merits of the RPD's decision. The only issue raised at the hearing and in the applicants' written representations concerned the constitution of the panel. Accordingly, it is the only issue that will be examined in these reasons.

ANALYSIS

[12] To the extent that the applicants' submissions raise an issue of procedural fairness, there is no doubt that the appropriate standard of review is correctness: *Hassani v. Canada (Minister of*

Citizenship and Immigration), [2007] 3 F.C.R. 501; *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539; *Sketchley v. Canada (Attorney General)*, 2005 FCA 404.

[13] Under section 163 of the IRPA, hearings before the RPD are normally conducted before a single member. However, the Chairperson can decide to constitute a panel of three members when the situation requires it:

Composition of panels	**Composition des tribunaux**
163. Matters before a Division shall be conducted before a single member unless, except for matters before the Immigration Division, the Chairperson is of the opinion that a panel of three members should be constituted.	**163**. Les affaires sont tenues devant un seul commissaire sauf si, exception faite de la Section de l'immigration, le président estime nécessaire de constituer un tribunal de trois commissaires.

[14] The IRPA does not specify the circumstances in which it would be appropriate to designate a three-member panel. To learn more about this, we need to turn to a policy of the Immigration and Refugee Board entitled "Designation of three-member panels – RPD Approach", which came into effect on January 23, 2003 (see Supplementary Affidavit of Aimable Ndejeru, Exhibit "A"). The policy provides that a three-member panel can be designated for "adjudication strategy" purposes or to provide "training in presiding skills".

[15] Specifically with respect to training, the policy states that designating a three-member panel enables new members to acquire practical experience in conducting hearings. Although all members

receive intensive and comprehensive training, some skills cannot be acquired in a purely theoretical manner. In this regard, the Policy sets out the following:

> Presiding effectively over a quasi-judicial hearing requires a combination of skills that are best acquired through the actual experience of conducting hearings. By their nature, presiding skills are not easily acquired through training of members in the abstract or in a classroom setting. For example, those members newly appointed to the Division, may have the benefit of sitting with an experienced member if they are assigned to three member panels. This will enable them to enhance their presiding skills before beginning to hear cases as a single member. (Supplementary Affidavit of Aimable Ndejeru, Exhibit "A", p. 13.)

[16] It also appears from the supplementary affidavit, filed by Mr. Aimable Ndejeru in support of the respondent's position, that newly appointed members receive complete and comprehensive training. Mr. Ndejeru was a member of the Immigration and Refugee Board (the IRB) from 1989 to 2001 and is currently a special advisor in professional development at the IRB. In his affidavit, he states that new members receive full-time training for three weeks on a number of subjects, including the substantive and procedural rules of immigration law. They also attend a number of hearings as observers. Participating in a three-member panel is thus the last step in an extensive training process.

[17] In this context, can the applicants argue that they were prejudiced because their claim was heard by a panel composed of three members rather than one? I think not.

[18] In her memorandum, counsel for the applicants took the position that no right of dissent had been provided, which increased the burden for the claimants who were heard by three members. This argument is based on an erroneous reading of subsections 67(1) and (2) of the *Refugee Protection Division Rules S.O.R.*/2002-228, which only deal with when a final decision takes effect. Furthermore, counsel for the applicants did not make this argument at the hearing. In any event, nothing in the IRPA or the *Immigration and Refugee Protection Regulations*, S.O.R./2002-227 suggests an intention to deviate from the general principle applied by judicial and quasi-judicial tribunals that a majority, not unanimity, is required where a decision is made by a panel consisting of more than one person. The practice before the RPD confirms, in fact, that this is the practice that has been adopted by this tribunal.

[19] Counsel for the applicants also tried to submit that her clients faced a higher evidentiary burden because they had to appear before three members. This argument appears to me to be baseless. Not only was counsel unable to establish any real prejudice, but even more important, the evidentiary burden does not change depending on whether the decision is made by one member or three. In all cases, refugee claimants have the onus of establishing, on a balance of probabilities, the facts they are relying on. The fact that three people instead of one consider a claimant's credibility and the risk of persecution that he or she would face in his or her country can operate as much in favour of a claimant as against.

[20] My colleague Mr. Justice Pinard had to address this same issue in a relatively recent case (*Ramirez* v. *Canada (Minister of Citizenship and Immigration)*, 2008 FC 602). In that case, the

applicant also objected to the fact that two of the three members were on training. After carefully reviewing the IRPA, the policy mentioned above and the evidence adduced, he rejected the applicant's submissions in the following terms:

> There is no evidence to indicate that this policy is contrary to section 163 of the Act that enables the IRB Chairperson to constitute a three-member panel. Nor is there any evidence that the applicant suffered real prejudice in the circumstances.

[21] Counsel also attempted to submit that section 163 of the IRPA is vague and does not adequately set out the Chairperson's power to designate a three-member panel. It appears to me that this argument also cannot be accepted. First, it is a veiled attack on the very constitutional validity of this provision, which counsel for the applicants cannot raise unless notice has been served on the Attorney General of Canada and the attorneys general of the provinces pursuant to section 57 of the *Federal Courts Act*, R.S.C., 1985, c. F-7. But also the policy adopted by the IRB, which defines the discretionary power of the Chairperson to designate a three-member panel, must be taken into account.

[22] Without questioning the professional qualifications of the two members in training, counsel for the applicants submitted that it was unfair that individuals who did not yet have all the requisite expertise determined an issue with such far-reaching implications as a refugee claim. It must be noted, first, that the IRPA does not require that members have any particular knowledge prior to their appointment. At most, subsection 153(4) of the IRPA specifies that at least ten percent of members must be members of the bar of a province (or members of the Chambre des notaires du Québec) for at least five years. On the other hand, the evidence shows that the training for new

members is exhaustive and conducted in a professional manner. It is only at the end of their training that new members sit with an experienced colleague and only to enable them to acquire, in a practical way, the necessary tools for managing a proceeding.

[23] In any event, in my view, the applicants are estopped from relying on a breach of the principles of procedural fairness since counsel who represented them before the RPD did not object at the hearing. It is true that, because of an administrative error by the IRB, counsel did not receive the notice prior to the hearing advising him that the panel would consist of three members. It is nonetheless true that counsel could have objected at the hearing or at least requested that the hearing be adjourned if he believed that an adjournment was necessary to better prepare the applicants. Accordingly, failure to raise this issue must be interpreted as waiving this argument before this Court.

[24] For all these reasons, I am therefore of the view that this application for judicial review must be dismissed. The parties did not submit a question for certification and none will be certified.

ORDER

THE COURT ORDERS that the application for judicial review is dismissed.

"Yves de Montigny"
Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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