Federal Court  Cour fédérale

Date: 20110614

Docket: IMM-5316-10

Citation: 2011 FC 698

Ottawa, Ontario, June 14, 2011

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

JUPA KABERUKA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of the decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated 27 July 2010 (Decision), which refused the Applicant's application to be deemed a Convention refugee or a person in need of protection under sections 96 and 97 of the Act.

BACKGROUND

[2] The Applicant was a pastor and later a bishop of a Methodist church in Rwanda. He is of mixed ethnicity; his father was Hutu and his mother, Tutsi. He alleges that the persecution began in 1997, when the Rwandan government called him to a meeting and accused him of promoting genocide, of collaborating with the government that was responsible for the genocide and of collaborating with rebels.

[3] The Applicant claims that, in 2004, police came to his house and arrested him. He was in police custody for three days, during which time he was cut with a razor and beaten severely.

[4] He claims that, in January 2009, he was summoned to a meeting with government, military and security officials because he had criticized the government in his Christmas Day sermon. He alleges that these officials shouted at him and struck him.

[5] He went into hiding. His wife received on his behalf a summons to appear before a *gacaca*, or court. The Applicant did not attend the hearing. Instead, he fled Rwanda on 22 February 2009 and arrived in the United States the following day. He stayed with friends for two months but did not claim asylum. On 8 April 2009, he crossed the border into Canada and made a claim for refugee protection, alleging a well-founded fear of persecution based on his religion, his perceived political opinion and his Hutu race.

[6] The Applicant appeared before the RPD on 23 July 2010. He was represented by counsel; no interpreter was present. The RPD found that the Applicant was “not a credible or trustworthy witness” and, on this basis, it rejected his claims under both section 96 and section 97. This is the Decision under review.

DECISION UNDER REVIEW

[7] The RPD accepted, *inter alia*, that the Applicant was a pastor and later a bishop of the Communauté méthodiste unie internationale. The remainder of his claim is cast in doubt, largely due to the RPD’s finding that the Applicant’s explanations were unreasonable and his behaviour and testimony were evasive and contradictory. For example, when pressed to be more specific regarding the timing of events, the Applicant paused at length and then could provide only the year in which the events took place. The RPD found that, as there was nothing in either of the two psychological reports to suggest that the Applicant had difficulty remembering what happened to him, his failure to be more specific was interpreted as evasion, and this diminished his credibility.

[8] At the hearing, the Applicant testified that in April 1997, he was summoned to the Justice Ministry, where he was accused of teaching “genocidal ideology” and supporting a rebel group. He refuted the accusations and was released without incident.

[9] He testified at the hearing that the period from April 1997 to April 1998 was uneventful. In his Personal Information Form narrative (PIF), however, he stated that, during this period, the Intelligence Ministry summoned him to four meetings. When confronted with the inconsistency, he

stated that he was confused and forgot about the meetings. The RPD did not accept that the Applicant would forget such meetings, as the Intelligence Ministry was one of the alleged agents of persecution. This diminished his credibility.

[10] The Applicant claims that, in 2004, he was in police custody for three days, during which time he was beaten severely. In 2005, the Applicant travelled to the United States. When asked why he did not seek refugee protection in the US, the Applicant replied that, as a bishop, he felt an obligation to return to his faithful back in Rwanda. The RPD noted that the Applicant was not ordained a bishop until 2008, three years after this trip to the US. It found the Applicant's explanation for not claiming protection in the US in 2005 to be unreasonable. This further diminished his credibility.

[11] In both his PIF and his oral testimony, the Applicant stated that the police and security establishment did not contact him from 2004 to January 2009. The RPD found it unreasonable that the Applicant could not explain why the establishment would ignore him for five years after spending the preceding seven years accusing him of teaching genocidal ideology.

[12] The Applicant claims that, in January 2009, he was summoned to a meeting with government, military and security officials because he had criticized the government in his Christmas Day sermon. He alleges that these officials shouted at him, struck his leg with a baton and slapped his face.

[13] The Applicant went into hiding. In February 2009, his wife received a summons on his behalf, requiring him to appear before a *gacaca*. Although the RPD accepted that the Applicant's wife received such a court summons, it gave the summons little weight because the document did not specify whether the Applicant was required to appear as a witness, as an accused or in some other capacity.

[14] The Applicant fled Rwanda and arrived in the US on 23 February 2009, at which time he informed the inspection officer that the purpose of his trip was to visit friends. The RPD found that, if the Applicant had feared for his life, as claimed, he would have immediately sought protection in the US instead of waiting for two months and then applying for refugee protection in Canada. The RPD did not accept as reasonable the Applicant's explanation that he felt he would be safer in Canada. There is no evidence that the US does not fulfill its obligations to provide protection to those who seek asylum, and the lower rates of successful refugee applications in the US as compared to Canada do not justify the Applicant's failure to seek asylum there. See *Bedoya v Canada (Minister of Citizenship and Immigration)*, 2007 FC 505. Moreover, failure to seek protection immediately can impugn an applicant's credibility, including his testimony about events in his country of origin. See *Assadi v Canada (Minister of Citizenship and Immigration)* (1997), 70 ACWS (3d) 892, [1997] FCJ No 331 (QL) (FCTD). In consequence of the Applicant's failure to claim asylum, the RPD drew a negative inference with respect to his subjective fear of persecution.

[15] The RPD recognized the diagnoses of post-traumatic stress disorder and depression set out in the Applicant's psychological and counselling reports. It found, however, that as the Applicant was not a credible witness, his diagnoses are not attributable to the alleged persecution in Rwanda.

[16] The RPD determined that there was no serious possibility that the Applicant would face persecution on a Convention ground, nor would he face a danger of torture, a risk to his life or a risk of cruel and unusual punishment or treatment if returned to Rwanda.

ISSUE

[17] The Applicant raises the following issue:

Whether the RPD misconstrued the evidence, ignored relevant evidence or otherwise assessed the evidence in a manner that was unreasonable.

STATUTORY PROVISIONS

[18] The following provisions of the Act are applicable in these proceedings:

Convention refugee	**Définition de « réfugié »**
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.

Person in need of protection

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

Personne à protéger

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

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes

standards, and	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.
Person in need of protection	**Personne à protéger**
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

STANDARD OF REVIEW

[19] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[20] At issue are the RPD's findings of fact and credibility and its treatment of the evidence. The appropriate standard of review is reasonableness. See *Aguebor v Canada (Minister of Employment*

and Immigration) (1993), 160 NR 315, 42 ACWS (3d) 886 (FCA); *Aguirre v Canada (Minister of Citizenship and Immigration)*, 2008 FC 571 at paragraph 14; and *Dunsmuir*, above, at paragraphs 51 and 53.

[21] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47; and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

ARGUMENT

The Applicant

The RPD Erred in Assessing the Evidence

The *Gacaca* Summons Calls the Applicant to Defend Himself

[22] The Decision is in error when it states that the *gacaca* summons does not specify why the Applicant was summonsed and whether the Applicant was called to defend himself against accusation. Line 6 of the summons clearly states: "Has he been convoked to defend himself? Yes." The RPD misconstrued this evidence and erred in giving little weight to the summons. As such, credibility, unjustly diminished with respect to this point, should be restored to the Applicant.

The Applicant's Diagnosis Does Specify Memory Loss

[23] The Decision is in error when it states: "There is nothing in the psychological or the counselling reports adduced by the [Applicant] which suggest (*sic*) that the [Applicant] would have difficulty with his memory." The report of the Canadian Centre for Victims of Torture clearly lists one of the psychological after-effects of the torture endured by the Applicant as "memory loss."

[24] Further, the RPD erred in dismissing the persuasive value of the two reports as well as the causal link between the Applicant's persecution in Rwanda and his diagnosis of anxiety, nervousness, depression, avoidance, hypervigilance and hypersensitivity. A reasoned and logical analysis would view his "evasive and contradictory" testimony as being a result of these diagnoses. Paragraph 5 of the Decision recognizes that an applicant's evidence is presumed true unless there are valid reasons to doubt its truthfulness. In the instant case, there is a valid reason for the apparent evasion and contradictions in the Applicant's evidence. The RPD has erred in not taking the diagnoses into account when evaluating the Applicant's "testimony and behaviour."

The Credibility Findings Are Unreasonable

[25] The Applicant failed to file a claim for refugee protection in the US, believing, based on the advice of his trusted friends, that he would receive better protection in Canada. He did not realize that this delay would adversely affect his claim. He was reasonably unfamiliar with the provisions of the Act, and he made his decisions based on the information that was available to him at the time.

Justice Luc Martineau of this Court, in *RKL v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at paragraph 12, observed that:

> the Board should not be quick to apply the North American logic and reasoning to the claimant's behaviour: consideration should be given to the claimant's age, cultural background and previous social experiences: see *Rahnema v. Canada (Solicitor General)*, [1993] F.C.J. No. 1431 at para. 20 (QL) (T.D.); and *El-Naem v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 185 (QL) (T.D.). Likewise, a lack of coherency or consistency in the claimant's testimony should be viewed in light of the claimant's psychological condition, especially where it has been medically documented: see *Reyes v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 282 (QL) (C.A.); *Sanghera v. Canada (Minister of Employment and Immigration)* (1994), 73 F.T.R. No. 155; and *Luttra Nievas v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 34 (QL) (T.D.).

[26] The Applicant asserts that, overall, the RPD misconstrued his evidence and was overzealous. The Applicant is required to prove the likelihood of persecution only on the preponderance of the evidence. See *Adjei v Canada (Minister of Employment and Immigration)* (1989), [1989] 2 FC 680, [1989] FCJ No 67 (QL) (FCA). The Applicant's evidence, including the *gacaca* summons to appear to defend himself and his physical scars evidencing his torture, shows that he has good reason to fear for his life, particularly given that the agents of persecution are government actors and that state protection would therefore not be available to him.

The Respondent

The Applicant Was Not Credible

[27] In the Respondent's view, the RPD reasonably concluded that there was nothing in the psychological report to suggest that the Applicant suffered from memory loss. The one line in the report of the Canadian Centre for Victims of Torture, which briefly stated that the Applicant suffered from memory loss, did not elaborate on the severity of this memory loss. Therefore, it was not unreasonable for the RPD to expect the Applicant, on the four occasions he was asked, to remember more than just the year in which the material events occurred. Although the Applicant argues that the RPD should have attributed his evasive and contradictory evidence to anxiety, nervousness, depression and other psychological diagnoses, this connection is not made in either report. Therefore, it would be unreasonable for the RPD to make such an attribution.

[28] The Applicant's failure to mention in his oral evidence that he was summoned to meet with the Intelligence Ministry four times between 1997 and 1998, and his failure to explain this inconsistency satisfactorily, warranted a negative credibility finding by the RPD.

[29] The Applicant also failed to claim asylum in the US on two occasions—first, in 2005 and a second time in 2009. The Applicant explained, with respect to the first opportunity, that he felt it his duty as a bishop to return to Rwanda to lead the faithful. However, as the RPD recognized, the Applicant was not a bishop at the material time. With respect to the second opportunity to claim asylum in the US, the Applicant explained his belief that Canada would be able to provide better protection for him than would the US. The RPD reviewed the jurisprudence and reasonably

concluded that, if the Applicant truly feared for his life, he would have claimed asylum at the first opportunity.

[30] Finally, the Respondent argues that, contrary to the Applicant's argument, the *gacaca* summons does not clearly state that the Applicant was to appear before the court as an accused, only to defend himself. In the alternative, if the Court does find that the RPD erred and the Applicant was called as an accused, the error does not amount to a reviewable error because assigning greater weight to the summons would still not overcome the Applicant's other credibility problems and because there is no indication that the RPD drew a negative credibility inference from the summons.

ANALYSIS

[31] The determinative issue in this case was the credibility of the Applicant:

> After considering the whole of the claimant's testimony, his evasive replies, his unreasonable explanations, and his failure to seek protection when it was reasonable for him to have done so, the panel finds that the claimant is not a credible or trustworthy witness.

[32] The Applicant's overall credibility was assessed on the basis of a series of negative credibility findings. Two of those findings are particularly important for this judicial review application.

[33] First of all, the RPD made the following finding at paragraph 7 of the Decision:

> Throughout his testimony, the claimant was unable to be specific about the timing of events central to his claim for protection. When pressed to be more specific, after lengthy pauses the claimant was

> unable to provide more than the year in which the alleged events took place. The panel finds this testimony and behaviour to be evasive. The claimant is an educated, sophisticated person. There is nothing in the psychological or the counselling reports adduced by the claimant which suggest (*sic*) that the claimant would have difficulty with his memory. The panel finds that his evasive testimony diminishes his credibility as a witness.

[34] The error occurs with the crucial finding that there "is nothing in the psychological reports adduced by the claimant which suggest (*sic*) that the claimant would have difficulty with his memory."

[35] The Applicant is 51 years old. In the report of the Canadian Centre for Victims of Torture it clearly states that one of the psychological effects of the torture that the Applicant endured is "memory loss."

[36] Had the RPD understood this, it is clear that it had available to it objective evidence that could explain the Applicant's forgetfulness, his apparent evasiveness and the contradictions in his testimony.

[37] The RPD seems to have disregarded the psychological report of the Canadian Centre for Victims of Torture as an explanation for the Applicant's answers. Dr. Pilowski's report does not specifically mention memory loss but describes him as "highly traumatized" and suffering from "Posttraumatic Stress Disorder," conditions which are not incompatible with memory loss.

[38] In my view, this mistake by the RPD is highly material because it impacts the whole of the Applicant's evidence and many of the grounds asserted for the negative credibility findings. Had the

RPD correctly understood that memory loss could be connected to what the Applicant said he had suffered there is no telling what this might have done to its handling of the credibility issue.

[39] As Justice John Evans, then of the Federal Court, stated in *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35, [1998] FCJ No 1425 (QL), at paragraphs 15 and 17:

> The Court may infer that the administrative agency under review made the erroneous finding of fact "without regard to the evidence" from the agency's failure to mention in its reasons some evidence before it that was relevant to the finding, and pointed to a different conclusion from that reached by the agency…. [A] court will be reluctant to defer to an agency's factual determinations in the absence of express findings, and an analysis of the evidence that shows how the agency reached its result.
>
> […]
>
> … In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact.

[40] The RPD also makes a further material error in paragraph 6 of the decision when it says that the 2009 *gacaca* summons "did not specify whether the claimant was being convoked as an accused, as a witness or in some other capacity. The panel gives little weight to this summons accordingly."

[41] The Applicant provided the RPD with a copy of this summons as well as an English translation, performed by the Settlement and Integration Services Organization (SISO) in Hamilton, which confirms the accuracy of the translation. The letter that accompanies the summons (page 176 of the Certified Tribunal Record) says that the Applicant is being summoned "[i]n accordance to article 49 of Law 13/2004 date 17/May/2004 regarding criminal persecution, you are requested to present yourself on 18/02/2009…."

[42] The sixth item in the summons itself translates as follows:

> (6) Has he been convoked to defend himself? Yes… If yes, File number (if applicable) 101. Conplaint (*sic*)… What he has been accused of… To explain himself.

[43] The fact that the Applicant was not being called as a witness or for some other reason is clear from the document read as a whole.

[44] This is a significant mistake by the RPD and it entirely undermines the findings made in paragraph 6 of the Decision.

[45] The Applicant raises other issues but there is no need for the Court to go further. The Decision is based upon a series of negative credibility findings. These highly material mistakes of fact render it unreasonable. It has to be returned for reconsideration.

[46] Counsel agree that there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is allowed. The decision is quashed and the matter is returned for reconsideration by a differently constituted RPD.
2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5316-10
STYLE OF CAUSE:	**JUPA KABERUKA** **and** **THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	April 13, 2011
REASONS FOR JUDGMENT AND JUDGMENT	**Russell J.**
DATED:	June 14, 2011

APPEARANCES:

Philip U. Okpala	FOR THE APPLICANT
Monmi Goswami	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Okpala Law Offices Professional Corporation Hamilton, Ontario	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT