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Docket: IMM-8509-11

Citation: 2012 FC 794

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, June 21, 2012

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

**ALINE VALENTINE UWIMANA
LIAM YOANN UWIMANA**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), of a decision by the Refugee Protection Division (RPD), dated October 14, 2011, that the applicants are neither Convention refugees within the meaning of section 96 of the IRPA nor persons in need of protection under section 97 of the IRPA.

II. Facts

[2] The female applicant, Aline Valentine Uwimana, is a citizen of Burundi. Her son, the male applicant, Liam Yoann Uwimana, is a citizen of the United States.

[3] The female applicant, the daughter of a mixed couple (Tutsi and Hutu), alleges that, on December 12, 1994, she witnessed the massacre of her family—that is, her mother, her two sisters and her brother—by a group of young Tutsis.

[4] The female applicant apparently reported two of the assailants, who were imprisoned and then released in 2006.

[5] After the massacre, the female applicant lived in several cities in Burundi.

[6] The female applicant alleges that she was raped by two men in January 2000. She was rescued by her neighbours and hospitalized for two weeks.

[7] From 2001 to 2005, the female applicant worked as a teacher. She explained that, in 2004, her family commenced long-distance marriage rituals with her future husband, Jean De Dieu Uwimana, who was residing in the United States.

[8] After she obtained a student visa, she left Burundi for the United States on September 19, 2005, with a passport bearing her cousin's photo.

[9] The female applicant's son was born in June 2007. That same year, the female applicant's husband obtained his permanent residence but refused to sponsor her because he discovered that his wife's passport photo was false.

[10] The female applicant decided to leave her husband to come to Canada with her 10-month-old son, for whom she submitted a fake birth certificate claiming that he was of Burundian nationality.

[11] On April 12, 2008, because of identity problems, she was placed in detention with her son.

[12] At the port of entry, the female applicant claimed that she had been raped on January 23, 2008. She alleged that she fears the intelligence people. She claimed, among other things, that her husband had stayed in Burundi (Tribunal Record (TR) at pages 236–239).

[13] After learning from the American authorities that the female applicant had entered the United States on September 19, 2005, with a Burundian passport and that her son was an American citizen, the Canada Border Services Agency (CBSA) was satisfied with the female applicant's identity and she was released.

[14] On May 27, 2008, the female applicant, in the initial version of her Personal Information Form (PIF), claimed that she had wanted to flee her country because her family's murderers had

been released. Her marriage to her husband, who lived in the United States, had allowed her to flee Burundi (TR at pages 106–107).

[15] On May 7, 2009, the female applicant amended her PIF and added that she had been raped in January 2000 (TR at page 112).

[16] In the RPD's decision dated March 1, 2011, the applicant was declared a vulnerable person as defined by Guideline 8 on Procedures with Respect to Vulnerable Persons Appearing before the Immigration and Refugee Board of Canada (Guideline 8).

III. Decision under review

[17] The RPD pointed out that the female applicant submitted three different versions of her account, namely, the one given to the immigration officer at the point of entry, the one given in her initial PIF and the one given in the amended version of her PIF.

[18] The RPD rejected the refugee claim of the female applicant's son because she did not submit evidence against the United States.

[19] The RPD rendered a negative decision based on the female applicant's lack of credibility. The RPD noted the implausibility or contradictions relating to, primarily, the following elements in the female applicant's account:

- a) the identity of the agents of persecution;
- b) the presence of the female applicant's cousin at her family's murder;

- c) the absence of persecution of this cousin;
- d) the identity of the persons who made threatening phone calls.

[20] The RPD also held a lack of evidence in support of the deaths of her family members against the female applicant.

[21] The RPD also analyzed the risk of persecution by reason of the female applicant's ethnicity and found that she was not a victim of it.

[22] Regarding the situation of women in Burundi, the RPD found that the female applicant does not fit the profile of women at risk of sexual violence in Burundi. In that regard, it pointed out that the female applicant was a teacher before leaving Burundi.

IV. Issue

[23] Did the RPD commit a reviewable error?

V. Relevant statutory provisions

[24] The following provisions of the IRPA apply in this case:

Convention refugee

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,

Définition de « réfugié »

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 themselves of the protection of each of those countries; or

(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.

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) 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

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(ii) the risk would be

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) 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) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en

faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

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) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(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

(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.

Personne à protéger

(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.

VI. Position of the parties

[25] The applicants criticize the RPD for failing to sufficiently consider the female applicant's vulnerable state. The female applicant claims that the RPD failed to consider the impact of her psychological state on her ability to testify. Moreover, the female applicant challenges the non-credibility finding made by the RPD regarding the different versions of her testimony, which she explained.

[26] Regarding the account's implausibility, the female applicant maintains that she never contradicted herself during her testimony. The female applicant also claims that she provided a plausible explanation for her use of a fake passport and the absence of her mother's name in the documents submitted in support of the death claims. The female applicant also argues that the RPD erred by finding that there was no link between the murders of 1994 and the rape.

[27] The respondent contends that the objective of Guideline 8 is not to fill in the gaps in the female applicant's testimony. He points out that the RPD was sensitive to the factors that could have had an impact on the female applicant's testimony.

[28] Moreover, the respondent claims that the RPD reasonably found that the female applicant lacked credibility. The respondent refers to the discrepancies and implausibilities that are central to the female applicant's account, namely, the identity of the agents of persecution and the threats against the cousin and the female applicant. He also claims that the lack of evidence establishing the death of the female applicant's family members undermined her credibility. Regarding the link between the rape of the female applicant and the murders of 1994, the respondent submits that the RPD's finding is valid given that it did not believe the female applicant. By this very fact, he maintains that the RPD's finding that the female applicant travelled with an authentic passport is reasonable with respect to the non-credibility findings.

VIII. Analysis

Guideline 8

[29] First, the issue of the application of the guideline is one of procedural fairness and is, as a result, reviewable on the standard of correctness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190).

[30] The female applicant's argument relies mainly on her vulnerability, which the RPD failed to consider. Guideline 8 unequivocally warns claimants and their counsel against the idea that vulnerability is necessarily associated with credibility:

5. General Principles

5.1 A person may be identified as vulnerable, and procedural accommodations made, so that the person is not disadvantaged in the presentation of their case. The identification of vulnerability will usually be made at an early stage, before the IRB has considered all the evidence in the case and before an assessment of the person's credibility has been made.

5.2 A person may be identified as vulnerable based, in part, on alleged underlying facts which are also central to the ultimate determination of their case before the IRB. An identification of vulnerability does not indicate the IRB's acceptance of the alleged underlying facts. It is made for the purpose of procedural accommodation only. Thus the identification of a person as vulnerable does not predispose a member to make a particular determination of the case on its merits. Rather, a determination of the merits of the case will be made on the basis of an assessment of all the evidence.

5.3 Similarly, evidence initially used to identify a vulnerable person and to make procedural accommodations may not have been tested through credibility assessments or other means. If such evidence is then used to adjudicate the merits of the case, the member should ensure that all hearing participants are given an opportunity to address this evidence as it relates to the merits of the case. This means that submissions may be made about the relevance of the evidence and the evidence may be tested through such means as questioning by the parties and the member, and other methods. The credibility and probative value of the evidence may then be assessed by the member, even though the IRB previously accepted the evidence for the purpose of identifying vulnerability and making procedural accommodations. [Emphasis added.]

[31] Certainly, this guideline must not be minimized in importance. Its general objective is to provide vulnerable claimants with the framework necessary for being able to testify, despite their emotional or psychological difficulties (*Mubiala v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1105).

[32] That being said, the guideline cannot help make credible a testimony that is deficient due to implausibilities or contradictions that cannot be directly linked to the claimant's state of vulnerability.

[33] After reviewing the hearing transcript carefully, this Court cannot conclude that the implausibility and non-credibility findings were made without consideration of the female applicant's vulnerable state. She benefitted from a hearing that respected her vulnerable state. In addition, this Court is of the opinion that the elements identified by the RPD that diminished the female applicant's credibility cannot be excused by her vulnerability. The RPD also explicitly noted the following:

[51] These contradictions and this implausibility undermine the claimant's credibility with respect to the threats received, and the panel does not believe that this can be attributed to the medication she is taking, as she appeared alert during the hearing and answered the questions spontaneously. . . .

Credibility

[34] In this case, it is important to note that the credibility problems are salient. The RPD criticized, among other things, the implausibility of important parts of the female applicant's account, namely, the circumstances surrounding the murder of her family, the identity of the

persecutors and the threats received. Significant deference is owed, and the appropriate standard of review is reasonableness (*Dunsmuir*, above; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708)).

[35] On this point, it is important to remember that it is up to the RPD, by virtue of its expertise, to assess all of the evidence submitted and the value of the refugee claimant's testimony (*Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 (QL/Lexis)). In this case, it was not demonstrated that the RPD did not consider the evidence. The RPD assessed the evidence submitted, and it is not up to this Court to substitute its reasoning for that of the RPD.

[36] From the same perspective, its implausibility findings are not open to judicial review if they are consistent and supported by clearly stated reasons, as are those of the decision under review (*Santos v Canada (Minister of Citizenship and Immigration)*, 2004 FC 937; *Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776, 208 FTR 267).

[37] Furthermore, there are identity problems underlying the credibility finding in this case. On this point, it is important to note that the female applicant submitted a false birth certificate in the name of her minor son, indicating that he was born in Burundi in an attempt to conceal her stay in the United States. Even though the RPD accepted the female applicant's identity, it nevertheless pointed out the concerns that remain regarding the use of a fake passport to leave Burundi.

[38] In light of Guideline 4 on Women Refugee Claimants Fearing Gender-Related Persecution, the RPD analyzed the possibility that the female applicant would be persecuted because of her

gender. The RPD's analysis refers to the documentary evidence, even if the RPD had reservations about whether the rape alleged by the female applicant took place. The analysis falls within the parameters of reasonableness.

[39] Under these circumstances, in view of all of the above-mentioned reasons, the objective evidence is of no help to the female applicant because she did not establish a well-founded subjective fear of persecution.

VIII. Conclusion

[40] For all of the above-mentioned reasons, the intervention of this Court is not required. The application for judicial review is therefore dismissed.

JUDGMENT

THE COURT ORDERS that the applicants' application for judicial review be dismissed.

No question of general importance arises for certification.

“Michel M.J. Shore”

Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-8509-11

STYLE OF CAUSE: ALINE VALENTINE UWIMANA
LIAM YOANNN UWIMANA
v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

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