Federal Court Cour fédérale

Date: 20120927

Docket: IMM-8375-11

Citation: 2012 FC 1143

Ottawa, Ontario, September 27, 2012

PRESENT: The Honourable Madam Justice Gleason

BETWEEN:

HENRI JEAN-CLAUDE SEYOBOKA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] In the present application for judicial review, the applicant seeks to set aside the decision of the Refugee Protection Division of the Immigration and Refugee Board [the RPD or the Board], made on September 29, 2011, in which the Board rejected his request to reopen the hearing into the application to vacate his refugee status. The applicant has a lengthy history of proceedings before the RPD and this Court. Because this application for judicial review depends in large part on decisions previously made by the Board and this Court, it is necessary to review those decisions and the applicant's immigration history.

Background

[2] The applicant is a citizen of Rwanda of Hutu ethnicity. Between 1991 and 1994, he was a member of the Rwandan military, the Forces armées rwandaises [FAR]. He joined the FAR voluntarily in 1991 and occupied the rank of artillery officer when the genocide occurred in 1994. The applicant has admitted that he could have demobilized in 1993 after the Arusha Accords were signed between the government of Rwanda and the Rwandan Patriotic Front, but chose to instead remain in the FAR to pursue a military career.

[3] On approximately April 14, 1994, the FAR recalled the applicant to active service, after the plane carrying the Rwandan President had been shot down and the Rwandan civil war had started. (The applicant had been attending university as part of his training as an officer in the FAR before the recall.) Upon being recalled, the applicant was assigned to an artillery unit in Kigali, where he was charged with identifying targets for rocket attacks and supervising the soldiers who carried out the attacks. The applicant deserted from the FAR at the end of May 1994, when, as he stated to investigators with the Department of Citizenship and Immigration in 2000, he became "bitter" as a result of the treatment he received due to his father being married to a woman of Tutsi ethnicity. The applicant fled to Kenya shortly after his desertion and sought admission to Canada as a refugee, where his wife and son had previously been granted refugee status.

[4] As his overseas application was taking some time to process, the applicant came to Canada on a false passport in 1996 and made another claim for refugee status upon arrival. In both applications, he concealed his military background, denied having been a member of any military organization and stated that he had merely been a student in Rwanda. The applicant was granted

refugee status on October 25, 1996 and shortly thereafter made an application for permanent resident status. The applicant also concealed his role in the FAR in his application for permanent resident status.

[5] In 1998, representatives of the International Criminal Tribunal for Rwanda [ICTR] and a member of the war crimes unit of Royal Canadian Mounted Police [RCMP] questioned the applicant because he was being sought as a material witness in connection with the prosecution of Colonel Bagosora, Director of the Cabinet in Rwanda's Ministry of Defense during the genocide. Following these interviews, the applicant amended the documents he had filed in support of his refugee and permanent resident applications to disclose his participation in the FAR.

[6] Over the next several years, the war crimes units of the RCMP, the Department of Justice, and Citizenship and Immigration Canada conducted investigations into the applicant's suspected involvement in the Rwandan genocide. In connection with the investigations, they obtained copies of indictments before the ICTR against Protais Zigiranyrazo, a former Prefect in Rwanda, who lived close to the applicant's family home in Kiyovu (a neighbourhood in Kigali) and against General Kabiligi, the applicant's commanding officer. The indictments contained a statement made by an anonymous witness, "DAS", which implicated the applicant in the brutal April 14, 1994 killing of a Tutsi woman named Francine and her children, who had lived close to the applicant's family's home. The applicant admits that he was in the vicinity of the home on April 13th to vacate members of his family to a safer location but denies any involvement in the murder of Francine or her children.

[7] On June 30, 2005, the Minister of Public Safety and Emergency Preparedness made an application to the RPD, pursuant to section 109 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA or the Act], to vacate the applicant's refugee status. The Minister argued that by reason of the applicant's participation in the FAR and the other acts he committed, namely his role in the murder of Francine and her children, the applicant was excluded from protection by virtue of section 98 of the IRPA and Article 1F of the *Convention Relating to the Status of Refugees, 1951*, Can TS 1969 No 6 [the Refugee Convention]. Section 98 of the IRPA provides that:

A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention Refugee or person in need of protection.	La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.

Article 1F of the Refugee Convention states in relevant part that the Convention:

[…] shall not apply to any person with respect to whom there are serious reasons for considering that:	[…] ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser :
(a) he has committed a crime against peace, a war crimes, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;	a) qu'elles ont commis un crime contre la paix, un crime de guerre ou un crime contre l'humanité, au sens des instruments internationaux élaborés pour prévoir des dispositions relatives à ces crimes;
(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;	b) qu'elles ont commis un crime grave de droit commun en dehors du pays d'accueil avant d'y être admises comme réfugiées;
(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.	c) qu'elles se sont rendues coupables d'agissements contraires aux buts et aux principes des Nations Unies.

[8] In a decision dated September 29, 2006, the RPD vacated the applicant's refugee status, determining that there was serious reason to believe he had been complicit in crimes against humanity, serious non-political crimes and acts contrary to the purposes and principles of the United Nations, within the meaning of paragraphs (a), (b) and (c) of article 1F of the Refugee Convention. The RPD premised its decision on several factors.

[9] First, it determined that the applicant had made material misrepresentations in concealing his participation in the FAR. The Board disbelieved the applicant's reason for the misrepresentation and determined that he had concealed his role in the FAR because he was concerned that had it become known he would have been excluded from refugee status and status as a protected person by reason of the acts committed by the FAR during the Rwandan genocide.

[10] Next, the Board reviewed the evidence regarding the murder of Francine and her children, and the applicant's claim that DAS did not exist. The RPD rejected this claim, noting that DAS had been interviewed twice by investigators from the ICTR. While recognising that the allegations against the applicant in respect of the murder of Francine and her children had not been proven before the ICTR, the Board noted that it nonetheless needed to take them seriously because they implicated the applicant personally in a direct violation of Article 1F of the Refugee Convention.

[11] The RPD then considered the applicant's role in the FAR and the role the FAR played in the Rwandan genocide and determined that the applicant was complicit in criminal acts committed by the FAR, which it determined to be a "limited brutal purpose" organization or an organization whose "violent activities cannot be separated from whatever other objectives it may have" (*Thomas*

v Canada (Minister of Citizenship and Immigration), 2007 FC 838 at para 43, [2007] FCJ No 1114). The RPD based its finding regarding the FAR on the voluminous documentation it had before it regarding the role played by the FAR in the Rwandan genocide. This documentation indicated that the FAR played a key role in orchestrating and furthering the genocide: the military killed a huge number of civilians and its members and leaders exhorted civilian Hutus to slaughter the Tutsi. The RPD referred extensively to the report of Alison Desforges of Human Rights Watch, *Leave None to Tell the Story* (March 1999), in its decision.[1] Desforges highlights the key role played by the military in the genocide; for example, at pp 176-177, she wrote:

> Soldiers and National Police, whether on active duty or retired, killed civilians and they gave permission, set the example, and commanded others to kill. Although fewer in number than civilian killers, the military played a decisive role by initiating and directing the slaughter.

[12] As for the applicant's complicity in the genocide, the RPD found the applicant's claim to have been unaware of the FAR's involvement in the genocide to not be credible, given the scale of the slaughter and the open and obvious role the military played in it. The Board noted that the applicant gave very vague responses regarding his whereabouts between April 7 and April 16, 1994, when the genocide was at its height. The RPD also drew a negative inference from the applicant's having lied about his involvement in the FAR, reasoning that he concealed his background because he knew it would result in his exclusion from protection under the IRPA and the Refugee Convention. The RPD thus concluded that the applicant had knowledge of the role of the military in the genocide and, notwithstanding this knowledge, voluntarily remained in his position as an active artillery officer while the genocide continued. The Board therefore determined that there was

[1] The French version of this report was cited by the RPD but for ease of reference, the English version has been quoted here.

serious reason to believe the applicant was complicit in the international crimes committed by the FAR and accordingly that he ought not to have been granted refugee status or status as a person in need of protection by virtue of section 98 of the IRPA and Article 1F of the Refugee Convention. It therefore vacated the decision granting him refugee status.

[13] On February 6, 2007, this Court denied the applicant's application for leave to bring a judicial review application in respect of the September 29, 2006 decision of the RPD vacating the applicant's refugee status. On June 4, 2007 the applicant brought a motion pursuant to Rule 399 (2)(a) of the *Federal Courts Rules*, SOR/98-106 seeking to set aside the denial of leave; this Court dismissed the motion on June 26, 2007.

[14] On September 20, 2007, the applicant made his first motion to the RPD to reopen the hearing into the application to vacate his refugee status, arguing that there had been a breach of natural justice. More specifically, he asserted that Canada Border Services had in its possession exculpatory statements from two persons whom had met with the RCMP and that these statements were not disclosed to the applicant. The applicant alleged that these two witnesses would have provided testimony to indicate he was not involved in the murder of Francine and her children.

[15] On April 14, 2008, the Board dismissed the applicant's first application to reopen for two reasons. First, it determined that there had been no breach of natural justice in the circumstances as the applicant had for some time been aware of the fact that the RCMP had interviewed the two witnesses in question but never requested disclosure of their statements and did not indicate that they had potentially exculpatory evidence he wished the Board to consider. Second, the Board held

that even if there had been a breach of natural justice, the decision to vacate the applicant's refugee status would still remain intact because it rested not so much on the applicant's suspected involvement in the murder of Francine and her children but rather on the "more obvious crimes against humanity in which [the applicant] was found to be complicit by reason of his active involvement in the FAR" (Certified Tribunal Record [CTR] at p 516).

[16] The applicant sought judicial review of this decision, and on January 30, 2009, Justice de Montigny dismissed the judicial review application (*Seyoboka v Canada (Minister of Citizenship and Immigration)*, 2009 FC 104, [2010] 2 FCR 3). Justice de Montigny held that there had been no denial of natural justice and that even if there had been there would be no basis for the Court to intervene. He noted that the most serious ground for vacating the applicant's refugee status rested on the complicity finding made by reason of the applicant's role in the FAR and the fact that he continued to serve as an artillery officer after he learned that the FAR was committing acts of genocide. Justice de Montigny held at paragraph 54 that there were reasonable grounds for the RPD to have concluded that the applicant was complicit in the international crimes committed by the FAR, noting that:

> [54] … A simple perusal of the vacation proceeding transcript reveals that the applicant was highly connected to the governing regime of Rwanda during the genocide of 1994. The applicant testified that he was able to freely enter the presidential palace and wander around Kigali for two weeks while the genocide commenced. His implausible claim that he was unaware of the extent of the massacres was rejected by the Tribunal. Since the applicant has already unsuccessfully sought judicial review of that decision, he should be precluded from attempting to collaterally attack that decision.

[17] On April 19, 2009, the applicant made a second application to the RPD to reopen the hearing into his application to vacate his determination of refugee status. In support of his second application, the applicant filed evidence that General Kabiligi had been acquitted of all charges by the ICTR. The applicant also filed the decision of the ICTR in which it convicted Protais Zigiranyirazo and in which it found the anonymous witness, DAS, to be unreliable. The applicant argued that the hearing into the vacation of his refugee status should be reopened since much of the evidence upon which the original panel had relied, with reference to the murder of Francine and her children, was without foundation.

[18] In a decision dated July 16, 2009, the RPD rejected the applicant's second request to reopen the vacation hearing, noting that the evidence upon which the applicant based his request had been in existence only since December 2008 and that the Board was precluded from hearing it because it constituted "new evidence" and the Board lacks jurisdiction to reopen to hear new evidence. The Board went on to note that:

> […] even if the evidence of the ICTR finding had been available at the time of the hearing into the Application to Vacate, the member may have come to the same decision because the reasons for vacating his status did not depend exclusively on the evidence whose weight is affected by the ICTR findings (at para 21, CTR at p 98).

The panel thus did not finally decide what impact the new evidence might have had on the original decision to vacate the applicant's refugee status as it determined that the new evidence was not admissible.

[19] The applicant once again made an application for judicial review. This time, however, his application was granted, and in a decision dated May 4, 2010, Justice O'Reilly set aside the July 16,

2009 decision of the RPD in *Seyoboka v Canada (Minister of Citizenship and Immigration)*, 2010 FC 488. Justice O'Reilly held that in its July 16, 2009 decision the RPD had failed to expressly consider the applicant's main point, namely, that evidence arising from proceedings at the ICTR conflicted with the evidence upon which the vacation determination had been made. In this regard, Justice O'Reilly stated that the general proposition that the Board does not have jurisdiction to reopen proceedings on the presentation of new evidence is "subject to a narrow and important exception where the new evidence supports a finding that there has been a breach of natural justice" (at para 24). He noted that such a breach may be shown to exist where the new evidence undercuts the facts upon which the original panel made its vacation decision and that the RPD had erred in failing to consider whether or not the new facts put forward by the applicant fell into this category. He therefore remitted the matter back to the RPD for consideration of this issue.

[20] The RPD considered this issue in its decision of September 29, 2011, which is the subject of the present application for judicial review.

The Decision Under Review

[21] In its September 29, 2011 decision, after reviewing the above background, the RPD analyzed whether or not the new evidence the applicant filed undercut the basis for the Board's September 29, 2006 decision to vacate the applicant's refugee status. The Board noted that the new evidence did not exonerate the applicant from having been present at the Kiyovu roadblock (where Francine and others were killed) and that in any event the new evidence was irrelevant to the other basis upon which the original panel had based its vacation decision, namely, the applicant's

involvement in the FAR, with knowledge of its role in the Rwandan genocide. The RPD noted that the original panel had concluded as follows:

> [T]he panel is of the opinion that the respondent (the applicant) by continuing to belong to an organization (the FAR) with a limited and brutal purpose, was complicit in achieving these objectives (para 25, CTR at p 10, citing September 29, 2006 decision of the Board, CTR at para 854).

[22] In the decision under review, the RPD went on to hold that the original panel's conclusion:

> […] was in no way based on the testimony of DAS or on the applicant's alleged actions at the roadblock. The new evidence did not call into question the applicant's membership in the FAR or the human rights violations with which soldiers were associated (at para 25, CTR at p 10).

The RPD thus concluded that the new evidence did not establish that there was a failure to observe the principles of natural justice because the new evidence would not have changed the outcome of the application to vacate the applicant's refugee status. Accordingly, the Board dismissed the applicant's second application to reopen the hearing into the vacation of his status.

Issues Raised by the Applicant

[23] The applicant argues that the Board committed two reviewable errors in its September 29, 2011 decision. First, he argues that the Board violated principles of natural justice because it decided the application to reopen without a hearing and failed to respond to two written requests from his counsel, asking that the Board indicate when and how it intended to proceed with the applicant's reconsideration request. The applicant asserts that had a hearing been held, he would have filed a copy of the appeal decision of the Appeals Chamber of the ICTR that acquitted Protais

Zigiranyirazo in November of 2009. The applicant also argues that, had a hearing been granted, he would also have made arguments to the RPD regarding the proper way in which to interpret Justice O'Reilly's decision.

[24] Secondly, the applicant asserts that the Board's decision on the merits of his second application to reopen the vacation hearing was unreasonable because the RPD failed to adequately consider the impact of the new evidence, and instead merely repeated its conclusions from the decision quashed by Justice O'Reilly and those of Justice de Montigny, which had been reached several years earlier before the new evidence came to light.

[25] For the reasons set out below, I have determined that neither of these arguments has merit and, accordingly, that this application for judicial review will be dismissed.

No Breach of Natural Justice

[26] As noted, the applicant twice wrote to the RPD and requested the Board advise as to how it intended to proceed with the reconsideration of the applicant's second application to reopen the hearing into the application to vacate his refugee status, following the decision of Justice O'Reilly. The first letter was written shortly after Justice O'Reilly's decision; the second was written approximately one year later, when the applicant had heard nothing from the Board. In the second letter, it is noteworthy that counsel for the applicant concluded as follows: "if further submissions are required from counsel please advise." Counsel did not ever indicate to the Board that the applicant wished to make further submissions and, likewise, at no time requested that the RPD hold

a hearing for the purposes of receiving evidence or submissions before ruling on the applicant's second request to reopen the vacation proceedings.

[27] It is common ground between the parties that the Board typically disposes of requests to reopen proceedings in applications to vacate a refugee determination without holding an oral hearing. Indeed, the record demonstrates that that is how the Board disposed of the applicant's first request to reopen (see CTR at p 524). In respect of his second application to reopen the vacation proceedings, the applicant was represented by experienced immigration counsel. During the course of the hearing in this judicial review application, applicant's counsel candidly conceded that counsel was aware of the Board's usual practice of deciding applications like this one without holding a hearing.

[28] Rule 44 of the *Refugee Protection Division Rules*, SOR/2002-228, provides that applications to reopen a hearing such as the present must be made in writing and must be accompanied by evidence by way of affidavit or statutory declaration. It is thus clear to applicants generally and was clear to applicant's counsel specifically that the RPD does not normally hold hearings into requests to reopen hearings. In this regard, as counsel for the respondent notes, the situation in an application to reopen a hearing is akin to an H&C application, in respect of which the jurisprudence firmly holds that there is no requirement that the tribunal hold a hearing in every case and that it is incumbent on an applicant to file all evidence and make all submissions in writing (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, [1999] SCJ No 39 at para 34; *Zhu v Canada (Minister of Employment and Immigration)*, 2011 FC 952 at para 21).

[29] The requirements of natural justice or procedural fairness depend upon the nature of the decision, the circumstances in which is rendered and its impact on the individual involved. The Supreme Court of Canada considered the factors relevant to determining the content of the requirements of procedural fairness, in the context of an application for humanitarian and compassionate (H&C) consideration by a failed refugee applicant, in *Baker v Minister of Citizenship and Immigration*, [1999] 2 SCR 817, 174 DLR (4th) 193 [*Baker*]. At paragraphs 21 to 27 of *Baker*, the Supreme Court enumerated the following as being factors relevant to determining the content of the duty: the nature of the decision and of the procedures followed by the tribunal in making it or the "closeness of the administrative process to the judicial process"; the requirements of the statute under which the decision is made and the role of the particular decision within the statutory scheme; the importance of the decision to the individuals affected; the legitimate expectations of the affected individuals regarding what procedures would be followed by the tribunal; and the choices made by the tribunal regarding procedure, especially where the tribunal is afforded the right to establish its own procedures.

[30] Application of these factors to the circumstances of this case leads to the conclusion that the RPD was not required to hold a hearing or to request further submissions from the applicant. While the interests at play in the applicant's file are doubtless very important given the implications of the RPD's decision to him, the other factors militate strongly in favour of the conclusion that the RPD was not required to hold a hearing and was not required to seek submissions from counsel for the applicant, prior to rendering its decision. In this regard, the RPD's written procedures make it clear that a hearing will not be held and that an applicant must file all the evidence and arguments it wishes the Board to consider. The applicant's counsel was well aware of these procedures and thus

the applicant had no legitimate expectation that a hearing would be held or that he would be afforded a further opportunity to make submissions or file evidence. Moreover, as counsel for the respondent correctly argues, had the applicant wished to make additional submissions, there is nothing that prevented him from so doing. The decision in question was not rendered until September of 2011. Had the applicant wished to place the November 2009 decision of the Appeals Chamber of the ICTR in Protais Zigiranyirazo's appeal before the RPD, he should have done so in writing, as Rule 44 of the *RPD Rules* directs. Likewise, he ought to have done the same in respect of any arguments he might wanted to have made in respect of the impact of Justice O'Reilly's decision.

[31] For these reasons, the applicant's first ground of review fails.

The RPD's Decision is Reasonable

[32] Likewise, the second ground of review advanced by the applicant also fails. As already discussed, the 2006 vacation decision was only partly premised on the evidence that was then before the RPD regarding the applicant's suspected role in the murder of Francine and her children, and the more significant ground in support of the decision to vacate the refugee determination centred instead on the RPD's findings that FAR was a limited brutal purpose organization and that the applicant, with awareness of the FAR's role in Rwandan genocide, chose to continue to serve as an artillery officer and to direct rocket attacks.

[33] The new evidence the applicant placed before the RPD was completely irrelevant to these issues. The Board's determination in the decision under review that the new evidence did not

undercut the vacation decision, and therefore that there was no breach of natural justice, was both reasonable and correct given that the new evidence did not relate to the principal ground upon which the original panel had based its decision.

[34] Moreover, there was ample evidence before the RPD in 2006 to support its conclusion that the FAR was a limited brutal purpose organization. The case law establishes that participation in such an organization raises a rebuttable presumption that the refugee applicant is complicit in its international crimes (*Ramirez v Canada (Minister of Employment and Immigration)*, [1992] 2 FC 306, [1992] FCJ No 109 at para 16). There was likewise ample basis for the RPD to have reasonably concluded that the applicant failed to rebut the presumption of complicity in light of the position he held, the scope of the genocide, the role of the FAR in it and the applicant's failure to disassociate himself from the FAR at the first available opportunity. Indeed, the reasonableness of the RPD's determinations in this regard was confirmed by this Court in the refusal to grant leave to appeal the RPD's 2006 vacation decision. As Justice de Montigny noted in *Seyoboka v Canada (Minister of Citizenship and Immigration)*, 2009 FC 104 (as previously cited), the applicant cannot reargue these issues in the context of a judicial review application, as so doing would constitute an impermissible collateral attack on the RPD's 2006 decision.

[35] Thus, the RPD's 2006 vacation decision was reasonably premised in large part on the applicant's role in the FAR and the FAR's involvement in the genocide. The new evidence the applicant invoked in support of his second application to reopen the vacation hearing is completely irrelevant to the determinations made by the Board in respect of these issues. Accordingly, this application for judicial review must be dismissed.

[36] No question for certification under section 74 of the IRPA was presented and none arises in this case.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review of the RPD's Decision is dismissed.

2. No question of general importance is certified.

3. There is no order as to costs.

"Mary J.L. Gleason"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Clare Crummey	FOR THE APPLICANT
David Cranton	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lorne Waldman, Barrister & Solicitor Toronto, Ontario	FOR THE APPLICANT
Myles J. Kirvan, Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT