

Federal Court



Cour fédérale

Date: 20121023

Docket: IMM-2778-12

Citation: 2012 FC 1212

Ottawa, Ontario, this 23rd day of October 2012

Present: The Honourable Mr. Justice Pinard

BETWEEN:

Rachel KAYINAMURA

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] On March 21, 2012, Rachel Kayinamura (the “applicant”) filed the present application for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board (the “Board”), pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the “Act”). The Board held the applicant was not a Convention refugee or a person in need of protection under sections 96 and 97 of the Act.

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[2] The applicant is a citizen of Rwanda and of the Tutsi ethnicity. The applicant was 17 years old during the Rwanda genocide.

[3] The applicant alleges she was spending Easter vacation with her aunt when the genocide began. The applicant claims that Hutu militants captured her, her aunt, and her aunt's servant.

[4] The applicant alleges the militants spared her life because Mr. Mparibatenda Theodomir, who had an alcohol store frequented by the militants, decided to keep the applicant for himself. The applicant alleges that for more than a month she was held hostage by Mr. Theodomir. She claims he raped and beat her many times during this period. The applicant alleges she was rescued by the *Front patriotique rwandais*.

[5] The applicant claims she participated at the Gacaca court between 2007 and 2009, where she accused Mr. Theodomir of rape and accused four other individuals, Mbyariyehe Gaspard, Ngirabanzi Felicien, Ahishakiye Jean, and Nshimiyimana Bosco, of capturing and beating her, her aunt, and her aunt's servant, and intending to kill them.

[6] After she gave her testimony, the applicant claims she received death threats from these individuals and their families in person, as well as anonymous threats over the telephone. She did not report these threats to the police because she could not prove them.

[7] The applicant alleges that of the five individuals she testified against at the Gacaca court, only Mr. Theodimir was given a prison sentence. The applicant claims Mr. Theodimir appealed his sentence in early 2009 and he was liberated in circumstances unclear to the applicant.

[8] In January 2009 the applicant claims she saw the liberated Mr. Theodimir. He allegedly told her he would kill her if she dared pursue him again. Unable to hold herself back, the applicant claims she responded that she would continue to pursue him. She allegedly proceeded to address herself to the Attorney General of Kigali to ask that Mr. Theodimir's file be revisited.

[9] In February 2009, the applicant alleges she received two notes telling her that her death was near. She claims she brought them to the police so they could investigate.

[10] On the evening of March 2, 2009, the applicant alleges that as she left work, she was kidnapped by two men she had never seen before. The men allegedly told her she should die so she would stop pursuing the Hutus. One of the abductors allegedly raped her. The applicant claims she was rescued by two of her coworkers who had followed the kidnappers' vehicle. The kidnappers allegedly fled, and the applicant and her coworkers contacted the police.

[11] The applicant claims she spent one week in hospital following the kidnapping. She started to have nightmares about her recent aggressors, whom the police had not been able to find.

[12] Afraid for her safety, the applicant decided to take the opportunity to travel to the United States with her traditional dance group. She left Rwanda on April 21, 2009 and arrived in the United States the following day.

[13] The applicant arrived at the Lacolle border crossing on July 10, 2009 to claim refugee protection in Canada.

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[14] The Board found that the applicant was not credible and her testimony not reliable regarding the essential elements of her claim for refugee protection.

[15] In addition, the Board found that even if the applicant was credible, her claim would fail on the issue of state protection. The Board found that the fact the police had not arrested the men who kidnapped her in 2009 in the six weeks prior to the applicant's departure from the country was not clear and convincing proof that state protection is inadequate in Rwanda. The Board also noted documentary evidence on the availability of witness protection in that country.

[16] This matter raises the following issues:

1. Did the Board err in its determination that the applicant was not credible?
2. Did the Board err by determining that state protection is adequate for the applicant in Rwanda?

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[17] I intend to deal first with the issue of state protection.

[18] The standard of review applicable to a finding of state protection, which is a question of mixed fact and law, is ordinarily reasonableness (*Ramokate v. The Minister of Citizenship and Immigration*, 2012 FC 210 at para 9; *Hinzman et al. v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, 362 N.R. 1 at para 38).

[19] When reviewing a decision on the reasonableness standard, the Court must determine whether the Board's findings fall within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para 47). Although there may be more than one possible outcome, as long as the Board's decision-making process was justified, transparent and intelligible, a reviewing court cannot substitute its own view of a preferable outcome (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para 59).

[20] The applicant argues the Board's finding on state protection is unreasonable because witness protection is inadequate in Rwanda. The applicant refers to the 2010 U.S. Department of State report for Rwanda and identifies statements in the report that show witness protection is weak.

[21] For his part, the respondent argues the applicant did not provide clear and convincing proof to reverse the presumption that Rwanda is capable of protecting its citizens. The respondent refers to

Carrillo v. Canada (The Minister of Citizenship and Immigration), 2008 FCA 94, [2008] 4 F.C.R. 636.

[22] I agree with the respondent that the applicant did not exhaust all internal courses of action available and did not provide clear and convincing evidence that Rwanda was not able to protect its citizens.

[23] First, the applicant did not file any complaints against four of the five agents of harm. Yet, she alleges that she had received death threats from them.

[24] Second, when the applicant called the police after she was kidnapped and raped in 2009, they immediately came to the crime scene and started investigating. They only had had one month and a half to try to find the assailants before she left the country. Since even in Canada, as pointed out by the respondent, individuals do not always face justice so fast, I find that the inability of the police to find the assailants in the six weeks before the applicant left Rwanda is not clear and convincing proof that witness protection is inadequate in Rwanda. Moreover, state protection does not need to be perfect (see *Canada (Minister of Employment and Immigration) v. Villafranca*, [1992] F.C.J. No. 1189 (F.C.A.), 99 D.L.R. (4th) 334 at para 7).

[25] Third, the Board referred to the U.S. Department of State Human Rights Report on Rwanda for 2010, which is the same report upon which the applicant relies. As noted by the applicant, the report identifies instances of threats and violence against genocide witnesses in Rwanda. However, as reasonably noted by the Board, there is a task force in place that monitors genocide survivors

deemed most at risk. The documentary evidence showed that local authorities and communities were in charge of protecting witnesses, that they were putting important efforts into doing so, that threats and violence against genocide survivors had significantly decreased and that there were no reports of genocide survivors or witnesses killed during the year. Contrary to the applicant's allegations, this demonstrates that authorities and communities in Rwanda are making significant efforts to protect witnesses and that it has proved to be efficient.

[26] Therefore, in my opinion, the Board reasonably determined that state protection is adequate for the applicant in Rwanda. As this finding is determinative of this application for judicial review, it will not be necessary to deal with the other issue of credibility.

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[27] For the above-mentioned reasons, the application for judicial review is dismissed.

[28] I agree with counsel for the parties that this is not a matter for certification.

JUDGMENT

The application for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board rendered on February 20, 2012 is dismissed.

“Yvon Pinard”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-2778-12

STYLE OF CAUSE: Rachel KAYINAMURA v. THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: September 11, 2012

**REASONS FOR JUDGMENT
AND JUDGMENT:** Pinard J.

DATED: October 23, 2012

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Me Denisa Chrastinova FOR THE RESPONDENT

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