

Federal Court



Cour fédérale

Date: 20121130

Docket: IMM-2143-12

Citation: 2012 FC 1408

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, November 30, 2012

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

FRANÇOIS SEBUCOCERO

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by the Refugee Protection Division [“the RPD”] of the Immigration and Refugee Board dated January 27, 2012, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [“the IRPA”]. The panel determined that François Sebucocero was neither a Convention refugee under section 96 nor a person in need of protection under section 97 of the IRPA.

I. Facts

[2] The applicant is a citizen of Rwanda. He worked as a police officer from September 2000 to January 2009. He then became a merchant.

[3] In March 2009, he testified before the Court of Gacaca Jurisdiction [“Gacaca Court”] against five people accused of genocide who were sentenced to general work in the community.

[4] Towards the end of March 2009, some individuals threw stones at the applicant’s house, and he received a written death threat. He gave a statement to the police, who investigated the matter. No arrests were made following this incident.

[5] On April 15, 2009, the applicant was attacked again because of his testimony before the Gacaca Court. The police failed to find the two assailants, and given that the attack occurred at night, it was hard for the applicant to identify them. The applicant again filed a complaint with the police.

[6] In the night of May 10, 2009, the police rang at the applicant’s door to inform him that his car had been set on fire. No arrests were made following this incident. The applicant therefore decided to leave Rwanda since he felt that the Rwandan state was unable to protect him and that his life could be in danger. The applicant alleges that he is at an even greater risk because he testified against people involved in the genocide and because he worked as a police officer in the past.

[7] On May 26, 2009, he left Rwanda for the United States on a visa. A few days later, he arrived in Canada and claimed refugee protection at the border.

II. Decision under review

[8] The RPD determined that the applicant is neither a Convention refugee nor a person in need of protection.

[9] The RPD was satisfied as to the applicant's identity and found his testimony to be direct and clear. The applicant is therefore credible with respect to his story.

[10] At the end of the hearing, the applicant expressed fear about his eventual return to Rwanda since, in his opinion, Rwandan authorities might interpret his having travelled abroad for a long period as proof of his opposition to them. Moreover, given that he is abroad, he would not be available for them if ever they asked him to do something.

[11] The RPD found that the applicant could not establish a well-founded fear of returning to Rwanda. In fact, after he left his position as a police officer, he was not subject to any travel or other restrictions. He is also not prohibited from travelling abroad. The panel therefore found that, on a balance of probabilities, the applicant would not be subject to a risk of persecution as a former police officer should he have to return to Rwanda.

[12] Regarding the state protection available in Rwanda, in response to the threats to his safety about which the applicant filed complaints, the RPD found this protection to be adequate. In fact,

the police investigated each of the applicant's complaints, even though they were unable to identify any suspects because of a lack of information. The applicant's efforts were not hampered by corruption. Moreover, as a former police officer, he testified in detail about the effective protection given by the police to the public.

[13] Lastly, the RPD found that it was true that, according to the documentary evidence on Rwanda, people who have testified before a Gacaca court, Gacaca judges and survivors are at risk of being assaulted, harassed or murdered. The panel was nonetheless of the opinion that the evidence also stated that the Rwandan government had adopted adequate measures to address the problem, including preventive measures such as detaining the accused and setting up hotlines.

III. Applicant's submissions

[14] The applicant submits that the RPD erred in finding that the Rwandan State is able to properly protect him. In its decision, the panel failed to address some of the documentary evidence that describes the danger faced by the applicant as someone who once testified before the Gacaca Court. In addition, the police's receipt of the complaint and their ensuing response are insufficient to establish that the Rwandan State offers effective protection.

IV. Respondent's submissions

[15] The respondent alleges that the applicant did not meet his burden of establishing that state protection in Rwanda is inadequate.

[16] First, the documents according to which Gacaca Court judges and witnesses and genocide survivors are in danger are not up to date since the last reported murders date back to before 2009. Furthermore, Rwandan authorities cannot be expected to provide a level of protection that even the best equipped police departments cannot aspire to, such as when, for example, the perpetrator of a crime cannot be identified because of a lack of evidence.

V. Issue

[17] Did the RPD err in finding that Rwanda can provide the applicant with adequate state protection?

VI. Standard of review

[18] The standard of review applicable to the RPD's finding regarding state protection is that of reasonableness (*Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at para 36, 69 Imm LR (3d) 309).

VII. Analysis

[19] The RPD mainly bases its decision to refuse to grant the applicant the status of a refugee or of a person in need of protection on its finding that effective state protection is available. The RPD's determination is unreasonable, for the following reasons.

[20] It is trite law that a democratic state is presumed to have the ability to protect its citizens. Clear and persuasive evidence must be produced to establish that a government is unable to

protect. This burden rests on the applicant (*Kaur v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1491, 2005 CarswellNat 3745).

[21] The applicant was attacked and threatened, and his property was damaged. He did everything in his power to report these acts to the authorities so that they could protect him, and he exhausted all avenues available to him. The acts were repeated however, and it appears from the evidence that the Rwandan police were unable to prevent the attacks against the applicant, who reported them as of the first incident.

[22] In its decision, the RPD refers to a 2010 report that notes that, in the previous year, for the first time, no murders of witnesses, judges or other participants involved in Gacaca Court proceedings were reported. Until 2009, therefore, persons connected to proceedings before the Gacaca Court were murdered. This is an important factor that weighs in favour of the Rwandan state's inability to protect participants in proceedings of the Gacaca Court, despite the measures implemented to protect such individuals.

[23] Moreover, the RPD's decision focuses on the police forces' efforts to arrest certain individuals who threatened and murdered participants in Gacaca Court proceedings and the general measures taken by the Gacaca Court to better protect citizens, such as setting up helplines and organizing neighbourhood patrols. As stated in the documentary evidence, most of these witness protection measures were taken recently.

[24] However, the RPD is silent on the conflicting evidence on the availability of effective state protection. In fact, according to a relatively recent report, dated 2007, there is a shortage of effective measures to properly protect Gacaca Court witnesses: this is corroborated by the applicant's testimony to the effect that the police lack resources to provide effective protection. Even though the documentary evidence suggests that witness protection has become more effective in the last two years and that this improvement probably resulted, in 2009, in the fact that, for the first time, no witness murders were reported, the applicant's situation is such that he continues to be the victim of criminal acts. According to the facts of this case, the RPD did not, in its reasons, deal with the contradictory evidence establishing the state's inability to protect its citizens or consider the facts particular to the applicant's situation. It was the RPD's duty to do so. (See *Francis v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1507, 2011 CarswellNat 5436).

[25] In *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at pp 724-725, 20 Imm LR (2d) 85 [*Ward*], the Supreme Court explained how applicants can demonstrate their home state's inability to properly protect them:

50 The issue that arises, then, is how, in a practical sense, a claimant makes proof of a state's inability to protect its nationals as well as the reasonable nature of the claimant's refusal actually to seek out this protection. On the facts of this case, proof on this point was unnecessary, as representatives of the state authorities conceded their inability to protect Ward. Where such an admission is not available, however, clear and convincing confirmation of a state's inability to protect must be provided. For example, a claimant might advance testimony of similarly situated individuals let down by the state protection arrangement or the claimant's testimony of past personal incidents in which state protection did not materialize. . . .

[26] The RPD's finding is not part of the possible, acceptable outcomes which are defensible in respect of the facts and the law since the decision deals mainly with the measures implemented to better protect Gacaca Court witnesses. It thus affords little weight to the evidence reporting that witnesses were murdered until 2009, clear and persuasive evidence establishing the state's inability to protect in cases similar to that of the applicant despite the measures adopted by the government. The fact that three incidents occurred in which the applicant's property was damaged or his physical safety was threatened and that it was impossible to prevent these incidents suggests that the situation is likely to recur. In fact, state protection following these three incidents did not materialize for the applicant.

[27] Lastly, considering the fact that the police were unable to help the applicant following his attacks or play a preventative role and the fact that some witnesses were murdered, one can only conclude that the RPD's decision is unreasonable. The evidence reveals that, where state protection fails, the risks that the applicant might face could be serious. The RPD was silent in this regard.

[28] In fact, *Ward*, above at pp 724-726, establishes that it would be unacceptable to require applicants to put their lives in danger to demonstrate that their home state is unable to properly protect them: "[m]oreover, it would seem to defeat the purpose of international protection if a claimant would be required to risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness".

[29] Even though, as pointed out by the applicant, one cannot expect Rwandan authorities to meet a standard to which even the best equipped police forces can only aspire (*Smirnov v Canada (Secretary of State)*, 89 FTR 269 at para 11, 1994 CarswellNat 1453F), the facts of the present matter indicate that the Rwandan authorities were unable to provide the applicant with an adequate level of protection.

[30] Despite an investigation, the attackers were not identified. Moreover, the evidence suggests that the Rwandan police intervened after the incidents and failed to prevent the attacks. Lastly, in its decision, the RPD failed to consider the conflicting documentary evidence about the Rwandan government's ability to implement effective measures to protect witnesses. Consequently, the RPD cannot base its decision on the fact that one cannot expect the Rwandan state to provide a level of protection to which the best equipped police forces cannot aspire since it failed to consider certain evidence that counters its finding that effective state protection is available in Rwanda.

[31] The respondent's representative used the documentary evidence on state protection in Rwanda to demonstrate that the system of protection has improved since the 1990s. However, in its decision, the RPD did not perform this exercise and, furthermore, did not appear to take into account the situation faced by the applicant. The RPD should have considered the documentary evidence supporting the position that state protection is available, but also the evidence suggesting the opposite, and then analyzed all of the evidence in light of the facts arising from the applicant's situation. Since it failed to do so, its decision is unreasonable. The parties were invited to submit a question for certification, but none was submitted.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review is allowed. The decision is set aside, and a hearing before a differently constituted panel will be held for redetermination of the applicant's claim for refugee protection. No question will be certified.

"Simon Noël"

Judge

Certified true translation
Johanna Kratz, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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AND JUDGMENT BY:** SIMON NOËL J.

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