

Federal Court



Cour fédérale

Date: 20130124

Docket: IMM-5172-12

Citation: 2013 FC 56

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, January 24, 2013

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

**NIKUZE KABAKA, ISAAC-MANZI GASANA,
SANO GASANA, UMUTONI GASANA,
SHEMA GASANA**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The principal applicant seeks judicial review of a decision by the Refugee Protection Division (RPD) of the Immigration and Refugee Board that she and her children are not Convention refugees under section 96 or persons in need of protection under section 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA). The RPD premised its decision

on the applicant's failure to rebut the presumption of state protection and on her failure to establish, on a balance of probabilities, a link between her assault and a group of criminals in whose arrest she had assisted.

II. Judicial proceeding

[2] This is an application under subsection 72(1) of the IRPA for judicial review of the RPD decision dated April 26, 2012.

III. Background

[3] The principal applicant, Nikuze Kabaka, is a citizen of Rwanda born in 1976. Her children are also citizens of Rwanda and were born in 1995, 1996, 1999 and 2006.

[4] The principal applicant claims she is a victim of longstanding domestic violence, her wealthy husband persuaded police to ignore her complaints and her conservative family persuaded her to remain with her husband (domestic violence ground). She states that her husband also beat their children and threatened to kill her if she divorced him.

[5] On October 30, 2009, the principal applicant's husband was detained by police for two days after he assaulted her. On his release, he obeyed a police order prohibiting him from visiting the family home but did continue to make telephone death threats.

[6] The principal applicant presented an attestation from the Rwandan National Police outlining the October 30, 2009, assault and previous incidents of domestic violence (Exhibit

C-11). Exhibit C-11 stated that police attempted to mediate previous incidents with good results but that the October 30, 2009, incident had been referred to a tribunal.

[7] The principal applicant also alleges that she was threatened with death and attacked by three soldiers of the Rwandan Patriotic Front (RPF soldiers) working for the Rwanda Revenue Authority (criminal victimization ground).

[8] In February 2009, the principal applicant and her half-sister assisted authorities in an investigation of the RPF soldiers that resulted in their imprisonment.

[9] The principal applicant presented an attestation from the Rwandan National Police confirming her role in the investigation of the RPF soldiers (Exhibit C-10).

[10] After the RPF soldiers were released, the principal applicant received death threats but police refused to investigate until the callers could be identified as the RPF soldiers.

[11] On November 25, 2009, the principal applicant and her half-sister were attacked by unidentified assailants outside her store and police opened an investigation.

[12] At the RPD hearing, the principal applicant's half-sister testified that, while the principal applicant was away, a person came to her store searching for her three days before the November 25, 2009, attack and later returned to the store with another person searching for her

and demanding money. The half-sister added that these men (the visitors) identified themselves and left a name and phone number, which she relayed to the Applicant.

[13] With Canadian visas already obtained by herself and her estranged husband for a previously-planned vacation, she and her children fled Rwanda on December 6, 2009.

IV. Decision under review

[14] The RPD found that the principal applicant was not a Convention refugee under section 96 or a person in need of protection under section 97 of the IRPA.

[15] The RPD found that the principal applicant did not rebut the presumption of state protection. On the domestic violence ground, it reasoned that Exhibit C-11 showed police were responsive to earlier incidents of domestic violence and intervened multiple times. The principal applicant had reconciled with her husband after incidents preceding the October 30, 2009, incident and documentary evidence showed police intervened effectively. On the criminal victimization ground, the RPD reasoned that police had intervened in the November 25, 2009, attack and were investigating her unidentified assailants.

[16] The RPD found that the principal applicant did not, on a balance of probabilities, demonstrate that her assailants were acting on behalf of either her husband or the RPF soldiers.

[17] The principal applicant's attempt to connect the November 25, 2009, incident with the visitors did not persuade the RPD that her assailants were acting on behalf of her husband or the

RPF soldiers. It reasoned that, if the visitors were the RPF soldiers, her half-sister would have recognized them by the names that they gave her. The principal applicant could not explain why she did not contact the visitors at the phone number they gave to her half-sister. She initially explained that she did not know the visitors and then began to refer to her role in the arrest of the RPF soldiers. Visibly frustrated, she added that she did not remember the visitors and that her half-sister had not spoken to her about the visit. According to the RPD, this inconsistency and her confusion of events leading to the arrest of the RPF soldiers and the November 25, 2009, attack arose from a desire to link the November 25, 2009, attack with the RPF soldiers.

[18] The RPD also found it unlikely that the assailants were the RPF soldiers because the principal applicant and her half-sister testified that they did not recognize their assailants. If their assailants had been the RPF soldiers, they would have been able to recognize them.

[19] Nor did the RPD believe that the assailants told the principal applicant during the attack that she caused them to lose their jobs. This was inconsistent with earlier claims that she could not identify her assailants and that she was not sure if the attempted murder was ordered by her husband or the RPF soldiers. The RPD was not satisfied with her explanation that the RPF soldiers may have been in collusion with her husband.

[20] The RPD found that it was unlikely that her assailant was her husband because, apart from making threatening phone calls, he did not interact with her after the October 30, 2009, assault and did not visit the family home to claim his effects until after the principal applicant fled Rwanda on December 6, 2009.

V. Issues

- [21] (1) Was the RPD's state protection finding reasonable?
- (2) Was the RPD's adverse credibility finding reasonable?
- (3) Was the RPD reasonable to find that the principal applicant had not established, on a balance of probabilities, a link between the November 25, 2009, attack and the RPF soldiers?

VI. Relevant statutory provisions

[22] The following legislative provisions of the IRPA are relevant:

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,

(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.

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) 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.

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 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

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 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

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

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.

VII. Analysis

[23] The reasonableness standard applies to questions of state protection (*Csonka v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1056), credibility (*Lin v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1235) and findings of fact (*Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 SCR 100).

[24] Where the reasonableness standard applies, this Court may only intervene if the Board's reasons are not "justified, transparent or intelligible". To satisfy this standard, the decision must also fall in 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 SCR 190, at para 47).

[25] The principal applicant argues that the RPD's decision was premised on a general adverse credibility finding about the November 25, 2009 attack. According to the principal applicant, the November 25, 2009 attack was the materialization of death threats by the RPF soldiers on their release from prison. The principal applicant argues she did not confuse the events leading to the arrest of the RPF soldiers with the November 25, 2009, attack. She contends, rather, that it was her half-sister who confused the events.

[26] The respondent, however, takes the position that the basis of the RPD's decision was the principal applicant's failure to (i) rebut the presumption that the Rwandan state could protect her from her husband and (ii) demonstrate, on a balance of probabilities, that her assailants on November 25, 2009, were the RPF soldiers. Both of these findings, according to the respondent, are reasonable. Moreover, the respondent contends that the RPD did not make a general credibility finding on the principal applicant's account of the November 25, 2009, attack. Rather, the RPD did not believe the principal applicant's claim that she heard her assailants accusing her of causing them to lose their jobs.

[27] It was reasonable to conclude that the principal applicant did not rebut the presumption of state protection. In *Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, [2008] 4 FCR 636, the Federal Court of Appeal held that claimants seeking to rebut the presumption "must adduce relevant, reliable and convincing evidence which satisfies the trier of fact on a balance of probabilities that the state protection is inadequate" (at para 30). Perfection is not the standard on which state protection is assessed. As Justice Donald Rennie stated in *Onodi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1191, "no country can offer its citizens perfect protection. It is not sufficient for a refugee claimant to show that the government's efforts have not always been successful" (at para 16). Finally, assessing state protection is always an individualized analysis requiring the RPD to "conduct an individualized analysis taking into account the applicant's circumstances" (*Horvath v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1350, at para 57).

[28] Given the circumstances of the principal applicant, it would not be unreasonable to conclude that she has access to effective and adequate state protection on her domestic violence ground. First, Exhibit C-11 shows police responded to her complaints about domestic violence in the past and sought to mediate between her and her husband with good results. Second, police responded to the episode of domestic violence on October 30, 2009, by detaining her husband for two days. Third, her husband was subject to a police order restraining him from entering the family home where she resided with her children; he complied with the order at least until they fled Rwanda on December 6, 2009. Since the principal applicant has previously accessed state protection from domestic violence with success, it reasonably follows that she did not present relevant, reliable, and convincing evidence that she lacks adequate and effective state protection.

[29] While the principal applicant's husband continued to make telephone death threats to her after his release from detention, the record does not show that she complained to police about these threats. Under *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, claimants are obliged to seek state protection unless the state is "unwilling or unable" to protect them. Previous interventions by police suggest that it would be reasonable to find that the state was not unwilling or unable to protect the principal applicant from her husband.

[30] Nor would it be unreasonable to find that the principal applicant had not presented reliable, clear, and convincing evidence rebutting the presumption that the Rwandan state would provide adequate protection on the criminal victimization ground. It would be reasonable to infer from the attendance of police at the scene of the November 25, 2009, attack and their investigation of the unidentified assailants (Certified Tribunal Record at p 27) that the Rwandan

state would protect the principal applicant on her criminal victimization ground if she were to return. This result remains reasonable even when one considers the earlier refusal of the police to investigate the death threats the principal applicant received from unidentified callers after the RPF soldiers were released from prison. Police did open an investigation after the November 25, 2009, attack. In *Kashif v Canada (Minister of Citizenship and Immigration)*, 2007 FC 586, Justice Richard Mosley stated that “state protection need not be perfect so long as the state is in effective control and makes serious efforts to protect its citizens” (at para 25). It would be reasonable to conclude that the investigation of the November 25, 2009, attack demonstrates serious efforts by the Rwandan police to protect the principal applicant.

[31] A finding of adequate state protection is fatal to claims under section 96 and 97 of the IRPA (*Samuel v Canada (Minister of Citizenship and Immigration)*, 2012 FC 973, at para 40). Since the RPD’s finding on state protection on the domestic violence ground and criminal victimization ground was reasonable, it is not necessary to consider its credibility finding or whether the principal applicant could establish a link between the RPF soldiers and the November 25, 2009, assault.

VIII. Conclusion

[32] For all of these reasons, the applicants’ application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS that the applicants' application for judicial review be dismissed. No question of general importance for certification.

“Michel M.J. Shore”

Judge

Certified true translation

Catherine Jones, Translator

FEDERAL COURT
SOLICITORS OF RECORD

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