Federal Court  Cour fédérale

Date: 20160208

Docket: IMM-3698-15

Citation: 2016 FC 156

[ENGLISH TRANSLATION]

Toronto, Ontario, February 8, 2016

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

FERDINAND GATEGETSE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] The applicant, Ferdinand Gategetse, is applying for judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [the Act], of a pre-removal risk assessment [PRRA] conducted by a Senior Immigration Officer. The officer determined that the applicant would not be subject to a risk of persecution, a danger of torture, a

risk to his life or the risk that he may be subjected to cruel and unusual punishment if he were returned to Burundi, his country of origin. The decision is dated July 14, 2015.

II. Facts

[1] The applicant is 67 years old and a citizen of Burundi. His wife is deceased, but he has two daughters in Europe, one daughter in Canada and one daughter in Burundi. He says he is HIV positive and Tutsi.

[2] On July 10, 2013, the applicant left Burundi to attend an international conference in the United States on a visa. He arrived in Canada on July 26, 2013, and applied for refugee protection that day. In that application, he claimed that he feared persecution because he had disputed a government decision forcing him to retire early. At that time, the applicant did not claim to fear persecution because of his ethnicity or HIV-positive status.

[3] In a decision dated May 12, 2014, the Refugee Protection Division [RPD] rejected his application, finding that it was not credible. The application for leave to seek judicial review for that decision was rejected on October 31, 2014.

[4] The applicant also applied for permanent residence on humanitarian and compassionate grounds on August 5, 2014, but has not received a response to date.

[5] After his application for leave to seek judicial review was rejected, a removal date was set for January 20, 2015. The applicant fled to the United States but was arrested, brought back to Canada, and placed in custody on March 26, 2015.

[6] A new removal date was set for May 2, 2015, but the flight was cancelled following an application for administrative deferral. On May 15, 2015, the applicant submitted a PRRA application. That application, which is the subject of this decision, was rejected on July 13, 2015. The applicant is still in custody.

III. Decision

[7] In his PRRA application, the applicant made three allegations: (1) that he is HIV positive and would be the victim of discrimination in Burundi as a result; (2) that he fears the Burundi authorities, who are looking for him because of his legal run-ins with the government, his political opinions and his Tutsi ethnicity; and (3) that these risks are exacerbated by the recent deterioration of the political situation in Burundi. To support those allegations, the applicant submitted documents describing the overall situation in Burundi.

[8] In the decision, the officer noted firstly that, as part of a PRRA, under section 113(a) of the Act, an applicant may present only new evidence that had not been submitted to the RPD for the application for refugee protection. Noting that the applicant had already substantiated the risk he would face as a result of the dispute of his forced retirement before the RPD and had submitted neither new developments nor evidence on that risk, the officer concluded that he could not consider the additional allegations.

[9] Moreover, the officer found that the allegation concerning the risk of persecution because of his HIV-positive status could not be considered because (1) the applicant did not explain why he had not reported that risk to the RPD; and (2) he had no proof of his medical condition.

[10] The officer acknowledged that the current conditions in Burundi had considerably deteriorated since the application for refugee protection and constituted a new risk that should be taken into consideration. However, the officer observed that the applicant had provided little evidence demonstrating that the Burundi government had denied him services or that he had participated in the political campaign against the party in power. The applicant also provided little evidence describing his origins or belonging to a particular ethnic group.

[11] As a result, the officer determined that the applicant had not established, pursuant to the requirements in section 96 of the Act, that he would be targeted because of his ethnicity or political opinions. Therefore, his application had to be examined under section 97 of the Act, as a person in need of protection.

[12] On that point, the officer noted that Burundi has a long history of civil unrest and that, since April 26, 2015, the political situation there had become very unstable: a failed coup on May 13, 2015; the flight of the vice president following death threats; a campaign of fear and intimidation by the Imbonerakure, a youth chapter of armed militants, against the opposition groups; and the tens of thousands of Burundi citizens seeking safety who have been displaced to neighbouring countries.

[13] However, the officer observed that it has been reported that the individuals targeted by the conflict were those participating in political affairs and in opposition to the government in power, and that the applicant had not submitted sufficient evidence to indicate that his circumstances corresponded with one of those two categories.

[14] In addition to that, one of the applicant's adult daughters currently lives in Burundi, and the applicant has not demonstrated that his daughter or other family members had received threats because of their ethnicity, their opposition to the government in power, or their relationship to the applicant. Moreover, he did not submit sufficient evidence to convince the officer that he had been forced to leave Burundi because of the current conditions there.

[15] Lastly, the officer examined two travel advisories issued by the Government of Canada for Burundi:

> I acknowledge the travel advisory currently in effect for Burundi (www.travel.gc.ca). In addition to that, the Government of Canada imposes a temporary suspension of removals (TSR) in countries where catastrophic events are occurring causing significant collapse of the State. Despite the advisory, the Government of Canada has not issued a temporary suspension of removals for Burundi since the political crisis began in April 2015. I give more weight to that fact.

[16] For all of these reasons, the officer concluded that the applicant had not discharged his burden according to law, and rejected the application.

IV. Analysis

[17] The applicant argues that there are three issues in dispute:

1. Did the officer err in his evaluation of the travel advisories for Burundi?

2. Did the officer breach his duty of procedural fairness by not allowing the applicant to demonstrate that he is Tutsi?

3. If the answer to the second question is no, did the officer err by ignoring the RPD's findings on this matter?

[18] For the first and third questions, which involve findings of fact and findings of mixed fact and law, the standard of review is reasonableness (*Martinez v. Canada (Minister of Citizenship and Immigration*), 2010 FC 31; *Selduz v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 361, paragraphs 9 and 10). This Court should intervene only if it concludes that the decision lacks justification, transparency and intelligibility and does not fall within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v. New Brunswick*, 2008, SCC 9, paragraph 47 [*Dunsmuir*]).

[19] For the second question, which involves the duty of procedural fairness, the standard of review is correctness (*Aboud v. Canada (Citizenship and Immigration)*, 2014 FC 1019, paragraph 34). Under that standard of review, this Court does "not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker..." (*Dunsmuir*, paragraph 50).

A. *Did the officer err in his evaluation of the travel advisories for Burundi?*

[20] The applicant argues that the officer committed a significant error in his analysis of the two announcements published by the Government of Canada and submitted as part of the documentary evidence the *Advisory against travel to Burundi* dated May 14, 2015, and the *Advisory against travel to Burundi* dated May 29, 2015. The first advisory recommended "avoiding all non-essential travel to Burundi" and the second recommended "avoiding all travel to Burundi." Despite those advisories, the officer concluded that he gave more weight to the fact that the Government of Canada had not imposed a temporary suspension of removals for Burundi.

[21] On that matter, the applicant argues that this analysis is unreasonable because there is jurisprudence from this Court stating that Government of Canada travel advisories also apply to citizens of other countries (*Sinnasamy v. Canada (Citizenship and Immigration)*, 2008 FC 67, paragraph 34; *Narany v. Canada (Citizenship and Immigration)*, 2008 FC 155, paragraph 14). According to the applicant, it was an error to ignore those advisories, which implied that they did not apply to him.

[22] The problem with the applicant's position on this is that the officer did not exclude the advisories as evidence. He considered the advisories and concluded that he would give more weight to the fact that the government had not imposed a temporary suspension of removals. The two rulings cited by the applicant simply state that travel advisories may be submitted as evidence, not that they are determining. The officer is free to evaluate these advisories as he

wishes. His conclusion is reasonable. The advisories are only what they claim to be: they advise people that the Government of Canada does not recommend travelling to a given country, but they do not prohibit doing so.

[23] Lastly, with regard to the first question, it is notable that following the date of the PRRA, the government added Burundi to the list of countries with a temporary suspension of removals. Nevertheless, although that affects the applicant's current situation, it does not affect the issue in dispute, because the government's decision was made after the officer's decision on the PRRA application.

B. *Did the officer breach his duty of procedural fairness by not allowing the applicant to demonstrate that he is Tutsi?*

[24] The applicant claims that the officer was obligated to inform him that he had doubts about his ethnicity and that he failed to fulfil that duty. However, it is well established that the applicant always bears the burden of demonstrating each element of a PRRA application (*Mbaraga v. Canada (Citizenship and Immigration)*, 2015 FC 580, paragraph 31). Furthermore, the applicant did not cite any ruling from this Court to support the claim that the officer was obligated to contact the applicant when he decided that he wanted evidence that the applicant is Tutsi. I see no suggestion in the jurisprudence that an officer, when evaluating a PRRA, is obligated to contact an applicant each time he finds that the applicant did not provide sufficient evidence on a particular element. The officer did not breach his duty of procedural fairness.

[25] To conclude on this point, the applicant submitted two affidavits before this Court to demonstrate that it was impossible to prove objectively that a person is of Tutsi ethnicity. The applicant requested that, in the event that this Court were to conclude that the officer breached his duty for procedural fairness, these affidavits be admitted even though they were not submitted before the officer. Because the officer did not err on this point, I am not required to evaluate that request.

C. *If the answer to the second question is no, did the officer err by ignoring the RPD's findings on this?*

[26] The applicant argues that, even if this Court does not find any procedural error in the decision at issue, the officer nevertheless erred in ignoring the fact that the applicant had proven his Tutsi identity to the RPD.

[27] However, the respondent notes that the RPD accepted the applicant's identity, but the applicant did not report his ethnicity to the RPD as a reason for persecution; his application for refugee protection makes no mention of this. According to the respondent, the officer did not err because the applicant did not prove that he is Tutsi.

[28] I agree with the respondent. A review of the RPD's decision reveals no mention of ethnicity. The RPD accepted the applicant's identity based on copies of his passport and his national identity card, but one of the affidavits the applicant wished to introduce before this Court states the following:

> Since the restoration of Burundi's independence in 1962, no government has chosen to identify Tutsi or Hutu ethnicities on

> identity cards, birth certificates, Burundi passports or any other official document.
>
> (Applicant's file, tab 5)

[29] If the matter of ethnicity was not raised before the RPD, it could not evaluate it. The applicant had the obligation to prove his ethnicity before the officer if he wanted to use it as a reason for his application, and it was reasonable for the officer to conclude that this fact was not proven.

[30] The applicant also claimed at the hearing that he would be seen as a member of the FNL, the Forces nationales de libération [National Liberation Forces], or otherwise persecuted if he returned to Burundi because of his application for refugee protection in Canada. However, it is well established in the jurisprudence that this Court is not obligated to re-examine the evidence, and I have no indication that the officer erred on these points.

V. Conclusions

[31] For the above reasons, the application for judicial review is dismissed. The applicant submitted two questions for certification:

a. How should PRRA officers consider travel advisories?

b. When the RPD accepts the applicant's identity, is the applicant required to prove each element of his identify for the PRRA?

[32] In my opinion, these questions are not of broad significance or general importance, because this Court has already ruled on these matters, which are nevertheless related to the specific facts of this case. Therefore, they do not meet the criteria to be certified (*Zhang v. Canada (Citizenship and Immigration)*, 2013 FCA 168, paragraph 9).

JUDGMENT

THE COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;
2. There are no costs;
3. No question is certified.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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