Federal Court Cour fédérale

Date: 20240911

Docket: IMM-8334-22

Citation: 2024 FC 1425

Ottawa, Ontario, September 11, 2024

PRESENT: Mr. Justice McHaffie

BETWEEN:

WILLY NGABO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Willy Ngabo is a citizen of Burundi, of Tutsi ethnicity. After he was found inadmissible for serious criminality for failing to provide a breath sample, he applied for a Pre-Removal Risk Assessment [PRRA], citing his fear of being killed in Burundi because he is Tutsi.

[2] The Senior Immigration Officer who reviewed the PRRA application could only consider risks that had arisen since the rejection of Mr. Ngabo's refugee claim in 2014. Based on a review of reports in the National Documentation Package [NDP] for Burundi published by the Immigration and Refugee Board of Canada [IRB], the PRRA Officer was not persuaded there was sufficient evidence of new risk developments for Tutsis in Burundi since 2014. They therefore refused the application. Mr. Ngabo seeks judicial review of that refusal, asserting that the PRRA Officer's review of the evidence was unreasonable, and that the finding that Mr. Ngabo was not at risk of persecution runs contrary to the weight of recent Canadian refugee protection decisions in respect of Burundian Tutsis.

[3] For the reasons set out below, I agree that the PRRA Officer's reasons show a selective reliance on certain aspects of the NDP evidence, without addressing significant relevant evidence that speaks contrary to their conclusions. In particular, the PRRA Officer did not address evidence referring to material changes in conditions in Burundi in the wake of events in 2015, or evidence regarding ethnic violence by government authorities against Tutsis. This evidence included a report prepared by the IRB in December 2019 specifically entitled *Burundi: The treatment of Tutsi, including women and youth, by the authorities and Imbonerakure members (2017–November 2019)*, and a November 2016 report prepared by the Fédération internationale pour les droits humains [FIDH] entitled *Repression and genocidal dynamics in Burundi*.

[4] While a PRRA officer is presumed to have considered all relevant evidence and need not refer to each document in the NDP, a failure to address critical evidence that squarely contradicts their findings will render the decision unreasonable. Having reviewed the evidence and considered the parties' arguments, I conclude that the PRRA Officer's failure to mention or

consider central contradictory evidence regarding the risks faced by those of Tutsi ethnicity in Burundi renders the decision unreasonable.

[5] The application for judicial review will therefore be allowed and Mr. Ngabo's PRRA application will be sent back for re-determination.

II. Issue and Standard of Review

[6] In reviewing the merits of a PRRA decision, the Court applies the reasonableness standard: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25; *Garces Canga v Canada (Citizenship and Immigration)*, 2020 FC 749 at paras 19–20. The Court will only set aside a decision on this standard where the applicant has shown that there are sufficiently serious and central shortcomings in the decision that it cannot be said to exhibit the requisite degree of justification, intelligibility, and transparency: *Vavilov* at paras 99–100.

[7] The only issue on this application for judicial review is therefore whether the refusal of Mr. Ngabo's PRRA application was unreasonable.

[8] In challenging the reasonableness of the PRRA Officer's decision, Mr. Ngabo raises three arguments: (1) that the decision was made without regard to contradictory evidence within the reports cited by the PRRA Officer; (2) that the decision was made without regard to contradictory evidence within the NDP for Burundi; and (3) that the decision was made without regard to the IRB's current assessment of risk for Tutsis in Burundi.

[9] For completeness, I note that Mr. Ngabo also raised an argument with respect to a procedural issue related to the date of the written PRRA decision compared to the date on which it was delivered. This argument was withdrawn at the hearing of the matter.

III. Analysis

A. *The PRRA Decision*

[10] Mr. Ngabo filed a refugee claim shortly after his arrival in Canada in 2012. He asserted that several family members had been killed in Burundi because they were Tutsis and that he had been targeted by and received death threats from two individuals as well as members of the Imbonerakure. The Imbonerakure are described in the country condition evidence as the "youth league" or "youth militia" affiliated with Burundi's ruling party, the predominantly Hutu Conseil national pour la défense de la démocratie – Forces pour la défense de la démocratie [CNDD-FDD].

[11] The Refugee Protection Division [RPD] of the IRB dismissed Mr. Ngabo's claim on April 24, 2014. The RPD found that omissions, a contradiction, and implausibilities in his narrative undermined his credibility, and that his failure to seek asylum in the United States was inconsistent with his asserted fear of returning to Burundi.

[12] Mr. Ngabo was convicted of assault in 2017, rendering him inadmissible to Canada, but he was permitted to remain in Canada on humanitarian and compassionate grounds. A subsequent conviction in 2019 for refusing to provide a breath sample resulted in Mr. Ngabo

being inadmissible on grounds of serious criminality pursuant to paragraph 36(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[13] Mr. Ngabo applied for a PRRA in May 2021. The PRRA process acts as a safeguard for ensuring compliance with Canada's commitments to the principle of *non-refoulement*, that is, the cornerstone principle that no one—including failed refugee claimants and those inadmissible to Canada—should be returned to a country where they would be at risk of being subjected to human rights violations: *Kreishan v Canada (Citizenship and Immigration)*, 2019 FCA 223 at paras 4, 115–116; *Németh v Canada (Justice)*, 2010 SCC 56 at paras 1, 19, 50; *Shaka v Canada (Citizenship and Immigration)*, 2019 FC 798 at para 46. It permits eligible individuals in Canada to apply to the Minister for protection if they are subject to a removal order: *IRPA*, s 112.

[14] PRRA applications are subject to certain limitations. These include that an unsuccessful refugee claimant may only present evidence arising after the rejection of their refugee claim: *IPRA*, s 113(a). The scope of a PRRA application may depend on the grounds of an applicant's inadmissibility: *IRPA*, ss 112(3), 113(c)–(e). So may the effect of a positive PRRA decision, which may confer refugee protection on the applicant or may just provide a stay of removal: *IRPA*, ss 112(3), 114. Mr. Ngabo was convicted of an offence carrying a maximum sentence of at least 10 years of imprisonment, but received a sentence of less than two years of imprisonment. His PRRA application was therefore considered on the basis of sections 96 to 98 of the *IRPA*, but he was only eligible for a stay of removal if the application was granted, and not refugee protection: *IRPA*, ss 112(3)(b), 113(e)(i), 114(1)(b).

[15] Mr. Ngabo prepared his PRRA application without the assistance of counsel. It therefore includes a number of statements that are not directly relevant to an assessment of his risk if returned to Burundi. However, Mr. Ngabo clearly identified his primary fear of returning to Burundi, namely the risks he faced as a Tutsi man. He noted that people were being killed every day in Burundi simply for being born Tutsi; that there is a lot of racism in Burundi; and that there is no protection for Tutsi people in the country.

[16] Mr. Ngabo did not cite specific evidence supporting these risks. However, even where an application is not presented as effectively as it could have been, an officer reviewing a PRRA has an obligation to assess whether the applicant is a Convention refugee or a person in need of protection on the basis of a reasonable and fair-minded review of the record, including the most recent available evidence of country conditions: *Ahsan v Canada (Citizenship and Immigration)*, 2023 FC 1114 at para 14; *Jama v Canada (Citizenship and Immigration)*, 2014 FC 668 at paras 17–21. The PRRA Officer therefore appropriately did not simply dismiss Mr. Ngabo's application for want of reference to the country condition evidence. Rather, they undertook a review of the evidence in the NDP for Burundi, recognizing that Mr. Ngabo's PRRA application had to be based on new risks arising after the rejection of his refugee claim in 2014.

[17] The PRRA Officer reviewed country condition evidence in the NDP, citing three documents in particular: (i) a 2020 Country Report on Human Rights Practices for Burundi, issued by the US Department of State, which is listed as Document 2.1 on the List of Documents in the NDP for Burundi; (ii) a Response to Information Request [RIR] dated July 30, 2021, entitled *Burundi: Situation of Tutsi, including the Tutsi elite; impact of COVID-19; treatment by*

society and by the authorities; state protection (2019–July 2021) (Document 13.1); and (iii) an August 2017 paper published by the International Refugee Rights Initiative entitled *"I Fled Because I was Afraid to Die": Causes of Exile of Burundian Asylum Seekers* (Document 2.9). Based on their review of the evidence, the PRRA Officer concluded the following:

- while the historic conflict between Tutsis and Hutus in Burundi is widely considered to have lasted from 1993–2005, the situation has "improved considerably since";

- the Constitution of Burundi, adopted in 2018, ensures more equitable representation in official positions of power, including representation in elected and appointed government positions for the Tutsi minority and equal rights and protections under the law;

- although there is evidence of Hutu members of the ruling party targeting Tutsis in their political narratives, this practice is "largely restricted to the political sphere," and the judicial system and state authorities, including police, do not reserve particular unfavourable treatment towards Tutsis based on their ethnicity;

- while the Imbonerakure are recognized as a major hurdle preventing repatriation among refugees, the "underlying notion" in many of the reports is that the Imbonerakure "mainly target the opposition," and Mr. Ngabo did not file evidence of his political position or opinion; and

- there was insufficient objective evidence to demonstrate that there were new risk developments since the RPD rejected Mr. Ngabo's refugee claim in 2014.

[18] The PRRA Officer concluded the evidence did not demonstrate that Mr. Ngabo faced more than a mere possibility of persecution in Burundi, or a risk to life or of cruel and unusual treatment or punishment, and found Mr. Ngabo was not a person described in sections 96 or 97 of the *IRPA*. They therefore dismissed Mr. Ngabo's PRRA application.

B. *The PRRA Officer's Assessment of the Evidence was Unreasonable*

[19] Having reviewed the PRRA Officer's decision, the parties' arguments, and the evidence in the NDP, I agree with Mr. Ngabo that the PRRA Officer's assessment of the country condition evidence was unreasonable, excluding relevant evidence of recent events and reaching conclusions regarding current conditions in Burundi without consideration of material aspects of the evidence that ran contrary to their conclusions.

[20] As this Court has repeatedly recognized, PRRA officers are not required to refer to every piece of evidence in the NDP in their assessment of country conditions; they are presumed to have reviewed and considered all of the evidence. However, they must consider evidence that contradicts their conclusion, and the more central or important the evidence, the more the Court may conclude that relevant evidence was not considered or that the officer failed to account for the evidence before it: *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC) at paras 15–17; *Solis Mendoza v Canada (Citizenship and Immigration)*, 2021 FC 203 at paras 36–43; *Vavilov* at paras 125–126.

[21] As noted above, the PRRA Officer in this case discussed the general situation in Burundi after the long and violent civil war that ended with the implementation of the Arusha Peace and

Reconciliation Agreement for Burundi and the approval of the country's Constitution in 2005. However, the PRRA Officer's statement that the situation had improved compared to the period of civil war, and their reference to the text of the country's Constitution, did not address important and relevant developments in 2015 and following, after Mr. Ngabo's refugee claim was dismissed in 2014.

[22] In April 2015, President Pierre Nkurunziza, leader of the ruling CNDD-FDD party, announced his intention to run for election for a third term of office, contrary to Article 96 of Burundi's Constitution. This announcement and apparent disregard for the recently adopted Constitution resulted in widespread protests and led to an attempted military coup in May 2015. As described in the *"I Fled Because I was Afraid to Die"* paper cited by the PRRA Officer, this political crisis was accompanied by "serious violence and repression," such that more than 418,000 Burundian refugees and asylum seekers left their homes, although the paper noted that there is "less open violence now" (*i.e.*, in 2017).

[23] Political tensions continued in the period before further elections were held in 2020. The July 30, 2021, RIR cited by the PRRA Officer (Document 13.1) noted that leading up to the 2020 elections, there was an increase in intimidation, disappearances, killings, and ethnic rhetoric. The PRRA Officer considered that the discussion in this document focuses on the risk to political opponents of the CNDD-FDD, rather than Tutsi civilians more generally. This is certainly true of aspects of the document, including certain aspects now highlighted by Mr. Ngabo. However, other aspects of the evidence, including the discussion of increased intimidation, killings, and ethnic rhetoric in advance of the 2020 elections is not so limited.

[24] The July 30, 2021, RIR also refers to the role of the Imbonerakure, noting that in 2019, members of this organization carried out widespread human rights abuses, and that the group used violent ethnic language against Tutsis. The document then advises the reader to see another RIR for further information on the Imbonerakure in Burundi. That RIR, which is listed as the next document on the List of Documents in the NDP for Burundi (Document 13.2), is dated December 16, 2019, and is entitled *The treatment of Tutsi, including women and youth, by the authorities and Imbonerakure members (2017–November 2019)*.

[25] The December 16, 2019, RIR includes additional information regarding the treatment of Tutsis by both Burundian government authorities and members of the Imbonerakure. As Mr. Ngabo notes, the discussion of treatment by government authorities includes the observation that during election periods, the regime wages "campaigns of intimidation" by describing political opponents, including the Tutsis, as "people to be eliminated" in order to terrorize and silence them. It also reports the view of an international crisis group that the Burundian government is engaging in "ethnicisation from above," with the country's troubles being laid at the door of individuals of Tutsi ethnicity.

[26] The RIR further references reports of hate speech used against Tutsis by the authorities and members of the ruling party, a speech by the President of the Senate advocating violence against Tutsis, and the use of ethnic slurs during acts of torture, with examples pertaining directly to Tutsis. Although the political nature of some of these attacks is identified, the RIR refers to events such as targeted assassinations, disappearances, torture, and extrajudicial executions happening as systematic attacks "devised as political strategies to destroy, terrorize

and humiliate the opposition's members, on one hand, and to wipe out the Tutsi community on the other" [emphasis added]. Although the RIR notes that a September 2017 report of the Commission of Inquiry on Burundi indicated that the Tutsi who suffered human rights violations since April 2015 were targeted because of their opposition to the government, rather than as a result of their ethnicity, it also notes that the "presumed ethnicity" of a victim would have sufficed in some cases to be considered armed opposition.

[27] In discussing the treatment of Tutsis by the Imbonerakure, the December 16, 2019, RIR notes that the Imbonerakure consider all opponents, including Tutsis, to be among the people to be eliminated. Evidence from former Imbonerakure members states that they targeted Tutsis because most of the members of the opposition were Tutsis and because of Rwanda's support of Tutsis.

[28] Mr. Ngabo also cites another document in the NDP, a report dated November 2016 prepared by FIDH and one of its member organizations, the Burundian Human Rights League (ITEKA), entitled *Repression and genocidal dynamics in Burundi* (Document 2.13). This report, which is cited in the RIR dated December 16, 2019, points to the April 2015 decision of President Nkurunziza to seek a third term as the trigger for a "violent political crisis," and the subsequent attempted coup as leading authorities to a "logic of systematic repression." It points to incidences of arrest and torture directed at those of Tutsi ethnicity, concluding that although "Tutsi are not the only ones targeted by the regime, ethnicity is sufficiently being used for the current situation in Burundi to be called a repression with genocidal dynamics."

[29] Having reviewed and considered these aspects of the NDP, I am in agreement with Mr. Ngabo that the PRRA Officer's assessment of the country condition evidence did not adequately engage with the evidence that contradicted their conclusions that the targeting of Tutsis is "largely restricted to the political sphere," that the Imbonerakure "mainly target the opposition," and ultimately that there was insufficient evidence of new risk developments since the RPD rejected Mr. Ngabo's refugee claim in 2014.

[30] Contrary to the Minister's submissions, the concern is not simply with the PRRA Officer's weighing of the evidence, which would not itself justify a finding of unreasonableness: *Vavilov* at para 125; *Solis Mendoza* at para 42; *Augusto v Canada (Solicitor General)*, 2005 FC 673 at para 9. Rather the concern is that the PRRA Officer failed to take the evidentiary record into account by failing to engage with relevant evidence before them that contradicted their conclusions: *Vavilov* at para 126; *Cepeda-Guttierez* at para 17. The absence of any discussion of events in Burundi in 2015 (after Mr. Ngabo's refugee claim) and subsequently, combined with their reference to the situation having improved since the civil war, and on provisions of the Constitution that may not be well-implemented in practice, means that the PRRA Officer's decision fails to show the transparency, intelligibility, and justification required of a reasonable decision. I note that the references Mr. Ngabo now makes are not to obscure or isolated passages in the NDP, but to documents specifically cited in the documents referred to by the PRRA Officer, whose titles themselves indicate they are relevant to Mr. Ngabo's claim of risk based on his Tutsi ethnicity.

[31] The Minister also notes that some of the evidence referred to above is dated, pointing to the 2020 elections in which a new President, Evariste Ndayishimiye, formerly Secretary General of the CNDD-FDD, was elected in place of President Nkurunziza (who died in June 2020). However, some of the evidence discussed above, including that related to violence and ethnic rhetoric, pertains to this very election. In any event, to the extent these elections may have changed the potential risks facing Tutsis in Burundi after 2015, this is not something the PRRA Officer addressed. Nor did the PRRA Officer conclude that evidence such as the FIDH report no longer describes current conditions in Burundi; they simply did not refer to it at all. I am therefore not satisfied that the Minister's arguments regarding the timing of the reports and the 2020 election affect the reasonableness of the PRRA Officer's decision.

[32] Given the foregoing conclusions, I need not address Mr. Ngabo's arguments with respect to the rates at which refugee claims of Tutsis from Burundi have been granted by the RPD and the Refugee Appeal Division in recent years.

IV. Conclusion

[33] For the foregoing reasons, I conclude the PRRA Officer's decision does not meet the requirements of a reasonable decision and must be set aside. Mr. Ngabo's PRRA application will be remitted for re-determination by a different officer.

[34] Neither party proposed a question for certification and I agree that no question suitable for certification arises in the matter.

JUDGMENT IN IMM-8334-22

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed. The decision of a Senior Immigration Officer dated March 23, 2022, refusing the applicant's application for a Pre-Removal Risk Assessment is remitted for re-determination by a different officer.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-8334-22
STYLE OF CAUSE:	WILLY NGABO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 8, 2024
JUDGMENT AND REASONS:	MCHAFFIE J.
DATED:	SEPTEMBER 11, 2024

APPEARANCES:

Raoul Boulakia	FOR THE APPLICANT
Alethea Song	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Raoul Boulakia Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT