Federal Court  Cour fédérale

Date: 20120508

Docket: IMM-3798-11

Citation: 2012 FC 42

Toronto, Ontario, May 8, 2012

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

JEAN LEONARD TEGANYA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AMENDED REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant Jean Leonard Teganya is an adult male citizen of Rwanda. In November 1999 he entered Canada and claimed refugee status. He was excluded from refugee protection in 2002, the matter was sent back by a consent Order of this Court. He was again excluded in 2005. This Court upheld that decision. In 2010 the Applicant received a negative PRRA decision, that decision was upheld by this Court in March 2011. The Applicant submitted a second PRRA

application which was denied in a decision dated June 11, 2011. This is a judicial review of the June 11, 2011 decision.

[2] For the reasons that follow I find that the application is allowed.

[3] The Applicant is the eldest of a family of four children. The Applicant was a medical student in a Rwandan hospital. He and other members of his family fled Rwanda in 1994 during the period when a civil war going on there. They fled first to the Congo, he then fled to Kenya and then to India. While in India the Applicant continued his studies. The Applicant's father meanwhile, returned to Rwanda where he was arrested and detained for considerable period in prison then was tried and convicted of crimes relating to genocide. His father remains in prison in Rwanda serving a 22 year sentence.

[4] The Applicant believed that he could not, as a student, seek asylum in India. He feared returning to Rwanda, believing that he, as the son of his father who was convicted, would be arrested and, even if ultimately tried and found not to be guilty, the period of imprisonment before trial, which he believed may be a long period, would, in his belief subject him to torture and punishment in any event. It is to be noted that of all his siblings only the applicant bears his father's surname a matter that the Applicant believes makes him particularly vulnerable to arrest in Rwanda.

[5] In support of his second PRRA application resulting in the decision under review, the Applicant, through Counsel, submitted a number of documents including:

a. Newspaper reports, including those from Canada and Rwanda specifically naming the Applicant;

b. Numerous documents respecting current country conditions in Rwanda;

c. Two expert reports from individuals knowledgeable as to country conditions in Rwanda;

d. An affidavit from a formerly friend who had lived in Rwanda;

e. An affidavit from a Rwandan lawyer respecting the conviction of the Applicant's father and the unavailability to communicate with him while he is in prison.

[6] The PRRA Officer gave little weight to much of this evidence and concluded:

> *Suite à l'analyse du dossier, ainsi que de la preuve objective sur les conditions du pays, j'estime que le demandeur n'a pas démontré qu'il pourrait être à risque au Rwanda.*
>
> *La demande est refusée.*

[7] The Officer did not request a hearing.

[8] Counsel for both parties at the hearing before me agreed that the standard of review of the Officer's decision is reasonableness. They also agreed that the question that the Officer had to address can be stated as: based on an assessment of the evidence, on a balance of probabilities, would the Applicant be subjected personally to a risk to his life or to a risk of cruel and unusual treatment or punishment if he was required to return to Rwanda. It is to be noted that the test is a "risk" and not a "certainty" and that the risk is to be assessed on a balance of probabilities. The decision of Rothstein J.A. (as he then was) in *Li v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1, supports this view. He wrote at paragraphs 12 to 14:

> *12. McGuigan J.A. adopted the "reasonable chance [of] persecution" test as the legal test to meet to obtain Convention refugee status, i.e. not necessarily more than a 50 percent chance but more than a minimal possibility of persecution.*

> *13. The certified question deals with subsection 97(1). The relevant portions of subsection 97(1) provide:*
>
> > *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 ... .*
>
> *14. As was found by McGuigan J.A. to be the case with respect to section 96, nothing in subsection 97(1) suggests that the standard of proof to be applied in assessing the danger or risk described in paragraphs 97(1)*(a) *and (*b*) is anything other than the usual balance of probabilities standard of proof. The answer to the first certified question is therefore:*
>
> > *The standard of proof for purposes of section 97 is proof on a balance of probabilities.*

[9] The risk alleged by the Applicant is set out as follows at page 3 of the Officer's reasons:

> *RISQUES ALLÉGUÉS*
>
> *Dans la présente demande ERAR subséquente, le demandeur réitère en partie les risques invoqués dans sa demande ERAR initiale.*
>
> *Ceux-ci étaient à l'effet que son père était soupçonné d'une implication dans le génocide rwandais et qu'à ce titre il ne pourrait bénéficier d'un procès équitable. Le demandeur soulignait que sa situation serait la même étant donné qu'il est le fis de son père. Il soulignait ses origines ethniques hutues ainsi que la possibilité qu'il soit considéré comme opposant au régime actuel.*
>
> *Dans la présente demande, il souligne un risque étant donné l'association de son père avec le MRND. Il précise que son père aurait été arrêté et emprisonné au moment du retour de la famille au Rwanda en 1997. Il ajoute qu'après une détention préventive de 7 ans, son père aurait été condamné à 22 ans d'emprisonnement.*

> *Monsieur rapporte qu'étant donné la situation de son père, mais également parce qu'il est le premier né et porte le même nom de famille que celui-ci, il serait à risque de traitements cruels et inusités.*
>
> *Il allègue également qu'étant donné la parution d'articles dans les médias concernant la décision de la Cour fédérale de maintenir la décision de la CISR et du premier ERAR, les autorités rwandaises auraient été informées de la demande d'asile de monsieur ainsi que le fait qu'il soit reconnu complice du génocide.*
>
> *Il souligne qu'étant donné cette situation, il est maintenant un réfugié sur place et qu'il serait aussitôt arrêté advenant un retour au Rwanda.*
>
> *Il rapporte qu'il pourrait être détenu pour une longue période et de façon arbitraire, puis, jugé devant un tribunal Gacaca, lesquels auraient été largement critiqués sur une base internationale puisqu'ils ne rencontraient pas les critères internationaux de procédure en plus d'une certaine forme de corruption.*
>
> *Il mentionne qu'il ne pourrait obtenir un procès juste et équitable au Rwanda étant donné qu'on le considérerait comme complice du génocide.*

[10] The first document considered by the Officer in evaluating risk was a newspaper article published in Rwanda. It is important to repeat that article in full:

> *RWANDA: GENOCIDE Suspect Faces Deportation From Canada*
>
> *James Karuhanga 31 March 2011*
>
> *Reports from Canada indicate that following a ruling this month, a court found that Jean Leonard Teganya, a Genocide suspect, could be deported to Rwanda.*
>
> *Teganya was an intern at Butare University Hospital in April, 1994, where militia killed nearly 200 Tutsi patients and staff at the hospital.*
>
> *When contacted yesterday, Prosecutor General Martin Ngoga said it was a positive step.*

> *"Much as it is a matter still within Canadian jurisdiction, and subject to further appeal, it is a positive step in our collective endeavor as community of nations to deal with every detail that would help bring perpetrators of Genocide to justice and deny them safe haven anywhere in the world," Ngoga said.*
>
> *Agnes Murekatete, a Genocide survivor, said that it is unfair that suspects like Teganya remain at large.*
> *"I just feel that life is so unfair. Many of those who made me and others orphans, many of those who killed our relatives in cold blood are sheltered all over the world."*
>
> *"I have no option but to forgive, yet the continued genocide denial fills me with sorrow. And they are all out there, everywhere, she said."*
>
> *At the University Hospital, in 1994, it was reported that nurses compiled lists of patients and staff to be killed, while doctors refused to treat Tutsi patients or kicked them out of the hospital where the Interahamwe militiamen were waiting.*
>
> *Teganya's father was a regional lader of the extremist Mouvement Révolutionaire National pour le Développement (MRND) party.*
>
> *In 2002, Canada's Immigration and Refugee Board asked Teganya why he wasn't killed at the hospital, and whether that meant militiamen identified him as someone sympathetic to their cause.*

[11] The Officer dismissed this article in saying that it does not say that charges would be laid against the Applicant or that the Applicant is charged in Rwanda:

> *Je constate que le demandeur ne présente pas de document démontrant que le procureur général aurait porté des accusations spécifiques à son endroit. D'ailleurs, le demandeur ne démontre pas avoir été accusé au Rwanda.*
>
> *Cela dit, si des accusations étaient déposées, le demandeur pourrait devoir subir un procès.*

[12] This determination as to a critical piece of evidence is unreasonable. First, it is not necessary to show that charges will be laid but only that there is a risk. Clearly that is evident. Secondly, the

Applicant's fear is prolonged detention prior to a trial, during which there is a risk of cruel and unusual punishment. Rarely does one see in cases of this kind such clear evidence of risk personally directed against an Applicant.

[13] Applicant's Counsel argued that, in the next portion of the Reasons the Officer made only a selected reference to the documents in the record and that many documents addressing conditions of prolonged detention before charges are laid and torture during such detention are ignored. I agree that a more thorough analysis of all aspects of the issues presented in these documents will be warranted at a subsequent determination. However, if the only issue were the treatment of these documents I would not have found the determination to be unreasonable.

[14] I find unreasonable, in addition to the treatment of the newspaper article the treatment by the Officer of the evidence of many individuals presented on behalf of the Applicant. The Officer appears to have been doggedly determined to find reasons, however slight, to dismiss or give little weight to these documents instead of considering what evidence and expert opinions they do present and giving proper weight to them. It must be remembered that the evidence is unrebutted. The Officer had on the other hand only country condition documents that were more or less weighted on both sides of this issue. It was incumbent upon the Officer to give full attention to what is set out in these documents.

[15] The first document considered in the reasons is a declaration of Noel Twagiranungu who holds a BA from the National University of Rwanda, an LLB from Utrecht University and is a PhD candidate at the Fletcher School of Law at Tufts University. He gave a detailed history of the civil

strife in Rwanda and is knowledgeable in criminal procedures and modalities of prosecution and punishment in Rwanda. He concludes that the Applicant's fear of seeing his basic rights to a free and fair trial denied and his life endangered were he to be returned to Rwanda to be credible and reasonable.

[16] The Officer unreasonably and without giving any basis for the conclusion reached stated that this evidence is a personal interpretation and partisan:

> *Bien que certains des évènements mentionnés soient rapportés par d'autres sources fiables, je considère que l'information rapportée n'est pas neutre et objective.*
>
> *Pour ces raisons, je considère que ce document reflète une idéologie spécifique et partisane.*
>
> *Je constate que les conclusions de ce document sont une interprétation personnelle de certaines lois du Rwanda.*

[17] There is simply no basis in the reasons for these conclusions.

[18] Next the Officer considered the Statement of Dr. Susan M. Thomson. She is an assistant professional of Contemporary African Politics at Hamphire College, Amherst, MA. Among other notable things she is Anmesty International's country advisor for Rwanda and Burundi. She provides an extensive review of country conditions in Rwanda and provides a number of conclusions including that among Rwandans are circumscribed in their actions.

[19] The Officer unreasonably dismisses this report as not being supported by objective and independent sources and lacking corroboration and that it fails to mention the Applicant specifically:

> *Bien que je reconnaisse la formation de l'auteure, je constate que le document en question est une opinion qui n'est pas soutenue, dans le document, par des sources objectives et indépendantes.*
>
> *D'ailleurs, certains propos mentionnés par l'auteure ne sont pas corroborés par des documents de sources neutres et indépendantes.*
>
> *Je considère que ce document ne mentionne pas la situation particulière du demandeur et ne démontre pas que le demandeur pourrait être à risque étant donné un retour au Rwanda.*

[20] The Officer's findings are unreasonable. It is not necessary that opinions expressed by an expert such as this be footnoted or filled with references to this source or that. It is a statement, not a scholarly research article. Further, it is not necessary that the Applicant's situation be addressed specifically in every piece of evidence. This statement serves as a background for other, more specific, evidence.

[21] The next piece of evidence from an individual that was addressed by the Officer is the affidavit of Venant Munyantwari. He is a friend of the family of the Applicant, now resident in the United States. He appeared as a witness in the trial of the Applicant's father. He attested that since the Applicant has the same last name as his father he possibly could have the same problems suffered by his father.

[22] The Officer irrationally and unreasonably dismissed this evidence because the Officer did not know how Mr. Munyantwari was found and that it was simply a letter of convenience:

> *J'ignore également comme le demandeur a retrouvé le signataire aux États-Unis. Étant donné ce qui précède, mais également parce que je considère qu'il s'agit d'une lettre de complaisance, je n'accorde que peu de poids à ce document.*

[23] It is immaterial how this person was located. Evidence from friends is frequently tendered in proceedings such as this. This affidavit cannot be dismissed as it was.

[24] The last significant piece of evidence from an individual is an affidavit from a Rwandan lawyer, [xx]. That affidavit speaks to the trial of the Applicant's father, his prolonged detention before trial (10 years) and that contact now with the father is impossible. The Officer dismisses the affidavit on the basis that it does not address certain issues specific to the Applicant:

> *De plus, bien que ce document en question mentionne que le père de monsieur a été condamné à 22 ans de prison, il ne permet pas de conclure à la présence de risques pour le demandeur.*
>
> *Ce dernier rapporte des frères et sœurs au Rwanda pour lesquels il ne précise ni incarcération, ni arrestation. Il n'explique pas non plus en quoi le fait d'être le fils de son père pourrait lui causer des risques au Rwanda étant donné le défaut de monsieur de démontrer que sa fratrie aurait, depuis cette condamnation, rencontré des difficultés de la part des autorités qui pourraient conduire à une incarcération.*
>
> *Je considère, donc, que ce document ne permet pas de conclure que le demandeur pourrait être incarcéré ou accusé advenant un retour au Rwanda, ni qu'il pourrait être à risque dans son pays d'origine.*

[25] This dismissal is unreasonable. The affidavit must be considered for what it does say. Not every piece of evidence must be directed to every specific point in issue. A party must be allowed to build its case, certain parts are background, other parts fill in gaps. The evidence as a whole is to be considered. No piece should be dismissed simply because it is a piece.

[26] The Officer reviewed certain other pieces of documentary evidence submitted on behalf of the Applicant. I will not review this in detail. Suffice it to say that all the documentary evidence

should be considered by a different person with a fresh mind. It is most desirable that a hearing should be held.

[27] In conclusion, I find that the manner in which the Officer treated critical pieces of evidence is unreasonable, hence the conclusion must be considered unreasonable. The decision is to be set aside and reconsidered by a different Officer, preferably with a hearing.

[28] The matter is fact specific, no party requested a certified question. None will be certified.

JUDGMENT

FOR THE REASONS PROVIDED

THIS COURT'S JUDGMENT is that:

1. The Application is allowed;
2. The matter is returned for redetermination by a different Officer;
3. There is no question for certification;
4. No Order as to costs.

"Roger T. Hughes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Jackie Swaisland	FOR THE APPLICANT
Leila Jawando Julie Waldman	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Waldman and Associates Barristers & Solicitors Toronto, Ontario	FOR THE APPLICANT
Miles J. Kirvan Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT