Federal Court  Cour fédérale

Date: 20160506

Docket: IMM-4482-15

Citation: 2016 FC 514

Ottawa, Ontario, May 6, 2016

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

HENRI JEAN CLAUDE SEYOBOKA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act], of a Pre-Removal Risk Assessment [PRRA] Officer's decision where she concluded that the applicant had not demonstrated that he was personally at risk pursuant to s 97 of the Act.

I. Facts

[2] The applicant is a citizen of Rwanda of mixed Hutu and Tutsi origin. Both his father and his father-in-law were part of the Hutu political elite prior to the genocide and he is a relative of the Hutu President assassinated in 1994.

[3] The applicant attented the *École supérieure militaire* in Kigali and remained part of the *Forces armées rwandaises* [FAR] reserve while attending university. He was called upon for active duty between 1990 and 1993 prior to the Arusha Accord and then again in April 1994, after President Habyarimana's plane was shot down.

[4] Starting from April 15, 1994, he was part of an artillery unit fighting the Rwanda Patriotic Front [RPF]. He was later transferred under General Kabiligi's command and took part in roadblocks.

[5] On May 28, 1994, the applicant fled to Zaire after deserting the army.

[6] On June 9, 1994, he went to Nairobi, Kenya, and applied to immigrate to Canada, where his wife and son resided. He did not disclose his military involvement at the time.

[7] In July 1994, the applicant was granted refugee status by the United Nations High Commission for Refugees [UNHCR]. His wife and son also obtained refugee status in Canada.

[8] On January 17, 1995, the applicant traveled to Canada on a fake passport and claimed refugee status upon arrival in Toronto. He did not disclose his military status in any of his application forms.

[9] On October 25, 1996, he was granted refugee status in Canada without a hearing.

[10] In March 1998, he was interviewed by staff from the International Criminal Tribunal for Rwanda [ICTR]. Following this interview, the applicant disclosed his military past to Citizenship and Immigration Canada [CIC].

[11] In April 2002, he was informed by a member of the ICTR that an anonymous witness had testified that he was responsible for the murder of his neighbour Francine and her two children after she refused to have sexual intercourse with him at a roadblock.

[12] On December 19, 2003, the applicant met with RCMP officers to discuss the allegations revealed by the ICTR.

[13] On September 29, 2006, the Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB] vacated the applicant's refugee status, finding him to be complicit in crimes against humanity and responsible for the murder of his neighbour and her two children.

[14] The vacation of the applicant's refugee status began a long process before the administrative tribunals and this Court, summarized in the following table [emphasis reflects the basis of the present case]:

Application	**Decision**	**Application for Leave and Judicial Review**	**Judicial Review**
Permanent Residence as a Recognized Refugee [November 1, 1996]	Refused [May 16, 2007]		
Motion for mandamus, relating to PR application			Refused [September 30, 2005] 2005 FC 1290
	Refugee Status Vacated [September 29, 2006]		
	Applicant declared inadmissible to Canada pursuant to s 35(1)(a) of the *Act* [July 3, 2007]		
Application to reopen decision to vacate refugee status	Refused by IRB [April 14, 2008]	Granted [August 15, 2008]	Dismissed [January 30, 2009] 2009 FC 104
PRRA Application [April 23, 2009]	**Refused [May 31, 2013]**	**Granted [August 22, 2014]**	**On consent [September 15, 2014]**
2nd application to reopen decision to vacate refugee status	Refused by IRB [July 16, 2009]	Granted [November 16, 2009]	Granted [May 4, 2010] 2010 FC 488
Reconsideration of the July 16, 2009 by the IRB following JR	Refused by IRB [September 21, 2009]	Granted [March 20, 2012]	Dismissed [September 27, 2012] 2012 FC 1143
Application for PR on H&C grounds [December 7, 2012]			
Reconsideration of PRRA Application	**Refused [July 17, 2005]**	**Granted [January 18, 2016]**	**[Pending]**

[15] In March 2014, a Department of Justice lawyer, Me Robert Fecteau, traveled to Rwanda for an unrelated case. When he met with the Attorney General of Rwanda, Me Fecteau was questioned as to why the Federal Court had postponed Mr. Seyoboka's removal to Rwanda. Me

Fecteau informed the Attorney General that he was not aware of the case and, upon his return to Canada, communicated with Me Todd, who was in charge of the applicant's file in Canada. The Minister then consented to have the applicant's PRRA application reconsidered in light of this new information.

II. Decision

[16] In her decision, the Officer considered the following claims made by the applicant:

a) He has not been involved either in war crimes or crimes against humanity;

b) He has been identified as a suspect of genocide and murder in Canadian and Rwandese media and thus may not get a fair trial in Rwanda, especially in a *gacaca* court;

c) The Attorney General of Rwanda has recently demonstrated an interest in him;

d) He is a known opponent of the current government: he belonged to the FAR and several of his family members have been killed or persecuted because of their relations to the Hutu elite; he is a member of the Communauté des immigrants rwandais de l'Outaouais [CIRO] and organized a protest against President Paul Kagame in Ottawa in 2006; and he is also a member of the Rwanda National Congress [RNC] since 2010;

e) He is in possession of information linking Paul Kagame to the plane crash that triggered the genocide, which he revealed to a French judge who subsequently published the information in a book, *La France dans la terreur rwandaise* (Charles Onana);

f) The Rwanda authorities have refused to deliver a passport to him; and

g) Hutus are persecuted in Rwanda.

[17] The Officer noted that the IRB had refused to reopen the exclusion decision and that the PRRA was not a means to re-examine the RPD's conclusions. Therefore, because the applicant was excluded from the Convention, the PRRA application needed to be evaluated under s 97 of the Act.

[18] The Officer found that the applicant was not likely to be prosecuted in Rwanda because, although the authorities have been aware of his case for several years, no proceedings have begun against him. The newspaper articles he submitted also did not demonstrate a particular risk to him as understood by s 97 of the Act. Moreover, the justice system in Rwanda has significantly improved: the ICTR agreed to transfer their remaining cases to the local justice system and the *gacaca* courts have been abolished. The Officer also found that it was speculative to interpret the Attorney General's inquiry about his case as a continued interest in prosecuting him.

[19] The Officer held that the applicant had not demonstrated that he was subject to risk because of his actual or perceived opposition to the current government. The applicant had not

presented any evidence demonstrating that his family members had been targeted because of their links to the Hutu elite and had not proved on a balance of probabilities either his membership in CIRO or the RNC. The Officer gave no probative value to corroborating affidavits and letters from CIRO and RNC executive members, because the objectivity and independence of their sources could not be established. Moreover, the objective documentation did not show that RNC members were targeted in Rwanda.

[20] The Officer finally found that there was no objective evidence which linked the information allegedly possessed by the applicant and the information published in the Onana book; that it was common for countries to prefer to deliver a passport to CBSA rather than to the person subject to removal, for fear that they would destroy it; and that country conditions did not demonstrate that Hutus were subject to persecution. The Officer concluded that the applicant had not demonstrated that he was personally at risk as understood by s 97 and rejected the PRRA application.

III. Issues

[21] This matter raises the following issues:

1. What is the applicable standard of review?
2. Did the Officer err in failing to hold an oral hearing?
3. Did the Officer err in her assessment of the evidence?

IV. Submissions of the Parties

A. *Applicant's Submissions*

[22] In his written submissions, the applicant argued that the Officer was bound by case law to re-evaluate his exclusion and inadmissibility to Canada in accordance with *Ezokola v Canada (MCI)*, 2013 SCC 40 [*Ezokola*], but abandoned this ground of review at the hearing.

[23] The applicant submits that the Officer was required to hold an oral hearing because she made veiled credibility findings when she concluded that there was insufficient corroborative evidence to support the applicant's sworn statement on the mistreatment of his family members. It is an error to discount an applicant's evidence merely because there is no corroborating documentary evidence. The Officer should have evaluated the applicant's sworn evidence against the burden of proof, rather than against the sufficiency of corroborative evidence.

[24] The applicant further submits that the Officer erred in finding that (a) the Rwandan authorities had no interest in prosecuting the applicant, (b) if charged, he would benefit from a fair and just trial, and (c) he faced no risk due to his membership in opposition groups. The Officer's findings derived from a flawed analysis of the evidence, where she considered the pillars of the applicant's evidence in isolation from one another, thus creating an impossible burden of proof. To properly assess the applicant's risk of prosecution in Rwanda, the Officer was required to look at his profile as a whole (*Yener v Canada (MCI)*, 2008 FC 371 [*Yener*]).

B. *Respondent's Submissions*

[25] The respondent submits that, even if all the requirements under s 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002/227 [the Regulations] to hold an oral hearing are met, they only create a presumption in favour of an oral hearing, and not a statutory obligation to hold one (*Begashaw v Canada (MCI)*, 2009 FC 1167 [*Begashaw*]). The Officer may still find that the evidence lacks weight or is insufficient to establish a legal threshold without triggering the need for an oral hearing.

[26] The respondent further submits that the decision falls within the range of possible, acceptable outcomes. The Officer's decision, when read in context, discloses that she carefully considered all of the relevant evidence in its totality. The applicant is simply taking issue with the weight given to the evidence by the Officer.

[27] Whether or not a decision-maker must examine the composite profile of an applicant will depend on the nature of the claim and the evidence provided by the claimant to demonstrate the existence of a composite or cumulative risk. In this case, the applicant failed to meet his burden of establishing that he fell into such a composite profile.

V. Analysis

A. *Standard of Review*

[28] The parties do not agree on the standard of review applicable on the issue of the oral hearing. The applicant submits that it is a matter of procedural fairness while the respondent contends that it is a question of mixed fact and law.

[29] The jurisprudence is divided on this point. In *Tiftikci v Canada (MCI)*, 2014 FC 43 [*Tiftikci*], at para 17, Justice Russell held that the failure to hold an oral hearing in the context of a PRRA was a question of procedural fairness and called for the standard of correctness. He relied on well-established jurisprudence from the Federal Court of Appeal and the Supreme Court of Canada, namely *Sketchley v Canada (AG)*, 2005 FCA 404 [*Sketchley*] and *CUPE v Ontario*, 2003 SCC 29 [*CUPE*]. However, in *Chekroun v Canada*, 2013 FC 737 [*Chekroun*], at para 40, Justice Strickland concluded that reasonableness applied, because the right to an oral hearing in the PRRA context was triggered only when certain conditions were met, which required an application of the law to the facts. In *Thiruchelvam v Canada (MCI)*, 2015 FC 913 [*Thiruchelvam*] at para 3, Justice Annis followed Justice Strickland's reasoning and noted that it appeared to be the dominant trend at the Court in recent years. I agree with the majority of the Court that the right to an oral hearing set out in s 167 of the *Regulations* requires a careful analysis of the facts at hand and is, as such, better characterized as a question of mixed facts and law.

[30] The parties agree that the second issue should be reviewed under the standard of reasonableness. It is trite law that the assessment of evidence by a decision-maker deserves deference from the Court and should only be interfered with if the decision is not justified, intelligible, or transparent 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, para 47 [*Dunsmuir*]).

B. *Did the Officer err in failing to hold an oral hearing?*

[31] The parties agree that s 113 of the Act and s 167 of the Regulations govern when an oral hearing may be held in the context of a PRRA and that the conditions listed in s 167 of the Regulations are cumulative. The issue is whether the Officer made veiled credibility findings, thus triggering the application of s 167 of the Regulations. If that is the case, the respondent further argues that the holding of an oral hearing under this provision is a matter of discretion, not of right, as per *Begashaw*.

[32] In *Ozomma v Canada (MCI)*, 2012 FC 1167 [*Ozomma*] at para 52, Justice Russell attempted to clarify the distinction between veiled credibility findings and sufficiency of evidence:

> Officers can only avoid credibility findings and decide applications on the basis of sufficiency of evidence if their decisions show that, credibility aside, what the applicant has to say is not sufficient, on the applicable standard of proof, to show that he or she faces a risk under either section 96 or section 97. In other words, it has to be a situation where a credibility finding is not necessary in order to decide the probative value of evidence so that, whether or not an applicant is being truthful, their evidence is not sufficient to

> establish persecution or a section 97 risk. In such a situation, it is not procedurally unfair to refuse to hold an oral hearing. [My emphasis]

[33] At issue is the applicant's statutory declaration, where he alleges that his family members have been harassed, persecuted and murdered because they were perceived as opponents of the current government. The applicant swore he believed Paul Kagame ordered the assassination of his father. His half-brother was also killed at the time. In 1998 his sister, niece and younger brother were also killed. The officer did not give any weight to the applicant's sworn statement about the mistreatment and murder of his family because of a lack of corroborative evidence.

[34] The Officer wrote in her decision:

> Tout d'abord, je note que le demandeur n'a pas soumis de preuves pour corroborer les faits et les évènements qu'il allègue au sujet des mauvais traitements subis par sa famille et l'assassinat de ses proches.
>
> Ensuite, j'ai considéré les nombreux documents sur les conditions de pays au Rwanda et les articles de presse soumis par le demandeur. Or, je constante que cette preuve ne démontre pas, selon la prépondérance des probabilités, que l'élite hutue ainsi que les soldats qui ont servi les FAR avant et pendant le génocide sont systématiquement perçus comme des adversaires ou des représentants de l'idéologie génocidaire et qu'ils subissent des préjudices de la part des autorités rwandaises en étant poursuivis et en faisant face à des sanctions illégitimes.

[35] I do not believe that this equates to a veiled credibility finding. While it may have been preferable for the Officer to formulate her conclusion more clearly, the record shows that she required corroboration because she was not satisfied, in light of the objective evidence, that the Rwandese authorities ordered the assassination of members of the applicant's family.

[36] While the applicant may believe that the mistreatments were ordered by Paul Kagame, this sort of evidence, because he has a personal interest in the matter, requires corroboration if it is to have any probative value (*Ferguson v Canada (Minister of Citizenship and Immigration)* 2008 FC 1067 at paras 26-28, *Zhang v Canada (Minister of Citizenship and Immigration)* 2009 FC 787 at para 6, *Vijayaratnam v Canada (MCI),* 2015 FC 48, at para 71; *Ibrahim v Canada (MCI),* 2014 FC 837, at para 25; *I(I) v Canada (MCI),* 2009 FC 892, at para 20). There was no corroborative evidence coming from either the applicant or the documentary evidence. It was reasonable for the Officer to find that incidents of that nature would have been reflected in the documentary evidence. This is not a case where the Officer made a credibility finding triggering the need of an oral hearing.

C. *Did the Officer err in her assessment of the evidence?*

[37] The applicant's main contention is that the Officer made a disjunctive analysis of each component of risk alleged by him and ultimately failed to consider his profile as a whole. He takes particular exception to the way the Officer assessed whether the Rwandan authorities were interested in prosecuting him, whether he would be subjected to unfair proceedings should he be prosecuted, and whether his membership in opposition groups put him at risk. The failure to take into account an applicant's profile as a whole was found to be a reviewable error in *Yener* (para 56-57) and *Boroumand v Canada (MCI),* 2007 FC 1219 (para 63). I agree with the applicant in part.

[38] The applicant provided undisputed evidence that the government has a special interest in him. The key piece of evidence was the affidavit by the Department of Justice lawyer outlining

his meeting with the Attorney General of Rwanda inquiring about the applicant and why the deportation was delayed.

[39] While the respondent argues that there may be another reason for the Attorney General's interest in the applicant, the only plausible explanation is that he wished to prosecute him. This is supported by the generally hostile and outraged language used by Rwandan newspapers to report on the applicant's case. The applicant is referred to as "[being] among the highest-ranking Rwandans of the dozen [genocide] suspects who fled to Canada" and reported as "[having] participated in the massacres" and being the "son-in-law of Colonel Elie Sagatwa, one of the leading masterminds of the Genocide". An article published in 2011 reports that Rwanda's Prosecutor General Martin Ngoga "ha[d] expressed shock about the news that one of the highly ranking genocide suspects [was being given] a new refugee hearing despite being turned down six times" and that the applicant was an "advocate of Hutu extremism".

[40] Further, the applicant's profile had to be considered as a whole. The cumulative impact of all elements of the applicant's profile had to be properly assessed by the Officer (*Boroumand v Canada (Citizenship and Immigration)*, 2007 FC 1219).

[41] The applicant's undisputed facts establish the profile of a former member of the FAR with links to the Hutu elite, who was named in an International Criminal Tribunal of Rwanda indictment in connection with the murder of a woman named Francine, having been interviewed by investigators from ICTR and Canadian officials, found to be complicit in the genocide by the

IRB. All these facts have been publicly reported by the media and have been the subject of an inquiry by the Attorney General of Rwanda.

[42] When considering this evidence as a whole the Officer's finding that there could be other reasons for the Attorney General's interest in the applicant is not reasonable.

[43] However, this error is not sufficient in itself to allow the judicial review because of the alternate finding by the Officer. In her decision, she also considered whether the applicant would be subjected to unfair proceedings should he be prosecuted. She found that this would not be the case. She reviewed at length a Human Rights Watch article titled « Rwanda. La justice après le genocide: 20 ans plus tard» (March 28, 2014) and the U.S. State Department *Human Rights Report: Rwanda* (2013), which make it clear that there have been drastic improvements since the 2012 abolition of *gacaca* tribunals. The Officer particularly insisted on the fact that the ICTR agreed in 2012 to transfer their remaining genocide cases to Rwanda, following years of negotiation with the Rwandese government to guarantee the accused's human rights.

[44] This was recognized by Justice Shore in *Mugesera v Canada (Minister of Citizenship and Immigration)* 2012 FC 32 at paras 66 and 67 where he stated:

> [66] Moreover, in the last few months, the Appeals Chamber of the International Criminal Tribunal for Rwanda and the European Court of Human Rights agreed to transfer to the Rwandan authorities Rwandans charged, *inter alia*, with participating in genocide and found:
>
> - They accepted commitments made the Rwandan government;
> - The Rwandan judicial system cannot be considered as a system lacking in impartiality

> and independence. Hence, accused persons will receive a full and fair trial;
>
> - Detention conditions for accused persons comply with international standards, and they will not face mistreatment.
>
> [67] These judgments from two recognized international tribunals confirm the findings made by the Minister's delegate, namely, that it is reasonable to believe in the good faith of the Rwandan government and to conclude that the rights of individuals charged with participating in genocide will be respected and that they will not be persecuted.

[45] By contrast, in his submissions, the applicant relies heavily on now outdated evidence to demonstrate the failures of the Rwandese judicial system.

[46] It is well-established that the Court owes administrative decision-makers a high degree of deference on the question of the weighing of the evidence. In *Dunsmuir*, at para 48, the Supreme Court held that:

> […]deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law […] [T]he concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision": "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., The Province of Administrative Law (1997), 279, at p. 286 (quoted with approval in Baker, at para. 65, per L'Heureux-Dubé J.; Ryan, at para. 49).

[47] In the case at bar, the Officer's reasons for concluding that the applicant would receive a fair trial in Rwanda if he were prosecuted are clear and grounded in the evidence. She was entitled to prefer more recent evidence to that which was submitted in 2009 by the applicant in support of his PRRA application. In this situation, the Court must respect the legislative choice

that Parliament made to leave matters of fact in the hands of the Officer's more specialized expertise (*Dunsmuir*, para 49).

[48] I note that the Officer did not directly address the question of conditions in detention centres, but simply generally held that the sanctions he would face would not amount to the risk described in s 97 of the Act. In light of the reasoning above, this was not unreasonable. While it is true that the U.S. State Department 2013 Report indicates that prison conditions are harsh, it also notes that they are constantly improving, and that each prison had dormitories, toilets, sports facilities, a health center, a guest hall, a kitchen, water, and electricity, as required by a 2006 presidential order governing prison conditions. The illegal detention, torture and abuse reported by the U.S State Department concern military detention centres, where people deemed 'security risks' are often held. The applicant has not demonstrated that he would fit in such a profile.

[49] This brings us to the question of the Officer's treatment of the applicant's alleged profile as a political opponent of the current Rwandese government. While the documentary evidence highlights the risk facing opponents of the Kagame government in Rwanda, I find that it was reasonable for the Officer to conclude that the applicant would not be perceived as such.

[50] The applicant's submissions on his profile as a political opponent rested on two particular points: his membership in CIRO, and his membership in the RNC. Regarding his membership in CIRO, the Officer acknowledged that the applicant had taken part in some of their activities, including a 2006 vigil on Parliament Hill which he helped organized, but noted that he had not submitted evidence attesting to a leadership role within the organization. In support of his

allegations, the applicant provided an affidavit from Martin Barakengera, another member of CIRO, who alleged having been intimidated by the staff from the High Commission of Rwanda in Ottawa following the vigil.

[51] In his affidavit, Mr. Barakengera neither explains his role within CIRO, nor his relationship with the applicant, and his description of the activity does not correspond to the description provided to the authorities by the applicant during the organization of the event. Given this contradiction and the impossibility to establish the reliability of the affidavit, the Officer concluded that it was a self-serving document and gave it no probative value.

[52] To support his membership in the RNC, the applicant alleged that he had had Skype conversations with a founder of the party, Patrick Karegeya , later assassinated in South Africa, and adduced a photocopy of his membership card, letters from Emmanuel Hakizimana, the RNC coordinator in Canada, and critical emails on Kagame he sent to online discussion groups. The Officer noted that the applicant had not adduced corroborative evidence to establish his relationship with Karegeya and that he had only submitted a copy not translated of the front side of his RNC membership card, and no other evidence as to his active membership, such as donation receipts or receipts for membership fees. She also noted that, while Mr. Hakizimana identified the applicant as an active member of the group, Mr. Hakizimana did not formally identify himself in his letter, did not use official letterhead, or seek corroborative evidence of the threats he alleged. As to the emails, the Officer found that she could not identify the recipients, or whether they had been read at all. She further relied on a research report from the IRB on the

RNC to conclude that RNC members were not more at risk than other political opponents in Rwanda.

[53] For these reasons, she found that the applicant had not demonstrated that he was a member of the RNC, or that he was at risk of being perceived as a political opponent of Kagame. I find that the record does not show that the Officer erred in ignoring or misinterpreting evidence on the question of the applicant's political membership and, overall, I am of the opinion that the Officer committed no reviewable error in her assessment of the risk faced by the applicant if prosecuted upon his return to Rwanda.

VI. Conclusion

[54] To summarize, the role of the Court in the context of an application for judicial review is to ensure that overall the decision-maker carefully balances the interests at stake and grounds his conclusions in the evidence before him in order to arrive at an acceptable outcome with respect to the facts and the law.

[55] In this case, nothing in the record indicates that the Officer failed to take into account Mr. Seyoboka's interests or that she erroneously ignored the evidence before her. The truth is that Mr. Seyoboka benefitted from the protection of Canada for many years, in spite of being a suspected war criminal, and justifiably so: there is no doubt that for many years, his life and human rights could not be guaranteed in Rwanda. But that is no longer the case. In the past few years, Rwanda has brought its justice system up to international standards, as acknowledged by the Appeals Chamber of the ICTR, and can safeguard Mr. Seyoboka's right to a fair trial in his

country of origin should he be prosecuted. It is now time for him to face his past actions, and let justice run its course.

[56] For these reasons, the application for judicial review is dismissed with no question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

There is no question for certification.

"Danièle Tremblay-Lamer"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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