Federal Court  Cour fédérale

Date: 20171107

Docket: IMM-1505-17

Citation: 2017 FC 1009

[ENGLISH TRANSLATION]

Montreal, Quebec, November 7, 2017

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

MARC MADRIGAL MATORE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] In its decision, the Refugee Protection Division [RPD] reached the following conclusion following its analysis of the evidence on record:

> [TRANSLATION]
> Regarding the applicant's ethnic origin, it was pointed out that a genocide against Tutsis is in the making in Burundi. In that regard,

> the documentary evidence shows that senior officials in Burundi have allegedly made racist statements against Tutsis. However, there is nothing in the documentary evidence to indicate that those statements were not simply unfortunate and isolated incidents, and certainly nothing to indicate that Tutsis are currently being hunted, even though ethnic discourse has resumed. For now, the documentary evidence essentially shows that the current crisis is political in nature. In that regard, the applicant has no political activities and the panel did not believe that the applicant took part in the demonstrations in April and May 2015. Moreover, the applicant did not demonstrate a serious possibility of being persecuted due to his Tutsi ethnicity. [Emphasis added.]
>
> (Reasons for Decision, at paragraph 1 following paragraph 24 [due to a paragraph numbering error in the Decision])

The excerpt from the RPD is erroneous because it uses the word “nothing” in a way that is out of context with the statements discussed below, drawn from reliable sources and clearly stating the contrary. The current moratorium on Burundi in Canada confirms the information from these reliable sources. It must not be forgotten that the Honourable Irwin Cotler himself, former Minister of Justice and Attorney General of Canada, presented the same facts and statements two weeks ago before parliamentarians in Ottawa. In addition to having sounded the alarm two years ago regarding the devastating events affecting the Tutsi population in Burundi, the Honourable Irwin Cotler also warned parliamentarians that they should not wait for the increasing danger faced by the Tutsis in Burundi to turn into a genocide.

[2] Canada and the world were already warned of the disaster that was spreading at the time in Rwanda during General Roméo Dallaire’s (now Senator Dallaire) time there with the Canadian Forces. As a signatory of the *United Nations Convention relating to the Status of Refugees*, Canada has an obligation under that Convention to address the reported danger faced by Tutsis in Burundi.

[3] "Burundian authorities are seeking to **spread mistrust and hatred against "the common Tutsi enemy", using genocidal semantics** somewhat reminiscent of the language used in Rwanda in 1994 by the "Hutu power" government calling for the systematic elimination of the Tutsi" (Tribunal Record, in the National Documentation Package on Burundi from the IRB on conditions in the country, *International Federation for Human Rights – Repression and Genocidal Dynamics in Burundi*, at page 103).

[4] The report from the United Nations Independent Investigation on Burundi [UNIIB], prepared in accordance with Human Rights Council resolution S-24/1, clearly indicates that "[w]e are gravely concerned about the general trend of ethnically divisive rhetoric by the Government, as well as others, which may carry a serious potential of the situation spiralling out of control, including beyond Burundi's borders" (Tribunal Record, at page 90).

[5] As well, "[s]ome Hutu political parties have long wanted this event to be officially qualified as genocide. However, some 1972 Tutsi survivors consider that this theory of the "double genocide" is to obscure the plan to exterminate the Tutsi who had been standing by the Umugambwe w'Abakozi b'Uburundi (Burundi Workers' Party)" (Tribunal Record, in the National Documentation Package on Burundi from the IRB on conditions in the country, *International Federation for Human Rights – Repression and Genocidal Dynamics in Burundi*, at page 105).

[6] "The Burundian authorities are also simultaneously speaking out against Rwanda and its Tutsi President, Paul Kagame, in a very virulent manner. This rhetoric aids to augment the idea

that Burundi is threatened by a “common external enemy” planning genocide against Burundi’s Hutus” (Tribunal Record, in the National Documentation Package on Burundi from the IRB on conditions in the country, *International Federation for Human Rights – Repression and Genocidal Dynamics in Burundi*, at page 107).

[7] This Court is satisfied that the RPD “failed to consider the evidence in light of the ‘particular situation’ of the applicant” (*Jeyachandran v Canada (Solicitor General)*, [1995] FCJ No 487 (QL) at paragraphs 9–10 [*Jeyachandran*]). The conditions in the country were not examined as a whole. That failure reveals a major gap in the RPD’s understanding, since it analyzed and assessed the documentary evidence erroneously. The Court notes in this regard that the socio-political context, culture and history of the country are essential to understanding a particular logic, one that is different from what could stem from the situation in another country (see *Ye v Canada (Minister of Employment and Immigration)*, [1992] FCJ No 584 [*Ye*]).

II. Nature of the matter

[8] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision rendered on February 22, 2017, in which the RPD of the Immigration and Refugee Board concluded that the refugee claimant was not a Convention refugee or a person in need of protection. The RPD therefore rejected the refugee claim based on section 96 and subsection 97(1) of the IRPA, in accordance with subsection 107(1) of the IRPA.

III. Facts

[9] The applicant, age 36, is a citizen of Burundi of Tutsi origin.

[10] On April 26 and May 13, 2015, the applicant alleges that he took part in demonstrations in Burundi protesting President Nkurunziza's third mandate. The applicant allegedly began to fear being arrested or killed because of his participation in the demonstrations as a young Tutsi following the attempted coup on May 13, 2015.

[11] From June 12 to October 25, 2015, and from December 15, 2015, to February 20, 2016, the applicant apparently left his neighbourhood of Nyakabiga to hide at his mother's home in the neighbourhood of Mutanga South. The applicant then allegedly returned to Nyakabiga, believing that the situation had calmed down.

[12] On May 6, 2016, a group of police allegedly arrested the applicant in Nyakabiga and held him for three days in a place known as Ndadaye. The applicant was allegedly locked in a container with other young Tutsis. The applicant was allegedly released after a ransom was paid by his family.

[13] On May 20, 2016, the applicant apparently hid, this time in the Bururi province, in the Mugamba region (the village where his mother was born).

[14] After returning to live with his mother in Mutanga South, the applicant was able to obtain a US tourist visa and arrived in the United States on December 2, 2016. That same day, the applicant went to the Canadian border to claim refugee status in Canada.

IV. Decision

[15] Due to contradictions between the applicant's oral testimony and the immigration form (Basis of Claim), the RPD did not believe the applicant's entire account. The RPD dismissed the applicant's explanations regarding these contradictions because it deemed them to be unsatisfactory. The panel drew a negative inference regarding the applicant's credibility.

[16] The RPD also concluded that, in light of all the evidence, the applicant did not demonstrate a serious possibility of being persecuted for his Tutsi ethnicity. According to the RPD, the applicant was unable to demonstrate, on a balance of probabilities, that there would be a threat to his life or a risk of torture or cruel and unusual treatment or punishment if he were to return to his country of origin. That is why the RPD rejected the refugee claim pursuant to section 96 and subsection 97(1) of the IRPA on February 22, 2017. That decision is the subject of this application for judicial review.

V. Issues

[17] The Court rewords the issues as follows:

1. In light of all the evidence, did the RPD err in concluding that the applicant was not credible?

2. Is the RPD's conclusion—that because of his ethnicity, the applicant is not a person in need of protection within the meaning of section 97 of the IRPA—reasonable?

[18] This Court considers that the standard of review applicable to the RPD's conclusion regarding the applicant's credibility is the standard of reasonableness (*Garcia Arreaga v Canada (Citizenship and Immigration)*, 2013 FC 977 at paragraph 30; *Devanandan v Canada (Citizenship and Immigration)*, 2016 FC 768 at paragraph 15). Regarding the issue of whether the applicant is a person in need of protection because of his Tutsi ethnicity, the Court considers it a question of mixed fact and law subject to the standard of reasonableness (*Gutierrez v Canada (Citizenship and Immigration)*, 2011 FC 1055 at paragraph 26).

VI. Relevant provisions

[19] The following provisions of the IRPA are relevant in this case:

Convention refugee	**Définition de *réfugié***
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,	**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) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	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) 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.

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.

Person in need of protection

Personne à protéger

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

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) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

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) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(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,

(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) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(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 occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
Decision on Claim for Refugee Protection	**Décision sur la demande d'asile**
107 (1) The Refugee Protection Division shall accept a claim for refugee protection if it determines that the claimant is a Convention refugee or person in need of protection, and shall otherwise reject the claim.	**107** (1) La Section de la protection des réfugiés accepte ou rejette la demande d'asile selon que le demandeur a ou non la qualité de réfugié ou de personne à protéger.

VII. Analysis

[20] For the reasons that follow, this application for judicial review is allowed.

[21] The Court agrees with the applicant in concluding that the RPD's decision is unreasonable. The issues are addressed as a whole, as a result of the statements clearly set out in the evidence before the RPD itself, demonstrating the danger that Tutsis face in Burundi.

[22] As no contradictions were raised by the RPD regarding the fact that the applicant is Tutsi, that shows a lack of in-depth assessment by the panel regarding the ethnic group to which the applicant belongs.

[23] Although the RPD is presumed to have examined all the evidence, the fact remains that this presumption is not irrefutable. The RPD did not consider or interpret the objective documentary evidence from internationally recognized international authorities and entities

pointing out the danger that Tutsis face. Although the applicant contradicted himself in his account, without raising any doubts that he is Tutsi, that does not change the fact that, as a Tutsi, his person is in danger. Moreover, clear, plain, and specific information from the documentation from the panel itself regarding the conditions in the country were submitted by the applicant and were not contradicted by the respondent.

[24] The Court notes that the RPD is "entitled to rely on documentary evidence in preference to the testimony provided by a claimant", even when the RPD concludes that the applicant's testimony is credible and trustworthy (*Khan v Canada (Minister of Citizenship and Immigration)*, 2002 FCTD 400 at paragraph 18; *Zhou v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 1087 (QL)). However, in the case at hand, the RPD improperly assessed the objective documentary evidence before it. The RPD erred in concluding that the applicant did not present a risk of persecution in Burundi due to his Tutsi ethnicity.

[25] In its decision, the RPD reached the following conclusion, following its analysis of the evidence on record:

> [TRANSLATION]
> Regarding the applicant's ethnic origin, it was pointed out that a genocide against Tutsis is in the making in Burundi. In that regard, the documentary evidence shows that senior officials in Burundi have allegedly made racist statements against Tutsis. However, there is nothing in the documentary evidence to indicate that those statements were not simply unfortunate and isolated incidents, and certainly nothing to indicate that Tutsis are currently being hunted, even though ethnic discourse has resumed. For now, the documentary evidence essentially shows that the current crisis is political in nature. In that regard, the applicant has no political activities and the panel did not believe that the applicant took part in the demonstrations in April and May 2015. Moreover, the

> applicant did not demonstrate a serious possibility of being persecuted because of his Tutsi ethnicity.
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> (Reasons for Decision, at paragraph 1 following paragraph 24 [due to a paragraph numbering error in the Decision])

The excerpt from the RPD is erroneous because it uses the word "nothing" in a way that is out of context with the statements discussed below, drawn from reliable sources and clearly stating the contrary. The current moratorium on Burundi in Canada confirms the information from these reliable sources.

[26] However, based on the objective documentary evidence on record, "Burundian authorities are seeking to **spread mistrust and hatred against "the common Tutsi enemy", using genocidal semantics** somewhat reminiscent of the language used in Rwanda in 1994 by the "Hutu power" government calling for the systematic elimination of the Tutsi" (Tribunal Record, in the National Documentation Package on Burundi from the IRB on conditions in the country, *International Federation for Human Rights – Repression and Genocidal Dynamics in Burundi*, at page 103).

[27] The report from the UNIIB, prepared in accordance with Human Rights Council resolution S-24/1, clearly indicates that "[w]e are gravely concerned about the general trend of ethnically divisive rhetoric by the Government, as well as others, which may carry a serious potential of the situation spiralling out of control, including beyond Burundi's borders" (Tribunal Record, at page 90).

[28] As well, "[s]ome Hutu political parties have long wanted this event to be officially qualified as genocide. However, some 1972 Tutsi survivors consider that this theory of the "double genocide" is to obscure the plan to exterminate the Tutsi who had been standing by the Umugambwe w'Abakozi b'Uburundi (Burundi Workers' Party)" (Tribunal Record, in the National Documentation Package on Burundi from the IRB on conditions in the country, *International Federation for Human Rights – Repression and Genocidal Dynamics in Burundi*, at page 105).

[29] "The Burundian authorities are also simultaneously speaking out against Rwanda and its Tutsi President, Paul Kagame, in a very virulent manner. This rhetoric aids to augment the idea that Burundi is threatened by a "common external enemy" planning genocide against Burundi's Hutus" (Tribunal Record, in the National Documentation Package on Burundi from the IRB on conditions in the country, *International Federation for Human Rights – Repression and Genocidal Dynamics in Burundi*, at page 107).

[30] This Court is satisfied that the RPD "failed to consider the evidence in light of the 'particular situation' of the applicant" (*Jeyachandran*, above, at paragraphs 9–10). The conditions in the country were not examined as a whole. That failure reveals a major gap in the RPD's understanding, since it analyzed and assessed the documentary evidence erroneously. The Court notes in this regard that the socio-political context, culture and history of the country are essential to understanding a particular logic, one that is different from what could stem from the situation in another country (*Ye*, above).

[31] In short, the fact that it did not consider all the objective evidence on record represents a major lapse by the RPD. For these reasons, this Court finds that the RPD's decision is unreasonable 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 at paragraph 47).

VIII. Conclusion

[32] This application for judicial review is allowed.

IX. Obiter

[33] As a signatory of the *United Nations Convention relating to the Status of Refugees*, Canada acknowledges with the moratorium for Burundi that the Tutsis are indeed in danger, particularly given that the fatal international error committed with Rwanda must not be repeated in Burundi, based on the excerpts cited above (among many others about Burundi).

[34] It must also be remembered that the international community once again failed by not denouncing the current situation in the Republic of Myanmar concerning the tragedy that has been revealed following human rights violations against the Rohingya Muslims, recognized by Canada and the United Nations as crimes against humanity.

[35] The events that took place in Rwanda, and the situation in the Republic of Myanmar, show that the international community accepts the error that was committed by failing to act at

the appropriate time. The international community should not overlook the lesson of Rwanda and its genocide.

[36] According to the documents on record, the situation of the Tutsis in Burundi is indeed more than precarious. According to the statements in the objective documentary evidence, it would be a monumental error to not consider the convincing evidence of the danger that Tutsis face in Burundi. Without an analysis of the documents submitted to the Court and before the RPD, this would be an inadvertent oversight, or rather turning a blind eye.

[37] Something must certainly be done before we see the corpses in the media. The obligation under the *United Nations Convention Relating to the Status of Refugees* is to ensure that lives are saved before a genocide is declared. The *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* provides a roadmap of procedures to be followed by decision-makers who process refugee claims, to ensure that the letter and spirit of the Convention are respected to avoid fatal errors as much as possible.

> 198. A person who, because of his experiences, was in fear of the authorities in his own country may still feel apprehensive vis-à-vis any authority. He may therefore be afraid to speak freely and give a full and accurate account of his case.
>
> 199. While an initial interview should normally suffice to bring an applicant's story to light, it may be necessary for the examiner to clarify any apparent inconsistencies and to resolve any contradictions in a further interview, and to find an explanation for any misrepresentation or concealment of material facts. Untrue statements by themselves are not a reason for refusal of refugee status and it is the examiner's responsibility to evaluate such statements in the light of all the circumstances of the case.

44. While refugee status must normally be determined on an individual basis, situations have also arisen in which entire groups have been displaced under circumstances indicating that members of the group could be considered individually as refugees. In such situations the need to provide assistance is often extremely urgent and it may not be possible for purely practical reasons to carry out an individual determination of refugee status for each member of the group. Recourse has therefore been had to so-called "group determination" of refugee status, whereby each member of the group is regarded *prima facie* (i.e. in the absence of evidence to the contrary) as a refugee.

45. Apart from the situations of the type referred to in the preceding paragraph, an applicant for refugee status must normally show good reason why he individually fears persecution. It may be assumed that a person has well-founded fear of being persecuted if he has already been the victim of persecution for one of the reasons enumerated in the 1951 Convention. However, the word "fear" refers not only to persons who have actually been persecuted, but also to those who wish to avoid a situation entailing the risk of persecution.

(*Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, UNHCR 1979.)

JUDGMENT in IMM-1505-17

THE COURT ORDERS that the application for judicial review be allowed, that the decision be set aside and the case referred back to the RPD for redetermination by a differently constituted panel. There is no question of importance to be certified.

OBITER

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It must also be remembered that the international community once again failed by not denouncing the current situation in the Republic of Myanmar concerning the tragedy that has been revealed following human rights violations against the Rohingya Muslims, recognized by Canada and the United Nations as crimes against humanity.

The events that took place in Rwanda, and the situation in the Republic of Myanmar, show that the international community accepts the error that was committed by failing to act at the appropriate time. The international community should not overlook the lesson of Rwanda and its genocide.

According to the documents on record, the situation of the Tutsis in Burundi is indeed more than precarious. According to the statements in the objective documentary evidence, it would be a monumental error to not consider the convincing evidence of the danger that Tutsis face in Burundi. Without an analysis of the documents submitted to the Court and before the RPD, this would be an inadvertent oversight, or rather turning a blind eye.

Something must certainly be done before we see the corpses in the media. The obligation under the *United Nations Convention Relating to the Status of Refugees* is to ensure that lives are saved before a genocide is declared. The *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* provides a roadmap of procedures to be followed by decision-makers who process refugee claims, to ensure that the letter and spirit of the Convention are respected to avoid fatal errors as much as possible.

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(*Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, UNHCR 1979.)

"Michel M.J. Shore"
Judge

Certified true translation
This 24th day of January 2020

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

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