Federal Court  Cour fédérale

Date: 20220705

Docket: IMM-4954-20

Citation: 2022 FC 988

Ottawa, Ontario, July 5, 2022

PRESENT: Madam Justice McDonald

BETWEEN:

MUBARAKA KAYUMBA

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant seeks judicial review of a decision of the Refugee Appeal Division (RAD), dated August 31, 2020, finding he was not a Convention refugee nor a person in need of protection. The Applicant, a citizen of the Democratic Republic of the Congo (DRC) raises various issues with the RAD's treatment of new evidence, assessment of his re-availment to the DRC, and internal flight alternative (IFA) analysis.

[2] For the reasons that follow, this application is granted. The RAD's treatment of the new affidavit evidence is not reasonable, nor is the finding that the Applicant's return to the DRC for a few hours undermined his subjective fear. Further, the RAD erred in its IFA analysis.

[3] I decline to certify the question posed by the Applicant.

I. Background

[4] The Applicant is a 36-year-old citizen of the DRC. He came to Canada under a false identity on a Rwandan passport. He was held in immigration detention until Canada Border Services Agency was able to establish his identity.

[5] The Applicant claimed refugee protection, fearing persecution on the basis of his Tutsi ethnicity and for deserting the DRC armed forces. He claims that he was abducted by the Alliance of Democratic Forces for the Liberation of Congo-Zaire (ADFLC) and trained as a child soldier at the age of 11. The ADFLC later became the Forces Armées de la République Démocratique du Congo (FARDC). The Applicant's commander broke away and formed the Congolese Rally for Democracy (RCD) and began fighting the FARDC. At some point, the RCD became integrated into the FARDC.

[6] In 2014, the Applicant told his superior that he wanted to leave the army. He claims that he was arrested and imprisoned. He escaped and fled to Rwanda where he was arrested and taken to another prison. He was told he could either stay in jail or work for the Rwandan military. He therefore cooperated and worked for the Rwandan military.

[7] The Applicant asked his friend Arro for help to get out of the country. Arro put him in touch with a smuggler named Patrick. In early 2017, Patrick gave the Applicant a Rwandan National identity document (ID) card with a fake name. However, the Applicant realized he did not have any genuine government ID as his DRC electoral card was expired. He crossed into the DRC to get a new card from the Congolese Electoral Commission – which he described as a civilian organization that is independent from the military. He states in his Basis of Claim narrative, "I did the return journey from Cyangugu to Goma and back in a single day in January 2017".

[8] In July 2017, the Applicant fled Rwanda for Canada.

A. *Refugee Protection Division (RPD) Decision*

[9] The RPD denied the Applicant's refugee claim. The RPD found the Applicant was not credible, and found that it was unlikely that he served in the armed forces of the DRC. The RPD noted that he stated he was a child soldier at age 11, but that the ADFLC rebellion did not begin until 1996. The RPD also found his testimony and knowledge of artillery and ammunition was vague.

[10] The RPD concluded that the Applicant had an IFA in Kinshasa.

B. *RAD Decision Under Review*

[11] On appeal to the RAD, the Applicant submitted photographs purporting to show that he participated in military activities as a child. The RAD determined that the photographs were not admissible pursuant to subsection 110(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] as they did not concern facts that arose after the rejection of his claim. The RAD also noted that one of the photographs was in the RPD record.

[12] The Applicant also submitted two affidavits confirming that he was in the DRC armed forces, as well as documentary evidence pertaining to killings of Tutsis. The RAD assessed whether these documents could be admitted under Rule 29 of the *Refugee Appeal Division Rules*, SOR/2012-257 [*RAD Rules*]. The RAD stated:

> Even accepting that you were not able to present these two affidavits before the RPD or with your appeal memorandum, I nevertheless consider that they have no probative value in relation to the question of whether you actually left the DRC armed forces and whether, today, you are indeed wanted by the authorities in that country. Consequently, in my view, their use should not be allowed as part of your appeal (at para 23).

[13] The RAD reached the same conclusion with respect to the documentary evidence pertaining to killings of Tutsis in Kivu, as the RPD found an IFA in Kinshasa.

[14] The Applicant also submitted evidence of the spread of COVID-19 in Kinshasa, to show this was no longer a viable IFA. The RAD did accept the evidence concerning COVID-19.

[15] The RAD declined the Applicant’s request for an oral hearing.

[16] The RAD held the RPD was correct in concluding the Applicant did not establish that he was active in the military from 1995 to 2014. The RAD also held the Applicant's return to the DRC, "even if only for a few days" in 2017 to obtain a new voter card undermined his credibility and demonstrated a lack of subjective fear.

[17] With respect to risk due to COVID-19 in Kinshasa, the RAD stated this would not qualify the Applicant as a person in need of protection under s. 97 of the IRPA, and any risk arising from COVID-19 could be assessed at a later date, prior to the Applicant's removal.

II. Issues

[18] The Applicant raises a number of issues with the reasonableness of the RAD decision. In my view, the following issues are determinative of this application:

A. Did the RAD err in failing to admit the new affidavit evidence?

B. Did the RAD err in its re-availment finding?

C. Did the RAD err in its IFA analysis?

[19] The Applicant also proposes a certified question.

III. Standard of Review

[20] The parties agree that reasonableness is the standard of review for issues with the RAD decision.

IV. Analysis

A. *Did the RAD Err in Failing to Admit the New Affidavit Evidence?*

[21] The Applicant argues the RAD erred in failing to admit the affidavit evidence, which, he argues, directly establishes that he served in the armed forces. The Affidavit of Musengimana Denatha states that she saw him in a military uniform in 2012, and that he told her he was part of the DRC armed forces.

[22] This evidence was tendered to the RAD to address the RPD's finding that the Applicant was not part of the armed forces. As this issue was at the core of the RPD's conclusion that the Applicant was not at risk because he never served in the armed forces, it is not logical for the RAD to conclude that this evidence was not "probative". Accordingly, this aspect of the RAD decision is unreasonable.

B. *Did the RAD Err in its Re-Availment Finding?*

[23] The Applicant argues the RAD unreasonably found that his return to DRC to get a new electoral card demonstrated an absence of subjective fear. As noted by the Applicant, although he only entered the DRC for a few hours, the RAD states that he was there for "a few days".

[24] As noted by Justice Brown in *Chitsinde v Canada (Citizenship and Immigration)*, 2021 FC 1066:

> In my respectful view, the RPD's finding of voluntary re-availment based on the Applicant's return for a few days to pick up her

> documents and say goodbye to her family is, without more, quite unreasonable. To quote Justice Mosely in *Abawaji v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1065 at para 15: "As noted by Justice John O'Keefe in *Camargo v. Minister of Citizenship and Immigration*, 2003 FC 1434 at paragraph 35, the United Nations High Commissioner for Refugees' Handbook on Procedures and Criteria for Determining Refugee Status (Geneva, 1988) indicates that "re-establishment" and "re-availment" both require an element of intent on the part of a claimant before physical presence in a country will negate refugee status. A temporary visit by a refugee to the country where persecution was feared without an intention to permanently reside there should not result in the loss of refugee status (at para 39).

[25] The evidence before the RAD was that the Applicant had made a temporary return to the DRC for a few hours to obtain identity documents. Even if the Applicant's return had been for longer than a few hours, there was no evidence before the RAD that he had the intention to re-avail himself to the DRC. Accordingly, the re-availment finding of the RAD – coupled with the mistaken comment that he was there for a few days – is an unreasonable finding.

C. *Did the RAD Err in its IFA Analysis?*

[26] The Applicant argues the RAD failed to address the second branch of the IFA analysis.

[27] The test for a viable IFA is well-established (*Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 (FCA) at paras 5-6, 9-10): first, there must be no serious possibility that the claimant will be persecuted in the part of the country where an IFA exists; and second, conditions in that part of the country must be such that it would not be unreasonable, in all the circumstances, for the claimant to seek refuge there. Both prongs of the test must be satisfied.

[28] On the reasonableness of the IFA, the Applicant submitted evidence showing that due to COVID-19, Kinshasa was not a viable IFA. His submissions to the RAD were as follows:

> Since Mr. Kayumba perfected his appeal, DRC – and Kinshasa in particular – has experienced a dramatic change in circumstances brought about by the COVID-19 pandemic. The virus is now spreading uncontrolled in that city and many international aid groups are warning of a looming disaster. These changes […] demonstrate that Kinshasa now also fails the second branch of the IFA test […]

[29] In response, the RAD states as follows with respect to risk due to COVID-19 in Kinshasa:

> […] results from your country's difficulty or inability to provide adequate health or medical care in the face of the COVID-19 pandemic. However, as stated in subparagraph 97(1)(iv) of the IRPA, a similar risk does not qualify you as a person in need of protection.
>
> In any event, the situation regarding COVID-19 in the DRC can be analyzed later, based on other criteria, as part of the remedies available to you before you are returned to your country (at paras 48-49).

[30] The considerations relating to the IFA are separate from an analysis under s. 97 of the IRPA. As noted by Justice Norris in *Sadiq v Canada (Citizenship and Immigration)*, 2021 FC 430, "[w]ith respect to the second part of the IFA test […] [t]he conditions in the proposed IFA that would make relocating there unreasonable must be something other than the risks that form the basis of the claim for protection. This is because, to even reach the second prong of the test, it must have been determined under the first prong that those risks are absent in the proposed IFA" (at para 44).

[31] Here the RAD erred when it conflates the IFA test with the test under s. 97 of the IRPA. Further, it was also an error for the RAD to fail to address the second, and mandatory, branch of the IFA test.

[32] In the circumstances, the RAD, unreasonably, failed to assess both branches of the IFA test.

V. Certified Question

[33] The Applicant proposes the following certified question:

> In assessing the second branch of the legal test for whether an internal flight alternative ("IFA") is reasonably available for a claimant, it is reasonable for a decision-maker to take into account post-refusal remedies available to the claimant under the IRPA as a basis for not considering country conditions currently prevailing in the IFA location?

[34] As stated in *Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168, for a question to be certified, "it must (i) be dispositive of the appeal and (ii) transcend the interests of the immediate parties to the litigation, as well as contemplate issues of broad significance or general importance" (at para 9).

[35] As I am granting this judicial review in part on the basis that the RAD failed to consider the second branch of the IFA test, it is not necessary to certify the proposed question.

VI. Conclusion

[36] This judicial review is granted and there is no question for certification.

JUDGMENT IN IMM-4954-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted, and the matter remitted for redetermination by a different decision-maker.

2. There is no question for certification

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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