Date: 20071218

Docket: IMM-508-07

Citation: 2007 FC 1332

Ottawa, Ontario, December 18th 2007

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

EMMA UWASE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] The applicant is a citizen of Rwanda and an ethnic Tutsi, born in 1987. The Refugee Protection Division (the RPD) accepted that she is a survivor of the Rwandan genocide of 1994, but did not believe that she was targeted by genocide perpetrators out of fear that she may testify against them. As a result, the RPD found that she was neither a Convention refugee nor a person in need of protection. It is that decision, rendered on December 6, 2006, of which the applicant now seeks judicial review.

BACKGROUND

[2] The applicant was only seven years old when President Habyarimana died in a plane crash on April 6, 1994. Shortly thereafter commenced one of the darkest periods in human history, where thousands of Rwandans (mostly Tutsis) were slaughtered as a result of the ethnic tensions which had been simmering for years and which were unleashed with the president's death. Ms. Uwase was left for dead, lying beside her parents' and sister's bodies, after a group of Hutus broke into their house and massacred them with machetes, clubs, rifles and other weapons. She was eventually rescued by soldiers of the Rwandan Patriotic Front, who took her to a refugee camp where she found her paternal grandmother.

[3] In September 2004, she heard announcements that genocide survivors for her home province were to register in order to testify before the *gacaca* courts which were created to investigate and prosecute crimes committed between October 1, 1990 and December 31, 1994. These courts, in essence, are public tribunals whose organisation and functioning are based on traditional Rwandan conflict resolution mechanisms. They were created to relieve the Rwandan judicial system, as it soon became apparent that it would be incapable of prosecuting the vast number of genocide-related crimes.

[4] The applicant claimed that on the day she went to register, she saw the two individuals responsible for her family members' deaths. After this, one evening while she was walking in her neighbourhood with her then fiancé, she alleged that she was warned not to testify and threatened with death by the two men. She was again threatened on July 4 and August 26, 2005, and only

managed to escape by screaming loudly. All of these incidents were apparently reported to the police.

[5] A few days after this last incident, the applicant found a note under her door saying that she and her husband would be killed if she testified at the *gacaca* trial. She gave the note to the police, who apparently told her that they could not do much because of the large number of similarly situated persons. She therefore decided to leave Rwanda and she arrived in Canada on December 7, 2005. She applied for refugee protection based on her fear of being killed by her family's murderers.

THE IMPUGNED DECISION

[6] The RPD accepted the applicant's identity, that she survived the genocide in which her parents and sister were killed, that she is probably traumatized, and that some genocide survivors are being targeted and killed for testifying (or registering to testify) at the *gacaca* courts. However, it disbelieved the applicant's allegations because of many significant and material inconsistencies and omissions in her evidence, including when and where she had seen the killers and when they had been released, the number of times she went to the police, the number of men who had approached her, whether she had in fact gone to the *gacaca* court and whether anyone had sought her after she left for Canada.

[7] On this basis, the RPD concluded that the applicant had not in fact registered with the *gacaca* courts, had not seen her family's killers and had not been targeted by anyone. The RPD

made these credibility findings after assessing the applicant's relative age and ability to testify at the refugee hearing.

[8] There being no reasonable explanation for the multiple inconsistencies in the applicant's account and no credible or trustworthy evidence in support of the facts alleged, the RPD found that the applicant would not face a serious possibility of persecution in Rwanda. It further found that the applicant's removal to Rwanda would not subject her personally to a danger of torture, believed on substantial grounds to exist, and would not subject her personally to a risk to her life, or a risk of cruel and unusual treatment or punishment.

ISSUES

[9] Counsel for the applicant did not dispute the credibility findings of the RPD. At the hearing, he also abandoned his argument that the applicant had been prejudiced by the RPD's failure to provide an audible recording of the hearing, as a transcript of the hearing before the RPD had been provided to the applicant pursuant to Rule 17 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22. As a result, the only question to be resolved is whether the RPD member erred by failing to consider the totality of the evidence and by not conducting a separate analysis of the risk faced by the applicant under section 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the IRPA).

ANALYSIS

[10] It is by now settled law that a negative credibility determination with respect to a refugee claim under section 96 is not necessarily determinative of a claim under section 97(1) of the IRPA. The essential elements to be established under the latter provision are simply not the same as those required under the former. As a result, the RPD has an obligation to address the objective risks and dangers stipulated in paragraphs 97(1)(a) and (b) of the IRPA where evidence has been led that could support such a finding of risk, even if it has rejected a section 96 claim on credibility concerns. As Justice Blanchard wrote in *Bouaouni v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1211 at para. 41:

> There may well be instances where a refugee claimant, whose identity is not disputed, is found to be not credible with respect to his subjective fear of persecution, but the country conditions are such that the claimant's particular circumstances, make him/her a person in need of protection. It follows that a negative credibility determination, which may be determinative of a refugee claim under s. 96 of the Act, is not necessarily determinative of a claim under subsection 97(1) of the Act. The elements required to establish a claim under section 97 differ from those required under section 96 of the Act where a well-founde[d] fear of persecution to a convention ground must be established. Although the evidentiary basis may well be the same for both claims, it is essential that both claims be considered as separate. A claim under section 97 of the Act requires that the Board apply a different test, namely whether a claimant's removal would subject him personally to the dangers and risks stipulated in paragraphs 97(1)(a) and (b) of the Act.
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> See also: *Nyathi v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1119 at para. 21; *Kilic v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 84 at paras. 22-27; *Ozdemir v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1008 at paras. 5-11.

[11] After having found that the applicant was not credible and that there was no trustworthy evidence in support of the facts alleged, the RPD concluded that the applicant will not face a serious possibility of persecution in Rwanda. Then, without any further analysis or discussion, it also determined that the applicant's removal will not subject her personally to a danger, believed on substantial grounds to exist, of torture, and will not subject her personally to a risk to her life, or a risk of cruel and unusual treatment or punishment under section 97(1) of the IRPA.

[12] The respondent argued that the RPD was justified not to undertake a more thorough analysis under section 97, since there was insufficient credible evidence, objective or otherwise, to demonstrate that she would be at risk. The applicant obviously disagrees, and submitted that the Board operated under a misconception of the *gacaca* court system when asserting that the applicant could only be at risk if she had registered to testify before that tribunal.

[13] The Court must therefore look at the documentary evidence with a view to find out whether the RPD did in fact err by failing to consider the totality of the evidence, and whether its conclusions with regard to the *modus operandi* of the *gacaca* courts were open to it.

[14] A careful reading of the RPD's reasons indicates that it rejected the applicant's claim because, in its view, only witnesses who have testified or who have registered to testify are at risk. Indeed, the focus of its enquiry was to determine whether there was sufficient evidence to support the applicant's claim that she did in fact register at the *gacaca* courts. The RPD member opened and closed her analysis essentially with the same finding, to the effect that some genocide survivors are

targeted and killed for testifying or registering to testify (at pp. 2 and 8 of the Reasons). Yet nowhere do we find any discussion of the way these community based courts operate and function. The issue for this Court, therefore, is whether this finding is borne out by the evidence.

[15] There is not much in the documentary record as to the *gacaca* courts and their *modus operandi*, beyond a 20 page report from a group called the Institute for Security Studies (the ISS) that provides details about the *gacaca* hearings. It appears that these tribunals were created in January of 2001 with a view to eradicate the culture of impunity in Rwanda and, hopefully, to prevent the possibility of another genocide. They are public tribunals whose organisation and functioning are based on traditional Rwandan conflict resolution mechanisms. First launched as a pilot project, the *gacaca* courts now sit throughout the country. At the *cellule* level, the lowest level, meetings of the *gacaca* court take place once a week. General assemblies are held every three months or when convened by the president. The duties and abilities of the *gacaca* courts of the *cellule* are to: conduct the information gathering phase of the *gacaca* process; to receive confessions and guilty pleas, evidence and information; to conduct investigations into such information; and, to try those accused of the less serious crimes. There is also a *gacaca* court of the sector to try the most serious crimes and to sit on appeal against judgments passed by the *gacaca* court of the *cellule*, and a general *gacaca* court of appeal.

[16] Information on who lived in the *cellule* at the time of the genocide, who was killed and who was responsible for the killings is now compiled by one person for every ten houses rather than in the general assembly of the *cellule*, as was the case in the beginning. Participation in the *gacaca*

court activities is mandatory. Once a week, all inhabitants of every *cellule* have to attend a *gacaca* session. There are even penalties (three to six months of prison) for people who are called to testify in a particular trial and fail to attend, or who make a slanderous denunciation at a trial. There is also a government-initiated media awareness campaign to encourage people to testify. Despite all this, many people choose to stay away from the *gacaca* courts because they are apparently afraid of being accused or of testifying.

[17] In his written submissions, counsel for the applicant argued that all people in the audience can be ordered to give testimony, or respond to accusations, which means that Ms. Uwase could be asked at any moment if there is anyone she can identify as a perpetrator in the mass of people in the audience that day. Accordingly, there would be no differentiation between the general population and potential witness, as testimony is gathered on an ongoing and spontaneous basis. It would therefore not matter much whether a person voluntarily registered to testify or not.

[18] With the greatest respect, it is not entirely clear that this is still a fair description of the system as it now works. As a result of the amendments introduced in June 2004, the collection of information is now done prior to the meeting of the general assembly, and despite the mandatory participation to the *gacaca* process, there does not seem to be any penalty for failing to attend the trials. The ISS Report clearly shows that many people choose to stay away from the *gacaca* courts, out of fear (either of being invited to testify or of being denounced) or lack of interest. It is therefore far from obvious that the applicant would have been compelled to testify or even to denounce her family's killers.

[19] Having said that, is the respondent correct in asserting that there was no need to further analyze whether she would be objectively at risk, under either section 96 or 97 of the IRPA, since there was insufficient credible evidence to demonstrate that she would be compelled to testify? Is there a risk only for those who have testified or who have registered to testify? This is not what the evidence reveals. The ISS Report itself states, at page 17 (p. 48 of the applicant record):

> There have been a number of documented cases in which people who have either made accusations, or are expected to, have been attacked or killed, have disappeared, or have had their homes destroyed. Some of these incidents have been reported in the press, amplifying the impression that witnesses, in particular genocide survivors, are easily targeted and eliminated by those they have implicated in crimes of genocide.

[20] We find similar reports in the Immigration and Refugee Board's own material. In a Response to Information Request dated 27 August 2004 (RWA42872.E), we find the following statement:

> Various reports also indicated that genocide survivors have been targeted for killing, intimidation and harassment in order to prevent them from testifying before the Gacaca courts.
>
> See also, to the same effect, another Response dated 23 January 2003 (RWA40362.E, at p. 58 of the applicant record)

[21] It appears, therefore, that some genocide survivors can be at risk even though they do not intend, or have not been called, to testify. The potential threat they represent for the killers may even have heightened as a result of the new procedure put in place in 2004, following which everybody is interviewed in the confines of his or her home; as previously mentioned, this new method for collecting the information was specifically designed to ensure that the victims would feel more at ease to speak out than was the case in a large assembly. Of potential significance is also the fact that

the applicant is the only survivor of her family, and presumably the only remaining witness of that fateful day when the attack took place.

[22] In light of these facts, and of the documentary evidence tending to show that preventing genocide survivors from testifying may provide those implicated in the genocide sufficient incentive to eliminate them, can it safely be assumed that the applicant is not at risk simply because she was not believed to have registered as a witness? To assess the risk to her life or the risk of cruel and unusual treatment or punishment, should not one take into consideration not only her intention to testify, but also the perception that the murderers may have of the threat that she represents so long as she is alive? Unfortunately, the RPD did not undertake that analysis.

[23] This is not to say that every genocide survivor in Rwanda has a valid claim under section 96 or section 97 of the IRPA. Each case must turn on its merit, and carefully be examined on the basis of the specific facts pertaining to the claimant's situation and to the general situation in the country at any given time. But in foreclosing the possibility that the applicant could be at risk solely because she was not found credible when claiming that she registered to testify at the *gacaca* court, the RPD made a reviewable error.

[24] For that reason, I am of the view that the decision reached by the RPD must be quashed. No question for certification was proposed by the parties, and none will be certified.

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ORDER

THIS COURT ORDERS that this application for judicial review is allowed, the decision of the RPD is set aside, and the applicant's claim that she is a person in need of protection is remitted to a different Board for reconsideration, in accordance with these reasons. On the re-determination of the applicant's claim, I direct that, as found by the RPD in the decision under review, the panel accepts that the applicant is a genocide survivor and that her parents and sibling were killed during the 1994 Rwandan genocide. No question of general importance is certified.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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