Federal Court		Cour fédérale

Date: 20110318

Docket: IMM-4152-10

Citation: 2011 FC 336

Ottawa, Ontario, March 18, 2011

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

JEAN LEONARD TEGANYA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) of a decision dated May 31, 2010, by the Pre-Removal Risk Assessment Officer of Citizenship and Immigration Canada (the Officer). The Officer rejected the applicant's PRRA application as it was found that the applicant was not a person in need of protection.

Factual Background

[2] The applicant, Jean Leonard Teganya, is a citizen of Rwanda. He originally left Rwanda in July 1994 for Zaire (Congo), where he stayed in a refugee camp. He then went to Kenya and to India. On November 17, 1999, he left India to come to Canada.

[3] Upon his arrival in Canada, the applicant submitted a refugee claim. His claim was heard in 2002. The Refugee Protection Division of the Immigration and Refugee Board (the RPD) concluded that he was excluded of the Convention under sections 1F(*a*) and 1F(*c*). The RPD found that he worked as a medical intern in a hospital where a number of atrocities occurred. Despite his awareness of the atrocities, the applicant remained at the hospital. The RPD found that he was complicit in crimes against humanity. This decision was dismissed on judicial review. On reconsideration in 2005, the RPD again found that he was an excluded person under sections 1(F)(*a*) and 1F(*c*). The applicant sought judicial review of this decision but was unsuccessful.

[4] On July 19, 2006, Citizenship and Immigration Canada submitted a report indicating that the applicant was inadmissible under s. 35(1)(*a*) of the Act. The applicant then submitted a PRRA application in September 2008. He claimed that he was at risk because he could be imprisoned and be subjected to cruel treatment.

[5] The applicant alleges that his father was a leader in the former regime, the Mouvement révolutionnaire national pour le développement (MRND). His father was imprisoned for 11 years without charge because he was suspected to have been involved in the genocide. The applicant

claims that he will suffer the same fate as his father. He also claims that he will be at risk because he is an ethnic Hutu and because he is from the northern region of Rwanda.

[6] The Officer considered the applicant's PRRA submissions. On May 31, 2010, the Officer concluded that the applicant's PRRA application should be rejected. The applicant seeks judicial review of this decision.

Impugned Decision

[7] From the outset, the Officer mentioned that since the applicant was inadmissible by virtue of s. 35(1)(*a*) of the Act, the analysis would only be conducted in relation to section 97.

[8] The Officer considered two country condition documents. The Officer assigned no weight to the first document entitled "Rwanda, a nation with a dark past and tenuous future", because it was authored by a person whose identity was being protected. As a result, there was no way to determine the purpose and the origin of the document. The second document was a Human Rights Watch report that mentioned problems with the judiciary and the courts. The Officer acknowledged that: (i) there are problems with the Gacaca courts, including corruption and undue influence; (ii) detainees have been abused by security forces; (iii) there are arbitrary arrests; (iv) the conditions of detention are difficult; and (v) people are held for long periods of time without charge. However, the Officer concluded that this document, and other similar documentation, did not lead to the conclusion that the applicant would be at undue risk upon returning to Rwanda.

[9] The Officer mentioned that, while the applicant claimed that his father had been detained for 11 years without charge, he has not provided evidence that the applicant's father had been imprisoned for that period of time or that the process was unfair. The Officer further noted the insufficiency of evidence related to a possible arrest upon returning to Rwanda because of his relationship with his father. The Officer also found no evidence that the applicant would be at risk because of his Hutu background.

[10] Finally, the Officer considered the United States Department of State (DOS) Report 2009, which mentioned the efforts of the government to reconcile. The Officer acknowledged that: (i) the rights of Rwandans are limited; (ii) violence against the survivors of the genocide is persistent; (iii) prisoners are detained under difficult conditions; (iv) security forces arrest and detain persons arbitrarily; and (v) corruption is a problem. However, the Officer concluded that these events are not connected to the personal situation of the applicant, but to the general population. Thus, the Officer found that the applicant had not demonstrated that his risk is different from any other Rwandan, and, therefore the risk is not personalized.

Issues

[11] This application raises the following issues:

1. *Did the Officer err in concluding that there was insufficient evidence to establish a risk to the applicant?*

2. *Did the applicant suffer a breach of natural justice and procedural fairness due to incompetent counsel?*

3. *Did the Officer breach the duty of fairness by failing to disclose his intention to rely on changing circumstances in Rwanda and ask for updated information from the applicant?*

[12] For the following reasons, this application for judicial review will be dismissed.

Statutory Provisions

[13] The following provision of the *Immigration and Refugee Protection Act* is relevant to this proceeding:

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,	(iii) la menace ou le risque ne résulte pas de sanctions

unless imposed in disregard of accepted international standards, and	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.
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

Standard of Review

[14] Since *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, issues relating to a PRRA Officer's treatment and consideration of the evidence on a PRRA application are reviewable on a standard of reasonableness (*Barzegaran v Canada (Minister of Citizenship and Immigration)*, 2008 FC 681, [2008] FCJ No 867; *Kanaku v Canada (Minister of Citizenship and Immigration)*, 2009 FC 394, [2009] FCJ No 493). According to the Supreme Court of Canada, the factors to be considered are justification, transparency and intelligibility within the decision-making process. The outcome must be defensible in respect of the facts and the law (*Dunsmuir*, *supra*, at para 47).

[15] The applicant also raised issues of natural justice and procedural fairness. It has long been held that the standard of review applicable to these issues is correctness (*Dunsmuir*, *supra*, at para 129; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, at para 43).

Analysis

1. *Did the Officer err in concluding that there was insufficient evidence to establish a risk to the applicant?*

[16] The applicant claims that the Officer in this case decided without regard to all of the evidence before her. First, the applicant notes that the Officer had before her, and relied upon, the decision of the RPD on the applicant's refugee claim. The RPD's decision explicitly relied upon the fact that the applicant's father was the leader of the MRND.

[17] The applicant further contends that the finding that he was complicit in crimes against humanity was highly publicized and the government of Rwanda would be aware of this decision. Accordingly, the applicant submits that his profile is one of a deportee from Canada who has been found complicit in crimes against humanity and who is the son of - and therefore associated with - a former leader of the MRND. The applicant asserts that his profile is specific and his personal circumstances differ from other Rwandan deportee. He thus argues that the Officer erred by failing to assess his claim on this basis.

[18] Following a review of the evidence, the Court remains unconvinced by the applicant's arguments. The Officer explicitly considered the fact that the applicant's father was a former leader of the MRND and did not question this finding of fact. It was open to the Officer, however, to conclude that the applicant had not established that he would be at risk because of his father's involvement in the party, particularly in light of the fact that he did not submit evidence establishing that his father had experienced poor treatment as a result of his position in the MRND. The applicant also failed to provide evidence with respect to his father's imprisonment. Moreover, the applicant's "Soumissions ERAR" (PRRA Submissions) (Certified Tribunal's Record at page 190)

clearly indicates that he was not involved in the genocide. It is his father who is suspected to have been part of the genocide :

> 2. Si je risque de subir ce traitement, ce n'est pas parce que j'ai commis un crime quelconque au RWANDA.
> C'est juste à cause de mon ethnie Hutu et du dossier de mon père qui est emprisonné au Rwanda depuis plus de 10 ans, sans inculpation ni jugement; juste pour les soupçons de son implication dans le génocide rwandais.
> [Emphasis added]

[19] In the Court's view, there was insufficiency of evidence to advance the applicant's arguments. The Officer considered all the evidence submitted by the applicant, and it was entirely reasonable for the Officer to conclude that the applicant had not established a profile that was different from all other Rwandans.

[20] Also, the applicant claims that the Officer erred in concluding that the applicant had not demonstrated that he would be considered part of the opposition and that he would be at risk because of his Hutu background. The applicant notes that the RPD expressly relied on his close connection to his father in inferring that he was complicit in crimes against humanity, and that this Court also relied on this association in upholding the RPD's decision (*Teganya v Canada (Minister of Citizenship and Immigration)*, 2006 FC 590, [2006] FCJ No. 778). The applicant submits that it is unreasonable for the Officer to draw different inferences from the facts that formed the basis for his exclusion. The applicant also asserts that it was unreasonable for the Officer to fail to mention this evidence, since it was important evidence that squarely contradicted his finding of fact (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425, 157 FTR 35).

[21] Again, the Court must disagree with the applicant. Contrary to the applicant's assertions, the Officer did not draw different inferences from the facts that formed the basis for his exclusion. The RPD found that the applicant was excluded because of his failure to leave and distance himself from the atrocities being committed at the hospital where he worked. Regarding the applicant's father, the RPD only concluded that the applicant would have been familiar with the political viewpoints of the MRND because of his father's role in the party. The Officer, when considering the applicant's PRRA submissions, did not explicitly disagree that the applicant's father had been a leader of the MRND. However, there was simply insufficient information before the Officer to conclude that this fact alone was sufficient to put the applicant at risk in Rwanda. Further, there is nothing to suggest that the applicant is at risk with the current political regime because of its work in the hospital of Butare. Absent further evidence that he would be identified as a member of the opposition, it was open to the Officer to conclude that the applicant had not demonstrated that he was at risk.

[22] It is trite law that a PRRA application is not an appeal or a reconsideration of the decision of the RPD (*Raza v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385, [2007] FCJ No 1632). The applicant was required to provide all the evidence necessary to establish his claims. In light of his failure to do so, the Officer's decision was reasonable.

[23] Finally, the applicant submits that the Officer erred in her consideration of the country's condition documentation. The applicant notes that the Officer clearly accepted that there are significant problems in Rwanda but concluded that the documented events are not connected to the personal situation of the applicant. The applicant submits that such a conclusion is unreasonable, as the documentary evidence clearly establishes that those associated with the genocide, which is part

of the applicant's profile, are at risk of unfair trials and arbitrary detention. The applicant further asserts that the Officer's conclusion that all Rwandans face the same risk as the applicant is unreasonable, as it is clear that the applicant is not like all other Rwandans.

[24] The applicant relies on *Sittampalam v Canada (Minister of Citizenship and Immigration)*, 2009 FC 65, [2009] FCJ No 59, where the Court set aside a danger opinion because the Officer had failed to consider documentary evidence indicating that the risk to the applicant was different from the risk to other Sri Lankans because of his association with the LTTE.

[25] In the case at bar, the applicant failed to establish that he would be associated with the genocide upon his return. The Officer reasonably concluded that the documentary evidence did not disclose a personalized risk to the applicant. At the hearing before this Court, counsel for the respondent correctly submitted that although the applicant is found to be complicit, this does not necessarily mean that the applicant is at risk. On the basis of the evidence submitted in this case, there is no link that allows this Court to conclude that the applicant would be subject to torture in Rwanda because he was found to be complicit. Similarly, since the applicant failed to establish that his situation is different from the situation faced by other Rwandans, the Officer, based on the evidence before her, did not err by concluding that all Rwandans face the same risk as the applicant. Thus, the Court concludes that the Officer did not err in analyzing the evidence submitted by the applicant.

2. Did the applicant suffer a breach of natural justice and procedural fairness due to incompetent counsel?

[26] The applicant submits that there was a breach of natural justice in this case because he was not aptly represented by his previous counsel and was subsequently prejudiced. The applicant refers to *R v G.D.B.*, 2000 SCC 22, [2000] 1 SCR 520, where the Supreme Court of Canada held that in order to determine whether a party's counsel was incompetent, the party must establish that: (i) the misconduct of counsel falls outside what would be normal professional judgment; and (ii) there was a miscarriage of justice as a result.

[27] The applicant claims that this test has been applied in the immigration jurisprudence of this Court (*Shirwa v Canada (Minister of Employment and Immigration)* (TD), [1994] 2 FC 51, [1993] FCJ No 1345; *Drummond v Canada (Minister of Citizenship and Immigration)* [1996] FCJ No 477, 112 FTR 33; *Osagie v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1368, [2004] FCJ No 1656).

[28] The applicant further submits that when counsel is retained to represent a client on a PRRA application, it is standard practice to interview the client, inform them of the proper information to provide to the PRRA Officer, ask the client to provide any documentary evidence substantiating their fear, submit certified true copies of any original documents, and prepare written submissions in support of the application.

[29] In the case at bar, the applicant asserts that his previous counsel acted incompetently in a number of areas by failing to review the PRRA forms filled out by the applicant, failing to prepare submissions in support of the application, failing to advise the applicant to submit original letters of

support, failing to submit another letter of support provided to him by the applicant, failing to inform the applicant that he needed to adduce evidence to support the fact that his father had been arrested, that persons like his father are at risk, and that the applicant would also be at risk by sharing his last name with his father; and failing to make the applicant aware that further evidence was requested of him. In a nutshell, the applicant claims that his previous counsel failed to fulfil his obligations and as a consequence, his previous counsel's actions were clearly prejudicial to the applicant.

[30] The Court does not agree with the applicant's submissions for the following reasons. The test for whether counsel's actions are so incompetent as to constitute a breach of natural justice and procedural fairness is whether counsel's actions fall outside the professional norms, and also whether counsel's actions resulted in prejudice to the applicant. However, the burden on the applicant is quite heavy. As noted in *Parast v Canada (Minister of Citizenship and Immigration)*, 2006 FC 660, [2006] FCJ No 844, at para 11:

> [11] The applicant must accept the consequences for his choice of counsel and for his deliberate decision to lie about his personal situation. It is only in the most exceptional circumstances that the Court considers the incompetence of counsel. According to the case law, evidence of counsel's incompetence must be so clear and unequivocal and the circumstances so deplorable that the resulting injustice caused to the claimant is blatantly obvious: see *Dukuzumuremyi v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 278 at paragraph 9, [2006] F.C.J. No. 349 (QL); *Drummond v. Canada (Minister of Citizenship and Immigration)* (1996), 112 F.T.R. 33 at paragraph 6 (F.C.T.D.).

[31] For instance, in the case at bar, the applicant claims that the Officer's rejection of the letter of support was the result of his previous counsel's incompetence. However and as noted by the

respondent, the Officer gave the letter little weight not only because it was a copy, but also because the allegations contained in the letter were uncorroborated and because the letter purported to establish that the applicant had not committed any crime – a fact that was irrelevant to the PRRA application, as it had already been established that the applicant was complicit in crimes against humanity.

[32] The applicant also claims that he was prejudiced because the Officer did not have the second letter of support. It is unclear from the record what information was contained in this letter and the applicant has not explained why the failure to include that letter was detrimental to his PRRA application. In the Court's view, it remains unclear that the applicant suffered any prejudice as a result.

[33] In *Nunez v Canada (Minister of Citizenship and Immigration)* (2000), 189 FTR 147, [2000] FCJ No 555, the Court stated that "[t]he proof offered in support of [an allegation of incompetence of counsel] should be commensurate with the serious nature of the consequences for all concerned."

[34] Counsel for the applicant referred the Court to a letter signed by the applicant and addressed to the Bureau du Syndic, the professional organization that regulates the conduct of lawyers for the Province of Québec. However, there is no evidence that counsel referred to in the letter has been held professionally liable (Certified Tribunal's Record at pp 245-47) and it would thus be inappropriate for this Court to make any determination in this matter *(Dukuzumuremyi v Canada (Minister of Citizenship and Immigration),* 2006 FC 278, [2006] FCJ No 349).

[35] Finally, the applicant states in his affidavit that his former counsel received a request from the PRRA Officer, asking the applicant to submit further documentation, and that counsel did not inform him of this request. However, there is no evidence in the applicant's record or in the certified tribunal record indicating that the Officer attempted to contact the applicant to seek additional, updated submissions. Absent such evidence, the Court cannot conclude that such a request was made.

[36] The Court is of the opinion that it cannot conclude that the applicant experienced prejudice not only as a result of his previous counsel's actions based on this evidence alone but also absent evidence as to the terms of the applicant's service agreement with his previous counsel.

[37] Overall, the Court finds that, while the applicant's former counsel may have acted in a manner that falls outside what is normally expected in the profession, the evidence does not indicate such extraordinary incompetence (*Huynh v Canada (Minister of Employment and Immigration)*, [1993] FCJ No. 642, 65 FTR 11, that caused any prejudice to the applicant as a result of counsel's actions. The applicant has not convinced this Court that the gaps in evidence are a direct result of counsel's actions. On the basis of the evidence provided by the applicant, he failed to meet his burden. Thus, this Court cannot conclude that the applicant's counsel was incompetent to the point that the applicant was deprived of natural justice or procedural fairness.

3. Did the Officer breach the duty of fairness by failing to disclose his intention to rely on changing circumstances in Rwanda and ask for updated information from the applicant?

[38] The applicant submits that the Officer erred by relying on the 2009 US DOS Report. The applicant cites *Mancia v Canada (Minister of Citizenship and Immigration)(C.A.)*, [1998] 3 FC 461, [1998] FCJ No 565, where the Court stated that when an officer wishes to rely on a document from a public source which became available after the filing of submissions, the duty of fairness requires an officer to disclose the document if it is "novel and significant and where [it evidences] changes in the general country conditions that may affect the decision." The applicant also relies on *Mahendran v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1236, [2009] FCJ No 1554, where the Court again found that the officer breached the duty of fairness by relying on a news article that post-dated the applicant's submissions without providing him with an opportunity to provide his own updated information.

[39] The Court cannot conclude that the Officer erred in this case. In *Mancia, supra*, at para 26, the Federal Court of Appeal clearly states:

> [26] […]The fact that a document becomes available after the filing of an applicant's submissions by no means signifies that it contains new information nor that such information is relevant information that will affect the decision. It is only, in my view, where an immigration officer relies on a significant post-submission document which evidences changes in the general country conditions that may affect the decision, that the document must be communicated to that applicant.

[40] In this case, the paragraph of the US DOS report quoted by the Officer did not contain "novel" or "significant" evidence, nor did it contain evidence of a change in general country conditions. The US DOS report from 2007, which was available in September 2008 when the

applicant made his PRRA submissions, contains the same information regarding the government's efforts at ethnic reconciliation. Thus, this information is clearly not the type of evidence discussed in *Mancia, supra*. The Officer did not breach the duty of fairness by failing to disclose this report to the applicant before relying on its contents.

[41] This Court concludes that the Officer acted fairly and came to a conclusion that was reasonable based on the evidence before her. In light of the above reasons, this application will be dismissed. This case does not raise a serious question of general importance which ought to be certified.

JUDGMENT

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

No question is certified.

"Richard Boivin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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