Federal Court  Cour fédérale

Date: 20120221

Docket: IMM-4141-11

Citation: 2012 FC 235

Ottawa, Ontario, February 21, 2012

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

ABDUL SHEMA SHAKA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant seeks an order setting aside the May 25, 2011 decision of the Refugee Protection Division of the Immigration Refugee Board of Canada (the Board), which found him to be neither a Convention (United Nations' *Convention Relating to the Status of Refugees*, [1969] Can TS No 6) refugee nor a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*). For the reasons that follow, the application for judicial review is dismissed.

Facts

[2] The applicant was born in Uganda to Rwandan parents. His mother filed a complaint before the gacaca courts in respect of persons who allegedly committed crimes during the Rwandan genocide. The applicant claims that he and his family received threats in an effort to intimidate them from pursuing this complaint. The applicant thus moved to Uganda. He then obtained a student visa to enter the United States (US).

[3] Upon arrival in the US the applicant neither pursued studies nor made an asylum claim. He made his way to Canada approximately one month later where he made a claim for refugee protection based on his Tutsi identity and his membership in the social group of "gacaca witnesses." The applicant's claim was refused by the Refugee Protection Division. While the Board had concerns about the applicant's credibility, the determinative issue was the existence of state protection in Rwanda. The Board found as follows:

> After reviewing the evidence available, the panel finds that the claimant has not rebutted the presumption of adequate state protection with clear and convincing evidence. After considering the documentary evidence, the panel determines, in light of the jurisprudence, that adequate state protection would be forthcoming to the claimant, as it was in the past, in the event he were to return to Rwanda. The claims under sections 96 and 97 of the IRPA must therefore both fail.

Issue

[4] The issue in this case is whether the decision of the Board to refuse the applicant's refugee claim is reasonable per *Dunsmuir v New Brunswick,* 2008 SCC 9, [2008] 1 SCR 190.

Analysis

[5] Section 18.1(4) of the *Federal Courts Act* (R.S.C., 1985, c. F-7) (*FCA*) provides this Court the jurisdiction to grant relief if the Court determines that a federal board, commission or other tribunal:

a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;	a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;
(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;	b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;
(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;	c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;
(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;	d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;
(e) acted, or failed to act, by reason of fraud or perjured evidence; or	e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;
(f) acted in any other way that was contrary to law.	f) a agi de toute autre façon contraire à la loi.

[6] The applicant raises two issues in his memorandum which presumably are argued under sections 18.1(4)(d) or (f). These issues are:

i. Did the Panel Member err in failing to consider that Rwanda is merely a fledgling democracy and, in consequence, fail to recognize that the presumption of state protection can be more easily overturned?

ii. Did the Panel Member err in failing to consider the actual operational level of protection available to the Applicant?

[7] The first error, is, in essence, that the Board improperly analyzed the applicant's refugee claim and therefore committed an error in law. I find that the Board committed no such reviewable error. With respect to the second error, I find that the decision withstands review on a reasonableness standard.

[8] The applicant's primary argument is that the Board was unaware, did not appreciate, or chose not to view Rwanda as a *fledgling democracy*. Had this fact been recognized, the applicant would have been entitled to have rebutted the presumption of adequate available state protection at a lower threshold. This argument is without merit. In *Perez Mendoza v Canada (Minister of Citizenship & Immigration)*, 2010 FC 119, para 33, Justice François Lemieux summarized some of the relevant legal principles regarding state protection:

> The kind of evidence that may be adduced to show that the state protection would not have been reasonably forthcoming includes: testimony of similarly situated persons, individual experience with state protection and documentary evidence (*Ward*).
>
> The standard of proof is balance of probabilities (*Carillo*).
>
> The quality of such evidence will be raised in proportion with the degree of democracy of a state (*Avila*).
>
> The degree of democracy may be lowered if the state tolerates corruption in its institutions (*Avila*).

> The evidence must be relevant, reliable, and convincing to satisfy the trier of fact on a balance of probabilities that the state protection was inadequate (*Carillo*).

[9] In *Alassouli v Canada (Minister of Citizenship & Immigration)*, 2011 FC 998 at paras 38-42, Justice Yves de Montigny refined the impact an analysis as to the nature of the democracy under scrutiny by a Board will have on the presumption of adequate and existing state protection. In that case, he held as follows:

> ….I wish to take this opportunity to address a matter discussed by the parties in their submissions, relating to the significance of the democratic nature of a state in determining the robustness of the presumption of state protection. Counsel for the applicant argues that Jordan is a kingdom whose "law does not provide citizens the right to change their monarchy or government". He goes on to submit that Jordan is therefore at the lowest end of democratic values, and that the applicant is therefore only required to demonstrate a minimal effort at seeking remedies to obtain state protection.
>
> With respect to the applicant, I cannot accept this argument. It is true that a claimant from a country with a full complement of strong democratic institutions must show serious efforts at obtaining protection. There is no doubt what this Court meant when it stated in *Kadenko v Canada (MCI)*, [1996] F.C.J. No. 1376, 143 D.L.R.(4th) 532 that "...the more democratic the state's institutions, the more the applicant must have done to exhaust all the courses of action open to him or her".
>
> But the reverse is not necessarily true in every case. It is quite possible that states which lack a democratic election process for choosing their leaders, such as monarchies, may nevertheless enjoy effective mechanisms of state protection, at least to repress common criminality and anti-social behaviour. Therefore, in assessing the availability of state protection, it is only logical that regardless of the manner in which a state chooses its leaders, tribunal members must examine the actual level of state protection available in that country, having regard to the particular circumstances of the applicant. When its authority is not threatened, it may well be that a state will be willing and able to provide a fair level of protection to its citizens, even if it does not conform with our ideal of democracy.

[10] I see no reason to depart from Justice de Montigny's analysis. The question remains one of fact, in each case, as to whether the presumption has been rebutted. The newness or the age of the democracy are not necessarily demonstrative of whether the state is truly democratic. More scrutiny may be required of countries that are in transition, but there is no automatic presumption or lesser threshold as contended. The test is the same, for all countries. What may vary is the amount of evidence required to rebut the presumption. To adopt Justice de Montigny's language:

> …democracy should not be used as a proxy for state protection. There is obviously a strong relationship between the citizens' participation in the institutions of the state on the one hand, and the effectiveness and fairness of the state's apparatus to protect them. There is no automatic equation between the two, and an assessment of state protection must always rest on a more nuanced analysis, taking into account the particular circumstances of a claimant, as well as the state involved.
>
> [Emphasis added]

[11] I will turn next to the second branch of the applicant's argument; that it fails to meet the standard of reasonableness in respect of its assessment of the evidence.

[12] The applicant's argument is essentially predicated on what amounts to a disagreement with the weight the Board gave to the evidence and, as I have already held, not on any identifiable error of fact.

[13] With respect to the Rwandan authorities' ability to provide protection to the applicant, the Board found as follows:

> The claimant introduced a report from *Human Rights Watch*, dated January 2007, calling for the government of Rwanda to respond to

threats against the gacaca process. More recent evidence suggests that the Rwandan authorities have indeed responded to the situation.

The US Department of State Report for 2009 observes:

> The government investigated and prosecuted individuals accused of threatening, harming or killing genocide survivors and witnesses or of espousing genocide ideology, which the law defines as dehumanizing an individual or a group with the same characteristics by threatening, intimidating defaming, inciting hatred, negating the genocide, taking revenge, altering testimony or evidence, killing, planning to kill, or attempting to kill someone. A special protection bureau in the Office of the National Public Prosecution Authority (formerly the Office of the Prosecutor General) investigated 473 cases, 181 of which were filed in court (see section 1.e.)...
>
> Most gacaca hearings took place without incident, but violence and threats of violence--usually perpetrated by persons accused of crimes related to genocide--against genocide witnesses were serious problems)

The Report further observed:

> The government held local communities responsible for protecting witnesses and relied on the local defense, local leaders, police, and community members to protect witnesses. A task force continued efforts to monitor those genocide survivors deemed most at risk and genocide suspects considered most likely to commit violent attacks. During the year it increased joint patrols in rural areas by survivors and security personnel used preventive detention of genocide suspects to prevent attacks deemed imminent by security officials expanded hotlines; and expedited gacaca hearings for those cases deemed most likely to involve the risk of violence against survivors and witnesses.

The Amnesty International Report declared:

> In December, with several appeals and revisions pending, the deadline to end gacaca was extended to the end of February 2010. After the closure of gacaca new accusations were to be presented before conventional courts.

> This report suggests that the gacaca process has been terminated, rendering moot the claimant's fear related to this particular social group.
>
> Finally, the UK Operational Guidance Note concluded:
>
> > While there have been continued reports of harassment, intimidation and even murders of genocide survivors/witnesses testifying to the gacaca system or the ICTR. the state authorities have demonstrated a willingness and ability to protect the genocide survivors and witnesses.
>
> The panel considered the claimant's personal circumstances. The claimant introduced a police report prepared following the arson at his family home. According to the report, the police are treating the incident as a criminal act, and the investigation is ongoing. The claimant's own evidence suggests that the police responded to his complaint and are pursuing the matter.
>
> While the police may not he perfect in Rwanda, that is not the relevant test. Rather the protection must be adequate. After reviewing the evidence available, the panel finds that the claimant has not rebutted the presumption of adequate state protection with clear and convincing evidence. After considering the documentary evidence, the panel determines, in light of the jurisprudence, that adequate state protection would be forthcoming to the claimant, as it was in the past, in the event he were to return to Rwanda. The claims under sections 96 and 97 of the IRPA must therefore both fail.

[14] The applicant has simply failed to demonstrate how evidence which was before the Board was not considered, or given unreasonable weight. Moreover, the gacaca court procedure has ended and complaints now may be made before the regular courts of Rwanda. The applicant's claimed basis for persecution has therefore evaporated. In addition to being correct in law, the decision falls within the range of possible, acceptable outcomes defensible in light of the facts and law and is therefore reasonable.

[15] The application for judicial review is dismissed.

[16] There is no question for certification and none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be and is hereby dismissed. No question for certification has been proposed and none arises.

"Donald J. Rennie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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