Federal Court | Cour fédérale

Date: 20120119

Docket: IMM-2587-11

Citation: 2012 FC 71

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, January 19, 2012

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

CHRISTIAN NZOHABONAYO
NICOLE BATUMUBWIRA,
KAELA MARIE OCEANNE ARAKAZA,
KAORI NEGAMIYE and
KENZA KEZIMANA

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review, submitted in accordance with subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (Act), of a decision dated March 23, 2011, in which the Refugee Protection Division of the Immigration and Refugee Board (panel)

found that the applicants were not refugees or persons in need of protection under sections 96 and 97 of the Act.

I. Background

A. Factual background

[2] Christian Nzohabgonayo (principal applicant), his spouse, Nicole Batumubwira, and their three minor children, Kaori Negamiya, Kenza Kezimana and Kaela Marie Océanne Arakaza, are citizens of the Republic of Burundi. The applicants belong to the Tutsi ethnic group. The family is seeking refugee protection in Canada in accordance with section 96 and subsection 97(1) of the Act.

[3] The applicants raise several acts of persecution that pushed them to leave Burundi.

[4] The family rented a house in Burundi that belonged to the principal applicant's father. His father had acquired it in 1984 and had registered it in the name of the principal applicant's older brother, Jean-Marie. The two brothers subsequently signed a lease agreement.

[5] In 1995, the house's former owners contested the sale of it and the principal applicant's father appeared before a civil court. The dispute by the former owners was unsuccessful.

[6] In 2007, the parents of the deceased former owners tried to challenge the sale of the house again and instituted a criminal proceeding against the principal applicant's father for using false documents. Even though the principal applicant's father won the criminal proceeding, the parents

filed an appeal with the Bujumbura Court of Appeal. The Court of Appeal agreed with the former owners' parents. The principal applicant's father appealed the decision to the Supreme Court.

[7] On May 18, 2009, the principal applicant's father received a written immediate eviction notice concerning the house in question. The next day, several police officers and registrars of the Court of Appeal broke down the doors of the house (where the applicants were living) and threw their belongings out into the street. During the eviction, the principal applicant contacted the president of the Supreme Court and obtained a handwritten letter staying the Court of Appeal's eviction notice. The letter stopped the family from being evicted.

[8] On May 20, 2009, the same police officers and registrars of the Court of Appeal arrived with a letter from the Minister of Justice cancelling the order by the President of the Supreme Court. The principal applicant alleges that the police officers made death threats against him during the incident. As a result, the applicants left the house that same day and hid at a different address.

[9] On May 22, 2009, an article about the applicants' eviction appeared in a local newspaper. Following the publication of the article, the principal applicant maintains that the family began receiving threats urging them to drop their action with the Supreme Court. The applicants moved again, and the principal applicant submits that he stopped going to work after those threats.

[10] On May 25, 2009, the principal applicant's lawyer filed a complaint against the notice issued by the President of the Court of Appeal. After the filing of his complaint, the applicant

alleges that he received another death threat. Consequently, the principal applicant concluded that the threats were coming from the authorities themselves.

[11] On June 2, 2009, the applicants moved to Mutanga North. Two days after their move, two unknown persons visited the applicant's wife at work and asked her to warn her husband to drop the house issue. The applicant alleges that those unknown persons also uttered death threats against his wife.

[12] On June 16, 2009, the principal applicant received a notice from the police to appear at the police station. The principal applicant alleges that his lawyer asked for permission to accompany him, but the request was denied. As a result, the principal applicant chose to not appear. On July 9, 2009, the principal applicant received another notice, which he also disregarded. Finally, on August 18, 2009, he further states that he received a wanted notice from Documentation Nationale du Burundi (the presidential police) and again decided to not appear.

[13] Subsequently, the applicants requested American visas and left Burundi on August 27, 2009, passing through Rwanda, Belgium and the United States. They arrived in Canada on August 30, 2009, where they immediately sought refugee protection.

[14] In their refugee claim, the applicants argued that their persecution was due to their membership in the Tutsi ethnic group. They also contended that their persecution is related to the murder of the principal applicant's mother-in-law in 1999. The principal applicant explained that his mother-in-law worked for the organization Médecins Sans Frontières and was killed by Hutu rebels

when they were at war. The principal applicant argues that those former rebels, the majority of whom are of Hutu ethnicity, are currently in power and that his mother-in-law's murderers are high-ranking police officers in the Burundian government. The principal applicant maintains that the authorities evicted them from their house because they were involved in the murder.

[15] The applicant explained that his spouse's sister was searching for her mother's killers and had received threats because of her investigation. The principal applicant notes that the sister and her family came to Canada in September 2010 and were found to be refugees under the Act.

[16] The hearing before the panel was held on February 15, 2011.

B. Impugned decision

[17] In its decision dated March 23, 2011, although satisfied with the identity of the applicants, the panel did not find them to be "Convention refugees" under section 96 of the Act or "persons in need of protection" under section 97 of the Act.

[18] The panel noted that the applicants claimed to fear the Burundian authorities by reason of their race and their membership in a particular social group – the Tutsi ethnic group. However, the panel found that the principal applicant gave vague and non-credible testimony in several parts of his account.

[19] First, the panel noted that it was the principal applicant's father who owned the house in question. In light of the events and the evidence, the panel found that the principal applicant had no right to intervene in the legal determinations regarding his father's house.

[20] Second, the panel noted that the principal applicant submitted as evidence a handwritten letter by the President of the Supreme Court of Burundi staying the eviction notice. The panel found the applicant's explanation that the President did not have the time to prepare a proper letter to be inadequate. The panel found that the photocopy of that letter lacked authenticity. The panel stated that it was not entitled to draw conclusions on the judicial system in Burundi. It stated that there was no evidence to conclude that the Burundian authorities acted in a persecutory or even discriminatory manner because eviction is not equivalent to persecution.

[21] Third, the panel noted that the testimony by the principal applicant and his spouse differed with respect to the issue of police threats. The applicant's explanation concerning this inconsistency did not satisfy the panel. The panel found that the principal applicant added the death threats in his account to bolster his refugee claim.

[22] Fourth, the panel placed little probative value on the wanted notices submitted by the principal applicant in evidence because: (i) the wanted notice was printed on a sheet of paper that was torn in two; and (ii) the panel noted a contradiction in the evidence—the applicant explained that they were "notices to appear" but the documents indicated that they were "wanted notices". The panel wrote the following (Decision by the panel, paragraph 39):

> . . . A notice to appear is a notice urging someone to appear and it is usually addressed to the person being notified, whereas a wanted notice involves,

> among other things, finding and apprehending a person and it is usually addressed to the people assigned to that task. That is precisely what the two wanted notices set out. The panel concludes that it is not credible that the Burundian authorities would have issued those wanted notices to the principal claimant. On the contrary, they are documents that would have been issued to the Burundian forces assigned to finding the male claimant. The panel concludes on a balance of probabilities that the documents in question are fraudulent. Consequently, the panel also concludes that the Burundian authorities were not looking for the principal claimant, as he alleges.

[23] Finally, the panel found that there was no evidence submitted by the applicants concerning the allegation of the murder of the principal applicant's mother-in-law.

II. Issues

[24] The applicants raised several issues. However, the Court is of the opinion that the only relevant issue in this case is whether the panel reasonably found that the principal applicant was not credible on the basis of all of the evidence in the record.

III. Relevant statutory provisions

[25] The relevant statutory provisions of the *Immigration and Refugee Protection Act* read as follows:

REFUGEE PROTECTION, CONVENTION REFUGEES AND PERSONS IN NEED OF PROTECTION	NOTIONS D'ASILE, DE RÉFUGIÉ ET DE PERSONNE À PROTÉGER
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	**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

opinion,

(*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
(*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.

appartenance à un groupe social ou de ses opinions politiques :
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) 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

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
(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or
(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

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

Personne à protéger

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) 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) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(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

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

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

généralement pas,
(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) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Person in need of protection

(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.

Personne à protéger

(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.

Decision on Claim for Refugee Protection

Décision sur la demande d'asile

Decision

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.

Décision

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.

No credible basis

(2) If the Refugee Protection Division is of the opinion, in rejecting a claim, that there was no credible or trustworthy evidence on which it could have made a favourable decision, it

Preuve

(2) Si elle estime, en cas de rejet, qu'il n'a été présenté aucun élément de preuve crédible ou digne de foi sur lequel elle aurait pu fonder une décision favorable, la section

shall state in its reasons for the decision that there is no credible basis for the claim.	doit faire état dans sa décision de l'absence de minimum de fondement de la demande.

IV. Applicable standard of review

[26] In accordance with *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339; and *Aguebor v Canada (Minister of Employment and Immigration)* (FCA), (1993) 160 NR 315, 42 ACWS (3d) 886, the standard of review applicable to the panel's findings with respect to the credibility of the applicants and the assessment of the evidence is reasonableness. The Court will intervene only if the decision was based on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

V. Position of the applicants

[27] The applicants allege that this matter satisfies the two tests (objective and subjective) set out in *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, (1993), 103 DLR (4th) 1 (*Ward*).

[28] The applicants argue that they identified themselves as individuals of Burundian nationality and Tutsi ethnicity in section 1(g) of their Personal Information Form (PIF). Furthermore, the applicants indicate that they noted at section 28 of the PIF that they were seeking protection based on two Convention grounds: race/ethnicity and membership in a particular social group, in this case their extended family. The applicants state that the panel should have addressed this issue in light of the fact that the principal applicant's mother-in-law was killed and that they were violently evicted from their house. The applicants also state that the panel had documents from the documentation

package on Burundi as well as the newspaper article dated May 22, 2009, that independently corroborate their allegations.

[29] The applicants contend that the panel made a reviewable error in law by refusing to provide reasons for its finding that the applicants are not persons in need of protection under section 97 of the Act (see *Albert v Canada (Minister of Citizenship and Immigration)*, 2007 FC 915, [2007] FCJ No 1211 (*Albert*), at paragraphs 29 to 35). Also, the applicants argue that the panel was aware of the fact that the applicant's sister-in-law, her spouse and her children were all accepted as Convention refugees by the same panel in Ottawa.

[30] The applicants note that the panel erred in its assessment of the applicants' credibility and argue that the panel should have given the applicants the benefit of the doubt. The applicants state that, pursuant to *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302, 31 NR 34 and *Giron v Canada (Minister of Employment and Immigration)*, [1992] FCJ No 481, 143 NR 238 (FCA), the panel must support its findings and inferences with the evidence in the record. More specifically, the applicants allege that the following errors were committed by the panel:

- The panel was unable to explain why the handwritten letter was not authentic;
- The panel acted arbitrarily by rejecting the principal applicant's explanation that the circumstances at the time resulted in the president of the Supreme Court not having enough time to be able to type out the whole letter;
- The panel erred by accepting the fact that the letter by the Minister of Justice cancelled the letter by the President of the Supreme Court without asking itself why the Minister had to intervene in a matter before the courts;

- The panel was also unable to explain why it rejected the wanted notices issued against the applicant on a half-sheet of paper with contradictory evidence (*Warsame v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 1202, 45 ACWS (3d) 148);

- The panel's finding that the principal applicant and his spouse contradicted each other on the statement regarding the two unknown individuals who went to visit the spouse at work was made maliciously and is unreasonable because it wanted the spouse to use exactly the same phrasing as that in the applicant's narrative;

- The panel drew an arbitrary inference by indicating that the applicant did not have cause of action in the matter of the ownership of the house.

[31] Finally, the applicants maintain that the panel had a statutory duty to state in its reasons for the decision that there is no credible basis for the claim by virtue of subsection 107(2) of the Act.

VI. The position of the respondent

[32] With respect to the respondent, he repeats the panel's facts and findings and states that it is up to the panel to weigh the evidence, analyze the applicants' testimony and assess their credibility.

[33] By virtue of *Aguebor*, above, the respondent alleges that the panel was entitled to compare the facts raised by the applicants in their PIFs, their documents and their testimonies and to come to conclusions with respect to their credibility on the basis of inconsistencies and omissions (see also *Bernal v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1007, [2009] FCJ No 1217; *Kumar v Canada (Minister of Citizenship and Immigration)*, 2009 FC 643, [2009] FCJ No 811 (*Kumar*); *Zhang v Canada (Minister of Citizenship and Immigration)*, 2009 FC 787, [2009] FCJ No 911).

[34] As a result, the respondent submits that, given that the panel found that the principal applicant was not credible, that determination has an influence on the merits of the refugee claim. In short, the respondent states that the panel's decision that the applicants are not refugees or persons in need of protection was reasonable and the Court cannot intervene.

VII. Analysis

[35] The Court notes that the panel's decision is based on the issue of the principal applicant's credibility.

[36] Pursuant to *Ward*, above, two components need to be present to establish fear of persecution: the applicant must subjectively fear persecution and must fear persecution in an objective sense. Essentially, in this case, after finding that there was a lack of evidence going to the subjective element of the claim, the Court rejected the claim because the lack of credibility finding was determinative in itself (see *Kanyai v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 850, [2002] FCJ No 1124 at paragraph 21; *Mbanga v Canada (Minister of Citizenship and Immigration)*, 2008 FC 738, [2008] FCJ No 949 at paragraph 21).

[37] The Court notes that the burden of proof rests with the applicant. The failings and inaccuracies noted by the panel were numerous and also touched on the essential elements of the applicants' refugee claim. The deficiencies raised by the panel included the following:

- The lack of evidence submitted by the principal applicant to demonstrate his right to intervene in the legal determinations affecting his father's house;
- The applicant's inadequate explanation concerning the authenticity of the handwritten letter by the President of the Supreme Court of Burundi submitted to evidence;

- The lack of evidence submitted to find that the Burundian authorities acted in a persecutory or even discriminatory manner;
- The contradiction in the testimony of the principal applicant and his spouse regarding the threats from the Burundian police officers;
- The lack of probative value with respect to the wanted notices submitted as evidence by the principal applicant;
- The total lack of evidence concerning the applicants' allegation that the killing of the principal applicant's mother-in-law was related to the violent eviction of the family from their home.

[38] More specifically, during the hearing, the principal applicant did not satisfy this Court that the handwritten letter by the President of the Supreme Court of Burundi was authentic and that the wanted notices were in fact "notices to appear". Counsel for the applicant also emphasized the fact that the applicant's sister-in-law sought refugee protection in Canada because she was being sought by the Burundian authorities and that she obtained it. It is settled law that a panel member must make his or her decision in light of the facts and the evidence in the record. Justice Crampton, then a puisne judge, also recently reiterated this principle in *Michel v Canada (Minister of Citizenship and Immigration)*, 2010 FC 159, [2010] FCJ No 184, at paragraph 43:

> [43] This Court has consistently held that each decision by the Board turns on its own particular facts and evidence. (See, for example, *Cius*, above; *Rahmatizedeh v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 578; *Sellathurai v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1235, [2003] F.C.J. No. 1630; *Marinova v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 178, [2001] F.C.J. No. 345; and *Casetellanos v. Canada (Solicitor General)*, [1994] F.C.J. No. 1926, [1995] 2 F.C. 190.) Accordingly, the Applicants'argument that the Board Member committed an error in failing to reconcile his Decision with his own reasoning in another case, where he would have had different facts evidence before him, is rejected.

[39] Furthermore, the following was pointed out by Justice Shore in *Kumar*, above: ". . . the contradictions are at the core of the Applicant's claim. They were sufficient for the Immigration and

Refugee Board, Refugee Protection Division (Board) to conclude that he was not credible" (at paragraph 1). Consequently, the Court must give significant deference when faced with such a decision. Justice Shore also specified the following at paragraph 3:

> [3] It is trite law that the Board is entitled to choose, in context, the evidence that is more fitting to the particularities of each given case. It is not up to the Applicant, nor the Court (*Starcevic v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1370 at par. 18) to reweigh the evidence or otherwise dictate the elements to which the Board should have attributed more weight:
>
> > [21] The RPD must, as a specialized tribunal, weigh the evidence submitted and make the necessary determinations.
> >
> > [22] To do so, the RPD may choose the evidence that best represents reality and this choice is part of its role and its expertise . . .
>
> (*Del Real v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 140, 168 A.C.W.S. (3d) 368; reference is also made to: *Alba v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1116 at par. 5; *Mohimani v. Canada (Minister of Employment and Immigration)* (1993), 41 A.C.W.S. (3d) 556, [1993] F.C.J. No. 564 (QL) (F.C.A.) at par. 2).

[40] In addition, the Court notes that the decisions raised by the applicants in their written submissions, namely *Albert*, above, and *Rahimi v Canada (Minister of Citizenship and Immigration)*, [1998] ACF No 613 at para 6-9 [*Rahimi*], cannot apply in this case. First, in *Albert*, the Court noted that the decision by the panel in question did not support its non-credibility finding by referring, for example, to the inconsistencies or contradictions in the evidence. However, in light of the foregoing, it is clear that the panel's findings were reasoned and the applicant's argument based on subsection 107(2) of the Act therefore cannot be accepted.

[41] In *Rahimi*, the Court noted that the panel made no general finding of credibility in its reasons, which is not the case here.

[42] It appears that the applicants are seeking reconsideration of the evidence in the record, which the Court cannot do in light of the applicable case law. The Court is of the opinion that the findings of fact made by the panel were clearly supported by the evidence in the record and by the applicants' testimony, and those findings cannot be said to be perverse or capricious. The Court points out that the standard does not involve determining whether this Court would have decided otherwise, but whether there was an error in the panel's decision. Consequently, in accordance with the reasonableness standard, which applies in this case, the Court cannot intervene and the application for judicial review must be dismissed.

[43] No question was raised by the parties for certification.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that

1. This application for judicial review be dismissed.

2. No question will be certified.

"Richard Boivin"

Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2587-11
STYLE OF CAUSE:	Christian Nzohabonayo et al v MCI
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	December 19, 2011
REASONS FOR JUDGMENT:	BOIVIN J.
DATED:	January 19, 2012

APPEARANCES:

Jacques J. Bahimanga	FOR THE APPLICANTS
Agnieszka Zagorska	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Law firm Ottawa, Ontario	FOR THE APPLICANTS
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT