

Federal Court



Cour fédérale

**Date: 20120920**

**Docket: IMM-5203-11**

**Citation: 2012 FC 1103**

**Ottawa, Ontario, September 20, 2012**

**PRESENT: The Honourable Mr. Justice Mandamin**

**BETWEEN:**

**JEAN CLAUDE NZAYISENGA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] The Applicant, Mr. Jean Claude Nzayisenga, applies for judicial review of the June 24, 2011 decision of the Refugee Protection Division of the Immigration and Refugee Board (RPD).

[2] The RPD refused the Applicant's claim for refugee protection pursuant to section 96 and subsection 97(1) of the *Act*. The RPD determined that the Applicant is not a Convention refugee and is not a person in need of protection.

[3] I conclude for reasons that follow that the application should be dismissed.

## **Background**

[4] The Applicant, Jean Claude Nzayisenga, was born in Rwanda to a Hutu father and a Tutsi mother. He lived with his grandparents while he attended primary school. When the genocide in Rwanda started in 1994, a neighbour of his grandparents, Alphonse Buregeya, came and took the Applicant's grandparents away. The Applicant's grandparents were Tutsis and Seventh Day Adventists and were killed by the men who took them away.

[5] The Applicant rejoined his parents in Karambi, about five kilometres away. Later in 1994, Hutu neighbours came to the home and beat him and his mother.

[6] After the genocide, the Applicant's parents denounced Mr. Buregeya who was imprisoned awaiting trial. In April, 2008, Mr. Buregeya appeared in the Gacaca court of Rwanda. The Applicant was summoned to testify which he did on May 12 and May 19, 2008. Mr. Buregeya was sentenced to 15 years in jail for his part in the genocide.

[7] On May 20, 2008, the Applicant was attacked by three men wearing masks. The Applicant was left unconscious on the side of the road. He was in hospital for about four days.

[8] The Applicant returned to the university he had been attending where he began receiving threatening calls on his cell phone. His parents also received calls on their home phone from unidentified men looking for the Applicant.

[9] Later that year the Applicant received an internship to work with RiskMetric Group in the United States; the Applicant left Rwanda on October 8, 2008 for the United States.

[10] On December 27, 2008, the Applicant came to Quebec and made a refugee claim. The Applicant claims to fear Mr. Buregeya and his family.

### **Decision Under Review**

[11] The RPD found the Applicant was not a Convention refugee because he did not have a well founded fear of persecution in Rwanda and was not a person in need of protection in that his removal to Rwanda would not subject him personally to risk of harm. The RPD determinative issues were the nature of the harm the Applicant feared and the existence of an Internal Flight Alternative (IFA).

[12] The RPD accepted the Applicant testified against Mr. Buregeya in the Gacaca Court and was beaten by unknown men following the trial. The RPD also accepted that the Applicant received threatening phone calls on his cell number from unidentified persons. The RPD also found that the last time his parents heard from anyone looking for the Applicant was approximately eight months before the RPD hearing.

[13] The RPD considered the current country conditions in Rwanda. The RPD noted the Rwandan government follow-up to the Gacaca Courts took measures to protect and improve the situation of the genocide survivors and witnesses.

[14] The RPD also found the documentary evidence did not corroborate the subjective fear the Applicant claimed. There were no reports of organized groups targeting genocide witnesses. The RPD found that 156 genocide survivors and witnesses were killed between 1995 and 2008 but this percentage was very low considering more than 1.2 million cases were heard in the Gacaca Courts. The RPD also noted that the documentary evidence showed that there had been major improvements in the previous year alone and that the fact that some people had been killed does not show an absence of state protection.

[15] The RPD found that that the Applicant's fear of persecution under s. 96 was not objectively well-founded on a forward-looking assessment.

[16] In regards to the s. 97 claim the RPD noted that the Applicant's parents still lived in the same place and that, although they were initially told that they would be harmed if they did not tell the caller about their son, this had not occurred. The RPD found the Rwandan government had taken significant steps to assist citizens of Rwanda after the genocide, and the Claimant's family had not been further contacted.

[17] In the alternative, the RPD also considered an internal flight alternative (IFA) for the Applicant. It set out the test for determining the existence of an IFA set out in *Rasaratnam v*

*Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706, 140 NR 138 (FCA)

[*Rasaratnam*] and then considered Kigali as a viable IFA.

[18] The RPD accepted that Rwanda is a small country, but stated that Kigali has a population of approximately one million people. The RPD decided there would be work opportunities for the Applicant in Kigali. The RPD also noted the Applicant is independent, well educated and does not require the assistance of his parents or family at this point in his life.

[19] The RPD found that the IFA of Kigali is objectively reasonable in all the circumstances.

### **Relevant Legislation**

[20] The *Immigration and Refugee Protection Act*, SC 2001, c 27 provides:

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 opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the

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 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

country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

...

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 themselves 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 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

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.

...

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 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,

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.

...

...

108. (1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances:

108. (1) Est rejetée la demande d'asile et le demandeur n'a pas qualité de réfugié ou de personne à protéger dans tel des cas suivants :

...

...

(e) the reasons for which the person sought refugee protection have ceased to exist.

e) les raisons qui lui ont fait demander l'asile n'existent plus.

...

...

(4) Paragraph (1)(e) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment.

(4) L'alinéa (1)e ne s'applique pas si le demandeur prouve qu'il y a des raisons impérieuses, tenant à des persécutions, à la torture ou à des traitements ou peines antérieurs, de refuser de se réclamer de la protection du pays qu'il a quitté ou hors duquel il est demeuré.

## Issues

[21] The Applicant raised the following issues:

1. Did the RPD fail to consider whether the Applicant suffered from cumulative harassment amounting to persecution?
2. Did the RPD err by not conducting a “compelling reasons” analysis under paragraphs 108(1)(e) and 108(4) of *IRPA*?
3. Does consideration of an IFA require a prior finding of a well-founded localized fear of persecution?

### **Standard of Review**

[22] The Supreme Court of Canada has held in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] that there are only two standards of review: correctness for questions of law and reasonableness involving questions of mixed fact and law and fact. The Supreme Court has also held that where the standard of review has been previously determined, a standard of review analysis need not be repeated.

[23] The RPD’s determination of whether incidents of discrimination or harassment amount to persecution is a question of mixed fact and law to be determined on a standard of reasonableness. *Liang v Canada (Minister of Citizenship & Immigration)*, 2008 FC 450 at paras 12-15 [*Liang*]



[24] Questions related to the application of section 108(1)(e) and 108(4) are determinations of mixed fact and law and are to be determined on a reasonableness standard. *Lewis v Canada (Minister of Citizenship & Immigration)*, 2011 FC 1378 at para 8. [Lewis]

[25] An examination of the RPD's determination regarding the viability of an IFA is also a question of mixed law and fact to be determined on a standard of reasonableness. *Melvin Alonso Cruz Pineda v Canada (Minister of Citizenship & Immigration)*, 2011 FC 81 at para 29 [Pineda]

### **Analysis**

[26] The Applicant submits he had been persecuted since his grandparents had been murdered, he and his mother beaten, and he was beaten and hospitalized after he testified in the Gacaca court. The Applicant submits the RPD accepted this testimony but did not specifically address whether the various incidents of mistreatment cumulatively created a well-founded fear of persecution. The Applicant also submits the RPD was required to consider section 108 of *IRPA* because the preconditions for consideration of compelling reasons were present. Finally, the Applicant submits an IFA analysis requires the RPD to find or assume the existence of a localized well-founded fear of persecution before conducting a proper IFA analysis.

*Cumulative Mistreatment*

[27] The question of whether the cumulative incidents of mistreatment create a well founded fear of persecution has been addressed by this Court in *Salim v Canada (Minister of Citizenship & Immigration)*, 2011 FC 1283 [*Salim*].

... The doctrine of cumulative grounds of persecution was summarized by Mr. Justice Nadon, speaking for the Federal Court of Appeal, in *Canada (Minister of Citizenship and Immigration) v Munderere*, 2008 FCA 84, 377 N.R. 259. Where evidence establishes a series of actions characterized to be discriminatory, and not persecutory, the cumulative effect of that conduct must be considered. It would be an error of law for the RPD not to consider the cumulative nature of that conduct, as directed against the claimant. The RPD is duty bound to consider all the events which may have an impact on a claimant's submission that he or she has a well-founded fear of persecution. *Salim* at para 30

[28] In the case at hand, the RPD considered all of the incidents of mistreatment alleged by the Applicant. While the RPD did not specifically say it had considered the cumulative effect of those incidents, it is clear that the RPD was aware of the totality of the Applicant's allegations.

[29] Moreover, the RPD was mindful of the change in circumstances in Rwanda. In my view, the RPD could proceed as it did since the Applicant's claim of fear rests, not on the totality of his experiences, but on the beating and threatening phone calls following his testimony in the Gracaca Court. The RPD decided the Applicant would not face a serious possibility of persecution in the event of his return to Rwanda today given government measures to safeguard genocide victims and witnesses. *Sugiarto v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1326 [*Sugiarto*].

[30] The RPD made no error in its review of these incidents and consideration of the Rwanda government measures to support victims and witnesses. It cannot be said to have failed to consider all the events cumulatively as reviewed all incidents and reasonably assessed the objective basis for the Applicant's fear in light of the relevant circumstances.

*Compelling Reasons*

[31] Given the RPD reasonably decided that the Applicant did not have a well founded fear of persecution, the precursors for a compelling reasons analysis under s. 108(4) were not present. Section 108(1) will only apply when the decision maker finds a claimant has a valid claim for refugee protection and then must find the cause of the persecution no longer exists. Only then does the decision maker consider s. 108(4).

[32] This Court has recently had the opportunity to address the application of subsection 108(4). In *Lewis* at para 43, Justice Scott stated:

43 *Brovina v Canada (Minister of Citizenship and Immigration)*, 2004 FC 635 at para 5 is the leading case. It states that section 108(1)(e) will only apply when the decision maker has made a determination that the person has had a valid claim for refugee protection due to persecution. The decision maker must then find that the cause of that persecution no longer exists. At this point, the decision maker can consider 108(4) and "...whether the nature of the claimant's experiences in the former country were so appalling that he or she should not be expected to return and put himself or herself under the protection of that state".

[33] This was not a case where the Applicant's experiences in the former country were so appalling that he should not be expected to return and put himself under the protection of the state. The RPD did not err for not conducting such an analysis.

*Internal Flight Alternative*

[34] In order to qualify for protection under either section 96 or 97, a claimant must face risk in all parts of the country he is fleeing. If there is a part of the country, an IFA, in which the claimant does not face risk, then that claimant does not meet the requirements for protection, irrespective of whether the claimant faces risk in the area that he fled.

[35] This Court has stated that the RPD need not proceed in the manner urged by the Applicant that the RPD must first find or assume the existence of a well-founded fear before conducting an IFA analysis. *Sarker v Canada (Minister of Citizenship & Immigration)*, 2005 FC 353, 137 ACWS (3d) 1196 [*Sarker*].

[36] In *Sarker* at para 7, Justice Snider stated that the RPD, in performing an IFA analysis, is not required to first make a finding that the Applicant faced a localized risk as argued by the Applicant:

When looking at the existence of an IFA, the Board could find that the Applicant faced a risk of persecution in [the area from which he originates], the Board could assume (without finally determining the question) that he faced persecution or it could ignore the whole question. As long as:

- (a) The Board applied the correct test to its IFA analysis;  
and

- (b) Its conclusions on the existence of an IFA was not patently unreasonable, in the sense that it is unsupported by the evidence;

Its decision should stand.

[Emphasis added, citations omitted]

[37] Here, the RPD stated and applied the correct test to its IFA analysis.

[38] The RPD's conclusions were supported by the evidence and fall within the range of reasonable outcomes based on the applicable law and facts. It does not matter that the RPD did not find or assume the existence of a well-founded fear of persecution in the area from which the Applicant originates.

[39] The RPD's IFA determination is reasonable. The Applicant has failed to establish that the RPD has made a reviewable error.

## **Conclusion**

[40] The application for judicial review does not succeed.

[41] The Applicant proposes questions for certification which reflect the issues identified. These questions have already been addressed by ample jurisprudence and I decline to certify the questions.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is dismissed.
2. No question of general importance is certified.

“Leonard S. Mandamin”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

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