Date: 20070208

Docket: IMM-3034-06

Citation: 2007 FC 137

Ottawa, Ontario, February 8, 2007

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

AJEMA MOLEBE
LESLIE KAKRA
NAOMI MOTEMONA AMBA

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), of the decision of the Immigration and Refugee Board, Refugee Protection Division (the panel), dated May 16, 2006, according to which the principal respondent, Ajema Molebe, is not excluded under paragraphs 1(F)(*a*) and 1(F)(*c*) of the *United Nations Convention Relating to the Status of Refugees*, July 28, 1951, 189 U.N.T.S. 137 (the Convention).

[2] In a related case (IMM-3269-06), which was heard on the same day, the respondents are applying for judicial review of the same panel decision. Although the facts in question are the same, the issues are different. The reasons for judgment are therefore rendered separately.

ISSUE

[3] The applicant raises two issues. However, I agree with respondent's counsel, who states in his memorandum that there is only one fundamental issue in this case: Did the panel err in law or in fact when it refused to exclude the principal respondent under the Convention?

[4] For the following reasons, the answer to this question is affirmative, and the application for judicial review will be allowed.

FACTUAL BACKGROUND

[5] The principal respondent (the respondent) is a citizen of the Democratic Republic of the Congo (DRC). She worked as a flight attendant with Air Zaire from 1993 to 1999. She arrived in Canada on December 15, 2002, with her baby Leslie Kakra.

[6] She is from a privileged family whose parents had close ties to President Mobutu. Her father was a senator and elected representative, and her mother was a senior leader of the *Mouvement populaire de la révolution* (MPR), the single party under the Mobutu regime.

[7] In 1997, President Mobutu was replaced by President Laurent Désiré Kabila, who installed a dictatorial regime in the country. Senior leaders of the former regime were hunted, persecuted and imprisoned. The respondent's father, who was suffering from a serious illness shortly before the change in regime, was imprisoned and died. The family lost everything.

[8] Following the persecution of her parents, the respondent joined an underground group fighting against President Kabila's regime to seek revenge. From 1997 to 2002, she was an active member of the *Mouvement de libération du Congo* (MLC), whose goal was to overthrow and eliminate President Kabila using any means possible, including assassination.

[9] The respondent attended secret meetings with Colonel Muamba, the former pilot of President Mobutu's plane and a close friend of Jean-Pierre Mbimba, the MLC leader. The respondent admits she was a spy for the MLC. In her travels as a flight attendant, she carried envelopes between Kinshasa and various African countries for Colonel Muamba in order to further the MLC's objectives.

[10] According to the documentary evidence, the MLC is a violent movement that has resorted to torture, rape, assassination and cannibalism in the furtherance of its objectives. The respondent acknowledges that Colonel Muamba's goal was to assassinate President Kabila. The respondent testified as follows regarding President Kabila (certified copies of the tribunal, Vol. 2, p. 1384):

> [TRANSLATION]
> . . . But I knew he would die, because people were plotting to, to, to make him go away, to kill him, in fact, to physically eliminate him
> . . .

[11] The respondent alleges that she has reason to fear a potential return to the DRC because of her romantic relationship with another Colonel, Eddy Kapend, the chief of security and President Laurent Kabila's aide de camp. Colonel Kapend was one of the many people implicated in President Laurent Kabila's assassination on January 13, 2001. In January 2003, a military tribunal sentenced him to death for assassinating the president.

[12] The respondent submits that she could also face the death penalty if she returned to her country, as she caused the death of a soldier in a traffic accident in 1998. She was arrested and detained by the military police on the evening of the accident. She was released thanks to the support of Colonel Kapend.

[13] Finally, the respondent alleges that she was a member of the MPR and that her mother was the regional president of the MPR. According to the documentary evidence, the MPR has a reputation for human and international rights abuses against civilians under President Mobutu's regime.

[14] Following a notice of intervention from the Minister, the Deputy Attorney General of Canada asked the panel to exclude the respondent under paragraphs 1(F)(*a*) and 1(F)(*c*) of the Convention because of the murder and her activities in the MLC and MPR. It is the dismissal of the application for exclusion that is the subject of this judicial review.

IMPUGNED DECISION

[15] After examining the documentary and testimonial evidence, the panel came to the following conclusions regarding the respondent's exclusion.

Regarding the murder:

(a) The description of the murder given by the applicant did not establish that the murder really did occur; and

(b) The panel is of the opinion that it was a traffic accident, that nobody died and that the police used this incident to extort money from the respondent before releasing her.

Regarding human rights abuses within the MLC:

(a) The respondent allegedly carried mail for some members of the politico-military group and attended meetings held to discuss forcing President Laurent Kabila from power;

(b) The applicant did not demonstrate that the respondent knew of the atrocities committed by the MLC and that meeting participants did not keep a tally of their victims; and

(c) With respect to the evidence that the MLC is a movement principally directed to a limited, brutal purpose, the applicant did not demonstrate that a group without the legal means to change a dictatorial regime is wrong in resorting to legitimate violence.

Regarding human rights abuses within the MPR:

(a) The applicant did not demonstrate that, as a Congolese citizen, the respondent was the only one who knew about the abuses of Mobutu's dictatorship. All Congolese had to be members of the MPR, the single party, considered to be the state party;

(b) It would seem that the respondent was aware only of general information available to the public; and

(c) In the panel's view, the respondent was not aware, as an intelligence officer or torturer would be, of the serious human rights violations committed by the Mobutu regime.

RELEVANT LEGISLATION

[16] The definition of Convention refugee in subsection 2(1) of the Act includes the following provision:

2(1) "Refugee Convention" means the United Nations Convention Relating to the Status of Refugees, signed at Geneva on July 28, 1951, and the Protocol to that Convention, signed at New York on January 31, 1967. Sections E and F of Article 1 of the Refugee Convention are set out in the schedule.	**2(1) « Convention sur les réfugiés »** La Convention des Nations Unies relative au statut des réfugiés, signée à Genève le 28 juillet 1951, dont les sections E et F de l'article premier sont reproduites en annexe et le protocole afférent signé à New York le 31 janvier 1967.

[17] Section F of Article 1 of the Convention, specifically paragraphs 1(F)(*a*) and 1(F)(*c*), is the root of the applicant's extraordinary intervention. These paragraphs stipulate as follows:

SCHEDULE **(Subsection 2(1))** **SECTIONS E AND F OF ARTICLE 1 OF THE UNITED NATIONS CONVENTION RELATING TO THE STATUS OF REFUGEES**	**ANNEXE** **(paragraphe 2(1))** **SECTIONS E ET F DE L'ARTICLE PREMIER DE LA CONVENTION DES NATIONS UNIES RELATIVE AU STATUT DES RÉFUGIÉS**
. . .	[. . .]
F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (*a*) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; . . . (*c*) he has been guilty of acts contrary to the purposes and principles of the United Nations.	F. Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser : *a*) Qu'elles ont commis un crime contre la paix, un crime de guerre ou un crime contre l'humanité, au sens des instruments internationaux élaborés pour prévoir des dispositions relatives à ces crimes; [. . .] *c*) Qu'elles se sont rendues coupables d'agissements contraires aux buts et aux principes des Nations Unies.

[18] Section 98 of the Act excludes persons referred to in section F of Article 1 of the Convention:

Exclusion — Refugee Convention 98. A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.	**Exclusion par application de la Convention sur les réfugiés** 98. La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.

ANALYSIS

Standard of review

[19] In *Canada (Minister of Citizenship and Immigration) v. Yaqoob*, 2005 FC 1017, [2005] F.C.J. No. 1260 (F.C.) (QL), my colleague Richard Mosley J. identified the appropriate standard of review in a judicial review that raises the issue of exclusion under paragraphs 1(F)(*a*) and 1(F)(*c*) of the Convention. At paragraphs 10 and 11, he stated that, in general, the appropriate standard of review is patent unreasonableness, except for questions relating to the interpretation of the law, where the standard is correctness.

[20] In *Harb v. Canada (Minister of Citizenship and Immigration)*, 2003 FCA 39, [2003] F.C.J. No. 108 (F.C.A.) (QL), the Federal Court of Appeal held as follows at paragraph 14:

> In so far as these are findings of fact they can only be reviewed if they are erroneous and made in a perverse or capricious manner or without regard for the material before the Refugee Division (this standard of review is laid down in s. 18.1(4)(*d*) of the *Federal Court Act*, and is defined in other jurisdictions by the phrase "patently unreasonable"). These findings, in so far as they apply the law to the facts of the case, can only be reviewed if they are unreasonable. In so far as they interpret the meaning of the exclusion clause, the findings can be reviewed if they are erroneous. (On the standard of review, see *Shrestha v. The Minister of Citizenship and Immigration*, [2002] F.C.J. No. 1154, 2002 FCT 887, Lemieux J. at paras. 10, 11 and 12.)

[21] To succeed, the applicant must demonstrate that the panel committed a patently unreasonable error.

[22] The applicant alleges that the panel circumvented the applicable principles of justice and disregarded the evidence dealing with the respondent's exclusion. The applicant argues that the panel erred in concluding that the respondent had no knowledge of the atrocities committed by the MLC and did not share its intent. Moreover, the applicant criticizes the panel for entertaining the notion that the goal sought by the MLC justifies the illicit means it employed to achieve its ends.

*Exclusion under paragraphs 1(F)(*a*) and 1(F)(*c*) of the Convention*

[23] The panel's conclusions regarding the applicant's allegation that the respondent had committed murder in a traffic accident in 1998 are not patently unreasonable. The evidence the panel had supports its view that there was no proof that murder had been committed.

Complicity

[24] The Court must first establish which criteria need to be considered in identifying complicity within the context of paragraph 1(F)(*a*) of the Convention. The Federal Court of Appeal has examined the issue in three decisions: *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 306 (C.A.), *Moreno v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 298 (C.A.) and *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433 (C.A.). In *Ramirez*, MacGuigan J.A. stated as follows at paragraph 16:

> What degree of complicity, then, is required to be an accomplice or abettor? A first conclusion I come to is that mere membership in an organization which from time to time commits international offences is not normally sufficient for exclusion from refugee status.
> . . .
> It seems apparent, however, that where an organization is principally directed to a limited, brutal purpose, such as a secret police activity,

> mere membership may by necessity involve personal and knowing participation in persecutorial acts.

[25] In the case at bar, the panel stated as follows at page 2 of its decision:

> After giving the principal claimant the opportunity to present her oral and documentary evidence, the panel assessed all the evidence in order to determine whether the two factors constituting complicity—shared common purpose and knowledge—are present in this case.
> [Emphasis added]

[26] The applicant submitted a large volume of evidence concerning MLC's activities as a perpetrator of human rights violations. However, the panel stated as follows with regard to how this organization should be qualified:

> With regard to the MLC being a movement with a limited, brutal purpose, the Minister's representative failed to demonstrate that a group deprived of any legal means to change a dictatorial regime would be wrong to turn to justifiable violence. In fact, the documentary evidence demonstrates that as soon as he came into power, President Kabila put an end to the democratic process and established a dictatorship. The MLC rebellion was aimed at establishing democracy, which does not clear the perpetrators of the atrocities committed against civilians from being denounced.

[27] In light of the magnitude of the documentary evidence, the Court finds the panel's statement to be patently unreasonable. No analysis of very relevant evidence about the MLC was done or mentioned. The Court's intervention is therefore required, since the panel did not consider important and relevant elements in qualifying the MLC. The burden of explanation increases with the relevance of the evidence in question (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. 1425 (F.C.T.D.) (QL)).

[28] In addition, the panel did not comment on or analyze the many contradictions in the respondent's oral testimony regarding the written documentation she submitted when she entered the country and the documentation submitted to the Americans when she claimed refugee status in the U.S. This constitutes important evidence needed to establish whether or not the respondent should be excluded.

[29] The parties did not submit any questions for certification, and this case does not involve any.

JUDGMENT

THE COURT ORDERS that:

1. The application for judicial review is allowed, and the matter is remitted to a differently constituted panel for redetermination. No question is certified.

"Michel Beaudry"
Judge

Certified true translation
Jason Oettel

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3034-06
STYLE OF CAUSE:	**MINISTER OF CITIZENSHIP AND IMMIGRATION v. AJEMA MOLEBE LESLIE KAKRA NAOMI MOTEMONA AMBA**
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	January 8, 2007
REASONS FOR JUDGMENT AND JUDGMENT BY:	Beaudry J.
DATED:	February 8, 2007

APPEARANCES:

Annie van der Meerscen	FOR THE APPLICANT
Luc R. Desmarais	FOR THE RESPONDENT

SOLICITORS OF RECORD:

John Sims, Q.C. Deputy Attorney General of Canada	FOR THE APPLICANT
Luc R. Desmarais Montréal, Quebec	FOR THE RESPONDENT