Federal Court  Cour fédérale

Date: 20120605

Docket: IMM-8792-11

Citation: 2012 FC 689

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, June 5, 2012

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

JULIENNE UMUHOZA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The alternative to international protection that is protection from a country of nationality must not also be an alternative to the analysis of alleged fears of persecution. It is important to remember, on this issue, the Supreme Court's remarks in *Canada (Attorney General) v Ward*, [1993] 2 SCR 689. In such a case, there is no way to avoid a necessary analysis of the file:

> The right to apply for the status of permanent resident is but one of several consequences flowing from the characterization of a claimant as a Convention refugee. The Convention refugee also benefits from the right to remain in Canada (s. 4(2.1)), the right not to be deported to the country where the refugee has a well-founded fear of persecution (s. 53(1)) and the right to work while in Canada (s. 19(4)(*j*) of the *Immigration Regulations, 1978*, SOR/78-172). None of these provisions requires assurance that the claimant has exhausted his or her search for protection in every country of nationality. The exercise of assessing the claimant's fear in each country of citizenship at the stage of determination of "Convention refugee" status, before conferring these rights on the claimant, accords with the principles underlying international refugee protection. Otherwise, the claimant would benefit from rights granted by a foreign state while home state protection had still been available. The reference to other countries of nationality in s. 46.04(1)(*c*) is probably intended as a double-check on the refugee's lack of access to national protection, in case of changed circumstances or new revelations, before the significant status of permanent resident is bestowed. [Emphasis added.]

[2] In this case, the finding regarding fear of persecution in the country considered as an alternative to international protection by the panel warrants the intervention of this Court. In fact, the documentary evidence, an objective reflection of the fear of persecution, does not support the analysis of the Refugee Protection Division (RPD).

II. Judicial procedure

[3] This is an application for judicial review in accordance with subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), of a decision by the RPD of the Immigration and Refugee Board (IRB), dated November 16, 2011, that the applicant is neither a Convention refugee as defined in section 96 of the IRPA nor a person in need of protection under section 97 of the IRPA.

III. Facts

[4] The applicant, Julienne Umuhoza, was born in Goma, in the Democratic Republic of the Congo (DRC). She is a Congolese citizen by birth.

[5] When she was 15 years old, during the war in North Kivu, she and her family members were displaced to Rwanda, where they acquired Rwandan citizenship.

[6] After her university studies, the applicant got a job as a journalist for the New Times in Kigali. In the course of her employment, she interviewed important people from the Rwandan body politic. Consequently, she alleges that she was approached by the Rwandan intelligence services, who accused her of sowing dissent. She was arrested but was able to escape after her family bribed her guard.

[7] The applicant, after obtaining a visa for the United States, sought protection in Canada, alleging a fear of persecution in Rwanda by reason of her political opinion, and in the DRC by reason of her Rwandan ethnicity.

IV. Decision under review

[8] The RPD, relying on *Loi nº 04/024, du 12 novembre 2004, relative à la nationalité congolaise* (Congolese law), found that the applicant could reinstate her Congolese nationality by complying with certain formalities. Consequently, the RPD analyzed only the applicant's alleged risk of persecution in the DRC concerning her ethnicity.

[9] On the basis of this finding, the RPD did not analyze the situation in Rwanda.

[10] Referring to the documentary evidence, the RPD was of the opinion that there is no "serious possibility of persecution in the DRC by reason of the claimant's Rwandan ethnicity" (RPD's decision at paragraph 18).

[11] Regarding subsection 97(1) of the IRPA, even though it stated that the human rights situation in the DRC is "dreadful" (RPD's decision at paragraph 21), the RPD was of the opinion that the situation gives rise to only a generalized risk faced by all Congolese.

V. Issues

[12] (1) Did the RPD err by finding that the applicant has Congolese nationality?

(2) If not, did the RPD err by finding that the applicant did not have a well-founded fear of persecution in the DRC?

VI. Relevant statutory provisions

[13] The following provisions of the IRPA apply in this case:

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 opinion,	**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*) is outside each of their	*a*) soit se trouve hors de tout

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.

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

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

every part of that country and is not faced generally by other individuals in or from that country,	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, unless imposed in disregard of accepted international standards, and	(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) 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.
Person in need of protection	**Personne à protéger**
(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.

VII. Position of the parties

[14] The applicant maintains that the RPD erred by not considering the basic conditions necessary for the reinstatement of Congolese nationality. Thus, in addition to complying with formalities, the applicant, who lost her Congolese nationality to acquire Rwandan nationality, must meet the basic conditions set by Congolese law, such as establishing ties to the DRC.

[15] In the alternative, she submits that the RPD erred by applying 96 and by refusing to apply section 97 of the IRPA. Relying on the documentary evidence, she submits that there is no internal flight alternative in Kinshasa.

[16] The respondent argues that the RPD's finding regarding the reinstatement of the applicant's Congolese nationality is supported by the documentary evidence. He specifies that the applicant failed to support her interpretation of Congolese law with expert evidence.

[17] Regarding fear of persecution in the DRC, he argues that the RPD adequately analyzed the documentary evidence to conclude that the applicant did not face a risk of persecution by reason of her ethnicity.

VIII. Analysis

a. Did the RPD err by finding that the applicant has Congolese nationality?

[18] This issue involves a factual assessment subject to a high degree of deference. The standard of review is therefore reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190; *Williams v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 126, [2005] 3 FCR 429 (QL/Lexis) (*Williams*) at paragraph 17).

[19] In *Williams*, the Federal Court of Appeal set out the applicable test for this:

> 22 I fully endorse the reasons for judgment of Rothstein J., and in particular the following passage at paragraph 12 [[1993] FCJ No 576 (QL)]:
>
> > The condition of not having a country of nationality must be one that is beyond the power of the applicant to control.

> The true test, in my view, is the following: if it is within the control of the applicant to acquire the citizenship of a country with respect to which he has no well-founded fear of persecution, the claim for refugee status will be denied. While words such as "acquisition of citizenship in a non-discretionary manner" or "by mere formalities" have been used, the test is better phrased in terms of "power within the control of the applicant" for it encompasses all sorts of situations, it prevents the introduction of a practice of "country shopping" which is incompatible with the "surrogate" dimension of international refugee protection recognized in *Ward* and it is not restricted, contrary to what counsel for the respondent has suggested, to mere technicalities such as filing appropriate documents. This "control" test also reflects the notion which is transparent in the definition of a refugee that the "unwillingness" of an applicant to take steps required from him to gain state protection is fatal to his refugee claim unless that unwillingness results from the very fear of persecution itself. Paragraph 106 of the *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention an the 1967 Protocol relating to the Status of Refugees* [Geneva, 1992] emphasizes the point that whenever "available, national protection takes precedence over international protection," and the Supreme Court of Canada, in *Ward*, observed, at page 752, that "[w]hen available, home state protection is a claimant's sole option." [Emphasis added.]

[20] In this case, the RPD, referring to *Williams*, found, in light of the relevant sections of the Congolese law and the documentary evidence, that the applicant could reinstate her nationality by complying with formalities.

[21] The RPD referred primarily to tab 3.8 of the National Documentation Package for the DRC dated April 29, 2011, entitled *Democratic Republic of Congo (DRC): Procedure and conditions for Congolese nationals of Rwandan origin to reinstate their nationality*, dated January 24, 2006, (tab 3.1), which states the following:

> A Doctor of History and researcher at the Centre for the Study of the African Great Lakes Region (Centre d'étude de la région des Grands lacs d'Afrique de l'Université d'Anvers) at the University of Antwerp in Belgium, who is also an expert in Central Africa and the Kivu region in particular (Centre d'étude de la région des Grands lacs d'Afrique n.d.), provided the information in this and the next paragraph during an 8 December 2005 telephone interview. With the passing of Law No. 04/024 of 12 November 2004, Congolese nationals of Rwandan origin automatically regained Congolese nationality. To the researcher's knowledge, no nationality reinstatement procedure has been planned and no conditions have been imposed; Congolese

> nationals of Rwandan origin are not required to report to the government authorities in order to reinstate their Congolese nationality. In cases of doubt, the person concerned must go to his or her chieftaincy of origin to obtain documentary evidence that he or she is a Congolese national, or the person must find five people to attest to his or her nationality if residing far from his or her place of origin. The same is true for all other Congolese.

[22] It also seems that the same document should have attracted the RPD's attention to the DRC's ethnic background, which will be addressed more fully in the analysis of the fear of persecution:

> The Kivu region expert also stated that the problem does not reside in Congolese nationals of Rwandan origin reinstating their nationality, but in the prevailing mistrust between them and members of other ethnic groups, particularly in Kivu. That mistrust has also been exacerbated by many years of war in DRC since 1996 (8 Dec. 2005). [Emphasis added.]

[23] Upon reading the RPD's reasons, this Court is convinced that the approach set out in *Williams* with respect to the power to reinstate nationality was followed.

[24] Thus, it is open to the applicant to reinstate her Congolese nationality in that she has, as described in *Williams*, the power to reinstate it if she wishes. In recognition of the above, the basic conditions of section 32 of the Congolese law, to which the RPD explicitly referred, do not constitute an obstacle to the reinstatement of Congolese nationality despite the fact that they are outside the scope of the term "formalities" in the applicant's mind.

[25] This Court cannot agree with the applicant regarding her interpretation of the Congolese law supported by the new documents submitted in evidence, namely an excerpt from the Rwandan Constitution, the primary reason being the nature of this application. In this case, this Court is acting

on judicial review and cannot go beyond its role of reviewing the evidence to which the RPD had access.

[26] In addition, the applicant's testimony during the hearing pointed out the following elements:

(a) the applicant is of Congolese nationality by birth;

(b) the applicant's parents, who live in Rwanda, are of Congolese nationality;

(c) she did not request a Congolese passport because she did not express any need to do so.

(Tribunal Record (TR) at page 261)

[27] Even if this Court does not share the RPD's opinion, sufficient reasons justify it. It is also supported by the documentary evidence and therefore stands up to the analysis carried out under the reasonableness standard of review. The RPD did not err by finding that the DRC is a country of nationality to be considered in the refugee claim.

[28] Making a finding of nationality is not, however, decisive in this case; the country proposed as an alternative to international protection must also be able to offer protection (*Williams* at paragraph 22).

[29] In this case, it is important to note that the RPD did not pursue the reasoning put forward in *Williams* and did not analyze the protection that the DRC could offer to the applicant. The RPD was compelled to analyze the fear of persecution in the DRC that was alleged by the applicant.

(2) Did the RPD err by finding that the applicant did not have a well-founded fear of persecution in the DRC?

[30] A level of deference is required for this issue, but this Court "may, if [it] find[s] it necessary, look to the record for the purpose of assessing the reasonableness of the outcome" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 at paragraph 15).

[31] Contrary to *Williams*, the applicant expressed, during the hearing, a well-founded fear of ethnic persecution in the DRC because she is a Congolese national of Rwandan origin. To that end, it is important to note that the RPD did not challenge the subjective aspect of the fear of persecution. The RPD's finding regarding the fear of persecution is as follows:

> [18] In light of the available documentary evidence, the panel is of the opinion that there is no serious possibility of persecution in the DRC by reason of the claimant's Rwandan ethnicity. She alleged no other nexus to the Convention. Consequently, she is not a Convention refugee. [Emphasis added.]

[32] It is settled law that it is in the interest of a tribunal to consider relevant evidence that is contrary to its findings or risk committing a reviewable error (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35).

[33] In this case, it should be remembered that the RPD's analysis of the objective aspect of the fear of persecution was hasty. To support its finding, the RPD cited two excerpts from tab 13.1 of the National Documentation Package for the DRC dated April 29, 2011, entitled *Democratic Republic of the Congo: The treatment of the Banyamulenge, or Congolese Tutsis, living in Kinshasa and in the provinces of North Kivu and South Kivu*, No COD103417.FE, dated March 31, 2010. That document addresses the following situation:

> However, in correspondence sent to the Research Directorate on 22 February 2010, the manager of *Le Phare* stated that the Banyamulenge are bothered in the Kivu region by the presence of the Democratic Forces for the Liberation of Rwanda (Forces démocratiques de libération du Rwanda, FDLR), a Rwandan Hutu rebel group (GlobalSecurity.org n.d.), that creates suspicion, particularly in South Kivu (*Le Phare* 22 Feb. 2010). Moreover, according to the Hj Representative, during sporadic attacks, Hutu rebels with the FDLR-who target mainly the Banyamulenge-commit [translation] "exactions, such as rape, massacres, theft and veritable manhunts, forcing civilians to flee their homes, which are subsequently burned" (Hj 22 Feb. 2010). [Emphasis added.]

[34] Furthermore, tab 2.5 of the National Documentation Package for the DRC dated April 29, 2011, entitled *Country of Origin Information Report: Democratic Republic of the Congo*, of the United Kingdom, dated June 30, 2009, provides the following clarifications on risk of persecution based on ethnicity:

> 21.03 Freedom House's Freedom in the World Survey 2008 reported:
>
> > "Societal discrimination based on ethnicity is practiced widely among the country's 200 ethnic groups, particularly against the various indigenous Pygmy tribes and the Congolese Banyamulenge Tutsis. The ongoing fighting in the eastern Kivu region is driven in part by ethnic rivalries. The ubiquity of firearms and deep mutual resentment over land security has helped to harden ethnic identities." **[14a] (Political Rights and Civil Liberties)**
>
> 21.05 In a similar vein, Human Rights Watch's (HRW) November 2008 report, 'We will crush you' recorded:
>
> > "During a bitter [2006 Presidential] campaign both candidates tried to mobilize ethnic and regional loyalties to win votes. Bemba, member of a well-known business and political family from the northwestern province of Equateur, portrayed himself as 'One Hundred Percent Congolese,' implying that Kabila was a foreigner. Bemba supporters stressed that Kabila was unable to speak Lingala (the main language of western Congo) and raised questions about his parentage, alleging that his mother was a Rwandan Tutsi." **[13c] (p13)**
>
> 21.10 An October 2007 Human Rights Watch (HRW) report, 'Renewed Crisis in North Kivu' recorded:

> "Congolese who speak Kinyarwanda (Rwandophones) represent less than five percent of the population of Congo and live largely in the two eastern provinces of North and South Kivu. Congolese Tutsi are a small part of the larger group of Rwandophones, numbering several hundred thousand and constituting between one and two percent of the total Congolese population of some 60 million. In South Kivu, Tutsi are known locally as Banyamulenge, but this term does not apply to Tutsi living in North Kivu. The rapid rise of Tutsi to national political prominence in the 1990s followed by a sharp decline in their power, as well as the anti-Tutsi hostilities accompanying the process, form the essential context of the current political and military crisis in eastern Congo." **[13b] (p9)** [Emphasis added.]

[35] The document also addresses the potential hardship that individuals of Rwandan origin could encounter in the course of their steps to acquire nationality:

> 21.11 The August 2007 concluding observations of the UN Committee on the Elimination of Racial Discrimination stated: "While welcoming the adoption of the Act of 12 November 2004, granting the Banyarwanda Congolese nationality, the Committee is concerned to note that in practice Congolese nationality is particularly difficult to acquire by members of this group." **[15f] (p4)** A March 2009 Refugees International report, 'Nationality Rights for All: A Progress Report and Global Survey on Statelessness', concurred; "Despite a 2004 citizenship law granting citizenship to the Banyamulenge community, it is unclear whether the 300,000 to 400,000 of them living in Congo can obtain nationality documents or their rights as citizens in the ongoing conflict in eastern Congo." **[31b] (p29)**
>
> 21.12 The October 2007 HRW report noted: "The struggle over North Kivu was embittered by ethnic hostilities, with Nkunda and his movement identified with Tutsi, while many other North Kivu residents, as well as most FDLR [he Democratic Forces for the Liberation of Rwanda] combatants, were Hutu. Both Tutsi and Hutu remembered past discrimination and violence against people of their ethnic group in Congo, and in neighboring Rwanda and Burundi. Both groups asserted the need to protect themselves from the other." **[13b] (p4)**
>
> 21.13 Refugees International's March 2009 report, provided a brief history of the Banyamulenge in the Democratic Republic of Congo, which concluded by noting: "In the name of defending Tutsis against oppression in North Kivu, a rebel army consisting primarily of Banyamulenge and commanded by General Laurent Nkunda has been fighting the government. Violence from this conflict has displaced hundreds of thousands of people. In early 2009,

> General Nkunda was arrested, a development with uncertain implications for conflict in the region." **[31b] (p29)**. [Emphasis added.]

[36] In light of these reports, the RPD's finding that the applicant was not objectively subject to persecution by reason of her ethnicity is unreasonable. In fact, these excerpts cannot support the RPD's finding that there is not a "serious possibility of persecution" (RPD's decision at paragraph 18). As a result, the RPD's decision as a whole is flawed.

[37] Moreover, the Court must point out that the RPD's reasoning is inappropriate with respect to the specific circumstances of this case. In fact, the RPD disregarded the factual importance of the displacement of the applicant's family from the DRC to Rwanda, fleeing ethnic persecution. On this point, the RPD found that this displacement did not constitute compelling reasons under subsection 108(4) of the IRPA without putting it into context in its analysis of section 96 of the IRPA.

IX. Conclusion

[38] If the RPD had the opportunity to study the ethnic context of the situation in the neighbouring countries of the DRC and Rwanda, it should have perhaps paid attention, in a comprehensive manner, to the documentary evidence that was available; that evidence could not be ignored in the specific context of the examination of an alternative to international protection that the RPD had intended to be objective.

[39] For all of these reasons, the RPD's decision is unreasonable further to the analysis of the evidence considered in its entirety by this Court; therefore, the application for judicial review is allowed and the matter is referred back to a differently constituted panel for redetermination.

JUDGMENT

THE COURT ORDERS that the application for judicial review be allowed and the matter be referred back to a differently constituted panel for redetermination. No question of general importance arises for certification.

"Michel M.J. Shore"
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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