Federal Court  Cour fédérale

Date: 20160304

Dockets: IMM-3933-15
IMM-3934-15

Citation: 2016 FC 272

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, March 4, 2016

PRESENT: The Honourable Mr. Justice LeBlanc

Docket: IMM-3933-15

BETWEEN:

EMMANUELLA NTAKIRUTIMANA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: IMM-3934-15

AND BETWEEN:

AIMABLE TUYSIENGE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

[1] The applicants in these two dockets are brother (Aimable) and sister (Emmanuella). They are originally from Rwanda and are seeking judicial review of a decision made by a visa officer working at the Canadian High Commission in South Africa (the Officer), under the terms of subsection 139(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations). The decision rejected their application for permanent residence as members of the class of Convention refugees abroad or the class of humanitarian-protected persons abroad. This decision was rendered on June 26, 2015, at an interview they both attended.

[2] Given that these two cases deal with related facts and similar issues, I will address them both in a single judgment, which will be recorded in each of the files.

[3] The applicants left Rwanda for South Africa in May 2010, two weeks apart, to attend the Soccer World Cup, which was taking place there at the time. They each had a visitor's visa. Shortly thereafter, in June 2010, the South African authorities granted them refugee status. They claim that they want to immigrate to Canada because they no longer feel safe in South Africa due to the widespread xenophobia there, and because the protection provided by their refugee status is only temporary.

[4] The Officer determined that the applicants were not eligible for permanent resident visas under the terms of subsection 139(1) of the Regulations on the grounds that they had a durable solution in South Africa, since (i) they had been living there for five years already; (ii) they had refugee status there, which afforded them, for all intents and purposes, the same rights and

privileges as permanent residents (access to public health care and social services, the right to study and to work, and mobility rights); (iii) in fact, Aimable was studying there and Emmanuella was working there; and (iv) they were both likely eligible for permanent resident status in South Africa.

[5] The Officer was also satisfied, despite fears expressed by the applicants regarding their personal safety, that the widespread violence and xenophobia in South Africa affect all South Africans, that measures had been taken by the authorities to address this issue quickly, and that, like all South Africans, protection by the State was available to them and that, as a result, the prospect of a durable solution in this country was not therefore compromised.

[6] The applicants feel that the Officer made an unreasonable decision that was contrary to the principles of procedural fairness, by failing to consider the insecurity of their refugee status in South Africa, which is still subject to renewal and which can only be made permanent through certification by an administrative body (the "Standing Committee") created by South African refugee protection law—a certification they have never obtained. They feel that the said decision is all the more flawed because at the time it was rendered, Aimable's refugee status had expired and had still not been renewed by the South African authorities, while Emmanuella's was about to expire in September 2015, with no indication that it would be renewed.

[7] The applicants do not make any argument against the Officer's determination regarding the allegation that they no longer feel safe in South Africa.

[8] The matter of whether someone filing an application under subsection 139(1) of the Regulations has a reasonable prospect of a durable solution within a reasonable period of time in a country other than Canada is a mixed question of fact and law and requires that the reasonableness standard be applied (*Barud v Canada (Citizenship and Immigration)*, 2013 FC 1152, at paragraph 12, 442 FTR 123 [*Barud*]; *Dusabimana v Canada (Citizenship and Immigration)*, 2011 FC 1238, at paragraph 20 [*Dusabimana*]; *Mushimiyimana v Canada (Citizenship and Immigration)*, 2010 FC 1124, at paragraph 21[*Mushimiyimana*]; *Qurbani v Canada (Citizenship and Immigration)*, 2009 FC 127, at paragraph 8; *Kamara v Canada (Citizenship and Immigration)*, 2008 FC 785, at paragraph 19). In keeping with this standard, the Court must show deference concerning the conclusions drawn by the Officer and consequently intervene only where these conclusions do not show the existence of justification, transparency and intelligibility or do not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at paragraph 47).

[9] The applicants have not convinced me that there is reason, in this case, to intervene. Nor have they convinced me that the issue for which they criticized the Officer is a procedural fairness issue. The failure to account for real evidence, if any such failure is established, concerns the reasonableness of the decision, and not its procedural fairness, as appears, for example, in section 18.1(4) of the *Federal Courts Act*, R.S.C. (1985) c. F-7, which sets out the Court's intervention power with regard to judicial review (see also *Persaud v Canada (Citizenship and Immigration)*, 2012 FC 274, at paragraph 7, 406 FTR 42; *Rivera v Canada (Citizenship and Immigration)*, 2009 FC 814, at paragraph 46, 351 FTR 267; *Murillo v Canada (Citizenship and Immigration)*, 2010 FC 514, at paragraph 12).

[10] Subsection 139(1) of the Regulations reads as follows:

139 (1) A permanent resident visa shall be issued to a foreign national in need of refugee protection, and their accompanying family members, if following an examination it is established that	139 (1) Un visa de résident permanent est délivré à l'étranger qui a besoin de protection et aux membres de sa famille qui l'accompagnent si, à l'issue d'un contrôle, les éléments suivants sont établis :
(a) the foreign national is outside Canada;	a) l'étranger se trouve hors du Canada;
(b) the foreign national has submitted an application for a permanent resident visa under this Division in accordance with paragraphs 10(1)(a) to (c) and (2)(c.1) to (d) and sections 140.1 to 140.3;	b) il a fait une demande de visa de résident permanent au titre de la présente section conformément aux alinéas 10(1)a) à c) et (2)c.1) à d) et aux articles 140.1 à 140.3;
(c) the foreign national is seeking to come to Canada to establish permanent residence;	c) il cherche à entrer au Canada pour s'y établir en permanence;
(d) the foreign national is a person in respect of whom there is no reasonable prospect, within a reasonable period, of a durable solution in a country other than Canada, namely	d) aucune possibilité raisonnable de solution durable n'est, à son égard, réalisable dans un délai raisonnable dans un pays autre que le Canada, à savoir :
(i) voluntary repatriation or resettlement in their country of nationality or habitual residence, or	(i) soit le rapatriement volontaire ou la réinstallation dans le pays dont il a la nationalité ou dans lequel il avait sa résidence habituelle,
(ii) resettlement or an offer of resettlement in another country;	(ii) soit la réinstallation ou une offre de réinstallation dans un autre pays;
(e) the foreign national is a member of one of the classes prescribed by this Division;	e) il fait partie d'une catégorie établie dans la présente section;

(f) one of the following is the case, namely	f) selon le cas :
(i) the sponsor's sponsorship application for the foreign national and their family members included in the application for protection has been approved under these Regulations,	(i) la demande de parrainage du répondant à l'égard de l'étranger et des membres de sa famille visés par la demande de protection a été accueillie au titre du présent règlement,
(ii) in the case of a member of the Convention refugee abroad class, financial assistance in the form of funds from a governmental resettlement assistance program is available in Canada for the foreign national and their family members included in the application for protection, or	(ii) s'agissant de l'étranger qui appartient à la catégorie des réfugiés au sens de la Convention outre-frontières, une aide financière publique est disponible au Canada, au titre d'un programme d'aide, pour la réinstallation de l'étranger et des membres de sa famille visés par la demande de protection,
(iii) the foreign national has sufficient financial resources to provide for the lodging, care and maintenance, and for the resettlement in Canada, of themself and their family members included in the application for protection;	(iii) il possède les ressources financières nécessaires pour subvenir à ses besoins et à ceux des membres de sa famille visés par la demande de protection, y compris leur logement et leur réinstallation au Canada;
. . .	. . .

[11] It is well established that it was the applicants' responsibility to convince the Officer, in order for their application for permanent residence in Canada, as members of the class of Convention refugees abroad or the class of humanitarian-protected persons abroad, to be approved, that they had no reasonable prospect of a durable solution within a reasonable period of time in South Africa (*Dusabimana*, supra at paragraph 54; *Salimi v Canada (Citizenship and Immigration)*, 2007 FC 872, at paragraph 7; *Mushimiyimana*, supra at paragraph 20). This burden is stringent.

[12] It is also well established that the matter of whether someone filing an application under subsection 139(1) of the Regulations has a reasonable prospect of a durable solution within a reasonable period of time in a country other than Canada requires a forward-looking assessment of his or her personal situation and of the situation in his or her country of residence (*Barud*, supra at paragraph 12–15). This is precisely what the Officer did in this case.

[13] As the Officer noted, the applicants have been resettled in South Africa since 2010 and have had access, during this time, as refugees, to all of the benefits associated with permanent resident status in this country. One is attending school there, the other is working there. They have access to the public health-care system and to social services and have freedom of movement rights.

[14] It is true that the applicants' refugee status must be renewed periodically. However, there is no evidence that suggests they might be expelled or returned to Rwanda if their status were not—or had not been—renewed, or that people in their situation are, after a certain period of time, systematically expelled or returned to their country of origin. Furthermore, South Africa is

a signatory country of the Refugee Convention, and the principle of non-refoulement is written into in its legislation.

[15] There is no further evidence in the file to enlighten the Court as to the certification process for refugee status in South Africa, whether there is one, or whether the applicants used it. The Court also notes that there is nothing in the file which suggests that the applicants filed an application for permanent residence with South African authorities. This may be explained by the fact that, according to the excerpts of South African legislation produced in evidence, permanent residence cannot be acquired until after five years of continuous residence in South Africa. At the time that the Officer rendered his decision, this prerequisite period of residence had, in all likelihood, only just been completed. Therefore, the Officer cannot be criticized for having judged that permanent resident status would be available to the applicants.

[16] In any case, as in the matter of protection by the State, the solution offered by the foreign country certainly does not need to be perfect (*Meci v. Canada (Citizenship and Immigration)*, 2014 FC 892, at paragraph 27; *Glasgow v. Canada (Citizenship and Immigration)*, 2014 FC 1229, at paragraph 36, *Riczu v. Canada (Citizenship and Immigration)*, 2013 FC 888, at paragraph 9); it is sufficient, under the terms of subsection 139(1), for it to be durable. The Court has already determined that a person with refugee status in South Africa would have a reasonable prospect of a durable solution there, within the meaning of subsection 139(1) of the Regulations, even if he or she had been the victim of a crime in the past (*Barud*, supra at paragraph 15). I see no reason to find otherwise in this case. The impermanent nature of the applicants' refugee status does not, in itself, justify a different conclusion, given their level of resettlement in South Africa and the opportunities available to them to obtain permanent legal

status there, either as refugees or as permanent residents. As the Officer noted, [translation] "there is a clear path to permanent residence" for the applicants, and I see no evidence before me, evidence that the applicants were supposed to have brought, that this conclusion, at the time the Officer came to it, was flawed or that things have since moved in the opposite direction.

[17] Although it seems that the applicants would have preferred for this part of the analysis to be more clearly stated in the Officer's decision, it seems clear enough to me to meet the requirements of reasonableness. The Court recalls that the reasons for a decision made by an administrative body do not have to be perfect (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, at paragraph 18, [2011] 3 SCR 708). Furthermore, insofar as the applicants now complain that the Officer did not specifically address the issue of certification for their refugee status, the Court is satisfied that this argument, as the respondent pointed out, was never raised as such with the Officer.

[18] In summary, the Officer accurately depicted the applicants' situation and took into account the situation in South Africa and the efforts made by the State to curb the crime and xenophobia existing in the country. From the point of view of a forward-looking assessment of the evidence on record, I cannot find that the Officer, by stating that the applicants did not discharge their burden to show that they had no reasonable prospect of a durable solution in South Africa, drew an unreasonable conclusion—that is, a conclusion falling outside of a range of possible acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, supra at paragraph 47).

[19] As the respondent notes, it appears that the applicants no longer want to live in South Africa because of the general conditions prevailing in the country and because they are hoping to find better jobs in Canada, where their other sister already lives. Yet this does not mean, as the respondent points out, that no durable solution exists for them in South Africa.

[20] In the matter of *Mohamed v Canada (Minister of Citizenship and Immigration)*, 127 FTR 241, 70 ACWS (3d) 691, Judge Marshall Rothstein, from the Federal Court, recalls that "[t]he Geneva Convention exists for persons who require protection and not to assist persons who simply prefer asylum in one country over another. The Convention and the Immigration Act should be interpreted with the correct purpose in mind." I respectfully consider this reminder to be rather fitting in the circumstances of this matter.

[21] Each applicant's application for judicial review will therefore be dismissed. The parties' attorneys have agreed that there is no cause, in this case, to certify a question to the Federal Court of Appeal. I agree.

ORDER

THE COURT ORDERS that:

1. The applications for judicial review in dockets IMM-3933-15 and IMM-3934-15 are dismissed;

2. There is no question to be certified.

"René LeBlanc"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3933-15
STYLE OF CAUSE:	EMMANUELLA NTAKIRUTIMANA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
AND DOCKET:	IMM-3934-15
STYLE OF CAUSE:	AIMABLE TUYSIENGE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	FEBRUARY 24, 2016
ORDER AND REASONS:	LEBLANC J.
DATED:	MARCH 4, 2016

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