Date: 20060901

Docket: IMM-7411-05

Citation: 2006 FC 1056

Ottawa, Ontario, September 1, 2006

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

ALPHONSINE NDIKUMANA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

OVERVIEW

[1] The burden of presenting "clear and convincing evidence" to prove a state's inability to protect should not be an impossible burden. It appears to defeat the purpose of international protection when an unequivocally credible claimant is required by a specialized tribunal to risk life and limb by being told to seek ineffective protection from state authorities in the state from which the claimant fled.

If the specialized tribunal reaches its conclusion by appearing to ignore the country condition evidence and without clear evidence in contradiction to the claimant's testimony than the state from which the claimant fled cannot be said to offer state protection to that specific claimant.

For an analysis of country condition evidence outside of a vacuum, an examination of the "objective evidence" must include, where necessary, historical, political and cultural antecedents, coupled with the current situation; thereby, the specialized tribunal demonstrates it is not unreasonable or manifestly unreasonable, as the case may warrant, in its analysis.

It is incumbent on the specialized tribunal to recognize and acknowledge the encyclopedia of references, dictionary of terms, thus, gallery of portraits which often are contradictory and, at the very least, require brief articulation as to why one set of facts and interpretations was chosen over another. Only then can an adequately expressed decision emerge in respect of a specific claimant.

Without a transparently articulated decision in this regard by a specialized tribunal, the analysis of the context and circumstances of the claimant cannot be considered reasonable to any degree in judicial review and must be returned for redetermination by the specialized tribunal.

JUDICIAL PROCEDURE

[2] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), for judicial review under the *Federal Courts Act*, R.S.C. 1985, c. F-7 of a decision of the Refugee Protection Division of the Immigration and Refugee Board (Board), dated November 2, 2005, wherein the Board determined that the Applicant was not a Convention refugee or a person in need of protection.

BACKGROUND

[3] The Applicant, Ms. Alphonsine Ndikumana, is a citizen of Burundi. Her children, Kessy Gakura, who is seven, and Elisa Bettine Dushime, who is four, base their claim on their mother's claim by reason of their membership in a particular social group, namely family.

[4] Ms. Ndikumana is a Tutsi. In October 1993, her neighbourhood was attacked by militant Hutus who killed many of her neighbours and friends and burned down her home, believing she would die in the fire. She fled and, while hiding, recognized some of the attackers as her neighbours.

[5] In October 2004, a group of armed men (including two she recognized from the earlier massacre) appeared outside her home. They threatened her because, having seen her in the marketplace, they had discovered she had not died in the previous attack and were afraid she would testify against them. As other neighbours awoke and came to investigate the source of the noise, the attackers left. When she went to the authorities, she was told that the government did not have sufficient resources to post a soldier at each citizen's home for protection.

[6] On November 1, 2004, armed men returned and broke into her home. Ms. Ndikumana and her children fled while her husband hid in the house. The men vandalized her home and left a message stating she would die if she stayed in Burundi.

[7] Ms. Ndikumana and her husband decided to seek protection separately; he left on his own, heading to another town. As for Ms. Ndikumana and her children, after seeking protection from the military, they were brought to a friend's house. The friend made arrangements for them to leave Burundi for the United States on November 26, 2004. After ten days in the United States, Ms. Ndikumana and her children came to Canada and claimed refugee protection. She does not know where her husband is now.

DECISION UNDER REVIEW

[8] The Board did not question Ms. Ndikumana's credibility. They believed her story, accepting her testimony as credible. She did demonstrate a well-founded fear of persecution.

[9] The Board found, however, that there was state protection available to Ms. Ndikumana. The authorities did respond both times she was attacked and she gave them a report of the events at issue. The Board found that Ms. Ndikumana did not refute the presumption of state protection with clear and convincing evidence of the inability of the authorities in Burundi to protect her.

ISSUES

[10] Did the Board err in determining that Ms. Ndikumana is not a Convention refugee or a person in need of protection because of the Board's finding that there is state protection available to her in Burundi?

ANALYSIS

Statutory scheme

[11] According to section 96 of the IPRA, a person is a refugee if they have a well-founded fear of persecution which is based on their race, religion, nationality, membership in a particular social group or political opinion:

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 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	*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*) 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.	*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.

[12] Subsection 97(1) of IRPA explains what constitutes a 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	**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*) to a danger, believed on substantial grounds to exist, or torture within the meaning of Article 1 of the Convention Against Torture; or	*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*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	*b*) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,	(i) elle ne peut, ou de ce fait, ne veut se réclamer de la protection de ce pays,
(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,	(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) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of	(iii) la menace ou le risque ne résulte pas de sanctions légitimes – sauf celles infligées au mépris des normes

	accepted international standards, and		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.

Standard of review

[13] The standard of review for the issue of state protection is that of reasonableness simpliciter as it is a mixed question of fact and law which involves applying a legal standard, "clear and convincing confirmation of a state's inability to protect" (*Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, [1993] S.C.J. No. 74 (QL), at paragraph 50), to a set of facts (*Chaves v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 193, [2005] F.C.J. No. 232 (QL), at paragraphs 9-12).

Did the Board err in determining that Ms. Ndikumana is not a Convention refugee or a person in need of protection because of the Board's finding that there is state protection available to her in Burundi?

[14] Absent a situation of complete breakdown of state apparatus such as was found in *Zalzali v. Canada (Minister of Citizenship and Immigration)*, [1991] 3 F.C. 605 (F.C.A.), [1991] F.C.J. No. 341 (QL), it is generally presumed that a state is able to protect its citizens. A refugee claimant must therefore provide clear and convincing evidence of the state's inability to protect in order to rebut this presumption (*Ward*, above, at paragraph 50 and 52; *Mendivil v. Canada (Secretary of State)* (1994), 167 N.R. 91 (F.C.A.)).

> The issue that arises, then, is how, in a practical sense, a claimant makes proof of a state's inability to protect its nationals as well as the reasonable nature of the claimant's refusal actually to seek out this protection. On the facts of this case, proof on this point was unnecessary, as representatives of the state authorities conceded their inability to protect Ward. Where such an admission is not available, however, clear and convincing confirmation of a state's inability to protect must be provided. For example, a claimant might advance testimony of similarly situated individuals let down by the state protection arrangement or the claimant's testimony of past personal incidents in which state protection did not materialize. Absent some evidence, the claim should fail, as nations should be presumed capable of protecting their citizens. Security of nationals is, after all, the essence of sovereignty. Absent a situation of complete breakdown of state apparatus, such as that recognized in Lebanon in Zalzali, it should be assumed that the state is capable of protecting a claimant.
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> …
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> In summary, I find that state complicity is not a necessary component of persecution, either under the "unwilling" or under the "unable" branch of the definition. A subjective fear of persecution combined with state inability to protect the claimant creates a presumption that the fear is well-founded. The danger that this presumption will operate too broadly is tempered by a requirement that clear and convincing proof of a state's inability to protect must be advanced. I recognize that these conclusions broaden the range of potentially successful refugee claims beyond those involving feared persecution at the hands of the claimant's nominal government. As long as this persecution is directed at the claimant on the basis of one of the enumerated grounds, I do not think the identity of the feared perpetrator of the persecution removes these cases from the scope of Canada's international obligations in this area. On this note, I now turn to a consideration of these enumerated grounds. (*Ward*, above)

[15] A state’s inability to provide perfect protection is insufficient to establish that it is unwilling or unable to provide reasonable protection in the circumstances. Thus, it is not sufficient for a claimant to show that his government has not always been effective in protecting persons in his particular situation (*Canada (Minister of Employment and Immigration) v. Villafranca*, [1992] F.C.J. No. 1189 (F.C.A.) (QL); *Ward*, above.).

> No government that makes any claim to democratic values or protection of human rights can guarantee the protection of all of its citizens at all times. Thus, it is not enough for a claimant merely to show that his government has not always been effective at protecting persons in his particular situation. Terrorism in the name of one warped ideology or another is a scourge afflicting many societies today; its

> victims, however much they may merit our sympathy, do not become convention refugees simply because their governments have been unable to suppress the evil. Where, however, the state is so weak, and its control over all or part of its territory so tenuous as to make it a government in name only, as this Court found in the case of *Zalzali v. Canada (Minister of Employment and Immigration)*, a refugee may justly claim to be unable to avail himself of its protection. Situations of civil war, invasion or the total collapse of internal order will normally be required to support a claim of inability. On the other hand, where a state is in effective control of its territory, has military, police and civil authority in place, and makes serious efforts to protect its citizens from terrorist activities, the mere fact that it is not always successful at doing so will not be enough to justify a claim that the victims of terrorism are unable to avail themselves of such protection
> (*Villafranca*, above)

[16] Ms. Ndikumana has provided clear testimony and convincing evidence that the state of Burundi is unable to reasonably protect her in her point specific situation, thus rebutting the presumption of state protection in her regard.

[17] Ms. Ndikumana testified that she was specifically targeted because she had witnessed the brutal attacks and killings of several people during the 1993 genocide in Mubimbi by Hutu militants, supporters of the former president Melchior Ndadaye.

[18] Ms. Ndikumana further testified that, several years after the genocide, some of the perpetrators who had returned from exile in Tanzania were able to recognize her in the central market of Bujumbura. Several of these men followed her to her home, armed with grenades and machetes, determined to kill her in an attempt to prevent her from testifying in court against them.

[19] Ms. Ndikumana provided oral testimony and documentary evidence to the effect that she sought protection from the authorities after having experienced many incidents of harassment and death threats but was informed that “les forces de l’ordre ne sont pas en mesure de protéger chaque

ménage". Ms. Ndikumana submits that the Board misconstrued the evidence when it stated that she had sought "des garanties de protection supérieures à celles dont dipose l'État de Burundi." She testified that she was personally in danger and, as such, was reasonably expected to seek some form of protection from her own government. She further testified that she did not feel her government could provide effective protection.

[20] Respectfully, the Board made an erroneous finding when it stated that Ms. Ndikumana requested a level of protection which is above what a country such as Burundi can be expected to provide. According to her narrative in the PIF, the military did not state that the level of protection requested by Ms. Ndikumana was above was they could provide. The military simply stated that they did not have the manpower at that time to assist her in her request for an investigation since most of their officers were on the front fighting the civil war. At no time did Ms. Ndikumana request a "superior" level of protection. One would expect anyone in her situation to request that the matter be investigated by the military.

[21] The documentary evidence further established that, in the current political and military situation of Burundi, extrajudicial executions of civilians remain a serious problem that is rarely investigated. This amounts to government inability to adequately act or even react in the circumstances of this specific case (cas d'espèce).

[22] Ms. Ndikumana had an obligation to approach her state for protection in situations in which protection might reasonably be forthcoming. Furthermore, she requested and expected a standard of protection adequate to the level and severity of the persecution she was facing. The fact that the

military attended her residence after each attack to take a report does not demonstrate actual or adequate protection. There is no evidence that Ms. Ndikumana requested any type of protection other than an investigation by the police and their cooperation in contacting the assailants, who were known to her.

[23] The simple willingness of the state to protect its citizens does not constitute protection; the state must provide actual protection. This was held by Madam Justice Danièle Tremblay-Lamer in *Bobrik v. Canada (Minister of Citizenship and Immigration)*, [1994] F.C.J. No. 1364 (QL), at paragraph 13:

> Thus, even when the state is willing to protect its citizens, a claimant will meet the criteria for refugee status if the protection being offered is ineffective. A state must actually provide protection, and not merely indicate a willingness to help. Where the evidence reveals that a claimant has experienced many incidents of harassment and/or discrimination without being effectively defended by the state, the presumption operates and it can be concluded that the state may be willing but unable to protect the claimant.

[24] The burden of presenting "clear and convincing evidence" to prove the state's inability to protect should not be an impossible burden. It seems to defeat the purpose of international protection when the Board requires the claimant to risk her life seeking ineffective protection from the state of Burundi.

[25] The Board arrived at its conclusion by ignoring the country conditions in Burundi and without clear evidence to contradict Ms. Ndikumana's testimony that Burundi would not offer her effective protection.

CONCLUSION

[26] This Court finds that the Board erred in assessing the evidence and ignored evidence before it in concluding that state protection was available to Ms. Ndikumana. As the decision of the Board was neither based on the evidence before it, nor supported by this evidence, it is unreasonable. This application for judicial review is therefore granted and the decision is returned to the Board for redetermination.

JUDGMENT

THIS COURT ORDERS that

1. The application for judicial review be granted and that the decision be returned to the Board for redetermination;

2. No serious question of general importance be certified.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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