

Date: 20080717

Docket: IMM-468-08

Citation: 2008 FC 880

Ottawa, Ontario, July 17, 2008

PRESENT: The Honourable Orville Frenette

BETWEEN:

LIBERE KUBWAYO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision of the Immigration and Refugee Board, Refugee Protection Division (the “Board”) dated November 26, 2007, concluding that by his lack of credibility, Mr. Libere Kubwayo (the Applicant) was neither a “Convention refugee” nor a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the “IRPA”).

I. Issue

[2] Was the Board's decision reasonable?

[3] For the reasons that follow, I find that the Board's decision was unreasonable; consequently the application will be allowed.

II. Facts

[4] The Applicant is an ethnic Hutu born in 1978 in the Bujumbura rural province of Burundi. He alleged fear of the Tutsie militia groups, as well as the army and the Tutsi led government of Burundi, which accused him of sympathising with the Hutu movement.

[5] The Applicant left Burundi on November 26, 2004. He arrived in Canada on December 7, 2004 and claimed refugee protection that same day. His flight itinerary was as follows:

<u>Place of departure</u>	<u>Date</u>	<u>Means</u>	<u>Place of arrival</u>	<u>Date</u>
Bujumbura, Burundi	26/11/04	Plane	Addis Ababa, Ethiopia	26/11/04
Addis Ababa, Ethiopia	26/11/04	Plane	Rome, Italy	27/11/04
Rome, Italy	27/11/04	Plane	Washington, DC	27/11/04
Washington, DC	28/11/04	Plane	Newark, U.S.A.	28/11/04
Newark, U.S.A.	28/11/04	Bus	Buffalo, U.S.A.	28/11/04
Buffalo, U.S.A.	07/12/04	Taxi	Fort Erie, Canada	07/12/04

[6] Civil war broke out in Burundi in 1993. The Applicant was then 15 years old. He witnessed the attacks waged against Hutus and was victim of an attack on Hutu students at the University of

Burundi in 1999. His brothers fled to Tanzania and the family has not had word of their father who escaped the school, where he was an instructor following a raid of the school in 1996.

[7] From November 1999 to November 2003, the Applicant lived in hiding at his uncle's farm in the town of Gatumba, in the province of Bujumbura rural. He fled to the capital of Bujumbura in November 2003, when he was informed that the gendarmerie was issuing an arrest warrant against all the Hutus in Bujumbura district, including the Applicant. That is when he went into hiding at the home of Pastor Ntashimikiro, in the region of Kamenge up until he left Burundi to attend a religious conference in the U.S.A., under the assumed name of Pastor Deo Ndayishimiye.

[8] The Applicant's intention was to come to Canada, a bilingual country, and claim refugee status there. His refugee hearing was held on June 8, 2007 and the decision rendered on November 26, 2007.

III. Impugned decision

[9] The Board's decision is based primarily on its negative credibility findings. Notably, the Board drew an adverse inference from the inconsistencies between the information provided at the Fort Erie Port-of-Entry (POE) in December 2004, where the POE states that he had been a member of a rebel movement Front Défense Démocrate (FDD) from 1999-2004 and member of the Front pour la paix et la démocratie au Burundi (FRODEBU) from 1993 to 1999; yet he testified that he

was never a member of either movement or a political party but had merely attended political meetings.

[10] The Board was not persuaded by the Applicant's explanation of this discrepancy when he stated that this was all a misunderstanding that he was asked by Citizenship and Immigration Canada (CIC) officials if there was a party he favoured and that he replied that he favoured the FRODEBU during the pre-election period. He was categorical when he stated that he was never a member of either group and the dates the CIC officer included on the POE comes from the historical background he provided.

[11] The Board was not satisfied with the Applicant's explanation for this discrepancy. In fact, the Board deemed it not fallible that the Applicant would attribute this significant discrepancy to linguistic problems of his inability to follow or understand the Officer's French accent when the Applicant made no requests for interpretation or found any other errors in the Personal Information Form (PIF). Also, the Applicant signed the PIF and had ample opportunity subsequently and prior to the commencement of the hearing to correct any errors due to language in the PIF. He did not.

[12] The Applicant's credibility was further undermined in the Board's view because of the Applicant's position regarding the whereabouts of his father who fled to escape his attackers in 1996. To the Board, the Applicant said in his PIF that he did not know where his father went to but yet testified that he had fled to Tanzania with his brothers. The Applicant sought to clarify this discrepancy in the Board's mind by stating that his mother told him that she thought that his father

may have fled to Tanzania and even she did not have any certainty where he would be in Tanzania. The family has not had word from him since his disappearance in 1996. The Board was not convinced by this explanation.

[13] The Board also attributed little weight to one of the supporting documents provided by the Applicant, notably, the “Attestation of residence” issued on March 14, 2003 bearing the Applicant’s photograph. The Board stated that this document which the Applicant indicated is issued to residents of Gatumba, was issued in March 2003 when the Applicant had testified that he did not return to Gatumba until November 2003 or seven months later. In the Board’s view, the Applicant failed to provide a satisfactory explanation why the document in question, confirming his residence, was issued at a time when he was not even in Gatumba.

[14] In addition, the Board alluded to the fact that the Applicant did not claim refugee protection at the first port of call or indeed at the second but rather by-passed both Italy and the U.S.A. and came to Canada to seek refugee protection. The Board did not embrace the Applicant’s explanation that as a francophone, his intention was to come to Canada, a bilingual country, where he would be able to use his French and learn to speak English.

[15] Finally, the Board noted that these discrepancies notwithstanding, there was significant change in the ethnic composition of the governing forces in Burundi such that there was no objective fear of persecution should he return to his home country even as an intellectual Hutu from Bujumbura rural who had also lived abroad.

IV. Analysis

[16] It is trite law that credibility findings of the Board garner the highest degree of deference. Since its recent decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, 329 N.B.R. (2d) 1, the Supreme Court of Canada has established that the standard of review for such decisions is that of reasonableness. The Court stated at paragraph 47 in *Dunsmuir*, above:

[. . .] In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[17] As indicated by my colleague Madam Anne MacTavish, while findings of credibility are subject to the highest deference they are not sheltered from review. She states in *Kitoko v. Canada (MCI)*, 2004 FC 1508, 43 Imm. L.R. (3d) 82:

5 While subject to considerable deference, findings of credibility can be set aside where a decision is based on inferences that are not supported by the evidence: *Bains v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1144 at para. 11. Further, the failure of the Board to consider explanations offered by an applicant may also constitute a basis for setting aside a decision: *Owusu-Ansah v. Canada (Minister of Employment and Immigration)*, (1989), 8 Imm. L.R. (2d) 106 (F.C.A.).

[18] Applying this standard to the impugned decision after a careful review of the file, including the objective documentary evidence regarding the country conditions in Burundi and the transcripts of the hearing on June 8, 2007, I am not persuaded that the Board's findings fall within the range of possible acceptable outcomes in that it is based on inferences that are not supported by the evidence and fails to consider explanations offered by the Applicant.

[19] First, the Board ignored parts of the Applicant's oral testimony with respect to the information contained in his POE pertaining to his membership in the FDD and FRODEBU. The inconsistencies identified by the Board are based on the Board's own reading of the Applicant's evidence. Indeed as it should be. However, a review of the POE shows that while on page 4 of 6 it is indicated that the Applicant is a member of both organizations, the preceding page 3 of 6 states in response to the following question:

- c) Que craignez-vous si vous retourniez dans votre pays d'origine?
[Réponse] On m'accuse de sympathiser avec le mouvement
rebel. C'est un génocide là bas. Je crains être tué.

In other words, the Applicant's explanation of the discrepancy is supported by the information provided in the preceding information in the POE. The Applicant clearly states that he fears returning to Burundi because the government is accusing him of sympathizing with the Hutu movement. He did not state that he fears returning to his country because he was a member of either the FDD or the FRODEBU. It was therefore not reasonable for the Board to base its negative decision on this misinterpretation of the evidence before it or simply ignore the explanation provided.

[20] Second, the Board made an erroneous finding of fact by impugning the Applicant's credibility based on alleged inconsistent answers regarding the Applicant's father's whereabouts. Contrary to the Board's finding, the transcript of the hearing does not state that the Applicant thought that his father had fled to Tanzania with his brothers. The Board was clearly wrong.

[21] Third, the Board was also clearly wrong in its assessment of the supporting document provided by the Applicant attesting to his residency in Gatumba. The Board states that the document was issued in March 2003 when the Applicant was not a resident of the region. In fact, the evidence is quite the opposite. The evidence clearly shows that the Applicant resided in Gatumba commune until the end of 2003. Consequently, the Applicant was a resident when the document was issued to him in March 2003. Again, the Board was clearly wrong.

[22] Finally, the Board draws an adverse inference without a careful analysis of the facts of the Applicant's failure to seek asylum at the first opportunity. The Board states as follows:

When he left his country, the claimant first travelled to Italy. He did not seek protection there. Then he travelled to the U.S.A. on the 27th of November 2004. Again, he did not seek asylum there and travelled to Canada instead, where he made a claim at Fort Erie, on December 7th, 2004.

The panel finds that the claimant failed to seek protection at the first possible opportunity. He was asked why he failed to claim in the United States of America. His explanation for not claiming asylum there was that he did not speak English and that he chose to come to Canada because here he would be able to communicate in French.

While language considerations are important in most life decisions, the panel finds that when a person has been personally targeted for persecution and possible death, such considerations rarely carry much weight. The panel finds the claimant's failure to seek protection as soon as he could, also raises doubt as to his subjective fear.

[23] A careful review of the Applicant's travel itinerary indicates that the Applicant was in transit not only in Rome but also in Addis Ababa en route to Washington, DC, making it unlikely that he would have had an opportunity to claim asylum in either Italy or Ethiopia. His trajectory in the

United States of America shows that he arrived on November 27th from the Rome leg of his trip and flew the very next day to Newark, New Jersey, on November 28, 2004. From there, the evidence shows, he took a bus to Buffalo, New York that same day on November 28, 2004 heading towards Canada. According to his affidavit, after nine itinerant days in Buffalo, he took a taxi across the border to Fort Erie where he claimed asylum.

[24] When one considers the Applicant's itinerary and his explanation for coming to Canada for linguistic reasons, it was not reasonable for the Board to draw the inference that the Applicant failed to seek asylum at the first possible opportunity. It was not possible to do so in either Ethiopia or Italy and it is reasonable that he would not have done so in the United States based on the single minded trajectory of his route to the Canadian border.

[25] For these reasons, I find that the Board's credibility findings fall outside the range of possible reasonable outcomes based on the totality of the facts before it.

[26] There was no question requiring certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

- the application for judicial review of the Board's decision of November 26, 2007 is allowed;
- the decision of November 26, 2007 is quashed and the matter is returned to be re-determined by a differently constituted panel;
- no question is certified.

"Orville Frenette"

Deputy Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-468-08

STYLE OF CAUSE: Libere Kubwayo
v.
MCI

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**REASONS FOR JUDGMENT
AND JUDGMENT BY:** FRENETTE D.J.

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