

Federal Court



Cour fédérale

**Date: 20101110**

**Docket: IMM-4225-09**

**Citation: 2010 FC 1124**

**Ottawa, Ontario, November 10, 2010**

**PRESENT: The Honourable Mr. Justice O'Keefe**

**BETWEEN:**

**BEATRICE MUSHIMIYIMANA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), for judicial review of a decision of an immigration officer (the officer) of the Immigration Section, High Commission of Canada in Pretoria, South Africa (the Commission), dated June 5, 2009, wherein the applicant was refused permanent residence in Canada as a member of the Convention refugee abroad class.

[2] The applicant requests:

1. That the decision of the Board be quashed;
2. A declaration that the applicant is a Convention refugee;
3. In the alternative, a declaration that there are grounds upon which an officer should determine the applicant to be a Convention refugee; and
4. That the matter be referred back to the Commission for reconsideration in accordance with such orders this Court considers appropriate.

### **Background**

[3] The applicant fled to South Africa from her native Burundi with her parents and siblings on December 8, 1999. The family of mixed Hutu and Tutsi origin was being targeted by both ethnic groups. The family was granted Convention refugee status by South Africa in 2001, however, the family continued to face persecution from the Burundian community there. The applicant's father approached the United Nations High Commission for Refugees (UNHCR) who referred him to the Canadian Embassy to apply for resettlement. The applicant's father included all of his children in the application, but the applicant and her older brother, Richard Ndagijimana, were rejected because they were over 22 and both were married.

[4] The applicant's father, mother and five younger siblings left for Canada in October of 2005. The applicant and her brother then applied individually for resettlement in Canada and described in

a narrative the violent incidents from the Burundian community beginning in March of 2000. The applicant finalized her application on March 18, 2008. Shortly thereafter, the applicant alleges that new incidents of persecution arose, this time at the hands of the South African community, angry at foreigners for taking jobs. The applicant described these incidents in a letter to the Commission in May of 2008.

[5] The applicant and her husband, a fellow Burundian refugee, were interviewed by the officer on January 27, 2009 at the Canadian Consulate in Cape Town. The applicant alleges that the officer did not allow them to fully describe the incidents of persecution. The applicant also alleges that the officer told them there was no problem with the information on the security problems they were having, so when the officer asked at the conclusion if they had anything to add, the applicant only asked how long it would take for the application to be processed. At the conclusion of the interview, the officer said he was going to compare the information the applicant had provided with the information on her family's file in Pretoria.

[6] On June 5, 2009, the officer denied the application. The officer found that the last incident involving the applicant occurred in December of 2006 and that protection of the South African police could be obtained if further problems were to occur. The applicant had a durable solution in South Africa, in the officer's view, and could apply there for permanent residency and citizenship in the long term. The officer also cited the applicant's husband's gainful employment in South Africa since 2001 and that the applicant and her dependents had the right to work and study there.

[7] The applicant found the denial particularly striking in light of the fact that her older brother's application had been accepted.

### **Issues**

[8] The issues are as follows:

1. What is the standard of review?
2. Did the officer deny the applicant procedural fairness by relying on extrinsic evidence?
3. Did the officer contradict himself by finding that the applicant had both a founded claim and a durable solution?
4. Was it reasonable for the officer to conclude that the applicant had a durable solution in South Africa?

### **Applicant's Written Submissions**

[9] The applicant submits that it was unfair for the officer to rely on the extrinsic evidence from the files of the applicant's family members. The applicant was unaware of the contents of those files and had no opportunity to respond to any concerns the officer may have had regarding the contents.

[10] The officer appeared to acknowledge the applicant's need for resettlement when he stated that the claim appeared to be founded. Since the applicant's refugee status regarding persecution in

Burundi had already been confirmed, it can be inferred that the officer was referring to her claim against South Africa. It was incongruous for the officer to then go on to state that the applicant had a durable solution in the very same country. The reasons are not sufficiently clear to permit the applicant to know why her claim failed and this, submits the applicant, was an additional breach of the duty of fairness.

[11] On the merits, the applicant says that the officer's ultimate conclusion was unreasonable because it was based on an erroneous belief that the applicant would obtain permanent resident status in South Africa and because the officer ignored a key piece of evidence. The applicant submits that the test for a durable solution in the country of asylum is called local integration and, according to UNHCR documents, is comprised of legal, economic and socio-cultural integration factors. With regard to her legal status, the applicant submits that the officer engaged in speculation and submits that her ability to get permanent residency is far from assured. The officer similarly erred in considering her family's socio-cultural integration because he completely ignored the evidence that the applicant's family had been experiencing persecution at the hands of the general South African community and felt unsafe.

[12] In a further memorandum, the applicant submits that the officer also erred for failing to mention and distinguish the UNHCR Resettlement Registration Form dated February 12, 2007 which details the persecution the applicant faces in South Africa and the importance of reunification with family members in Canada.

**Respondent's Written Submissions**

[13] The respondent agrees that relying on undisclosed extrinsic evidence is a breach of procedural fairness but submits that there is no evidence that the officer in fact relied on the information from the other files. There is no reference to anything contained in the files. Nor is there any reference to an adverse credibility finding or the presence of prejudicial information which would warrant providing the applicant an opportunity to correct or address those concerns.

[14] The applicant's application was assessed on an individual basis. Not every member of a family is in an identical situation and the circumstances which led to the applicant's older brother or other family members gaining acceptance were not material to her application.

[15] There was no contradiction in the officer's reasons. The officer merely noted that the applicant's claim appeared to be well-founded in relation to Burundi. South Africa is the country which has granted the applicant asylum and where she has a durable solution.

[16] On the merits, there were ample reasons to support his finding that South Africa provided a durable solution as discussed in the reasons. The officer did not speculate that she will or shall obtain permanent residency. The officer merely raised the prospect that she could avail herself of the opportunity. Based on the applicant's evidence, she could have applied for permanent residency by now but has chosen to remain in the precarious position of having to renew her refugee status every two years.

[17] With respect to the evidence of xenophobic attacks, there is no evidence that this evidence was ever put before the officer and therefore, it could not be considered in rendering his decision. Furthermore, the officer was not required to mention the UNHCR opinion that the applicant did not have a durable solution. The officer was required to come to his own determination.

### **Analysis and Decision**

[18] Subsection 139(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations), lists the general requirements for the issuance of permanent resident visas to the designated classes of protected persons abroad.

[19] In order to comply with the requirement in paragraph 139(1)(e), an applicant needs to establish that he or she fits into either the Convention refugees abroad class or the humanitarian protected persons class described in subsections 144 to 148 of the Regulations.

[20] Someone determined to be a Convention refugee however, is still required under subparagraph 139(1)(d)(ii) to establish that there is no reasonable prospect, within a reasonable period, of a durable solution in another country such as an offer of resettlement in another country. It is the officer's determination that a durable solution existed for the applicant in South Africa that prevented him from allowing the application even though it appeared that the applicant satisfied the requirement in paragraph 139(1)(e) as a Convention refugee.

[21] **Issue 1**

What is the standard of review?

A determination by an immigration officer of a foreign national's applicability under section 139 of the Regulations will generally be subject to the deferential standard of reasonableness. The determination of whether the applicant has a durable solution of resettlement in another country requires a review of the applicant's circumstances in his or her country of nationality or habitual residence, or in another country. Such a determination is clearly a question of mixed fact and law and is thus subject to review on the standard of reasonableness (see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190).

[22] On the issue of procedural fairness in relation to the undisclosed extrinsic evidence the applicant says the officer relied on, I agree that the standard of review is correctness (see *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3).

[23] **Issue 2**

Was it unfair for the officer to rely on undisclosed extrinsic evidence?

The CAIPS notes confirm that the officer explained to the applicant at the conclusion of the interview that he would review the information on the applicant's relative's file. Both parties agree that those documents constitute extrinsic evidence such that reliance on them without giving the applicant an opportunity to explain apparent inconsistencies, constitutes a breach of procedural fairness (see *Toma v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 780, 55 Imm.



L.R. (3d) 197 at paragraph 11). The only issue appears to be whether or not the officer in fact relied on that extrinsic evidence in any material way.

[24] The respondent asserts that there is nothing in the decision letter or the CAIPS notes to indicate that the officer based his decision to deny the application on the contents of the applicant's family's file.

[25] I would agree, in part, that the reasons do not suggest that the officer used the files or anything therein to impugn the truth or reliability of any of the applicant's other evidence. However, I would reject the respondent's general assertion that the files were not relied upon. I would agree with the applicant that such an assertion is pure speculation and also unlikely.

[26] The officer clearly indicated to the applicant that something in her family's file was material to the disposition of her application. As noted, it does not appear that he used the file to contradict the applicant's evidence, but there is the more troubling possibility that the case of the applicant's other family members was to determine the comparative merits of the applicant's file. Applications must be processed individually and as much as possible, only assessed against the abstract requirements.

[27] In any event, the applicant has certainly given the impression during the interview that her family's file was material to the decision and quite logically inferred that something contained therein when compared with her application, led to her denial.

[28] As a result, the applicant was denied a fair process.

[29] Consequently, the application for judicial review must be allowed and the matter is referred back for redetermination.

[30] Because of my finding on the above issue, I need not deal with the other issues.

[31] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

**JUDGMENT**

[32] **IT IS ORDERED that** the application for judicial review is allowed and the matter is referred to a different officer for redetermination.

“John A. O’Keefe”

---

Judge

## ANNEX

**Relevant Statutory Provisions***The Immigration and Refugee Protection Act, S.C. 2001, c. 27*

<p>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,</p> <p>(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or</p> <p>(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.</p>	<p>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 :</p> <p>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;</p> <p>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.</p>
---	---

*The Immigration and Refugee Protection Regulations, SOR/2002-227*

<p>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</p> <p>(a) the foreign national is outside Canada;</p>	<p>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 :</p> <p>a) l'étranger se trouve hors du Canada;</p>
--	---

- |   |   |
|---|---|
| (b) the foreign national has submitted an application in accordance with section 150;   | b) il a présenté une demande conformément à l'article 150;  |
| (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 or source country class, financial assistance in the form   | (ii) s'agissant de l'étranger qui appartient à la catégorie des réfugiés au sens de la Convention outre-frontières ou   |

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

à la catégorie de personnes de pays source, 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 themselves 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;

(g) if the foreign national intends to reside in a province other than the Province of Quebec, the foreign national and their family members included in the application for protection will be able to become successfully established in Canada, taking into account the following factors:

g) dans le cas où l'étranger cherche à s'établir dans une province autre que la province de Québec, lui et les membres de sa famille visés par la demande de protection pourront réussir leur établissement au Canada, compte tenu des facteurs suivants :

(i) their resourcefulness and other similar qualities that assist in integration in a new society,

(i) leur ingéniosité et autres qualités semblables pouvant les aider à s'intégrer à une nouvelle société,

(ii) the presence of their relatives, including the relatives of a spouse or a common-law partner, or their sponsor in the expected community of resettlement,

(ii) la présence, dans la collectivité de réinstallation prévue, de membres de leur parenté, y compris celle de l'époux ou du conjoint de fait de l'étranger, ou de leur répondant,

(iii) their potential for employment in Canada, given their education, work experience and skills, and

(iii) leurs perspectives d'emploi au Canada vu leur niveau de scolarité, leurs antécédents professionnels et leurs compétences,

(iv) their ability to learn to communicate in one of the official languages of Canada;

(iv) leur aptitude à apprendre à communiquer dans l'une des deux langues officielles du Canada;

(h) if the foreign national intends to reside in the Province of Quebec, the competent authority of that Province is of the opinion that the foreign national and their family members included in the application for protection meet the selection criteria of the Province; and

h) dans le cas où l'étranger cherche à s'établir dans la province de Québec, les autorités compétentes de cette province sont d'avis que celui-ci et les membres de sa famille visés par la demande de protection satisfont aux critères de sélection de cette province;

(i) subject to subsection (3), the foreign national and their family members included in the application for protection are not inadmissible.

i) sous réserve du paragraphe (3), ni lui ni les membres de sa famille visés par la demande de protection ne sont interdits de territoire.

...

...

144. The Convention refugees abroad class is prescribed as a class of persons who may be issued a permanent resident visa on the basis of the requirements of this Division.

144. La catégorie des réfugiés au sens de la Convention outre-frontières est une catégorie réglementaire de personnes qui peuvent obtenir un visa de résident permanent sur le fondement des exigences prévues à la présente section.

145. A foreign national is a Convention refugee abroad and a member of the Convention refugees abroad class if the foreign national has been

145. Est un réfugié au sens de la Convention outre-frontières et appartient à la catégorie des réfugiés au sens de cette convention l'étranger à qui un

determined, outside Canada, by  
an officer to be a Convention  
refugee.

agent a reconnu la qualité de  
réfugié alors qu'il se trouvait  
hors du Canada.



**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-4225-09

**STYLE OF CAUSE:** BEATRICE MUSHIMIYIMANA  
- and -  
THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** Ottawa, Ontario

**DATE OF HEARING:** June 8, 2010

**REASONS FOR JUDGMENT  
AND JUDGMENT OF:** O'KEEFE J.

**DATED:** November 10, 2010

**APPEARANCES:**

Heather Neufeld FOR THE APPLICANT

Helene Robertson FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

South Ottawa Community Legal Services FOR THE APPLICANT  
Ottawa, Ontario

Myles J. Kirvan FOR THE RESPONDENT  
Deputy Attorney General of Canada