

Federal Court



Cour fédérale

**Date: 20110902**

**Docket: IMM-4834-10**

**Citation: 2011 FC 1039**

**Ottawa, Ontario, September 2, 2011**

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

**BETWEEN:**

**VALERIEENNE MIYA KIKA,  
JEANNE NAMUNGUNGU KUBOTA,  
PATRICK NAMUNGUNGU KUBOTA**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

I. Overview

[1] On the advice of their Canadian sponsor, Ms. Valerienne Miya Kika, her son, Patrick, and her daughter, Jeanne, left their home in the Democratic Republic of the Congo [DRC] in 2009 and made their way to a refugee camp in Tanzania. A Canadian immigration officer interviewed Ms.

Kika in Bujumbura, Burundi and considered her application for permanent residence in Canada.

The officer turned down her application primarily for a lack of evidence of persecution.

[2] Ms. Kika submits that the officer overlooked some important facts that were central to her application and, therefore, rendered an unreasonable decision. She also argues that the officer's reasons were insufficient. She asks me to overturn the officer's decision and order a reassessment of her application by another officer.

[3] I agree with Ms. Kika that the officer's decision was unreasonable in the sense that it did not take account of all of the relevant facts. I must, therefore, allow this application for judicial review. It is unnecessary to consider whether the officer's reasons were adequate.

[4] The sole issue, therefore, is whether the officer's decision was unreasonable.

## II. Factual Background

[5] Ms. Kika claimed that her son, a priest, had been murdered in 1998 during a massacre carried out by an army general, General Amisi Gabriel, who then threatened to kill the rest of the family. She often had to flee her home to escape danger, but always returned to her job as a school teacher in Uvira. For example, in 2002, 2006 and 2007, she and her children were forced to hide in the bush. In 2006, soldiers raped her during an attack.

[6] Patrick was particularly at risk because he was a witness to the events of 1998. He claimed that he and another brother had been threatened with death. (Patrick, however, had been unable to attend the interview with the officer).

### III. The Officer's Decision

[7] The officer considered Ms. Kika's application on three separate bases: as a Convention refugee abroad, and as a member of the country of asylum and source country classes (under the *Immigration and Refugee Protection Regulations*, SOR/2002-227, ss 145, 147 and 148, respectively – see Annex A).

[8] The officer found that Ms. Kika did not fall within the source country class because she was no longer resident in the country of her nationality. That finding is not contested.

[9] In his letter to the applicants, the officer concluded that Ms. Kika's fear of persecution was not well-founded. In particular, the officer noted that Ms. Kika did not meet the requirement of s 147 that she be "seriously and personally affected" by civil war or armed conflict. The officer referred to the murder of Ms. Kika's son in 1978 (not 1998), and noted that she continued in her teaching job until her retirement in 2007. She left the country only when advised to do so by her sponsor; she did not flee out of fear. Finally, the officer was concerned that none of the family members had registered with the UNHCR.

[10] The officer's notes disclose some additional information. The officer apparently found Ms. Kika's responses at the interview to be vague, confusing and sometimes incoherent. The notes also make reference to Ms. Kika's fear of General Amisi Gabriel, and to her rape in 2006. They further record the fact that Ms. Kika left the DRC, not only because her sponsor recommended it, but because she was afraid of persecution.

IV. Was the Officer's Decision Unreasonable?

[11] The officer made no explicit credibility finding against Ms. Kika, although his notes disclose some concerns. His reasoning, essentially, was that there was insufficient evidence to support her claim of persecution.

[12] In his decision, the officer omitted reference to some important facts supporting Ms. Kika's application:

- her fear was not founded solely on the murder of her son;
- the alleged agent of persecution, General Amisi Gabriel, presented an ongoing risk of harm;
- her rape in 2006;
- her ongoing fear of persecution in DRC; and

- the risk to Patrick as a witness to the 1998 massacre.

[13] Ms. Kika also contends that the officer made a serious factual error when he determined that her son had been killed in 1978, not 1998. The 1998 date was contained in supporting documents but, according to the officer's notes, Ms. Kika provided the 1978 date at the interview. The 1978 date is clearly implausible - Ms. Kika could not have had an adult son in 1978 when she was 26. Still, there was some evidence before the officer on which to base his finding.

[14] However, I find that the officer's conclusion was unreasonable. While he did not explicitly dispute the credibility of relevant evidence before him, he failed to consider important elements of it, as outlined above, in his analysis of Ms. Kika's application. In particular, the officer apparently did not consider the possibility that Ms. Kika had a gender-based claim for refugee protection as a result of her sexual assault in 2006.

#### V. Conclusion and Disposition

[15] The officer's decision was unreasonable in that it did not represent a defensible outcome based on the law and the facts before him. I must, therefore, allow this application for judicial review and order a reassessment of Ms. Kika's claim by another officer. Neither party proposed a question of general importance for me to certify, and none is stated.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that**

1. The application for judicial review is allowed and a new hearing, before a different officer, is ordered;
2. No question of general importance is stated.

“James W. O’Reilly”

---

Judge

## Annex "A"

*Immigration and Refugee Protection Regulations, SOR/2002-227**Règlement sur l'immigration et la protection des réfugiés, DORS/2002-227*

## Member of Convention refugees abroad class

## Qualité

**145.** A foreign national is a Convention refugee abroad and a member of the Convention refugees abroad class if the foreign national has been determined, outside Canada, by an officer to be a Convention refugee.

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

## Member of country of asylum class

## Catégorie de personnes de pays d'accueil

**147.** A foreign national is a member of the country of asylum class if they have been determined by an officer to be in need of resettlement because

**147.** Appartient à la catégorie de personnes de pays d'accueil l'étranger considéré par un agent comme ayant besoin de se réinstaller en raison des circonstances suivantes :

(a) they are outside all of their countries of nationality and habitual residence; and

a) il se trouve hors de tout pays dont il a la nationalité ou dans lequel il avait sa résidence habituelle;

(b) they have been, and continue to be, seriously and personally affected by civil war, armed conflict or massive violation of human rights in each of those countries.

b) une guerre civile, un conflit armé ou une violation massive des droits de la personne dans chacun des pays en cause ont eu et continuent d'avoir des conséquences graves et personnelles pour lui.

## Member of the source country class

## Catégorie de personnes de pays source

**148.** (1) A foreign national is a member of the source country class if they have been determined by an officer to be in need of resettlement because

**148.** (1) Appartient à la catégorie de personnes de pays source l'étranger considéré par un agent comme ayant besoin de se réinstaller en raison des circonstances suivantes :

(a) they are residing in their country of nationality or habitual residence and that country is a source country within the meaning of subsection (2) at the time their permanent resident visa application is made as well as at the time a visa is issued; and

a) d'une part, il réside dans le pays dont il a la nationalité ou dans lequel il a sa résidence habituelle, lequel est un pays source au sens du paragraphe (2) au moment de la présentation de la demande de visa de résident permanent ainsi qu'au moment de la délivrance du visa;

(b) they

(i) are being seriously and personally affected by civil war or armed conflict in that country,

(ii) have been or are being detained or imprisoned with or without charges, or subjected to some other form of penal control, as a direct result of an act committed outside Canada that would, in Canada, be a legitimate expression of freedom of thought or a legitimate exercise of civil rights pertaining to dissent or trade union activity, or

(iii) by reason of a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership in a particular social group, are unable or, by reason of such fear, unwilling to avail themselves of the protection of any of their countries of nationality or habitual residence.

b) d'autre part, selon le cas :

(i) une guerre civile ou un conflit armé dans ce pays ont des conséquences graves et personnelles pour lui,

(ii) il est détenu ou emprisonné dans ce pays, ou l'a été, que ce soit ou non au titre d'un acte d'accusation, ou il y fait ou y a fait périodiquement l'objet de quelque autre forme de répression pénale, en raison d'actes commis hors du Canada qui seraient considérés, au Canada, comme une expression légitime de la liberté de pensée ou comme l'exercice légitime de libertés publiques relatives à des activités syndicales ou à la dissidence,

(iii) craignant avec raison d'être persécuté du fait de sa race, de sa religion, de sa nationalité, de ses opinions politiques ou de son appartenance à un groupe social particulier, il ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection du pays dont il a la nationalité ou de celui où il a sa résidence habituelle.

Source country

(2) A source country is a country

(a) where persons are in refugee-like situations as a result of civil war or armed conflict or because their fundamental human rights are not respected;

(b) where an officer works or makes routine working visits and is able to process visa applications without endangering their own

Pays source

(2) Est un pays source celui qui répond aux critères suivants :

a) une guerre civile, un conflit armé ou le non-respect des droits fondamentaux de la personne font en sorte que les personnes qui s'y trouvent sont dans une situation assimilable à celle de réfugiés au sens de la Convention;

b) un agent y travaille ou s'y rend régulièrement dans le cadre de son travail et est en mesure de traiter les demandes de

safety, the safety of applicants or the safety of Canadian embassy staff;

(c) where circumstances warrant humanitarian intervention by the Department in order to implement the overall humanitarian strategies of the Government of Canada, that intervention being in keeping with the work of the United Nations High Commissioner for Refugees; and

(d) that is set out in Schedule 2.

## SCHEDULE 2

(paragraph 148(2)(d) and section 149)

1. Colombia
2. El Salvador
3. Guatemala
4. Democratic Republic of Congo
5. Sierra Leone
6. Sudan

visa sans compromettre sa sécurité, celle des demandeurs ni celle du personnel de l'ambassade du Canada;

c) les circonstances justifient une intervention d'ordre humanitaire de la part du ministère pour mettre en oeuvre les stratégies humanitaires globales du gouvernement canadien, intervention qui est en accord avec le travail accompli par le Haut-Commissariat des Nations Unies pour les réfugiés;

d) il figure à l'annexe 2.

## ANNEXE 2

(alinéa 148(2)d) et article 149)

1. Colombie
2. El Salvador
3. Guatemala
4. République démocratique du Congo
5. Sierra Leone
6. Soudan

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

**DOCKET:** IMM-4834-10

**STYLE OF CAUSE:** VALERIEENNE MIYA KIKA, ET AL  
v  
THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** April 19, 2011

**REASONS FOR JUDGMENT  
AND JUDGMENT:** O'REILLY J.

**DATED:** September 2, 2011

**APPEARANCES:**

Micheal Crane FOR THE APPLICANT

Lorne McClenaghan FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Micheal Crane FOR THE APPLICANT  
Barrister & Solicitor  
Toronto, Ontario

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