Federal Court  Cour fédérale

Date: 20160304

Docket: IMM-3964-15

Citation: 2016 FC 271

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, March 4, 2016

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

VALENTINE UWAMAHORO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant is seeking judicial review of a decision by a visa officer at the Canadian High Commission in South Africa (the Officer), under subsection 139(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations), denying her application for permanent residence, for herself and her two minor children, as members of the Convention

Refugee Abroad class or the Humanitarian-Protected Persons Abroad class. This decision was rendered on July 2, 2015.

[2] The applicant is a Rwandan citizen. She left Rwanda in 2002 and found refuge in South Africa, where she has been living ever since, and has been granted refugee status. In 2009, her husband filed an application for permanent residence with South African authorities on his behalf and on behalf of the applicant. Her husband having died in 2011, the applicant had to file her own application, which she did in 2013, and it still does not appear to have been adjudicated.

[3] In 2013, the applicant submitted her application for permanent residence in Canada, alleging that 10 years after having been granted refugee status by South African authorities, she still did not have permanent resident status, and because she was now living alone with her two children, her financial situation was becoming increasingly difficult to the point where she had to abandon her studies. When she was interviewed by the Officer, on July 2, 2015, the applicant also said she wanted to leave South Africa because she did not feel safe there due to the climate of violence and xenophobia. She also said she feared reprisals from Rwandan nationals living in South Africa because she had participated in some Rwanda Heritage Foundation activities, in particular those designed to instill Rwandan cultural values in young Rwandans living in South Africa.

[4] Based on the interview, the Officer determined that the applicant was not eligible for a permanent resident visa under subsection 139(1) of the Regulations on the ground that she had a durable solution in South Africa, since (i) she had already been living there for about 10 years; (ii) she had refugee status there, which for all intents and purposes gave her the same rights and

privileges as permanent residents (access to public health and social services, the right to study and work, and mobility rights); (iii) she had studied nursing there; (iv) she was working as a taxi driver; and (v) she could still hope to obtain permanent resident status in South Africa.

[5] The Officer was also satisfied, despite the applicant's fears for her personal safety, that the violence and xenophobia that plagued South Africa affected all South Africans, that authorities had taken steps to address these issues, and that as a result, the applicant's durable relocation in South Africa was not compromised.

[6] The applicant believes that the Officer rendered an unreasonable decision that was contrary to the principles of procedural fairness by failing to consider the precariousness of her 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 under the South African *Refugees Act*, which she has not yet obtained. She also alleges that he did not taken into account the fact that she no longer feels safe in South Africa.

[7] The issue of whether an applicant under subsection 139(1) of the Regulations has a reasonable prospect, within a reasonable period, of a durable solution in a country other than Canada is a question of mixed fact and law and attracts a reasonableness standard of review (*Barud v. Canada (Citizenship and Immigration)*, 2013 FC 1152, at paragraph 12, 442 F.T.R. 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 of review, the Court must show deference to 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 S.C.R. 190, at paragraph 47).

[8] The applicant did not convince me that there is a basis for intervention in this case. Nor did she convince me that the matter for which she holds the Officer at fault involves procedural fairness. The failure to consider material evidence, if such a failure is established, concerns the reasonableness of the decision, and not its procedural fairness, as stated in subsection 18.1(4) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, which sets out the powers of the Federal Court in matters of 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; *Ibarguen Murillo v. Canada (Citizenship and Immigration)*, 2010 FC 514, at paragraph 12).

[9] 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	b) il a fait une demande de visa

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;

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

(ii) s'agissant de l'étranger qui appartient à la catégorie des réfugiés au sens de la Convention outre-frontières, une aide financière publique

assistance program is available in Canada for the foreign national and their family members included in the application for protection, or	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;
[…]	[…]

[10] It is well established that it was the applicant's responsibility to convince the Officer to approve her application for permanent residence in Canada, as a member of the Convention Refugee Abroad class or the Humanitarian-Protected Persons Abroad class, that she had no reasonable prospect, within a reasonable period, of a durable solution in South Africa (*Dusabimana*, above, at paragraph 54; *Salimi v. Canada (Citizenship and Immigration)*, 2007 FC 872, at paragraph 7; *Mushimiyimana*, above, at paragraph 20). This is a heavy burden.

[11] It is also well established that resolving the question of whether an individual, who applies under subsection 139(1) of the Regulations [and] has a reasonable prospect, within a reasonable period of a durable solution in a country other than Canada, requires a forward-looking assessment of the individual's personal circumstances and the conditions in the individual's country of residence (*Barud*, above, at paragraphs 12–15). This is exactly what the Officer did in this case.

[12] As the Officer pointed out, the applicant had relocated to South Africa and had been living there since 2002; and as a refugee since 2003, enjoyed all the benefits of permanent resident status in South Africa and even the same benefits as a permanent resident in Canada. She studied and worked there. She and her children also had access to public health and social services. Her children were of school age and attended school.

[13] It is true that so far, she has had to renew her refugee status periodically. However, there is no evidence before me to suggest that the applicant might be sent back to Rwanda, that her status, if it is not permanent at the time, will not be renewed in 2019, or that individuals in the same situation as hers are routinely sent back to their country of origin after a certain period of time. South Africa is a signatory to the Refugee Convention, and the principle of *non-refoulement* [non-rejection at border] is enshrined in its legislation.

[14] There is no further evidence in the docket that can enlighten the Court on the procedure for certifying refugee status in South Africa, if there is one; whether or not the applicant went through the process; or, if applicable, any information explaining that the aforementioned certification had still not been granted to her. As the Officer also noted, the application for permanent residence that the applicant submitted to African authorities in 2013 is still pending, which means she can still obtain permanent resident status.

[15] At any rate, as in the matter of state protection, 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); subsection 139(1) requires only that it be durable. The Court has already determined that a person with refugee status in South Africa has a reasonable prospect of a durable solution there, within the meaning of subsection 139(1) of the Regulations, even if the person has been a victim of crime in the past (*Barud*, above, at paragraph 15). I see no basis for finding otherwise in this case, especially since the applicant alleges that she herself has not been a victim of crime while living in South Africa. The temporary nature of the applicant's refugee status does not, in itself, provide the basis for a different conclusion, given the extent to which she has developed roots in South Africa and the opportunities still available to her to obtain permanent legal status there, either as a refugee or permanent resident.

[16] The interview notes reveal that the Officer was well aware of the temporary nature of the applicant's legal status in South Africa and that this factor was part of his review:

> The applicant has been in RSA for over a decade. She is recognized as a refugee in South Africa and has applied for permanent residency. It is likely that she would have obtained PR status under her husband but he unfortunately passed away. As such, she had to reapply as the principal applicant. The applicant has the right to work, study, medical care, social services (including child support) and all the same rights as a PR of South Africa. She has the same rights as a PR of Canada as well. She will be able to obtain PR status and eventually apply for citizenship. Her children have the same status as her and the same rights.

[17] Although it seems the applicant would have preferred this part of the review be more clearly highlighted in the Officer's decision, it seems sufficiently clear to me to satisfy the requirements of reasonableness. The Court notes that the reasons for a decision maker's decision 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 S.C.R. 708). Furthermore,

insofar as the applicant is now complaining that the Officer did not specifically address the issue of certification of her refugee status, the Court is satisfied that this argument, as the respondent pointed out, was never raised as such with the Officer.

[18] Also, there is no basis for the allegation that the Officer ignored the evidence regarding the dangers to which the applicant believed she was exposed as a result of her involvement in the Rwanda Heritage Foundation and the climate of xenophobia in South Africa. It is clear that the Officer examined this part of the applicant's application for permanent residence as shown in this extract of the interview notes:

> […] While South Africa presents certain challenges regarding crime, for the most part, crime affects all South Africans regardless of race, religion or color. It is terrible that a taxi driver in the Cape Town area was killed but a robbery resulting in a murder does not demonstrate to me that she does not have a durable solution in RSA – there have been taxi drivers robbed and murdered in most countries of the world. While xenophobia is a reality that hits South Africa from time to time the government takes harsh and real steps against xenophobia. The PA and her family have the same rights and opportunities as all permanent residents in South Africa and as citizens of South Africa. The applicant raised the point that she was scared of the Rwandan community in RSA. Despite this, she continues to be an active member of the Rwandan Cultural association and continues to associate with Rwandans. Her behavior and actions directly contradicts the behavior of someone who is afraid of the Rwandan community. I find that there is insufficient evidence before me to suggest that the applicant does not have a durable solution in RSA and as such am satisfied that she and her family have a durable solution.

[19] As the Court stated in *Barud*, contrary to what is generally the case in a review regarding state protection, when examining an application under subsection 139(1) of the Regulations, it is open to a visa officer to cite state efforts to improve the treatment of foreigners (*Barud*, above, at paragraph 15). That was done in this case.

[20] In short, the Officer accurately described the applicant's situation and took into account the situation in South Africa and the State's efforts to control the problems of crime and xenophobia in the country. From the standpoint of a forward-looking assessment of the evidence on record, I cannot find that the Officer, in determining that the applicant did not discharge her burden to demonstrate that she had no reasonable prospect of a durable solution in South Africa, drew an unreasonable conclusion, i.e. a conclusion falling outside of a range of possible acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, above, at paragraph 47).

[21] As the defendant notes, it seems that the applicant no longer wants to live in South Africa because of the general conditions in the country, her precarious financial situation, and because she hopes to find a better future in Canada for herself and her children. However, as the respondent also points out, this does not mean that there is no durable solution for her in South Africa.

[22] The application for judicial review will therefore be dismissed. Counsel for the parties have agreed that there is no need, in this case, to certify a question to the Federal Court of Appeal. I agree with this opinion.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. No question is certified.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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