

Federal Court



Cour fédérale

Date: 20100428

Docket: IMM-5080-09

Citation: 2010 FC 463

Ottawa, Ontario, April 28, 2010

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

CHARLES MUKASI

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review by Charles Mukasi from a decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada (Board). Mr. Mukasi challenges the Board's decision to deny his claim for refugee protection on the basis that he was complicit in crimes against humanity and thereby disqualified on the basis of art. 1F(a) of the *United Nations Convention Relating to the Status of Refugees* as incorporated by s. 98 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA).

a. Background

[2] Mr. Mukasi is a citizen of Burundi. In 1981 he became an active member of a prominent political party in Burundi known as “Union pour le progrès national” (UPRONA). It is undisputed that after voluntarily joining the party in 1981 Mr. Mukasi rose through the ranks of UPRONA where he held in succession the following positions:

- (a) Director for Radio National (the state-run radio station);
- (b) National Party Secretary;
- (c) Opposition Deputy in the National Assembly; and
- (d) Party President in 1994.

[3] It is also undisputed that since at least the 1960’s Burundi has been engulfed in an ethnic conflict between the Hutus and Tutsis, including periods when mass killings of civilians took place on both sides. The documentary evidence before the Board indicated very clearly that the Tutsi-dominated Burundian military had, from time to time, been responsible for the indiscriminate killing of many Hutu civilians. This was a history that Mr. Mukasi has never challenged.

[4] From 1962 to 1993 UPRONA held either nominal or actual political power in Burundi. In 1993 UPRONA was defeated in democratic elections but, within the year, President Ndadaye was assassinated by a faction of Tutsi military officers. In a report by Amnesty International dated March 22, 2001 the litany of ethnic killing in Burundi is described in detail including the following description of the situation after the assassination of the President:

As news of the assassination of President Ndadaye spread, thousands of Tutsi civilians as well as Hutu supporters of the former ruling party, the Union pour le progrès national (UPRONA), Union for National Progress, were killed in reprisal by Hutu civilians. Within four days of the coup attempt, mass and indiscriminate reprisals for these killings were being carried out by the Tutsi-dominated security forces and Tutsi civilians against the Hutu population. Hundreds of thousands of Hutu, as well as some Tutsi, fled the violence, mainly to Tanzania and Zaire (now the Democratic Republic of Congo) and hundreds of thousands of others, mainly Tutsi, were internally displaced. The majority of refugees and internally displaced have yet to return to their homes.

Leaders and allies of UPRONA organized themselves to resist the return of power to FRODEBU control. The Tutsi political opposition, backed by the Tutsi-dominated army, was reluctant to relinquish the power it had enjoyed since independence, and continued to force political concessions from the weakened FRODEBU government which could not consolidate its position. Tutsi youths formed armed groups, with the knowledge and even assistance of Tutsi soldiers. Many government supporters, particularly Hutu, were killed during such action. To counter this violence and what they considered as the inability of the FRODEBU-led government to protect its members and supporters, armed Hutu groups sprang up in and around Bujumbura and were themselves responsible for abuses. From 1994 onwards, a number of Hutu-dominated armed opposition groups, formally allied to political parties in exile, began an open war against the Tutsi-dominated armed forces and their political allies, killing many unarmed Tutsi civilians. Tutsi militias also operated, often in open collusion with the armed forces, carrying out political assassinations and extrajudicial executions, particularly of prominent Hutu. The violence spread country-wide, and Hutu and Tutsi who had previously lived together effectively separated, with urban centres dominated by Tutsi. Both armed opposition groups and the armed forces were responsible for large numbers of killings of unarmed civilians.

The FRODEBU government continued to weaken, as FRODEBU parliamentarians and officials were assassinated, arrested or fled into exile. The government requested international security assistance, a move violently opposed by UPRONA and the armed forces. In July 1996, Major Pierre Buyoya returned to power in a coup with the support of the armed forces, which he claimed to have carried out to

prevent further human rights violations and violence; many observers saw it as the completion of the October 1993 coup attempt. It also ended discussion of international security assistance. Nationally the new government employed a practice of forcibly relocating or "regrouping" the Hutu rural population into camps, a counter-insurgency strategy developed to undermine Hutu-dominated armed opposition groups by creating military zones and by removing any possible source of support or cover. Whole areas were cleared of civilians and homes and plantations destroyed. Furthermore, the war which broke out in the Democratic Republic of Congo (DRC) in late 1996 not only led to the expulsion and return to Burundi of tens of thousands of Burundian refugees but also meant that armed opposition groups lost bases in eastern DRC, including support they were deriving directly and indirectly from refugee camps. By 1997 the areas of conflict had been reduced.

[Footnotes omitted]

[5] During the late 1990's disagreements within UPRONA came to the surface. Mr. Mukasi led a hard-line faction within the party which opposed aspects of President Buyoya's plan for a peaceful resolution to the ethnic conflict. This political disagreement led to Mr. Mukasi being targeted by the Burundian authorities as a political trouble-maker. He claimed to have been subjected to a number of politically-motivated arrests and periods of detention between 1997 and 2005. In September 2005 Mr. Mukasi left Burundi and on October 3, 2005 he entered Canada from the United States and immediately sought asylum.

A. *The Decision Under Review*

[6] The Board's reasons indicate that it understood and applied the correct legal test for determining whether, as a senior leader with UPRONA, Mr. Mukasi should be excluded from refugee protection under s. 98 of the IRPA. The Board also found that UPRONA was not an

organization with a brutal and limited purpose. The Board then examined Mr. Mukasi's conduct in terms of whether he had been complicit concerning the undisputed atrocities and genocidal acts carried out by the Burundian military.

[7] In holding that Mr. Mukasi had been complicit the Board found that he had glossed over the numerous massacres of Hutu civilians by the Tutsi-dominated army after October 1993. It noted his steady rise in influence within UPRONA after 1989 including positions as a Director of National Radio, National Party Secretary, Opposition Deputy in the National Assembly, speech-writer for the President, and finally, Party President.

[8] The Board found that Mr. Mukasi was aware of the conduct of the armed forces during the October 1993 coup and afterwards (including the assassination of President Ndadaye) and it accepted a UNHCR finding that UPRONA was involved in the military coup. In the following passage the Board rejected Mr. Mukasi's argument that the war crimes committed by the Burundian armed forces did not involve UPRONA:

[38] I find that the claimant, as a senior member of UPRONA, was aware of the above and was in a position to shape and form UPRONA's policies. During the hearing, when asked about the army's role in the killing, the claimant maintained that the army responded to the crisis at the time. He also stated that the army intervened to stop the atrocities and genocides that were being committed by the supporters of FRODEBU. He also stated the Constitution did not allow the members of the army to join a political party; therefore, it would not be fair to associate them with UPRONA. I find that the claimant made these statements to minimize the atrocities committed by the army. Also, given the traditional link between UPRONA and the army, I find that the claimant's attempt to defend the army, and his further attempt to minimize the relationship between UPRONA and the army, not

credible, and not supported by the documentary evidence. I also find that during the civil war, during which time the claimant was in very high positions with UPRONA, the documents are silent on what, if any attempts, UPRONA made to condemn the army's actions or to stop it. This, together with the fact that the claimant is believed to have been associated with the 1993 coup attempt, and his continued efforts to undermine the attempt to power-sharing arrangements, further gives me reason to believe that the claimant's degree of knowledge was high.

[Footnote omitted]

[9] The Board concluded by finding that, despite his awareness of UPRONA's support for violence, Mr. Mukasi willingly joined the party in 1981, willingly remained in it, and willingly moved up its ranks to the position of Party President in 1994. The Board concluded by finding that there were serious reasons for considering that Mr. Mukasi had been complicit in crimes against humanity which excluded him from refugee protection. It is from this decision that Mr. Mukasi brings this application for judicial review.

II. Issue

[10] Did the Board err in its assessment of the evidence and, in particular, did it reach its decision on the basis of a selective application of the evidence?

III. Analysis

[11] The issue raised on this application is one of mixed fact and law and will, therefore, be reviewed on a standard of reasonableness: see *Murcia v. Canada (Minister of Citizenship and Immigration)* (2006), 2006 FC 287 at para. 18, 146 A.C.W.S. (3d) 699.

[12] It was argued on behalf of Mr. Mukasi that the Board erred in making a finding of complicity on the basis of a selective assessment of the available evidence. Mr. Mukasi asserts that he consistently promoted peaceful solutions to the ethnic divisions that engulfed Burundi during the period of his political involvement. He says that the Board erred by relying upon vague associations in the documentary evidence between UPRONA and the Burundian military, and more particularly, between his conduct and the conduct of the military in its brutal retaliatory campaigns targeting Hutu civilians.

[13] Mr. Mukasi's attempt to disassociate his political work on behalf of UPRONA from the atrocities that were carried out by the Burundian military was not accepted by the Board and for good reason. There was ample evidence in the record to establish a link between the military forces and Tutsi militias that perpetrated these brutal acts, Mr. Mukasi and UPRONA. Examples of this included the following from independent third-party sources:

The former single party, founded in 1957 and legally recognised in 1960, UPRONA, retained a close relationship with the armed forces under the presidencies of Michel Micombero, Jean Baptiste Bagaza and Pierre Buyoya. It was heavily defeated by the Hutu-dominated *Front pour la Démocratie au Burundi*, Front for Democracy in Burundi, in Burundi's first multi-party elections in 1993. UPRONA and the security forces were unwilling to cede power and were closely associated with violence by the *Sans échec* ("Without

Failure") and other Tutsi militia in the 1993 to 1996 period. Senior members of UPRONA including **Charles Mukasi, Libère Bararuntyeretse** and **Alphonse Kadege** were among the civilians associated with the 1993 coup attempt. Charles Mukasi, has also been accused of undermining the 1994 Convention of Government power-sharing arrangement and of orchestrating some of the spiralling violence which enabled Pierre Buyoya to return to power in 1996.

[Emphasis added]

Source: Amnesty International March 22, 2001

[...]

UPRONA

The third player in this violent field is the official opposition UPRONA party. Given a disproportionate share of power in the September 1994 Government Agreement, it has since then seemed bent on getting even more, raising doubts as to its real desire to see the agreement work. Many people believe that its ultimate aim is to regain by hook or by crook the power it lost through the ballot box in June 1993. Even if UPRONA cannot be entirely lumped together with the extremist micro-parties and armed Tutsi militias, it is now if not a party of extremists at least a party led by extremists. Its proclaimed desire to 'solve the crisis in a peaceful fashion' seems, to say the least, disingenuous. For example, when an OAU mission came to Bujumbura in mid-July to try to initiate new discussions between the protagonists of the political conflict, the UPRONA chairman Charles Mukasi used the fact that the OAU mission was proposing Addis-Ababa as the venue as an excuse to refuse to attend and to declare:

'We suggest that if people have anything to say to one another they should do so within Burundi's borders We are not against anything whatsoever. We are rather in favour of an idea which is the Peace Process. This should be created and developed within the borders of the country If the international community became exasperated and lost interest in what is happening to us I would be very happy because this would force us to move forward rapidly'.

The FRODEBU Chairman Jean Minani who supported the idea of taking the talks to Addis-Ababa retorted that

'he [Mukasi] knows very well that talks here in Burundi are nearly impossible, when the city of Bujumbura is being held hostage by Tutsi militias patrolling, doing night rounds, killing people everyday without the police, the *gendarmes* or the Army being able to do anything'.

UPRONA public positions are mostly of the same style, seeming to permanently pretend that there is no major problem, that Tutsi militias do not exist, that Tutsi extremist parties are in fact democratic and that it is only the ill-will of FRODEBU which blocks the political dialogue. In such a climate its constant call to FRODEBU moderates to share with them the fight against FDD Hutu extremists does seem rather biased.

Source: UNHCR August 1995

[...]

Correspondents say Mr Mukasi, a politician believed to be supported by hardliners in the military, refused to attend the talks and sacked party representatives who did. Burundi's neighbours have linked a lifting of sanctions to progress in the talks.

Source: BBC News, October 8, 1998

[...]

Continued Tutsi domination of the army lay at the centre of Burundi's fragile security situation, and it was the army that now imposed conditions for a return to normality. Three months of talks were required before a new president was chosen, elections being out of the question. During these negotiations, UPRONA and other opposition parties were able to negotiate a deal that gave them forty per cent of executive posts. FRODEBU accepted this arrangement in order to reassure the Tutsi minority. Cyprian Ntaryamira, the rather colourless agricultural minister, was eventually chosen as president.

On 6 April 1994, Ntaryamira died with Rwanda's President Habyarimana when their aircraft was shot down over Kigali. The problem of the presidential succession now resurfaced. FRODEBU wanted the popular Sylvestre Ntibantunganya as president, but the opposition, led by UPRONA, set conditions that were accepted on 10 September. These gave UPRONA an even greater say in power. This alienated the radical wing of FRODEBU, which distanced itself from

the interim president in protest and in August created the National Council for the Defence of Democracy (CNDD) and its armed wing led from exile by Leonard Nyangoma.

FRODEBU retained the presidency, but felt constrained by fears of another *coup* or genocidal civil war to concede an ever-growing share in government and administration to UPRONA and other opposition parties. The successful assumption of power by the Tutsi-dominated Rwandese Patriotic Front (RPF) in neighbouring Rwanda in 1994, merely emboldened UPRONA and the Burundian army. A political agreement, brokered by the UN and concluded on 11 September 1994, stipulated that the position of prime minister and ten other cabinet posts (of a total 23) would go to the opposition parties. The defence and justice portfolios were to be held by political 'neutrals', meaning a soldier and a judge (effectively Tutsi). Within the local administration and civil service, 45 per cent of posts were also reserved for opposition nominees. The agreement deprived the National Assembly of the power to dismiss the government. It introduced a National Security Council to which FRODEBU and the opposition each nominated five members, and which has an effective veto over the executive. In short, the electoral victory of 1993 was virtually nullified and the president prevented from reforming the army or administration or otherwise threatening what the Tutsi minority saw as its vital interests. Even this was insufficient to deter UPRONA's leader, Charles Mukasi, who remained outside government, from making additional demands aimed at emasculating FRODEBU. In effect, UPRONA seemed determined to exploit the government's very reasonable fear of a complete breakdown in order, to recoup the loss of power suffered in the elections of 1993. This involved some neatly judged brinkmanship on the part of UPRONA and the army, and predictably led to catastrophe.

Source: Africa Watch, Burundi: The politics of intolerance, African Security Review, Vol. 8 No. 6, (1999)

[14] Mr. Mukasi complains that the testimonials he tendered to contradict the third-party sources received inadequate attention from the Board. I reject this argument. The Board's reasons indicate that Mr. Mukasi's materials were appropriately considered but rejected on the basis that they were not objective. It is not the role of the Court on judicial review to reweigh the evidence and it would

not be appropriate for me to substitute my own views of the evidence for those of the Board. Even if I had that authority I would not have reached any different conclusion from that of the Board. Much of what Mr. Mukasi presented in his own defence was highly rhetorical, unbalanced and, in parts, inflammatory.

[15] The evidence Mr. Mukasi put forward was in sharp contrast to the third-party documentary record and there was a strong foundation for the Board's conclusion that Mr. Mukasi had been complicit concerning the undisputed history of crimes against humanity carried out by the Tutsi-dominated Burundian armed forces during the time of his political influence within Tutsi-controlled UPRONA.

[16] Mr. Mukasi's complaints of procedural unfairness were not advanced before me in oral argument. Those arguments have no legal merit and I reject them without reservation.

[17] This application for judicial review is dismissed.

[18] Neither party proposed a certified question and no issue of general importance arises on this record.

JUDGMENT

THIS COURT ADJUDGES that this application for judicial review is dismissed.

“ R. L. Barnes ”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5080-09

STYLE OF CAUSE: Mukasi
v.
MCI

PLACE OF HEARING: Calgary, AB

DATE OF HEARING: April 6, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT BY:** Mr. Justice Barnes

DATED: April 28, 2010

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