

Federal Court



Cour fédérale

Date: 20100816

Docket: IMM-5736-09

Citation: 2010 FC 817

Ottawa, Ontario, August 16, 2010

PRESENT: The Honourable Mr. Justice Crampton

BETWEEN:

FRANCINE BUKURU

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Background

[1] The Applicant is a citizen of the Democratic Republic of Congo (DRC) who is of Tutsi ethnicity. She claims to have suffered appalling persecution, torture and cruel and unusual treatment in four principal waves beginning in 1996, when she was approximately 14 years old, and ending in 2007, when she left the DRC.

[2] In the first wave, she alleges that her village was attacked by Zairian soldiers who accused them of being Tutsi supporters of rebel forces and of having given refuge to those forces. She alleges that those soldiers killed her parents; killed her sister, her sister's husband and their two children after her sister resisted their attempt to rape her; abducted the remainder of the family; imprisoned, raped and tortured the women for approximately one week; and threw the men handcuffed in the Rusizi river, where all but one of them (who was saved downstream) drowned. She claims to still have the physical scars of that experience. The Zairian soldiers apparently escaped when attacked by the aforementioned rebel forces (Alliance des forces démocratiques de libération (AFDL)).

[3] The second wave of alleged atrocities occurred in August 1998, when hostilities broke out between forces loyal to President Kabila and various militia groups (the Mai Mai, the Burundian Hutu rebels known as the Forces for National Liberation (FNL) and the Hutu Forces for the Defense of Democracy (FDD)). At that time, Ms. Bukuru was living with one of her uncles. She claims that she was repeatedly raped by men from those marauding militia groups.

[4] The third wave occurred in 2004, when she witnessed massacres and escaped to Rwanda.

[5] Finally, in 2007, she claims to have witnessed a violent massacre by troupes loyal to Colonel Mutupeke while she was staying with an aunt in a refugee camp in Kanyola. She managed to escape death because she was in a toilette outside her aunt's tent at the time of the attack. When she eventually came out of the toilette, she found her aunt and her aunt's two children dead with their

throats slit, and was unable to find her husband, son and uncle. She then came across the bodies of many other people in the camp, who appeared to have been killed by machetes.

[6] Shortly afterwards, Ms. Bukuru managed to escape to the U.S. after obtaining a U.S. student visa. After spending approximately one month in the U.S., without ever having attended school, she came to Canada by land, via Buffalo, on July 18, 2007. She claimed refugee status approximately two weeks later. In the personal information form (PIF) filed in support of her application, she claimed to fear death at the hands of the warlords or militia groups that continue to perpetuate the ethnic conflict in the DRC.

II. The Decision Under Review

[7] In a decision dated November 5, 2009, the Refugee Protection Division (RPD) of the Immigration and Refugee Board rejected Ms. Bukuru's application on the basis that it did not find her to be credible. After expressing doubt as to whether Ms. Bukuru had ever experienced the atrocities she had described, the RPD concluded that she had not discharged her burden of demonstrating a well-founded fear of persecution in the DRC, or a risk described in s. 97 of the *Immigration and Refugee Protection Act* (IRPA).

[8] The RPD found Ms. Bukuru to be not credible as a result of the following:

- i. There was no mention of her claim to have been raped in the notes that were made at the time she entered Canada;

- ii. She returned from Rwanda to her village in the DRC on multiple occasions after having obtained refuge in Rwanda during the period 1996 to 2007;
- iii. She testified that she left the DRC on June 27, 2007, whereas she stated in her PIF that she left on May 27, 2007;
- iv. She testified that her father was a teacher, whereas he is identified as having been a civil servant (“fonctionnaire”) in her birth certificate;
- v. She testified that her father died at the age of 42, whereas her birth certificate states that he was 47 when she was born;
- vi. She did not seek a gynaecological or other physical examination after reaching the refugee camp where she claimed to have stayed in 1996;
- vii. She testified that she did not know the name of the person who loaned her in excess of US \$12,000 for her tuition, notwithstanding that this person accompanied her to the U.S.; and
- viii. She did not seek asylum in the U.S. during the period of approximately one month that she spent there before travelling to Canada.

[9] At the outset of its decision, the RPD characterized Ms. Bukuru's claim for refugee protection as being based on (i) her membership in a social group consisting of women, and (ii) her claim to being a person in need of protection, as contemplated by s. 97 of the IRPA.

III. Issues

[10] Ms. Bukuru alleges that the RPD erred by:

- i. misunderstanding and ignoring parts of her testimony, and thereby rejecting the credibility of her testimony;
- ii. failing to consider a report written by two psychologists; and
- iii. misunderstanding the basis for her claim for refugee protection.

IV. Standard of review

[11] The issues that have been raised by the Applicant are reviewable on a standard of reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paras. 51-56; and *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at paras. 45-46).

[12] In *Khosa*, at para. 59, reasonableness was articulated by Justice Ian Binnie as follows:

[...] Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine

if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.

V. Analysis

A. *Did the RPD err in misunderstanding or ignoring parts of Ms. Bukuru's testimony, and in thereby impugning her credibility?*

[13] Ms. Bukuru's explanations for the "contradictions" and other credibility issues raised by the RPD are as follows:

- i. The notes made at the time of her entry into Canada: Ms. Bukuru testified that although she had difficulty speaking English with the officer at the border crossing where she entered Canada, she did mention to that officer that she had been raped, as she subsequently claimed in her PIF. She added that she had even shown the officer the scars from the wounds she allegedly suffered when she was raped and tortured in prison. (This latter fact was not mentioned in the RPD's decision.)
- ii. Her repeated returns to the DRC from Rwanda: Ms. Bukuru testified that civil war broke out on an episodic basis in the DRC during the period 1996 to 2007. She stated that whenever hostilities subsided, they were told that they were no longer welcome in Rwanda. She added that the DRC refugees in Rwanda were not liked by the Rwandans, in part because they (the refugees) brought insecurity to the areas of refuge. She further explained that the refugees were threatened by the Rwandans, that the refugees felt

insecure there, and that conditions in the camps were very difficult. With respect to the latter, she explained that people were dying from malnutrition and it was very difficult to sleep in the camps, which were situated on the slopes of hills, such that their feet would wind up sticking outside of the tent and constantly getting cold.

- iii. Her date of departure from the DRC: When asked when she left the DRC, Ms. Bukuru stated that it was on June 27, 2007. However, in her PIF, she stated that she left the DRC on May 27, 2007. In its decision, the RPD took “note” of this contradiction and of the fact that Ms. Bukuru testified that she decided to leave the DRC on June 26, 2007. A review of the hearing transcript suggests that Ms. Bukuru, whose first language is Swahili, may not have appreciated that she may have erred when completing her PIF and that she likely did not fully understand the distinction that was being drawn between when she decided to leave the DRC and when she actually left the DRC.
- iv. Her father’s occupation: Ms. Bukuru testified that her father was a teacher (“enseignant”). When she was informed that her birth certificate indicated that he was a civil servant (“fonctionnaire”), she explained that everyone employed by the state in the DRC is called a civil servant, and that her father was employed by the state as a teacher.
- v. Her father’s age when he died: Ms. Bukuru’s birth certificate states that her father was 47 when she was born. When asked how old her father was when he died, Ms. Bukuru initially stated that she didn’t remember. She then guessed that he was at least 42 years old. When it was put to her that she had stated that he was approximately 42 years old

when hostilities broke out in 1996, and that he should have been approximately 66 years old by that time, she replied that she was simply guessing, because she was not sure of her father's age. Earlier in her testimony, she replied that she didn't know when her parents were born. She also stated that she has memory problems.

vi. Her failure to seek a gynaecological or other physical examination: Ms. Bukuru

testified that she was given some sedatives, Aspirin and antibiotics when she reached a refugee camp after being imprisoned, tortured and raped for a week in 1996. She further testified that she requested a medical test with respect to pains in her stomach ("mal au bas ventre") and that she was told that there was no equipment in the camp to provide such tests. When asked why she didn't consult a doctor upon her return to the DRC, she replied that she had no money and couldn't obtain any from anyone, as the rest of her family members from the village had been killed. The RPD observed that her failure to explain why she did not seek a gynaecological or other physical exam "discredited her claim to have been sexually assaulted" (translation).

- vi. Her claim to not know the person who loaned her the money for her tuition: When asked where she obtained the more than \$12,000 required for her tuition fees in the U.S., she replied that the same person who helped her to obtain her student visa also took care of paying the tuition fees. She explained that the person is a friend of her uncle's wife whose identity she did not know.

- vii. Her failure to claim asylum in the U.S.: Ms. Bukuru testified that she did not claim refugee status in the U.S. primarily because she could not afford to go to school and she was afraid that, as someone who had entered the U.S. on a student visa, she would have been imprisoned for not going to school. She added that she did not have anyone to help her there and that she decided to instead claim asylum in Canada where she has a sister, and where there is no racism. In her written submissions, she further noted that she was legally in the U.S. on a student's visa. It appears that she believed that it was not necessary for her to claim asylum there in order to be able to stay there indefinitely. The RPD observed that her failure to claim asylum in the U.S. contradicted her claim to having a subjective fear of persecution and "almost completely" undermined her claims regarding the difficulties she encountered in the DRC.

[14] In my view, it was unreasonable for the RPD to have rejected Ms. Bukuru's application for refugee status primarily on the basis that her credibility had been impugned by the aforementioned "contradictions" and questions that it raised in respect of the eight matters discussed above.

[15] In my view, Ms. Bukuru provided explanations that did not give rise to a contradiction or a reasonable concern about her credibility, in respect of (i) why she returned to the DRC from Rwanda on a number of occasions, (ii) her father's occupation, (iii) her failure to seek a gynaecological or other physical examination upon her arrival at the refugee camp in Rwanda in 1996 or upon her return to the DRC, and (iv) her failure to claim asylum in the U.S.

[16] As to the remaining alleged contradictions and questions that the RPD identified or raised with respect to Ms. Bukuru's evidence, I find that, individually and collectively, they were not such as to provide a reasonable basis for rejecting her application under sections 96 and 97 of the IRPA.

[17] As to the date of Ms. Bukuru's decision to depart from the DRC, as noted at sub-paragraph 13(iii) above, it is not clear that Ms. Bukuru understood what she was being asked. Regarding the date that she actually left the DRC, it is entirely possible that the inconsistency between May 27, 2007 and June 27, 2007 was an inadvertent error. In any event, in the context of her overall testimony, that error is very minor.

[18] As to her father's age at the time he died, Ms. Bukuru was very explicit in her testimony that she didn't know when he was born and that she was simply guessing his age.

[19] As to her alleged failure to report that she had been raped when she entered Canada, Ms. Bukuru testified that she did report this fact to the entry officer and that she also showed him her physical scars.

[20] In my view, on the particular facts of this case, these three "contradictions", together with the fact that Ms. Bukuru was unable to or refused to identify the person who loaned her the money for her U.S. tuition, could not reasonably justify a conclusion that Ms. Bukuru did not have a well-founded fear of persecution on the basis of her Tutsi ethnicity, and was not a person in need of protection, as contemplated by sections 96 and 97 of the IRPA, respectively.

[21] Most importantly, those particular facts include Ms. Bukuru's very detailed and unimpugned testimony regarding the appalling persecution that she and her family suffered in the DRC and her experiences in refugee camps in Rwanda. In my view, that testimony was so compelling that the inconsistencies or other difficulties with Ms. Bukuru's evidence would have had to be much more important before the RPD could reasonably have concluded that she did not warrant protection under sections 96 or 97 of the IRPA.

[22] Given my conclusion above, it is not necessary to address the remaining issues raised by Ms. Bukuru.

VI. Conclusion

[23] The application for judicial review will be allowed. The decision dismissing the Applicant's claim to be recognized as a Convention refugee and a person in need of protection is set aside. This matter is remitted to a differently constituted panel of the Board.

[24] There is no question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES THAT this application for judicial review is granted. The Decision dismissing the Applicant's claim to be recognized as a Convention refugee and a person in need of protection is set aside. The matter is remitted to a differently constituted panel of the Board to determine, according to law and in light of the foregoing reasons, whether the Applicant is a Convention refugee within the meaning of s. 96 of the IRPA and/or is a person in need of protection within the meaning of s. 97 of the IRPA.

"Paul S. Crampton"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-5736-09

STYLE OF CAUSE: FRANCINE BUKURU v. THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: May 3, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT BY:** Crampton J.

DATED: August 16, 2010

APPEARANCES:

Anthony Kako FOR THE APPLICANT

Melissa Mathieu FOR THE RESPONDENT

SOLICITORS OF RECORD:

Anthony Kako FOR THE APPLICANT
Barrister and Solicitor
Toronto, Ontario

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