

Federal Court



Cour fédérale

Date: 20111206

**Docket: IMM-2043-11
IMM-2045-11**

Citation: 2011 FC 1423

Ottawa, Ontario, December 6, 2011

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

CLARA KIZA MUTENDE

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION
and
THE MINISTER OF PUBLIC SAFETY**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] Clara Kiza Mutende seeks judicial review of two decisions made by an Immigration Officer. In the first decision, the Officer declared her to be ineligible to claim refugee protection in Canada because she had entered Canada through a safe third country and had not established that she had a family member in Canada. Ms. Mutende also challenges the Officer's decision to issue an exclusion order against her.

[2] For the reasons that follow, both of Ms. Mutende's applications will be dismissed.

Background

[3] Ms. Mutende endeavoured to enter Canada from the United States. She sought to apply for refugee protection in Canada, claiming to have a well-founded fear of persecution in the Democratic Republic of Congo [DRC], allegedly her country of birth and citizenship.

[4] The combined effect of Canada's *Safe Third Country Agreement* with the United States, subsection 100(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, and section 159.5 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, is that Ms. Mutende needed to have an 'anchor relative' in Canada in order to be eligible to claim refugee protection in this country.

[5] Ms. Mutende attended at the offices of Canada Border Services Agency [CBSA] in Fort Erie on March 11, 2011, in order to file her refugee claim. She was accompanied by Byatanga Ilango Mutende, a Canadian citizen who Ms. Mutende says is her brother.

[6] An Immigration Officer interviewed the two individuals separately in order to assess the *bona fides* of their sibling relationship. The Officer determined that there were material inconsistencies in the information provided by the pair. The Officer also had concerns about the identity documents produced by Ms. Mutende.

[7] The Officer advised Ms. Mutende and her putative brother of the various inconsistencies in their statements and asked for an explanation. Although Ms. Mutende could offer no explanation, Mr. Mutende suggested that the discrepancies were due to Ms. Mutende being 20 years younger than him, with the result that she might not remember family details from when she was a child.

[8] The Immigration Officer was not satisfied that the age gap explained the many inconsistencies in their stories. Accordingly, she advised Ms. Mutende and her putative brother that she would issue an exclusion order against Ms. Mutende as she was ineligible to claim refugee protection in Canada.

[9] After the Officer had advised the pair of her decision, Mr. Mutende asked the Officer if the CBSA could perform a DNA test to prove their biological relationship. The Officer responded that CBSA did not itself perform DNA testing, and that it was open to the applicant and Mr. Mutende to have tests done at an accredited lab. However, because she was convinced from the interviews that there was no sibling relationship between the pair, the Officer was not prepared to delay her decision in order to allow them to undergo testing.

[10] Consequently, the Officer declared Ms. Mutende ineligible to claim refugee protection in Canada and issued an exclusion order against her. She was returned to the United States later that day.

[11] Three days later, the CBSA received the results of Ms. Mutende's RCMP/FBI fingerprint search. They revealed that Ms. Mutende had used at least two other aliases in the United States.

More significantly, the search revealed that Ms. Mutende was born in the city of Brazzaville, in the Republic of Congo, and not in the Democratic Republic of Congo, as she had claimed.

The Failure of the Officer to Put Inconsistencies to the Applicant

[12] Ms. Mutende alleges in her memorandum of fact and law that she was treated unfairly as the Officer failed to identify the inconsistencies in her answers and give her a chance to explain. She did not pursue this argument at the hearing, and in any event, it appears from the record that the Officer did in fact confront Ms. Mutende and her putative brother with the inconsistencies in their stories and afforded them an opportunity to explain the discrepancies.

The Officer's Assessment of the Inconsistencies

[13] Ms. Mutende asserts that the Officer's assessment of the answers provided by Ms. Mutende and her putative brother was unreasonable.

[14] Ms. Mutende argues that the consistencies in their stories outweighed the inconsistencies, and supported the existence of a sibling relationship. She says that the Officer also erred by failing to consider that a number of the 'discrepancies' that she identified may have actually been different descriptions of the same facts. Ms. Mutende further contends that the Officer failed to take into account the explanation that Ms. Mutende had been separated from her brother from a young age, and would thus have had less knowledge of family matters dating from that time.

[15] I am satisfied that the Officer's assessment was reasonable. While some of the information provided was undoubtedly consistent, there were also material differences in the information provided by Ms. Mutende and her putative brother.

[16] By way of example, both individuals stated that their sister Mariamou (as Ms. Mutende called her) or Marie (as Mr. Mutende referred to her) had died. However, Ms. Mutende told the Officer that she was murdered in 2009 by people who came to her home and killed her. In contrast, Mr. Mutende stated that she died of an illness in 2004.

[17] While Ms. Mutende is evidently much younger than the man she claims is her brother, she was an adult by the time her sister allegedly died, whether it was in 2004 or in 2009. Her assertion that she had been separated from her putative brother for many years simply did not explain this significant divergence in their stories.

[18] There was also a discrepancy regarding the number and identity of Ms. Mutende's father's siblings. Moreover, Ms. Mutende claims that she and her putative brother had the same mother and the same father. However, as the Officer noted, Ms. Mutende did not mention a sibling named André when she was asked to identify her father's siblings. This is not surprising, as Ms. Mutende identified André as her father. What is surprising is that Mr. Mutende identified André as his father's brother.

[19] Ms. Mutende and her putative brother also disagreed about the number of times he had been married. The fact that she had been separated from her putative brother for many years might have

explained Ms. Mutende not knowing the answer to this question. However, she claimed to know the answer, stating categorically that although her brother had been involved with a number of women, he had only been married once. This answer was different than the one provided by Mr. Mutende.

[20] These are just some of the discrepancies in the answers that were identified by the Immigration Officer. As a consequence, I am satisfied that the Officer's finding that Ms. Mutende had failed to demonstrate that she had a brother in Canada was entirely reasonable.

The Officer's Treatment of the Identity Documents

[21] The Officer had several concerns about Ms. Mutende's identity documents, particularly the manner in which the documents were procured. While most of these concerns were reasonable, I do accept that the Officer did not properly understand Ms. Mutende's explanation that the documents were obtained in the city of "Uvira", and not from a person called "Vera".

[22] However, I am not persuaded that this one error provides a sufficient basis to call into question the Officer's overall assessment of the evidence, given the reasonableness of the Officer's numerous other findings.

[23] I am also not persuaded that it was an error for the Officer not to make specific reference to the identity documents of Ms. Mutende's putative brother. Mr. Mutende may very well be the person he claims to be. Indeed, there is no reason to think otherwise. It does not matter whether or not his documents are reliable, however, if it has not been established that Ms. Mutende is who *she* claims to be.

The Failure of the Officer to Wait for DNA Testing

[24] Ms. Mutende also claims that it was unfair for the Officer not to defer her decision in order to allow the pair to undergo DNA testing. I do not agree.

[25] In support of her contention that she was treated unfairly, Ms. Mutende explained the “Catch-22” situation facing applicants who want to obtain DNA testing in order to satisfy Canadian immigration authorities as to their familial relationships.

[26] According to Ms. Mutende, the CBSA will not accept the results of DNA tests unless it has been involved in the testing process, as it understandably wants to ensure the integrity of that process. However, Ms. Mutende claims that the CBSA will not involve itself in the testing process until such time as the individual has actually presented him- or herself to immigration authorities, by which time it is too late to have testing done.

[27] Ms. Mutende says that this is unfair, and cries out for some form of policy guidance.

[28] As interesting as this argument may be, I do not need to address it in this case as there is nothing in the record before me to suggest that Ms. Mutende and her putative brother ever made any efforts to involve the CBSA in DNA testing prior to presenting themselves at the border at Fort Erie on March 11, 2011. Indeed, there is nothing in the record that would indicate that the pair gave any consideration to DNA testing until the Immigration Officer advised them that her decision would be unfavourable.

[29] I am also not persuaded that fairness required the Officer to delay her decision in order to allow for DNA testing. While it would have been open to the Officer to allow the parties to seek such a test, she was under no obligation to do so. The onus is on applicants to satisfy Canadian immigration authorities of their eligibility and admissibility. This they had failed to do.

[30] Given the numerous and material discrepancies in the information that Ms. Mutende and her putative brother provided to the Officer, the Officer had quite reasonably determined that the two were not brother and sister. In the circumstances, it was neither unfair nor unreasonable for the Officer to refuse to delay matters, and to confirm the decision that she had already made.

The Clean Hands Issue

[31] Although I have chosen to deal with this matter on its merits, it would also have been open to me to dismiss Ms. Mutende's application for judicial review on the grounds that she does not come before the Court with clean hands.

[32] Ms. Mutende has failed to answer, or even address, the results of the fingerprint search in her affidavit. As a result, I have uncontradicted evidence before me that Ms. Mutende made a material misrepresentation as to her country of origin, a matter that would clearly have been central to her identity and, ultimately, to her refugee claim.

[33] More significantly, insofar as the issues involved in this application are concerned, the results of the fingerprint search cast further doubt on Ms. Mutende's eligibility to claim refugee

protection in Canada, which depended on her establishing that Mr. Mutende is indeed her brother. Ms. Mutende claims that she and her brother were born and raised together in the DRC by the same parents. The fact that Ms. Mutende was apparently born in Brazzaville in the Republic of Congo casts grave doubt on the veracity of her entire story.

Conclusion

[34] For these reasons, the application for judicial review is dismissed. On the consent of the parties, the style of cause is amended to add the Minister of Public Safety as a respondent.

Certification

[35] I agree with the parties that this case turns on its facts and does not raise a question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is dismissed;
2. The style of cause is amended to add the Minister of Public Safety as a respondent; and
3. No serious question of general importance is certified.

“Anne Mactavish”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2043-11 and IMM-2045-11

STYLE OF CAUSE: CLARA KIZA MUTENDE v.
THE MINISTER OF CITIZENSHIP
AND IMMIGRATION ET AL

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: November 30, 2011

**REASONS FOR JUDGMENT
AND JUDGMENT:** Mactavish J.

DATED: December 6, 2011

APPEARANCES:

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