Bukumba v. Canada (Minister of Citizenship & Immigration)

Madeleine Mangabu **Bukumba** and Gracia Mukumba, Applicant and The Minister of Citizenship and Immigration, Respondent

Federal Court

von Finckenstein J.

Heard: January 14, 2004
Judgment: January 22, 2004
Docket: IMM-3088-03

Counsel: Mr. Stephen G. Jenuth, for Applicant

Ms Carrie Sharpe, for Respondent

Subject: Immigration

Aliens, immigration and citizenship --- Convention refugees -- Elements of Convention refugee status -- Exclusion clauses

Applicant was citizen of Democratic Republic of Congo (DRC) -- Applicant worked for DRC government agency -- Applicant offered public criticisms of DRC government -- Applicant fled DRC via Kenya for Canada -- Applicant claimed Convention refugee status on basis of fear of persecution in homeland -- Immigration and Refugee Board dismissed claim on basis applicant's actions for DRC government constituted crimes against humanity -- Applicant brought application for judicial review -- Application dismissed -- Applicant's actions in DRC were consistent with binding definitions of crimes against humanity -- Documentary evidence illustrated that applicant's former government agency was responsible for arrest and detention of political opponents and journalists -- Applicant was culpable as accomplice -- Although applicant was not physical perpetrator of crimes, applicant responsible by virtue of employment and close relationship with head of government agency.

Cases considered by von Finckenstein J.:

> Canada (Minister of Citizenship & Immigration) v. Ekuban (2001), 2001 FCT 65, 2001 CarswellNat 224, [2001] 3 F.C. 85, 2001 CarswellNat 2083, 200 F.T.R. 285 (Fed. T.D.) -- referred to
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> Figueroa c. Canada (Ministre de la Citoyenneté & de l'Immigration) (2001), 2001 CAF 112, 2001 CarswellNat 859, 2001 FCA 112, 2001 CarswellNat 2237, 16 Imm. L.R. (3d) 61, 278 N.R. 27, 212 F.T.R. 318 (note) (Fed. C.A.) -- referred to

Gonzalez v. Canada (Minister of Employment & Immigration) (1994), 24 Imm. L.R. (2d) 229, [1994] 3 F.C. 646, 170 N.R. 302, 115 D.L.R. (4th) 403, 1994 CarswellNat 130, 1994 CarswellNat 1487 (Fed. C.A.) -- followed

Harb c. Canada (Ministre de la Citoyenneté & de l'Immigration) (2003), 2003 CarswellNat 1279, 2003 CAF 39, 2003 CarswellNat 180, 2003 FCA 39, (sub nom. Harb v. Canada (Ministre de la Citoyenneté & de l'Immigration)) 302 N.R. 178, 27 Imm. L.R. (3d) 1 (Fed. C.A.) -- considered

Hovaiz v. Canada (Minister of Citizenship & Immigration) (2002), 2002 FCT 908, 2002 CarswellNat 2198, 2002 CFPI 908, 2002 CarswellNat 3007 (Fed. T.D.) -- considered

Le Procureur v. Akayesu (September 2, 1998), Doc. N.ICTR-96-4-T (Int. Criminal Trib.) -- referred to

Mendez-Leyva v. Canada (Minister of Citizenship & Immigration) (2001), 2001 FCT 523, 2001 CarswellNat 1083, 205 F.T.R. 150, 2001 CFPI 523 (Fed. T.D.) -- followed

Moreno v. Canada (Minister of Employment & Immigration) (1993), 21 Imm. L.R. (2d) 221, [1994] 1 F.C. 298, 159 N.R. 210, 107 D.L.R. (4th) 424, 1993 CarswellNat 124, 1993 CarswellNat 1343 (Fed. C.A.) -- referred to

Mugesera c. Canada (Ministre de la Citoyenneté & de l'Immigration) (2003), (sub nom. Mugesera v. Canada (Ministre de la Citoyenneté & de l'Immigration)) 309 N.R. 14, 31 Imm. L.R. (3d) 159, (sub nom. Mugesera v. Canada (Minister of Citizenship & Immigration)) 232 D.L.R. (4th) 75, 2003 CAF 325, 2003 CarswellNat 2663, 2003 FCA 325, 2003 CarswellNat 2926 (Fed. C.A.) -- followed

Penate v. Canada (Minister of Employment & Immigration) (1993), 71 F.T.R. 171, [1994] 2 F.C. 79, 1993 CarswellNat 249, 1993 CarswellNat 249F (Fed. T.D.) -- considered

R. v. Finta (1994), 28 C.R. (4th) 265, [1994] 1 S.C.R. 701, 20 C.R.R. (2d) 1, 70 O.A.C. 241, 88 C.C.C. (3d) 417, 112 D.L.R. (4th) 513, 165 N.R. 1, 1994 CarswellOnt 61, 1994 CarswellOnt 1154 (S.C.C.) -- referred to

Ramirez v. Canada (Minister of Employment & Immigration) (1992), 89 D.L.R. (4th) 173, [1992] 2 F.C. 306, 135 N.R. 390, 1992 CarswellNat 94, 1992 CarswellNat 94F (Fed. C.A.) -- considered

Sivakumar v. Canada (Minister of Employment & Immigration) (1993), 163 N.R. 197, [1994] 1 F.C. 433, 1993 CarswellNat 242, 1993 CarswellNat 242F (Fed. C.A.) -- considered

Srour v. Canada (Solicitor General) (1995), (sub nom. Srour v. Canada (Solliciteur général)) 91 F.T.R. 24, 1995 CarswellNat 1036 (Fed. T.D.) -- considered

Sumaida v. Canada (Minister of Citizenship & Immigration) (2000), 2000 CarswellNat 23, 3 Imm. L.R. (3d) 169, 183 D.L.R. (4th) 713, 252 N.R. 380, [2000] 3 F.C. 66, 2000 CarswellNat 1751, 179 F.T.R. 148 (Fed. C.A.) -- considered

Statutes considered:

Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24

s. 4(3) "crime against humanity" -- considered

Immigration and Refugee Protection Act, S.C. 2001, c. 27

s. 35(1)(a) -- considered

s. 98 -- considered

Rules considered:

Federal Court Immigration and Refugee Protection Rules, SOR/93-22

R. 5(1) -- referred to

Treaties considered:

Convention Relating to the Status of Refugees, 1951, C.T.S. 1969/6; 189 U.N.T.S. 150

Article 1E -- considered

Article 1F -- considered

Article 1F(a) -- considered

APPLICATION for judicial review of decision that applicant was not Convention refugee

***von Finckenstein J.*:**

1 The principal applicant, Madelaine **Bukumba,** is a 41 year-old woman from the Democratic Republic of Congo (DRC). She was named the designated representative of her daughter, 10 year-old Gracia Mulumba. In the DRC, the applicant was employed by the Comité de Securité de l'État (CSE). Recruited by the current Minister of the Interior, her job was to listen incognito to the conversations of individuals in public places and to report on their opinions to the CSE. She also reported on media coverage of the government.

2 The applicant claims persecution on the basis of political opinion. She claims that she was criticized and punished by her supervisor for issuing reports critical of the government. Most seriously, in August 2000, she was shown on television speaking against the government's use of child soldiers. As a result, she was imprisoned for 15 days. After her release, she attempted to quit her job but was told that she would be killed if she did so. It was at this point that she fled with her daughter to Kenya and eventually came to Canada.

3 The Board found that the applicant was excluded from the definition of Convention Refugee as she had knowingly been an accomplice to crimes against peace, war crimes and crimes against humanity as an employee of the CSE in the late 1990s. In addition, it found that there was insufficient credible evidence that either she or her daughter would face a risk to her life, or a risk of cruel and unusual treatment or torture if returned to the DRC.

Issues

4 The applicant alleges that the Board erred in finding:

> (1) that the CSE engaged in crimes against humanity or torture,
>
> (2) that the applicant was an accomplice to any crimes which CSE committed, and
>
> (3) that she and her daughter would not be subject to more that a mere possibility of persecution if returned to the DRC.

5 As a preliminary matter, the respondent takes issue with the manner in which the applicant has phrased the issues. The applicant failed to raise error of law as a ground for relief in her application for leave but did so in her Memorandum of Argument. In the respondent's view this contravenes section 5(1) of the *Federal Court Immigration and Refugee Protection Rules*, SOR/93-22.

6 Although the applicant did not raise issues of law in her application for leave, the respondent has suffered no prejudice from her failure to do so. See: *Canada (Minister of Citizenship & Immigration) v. Ekuban* (2001), 200 F.T.R. 285 (Fed. T.D.). The request in her application for leave that the court consider "other grounds" provides sufficient basis for this Court to consider the issues of law which she now raises.

Standard of Review

7 Both sides agree that the standard of review for the Board's decision that certain acts fall within the definition of "crimes against humanity" is correctness (*Mendez-Leyva v. Canada (Minister of Citizenship & Immigration)* , 2001 FCT 523 (Fed. T.D.) ;Gonzalez v. Canada (Minister of Employment & Immigration) (1994), 24 Imm. L.R. (2d) 229 (Fed. C.A.) and that the standard of review for the Board's decision that certain acts occurred is patent unreasonableness (*Mugesera c. Canada (Ministre de la Citoyenneté & de l'Immigration)* , [2003] F.C.J. No. 1292, 2003 FCA 325 (Fed. C.A.).

8 For issues 1 and 2, the central question has been whether or not the CSE and the applicant herself undertook certain acts. Issue 3 relates to the Board's factual finding that 10 year-old Gracia Mukumba would not be at risk if returned to the DRC. Accordingly, the standard of review for all three issues is patent unreasonableness.

Relevant Law

9 Section 98 of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (Act) provides as follows:

> 98. A person referred to in section E or F of Article 1 of the Refugee Convention is

not a Convention refugee or a person in need of protection.

10 Subsections E and F of Article 1 of the *United Nations Convention Relating to the Status of Refugees* (Refugee Convention) provide:

> E) This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country/
>
> F) The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that...(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.

11 Section 35 (1) of the Act also provides that:

> A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for... (a) committing an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the Crimes Against Humanity and War Crimes Act....

12 Subsection 4(3) of the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24 provides:

> "Crime against humanity" means murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crimes against humanity according to customary international law or conventional international law or by virtue or its being criminal according to the general principles of law recognized by the community of nations....

Issue 1: Did the Board err in finding that the CSE had engaged in crimes against humanity or torture

13 The applicant refers to the definition of crimes against humanity in Article 1 (F) of the Refugee Convention. She argues that the Federal Court of Appeal in *Sivakumar v. Canada (Minister of Employment & Immigration)* , [1993] F.C.J. No. 1145 (Fed. C.A.) (Sivakumar) found that the acts described in the latter section must be widespread and involve the systematic targeting of certain populations.

14 In this case, the applicant argues that the only evidence before the Board was that the CSE arrested, imprisoned for short periods and harassed individuals. She argues that these activities were not widespread and systematic and do not otherwise meet the definition of crimes against humanity. She submits that there is no evidence on the Record that individuals were tortured while imprisoned by the CSE and that allegations of mistreatment in an Amnesty International Report central to the Board's decision were directed against civil war combatants and the Military Order Court rather than at the CSE

15 In *Mugesera c. Canada (Ministre de la Citoyenneté & de l'Immigration)* , [2003] F.C.J. No. 1292, 2003 FCA 325 (Fed. C.A.) at para. 52, the Federal Court of Appeal found that that there four esseential factors to a crime against humanity: (I) the act, inhumane by definition and by nature, must occasion serious suffering or seriously impair physical integrity or mental or physical health; (ii) the act must be part of a widespread or systematic attack; (iii) the act must be against members of a civilian population; (iv) the act must be committed for one or more discriminatory reasons, in particular for national, political, ethnic, racial or religious reasons. (*Le Procureur v. Akayesu* (September 2, 1998), Doc. N.ICTR-96-4-T (Int. Criminal Trib.)[Le-Procureur v. Jean-Paul Akayesu, International Criminal Tribunal for Rwanda] *R. v. Finta*, [1994] 1 S.C.R. 701 (S.C.C.)Sivakumar v. Canada (Minister of Employment & Immigration) (1993), [1994] 1 F.C. 433 (Fed. C.A.) ; *Figueroa c. Canada (Ministre de la Citoyenneté & de l'Immigration)* (2001), 212 F.T.R. 318 (note)

16 Article 1(F) of the Refugee Convention requires that there be a "serious reason for considering" thatiividual has committed a crime against humanity. In *Ramirez v. Canada (Minister of Employment & Immigration)* , [1992] 2 F.C. 306 (Fed. C.A.), the Court described this standard as less than proof on a balance of probabilities. The onus is on the government to meet this standard of proof (*Srour v. Canada (Solicitor General)* , [1995] F.C.J. No. 133 (Fed. T.D.).

17 The applicant conceded at the hearing that there are ongoing crimes against humanity committed in the DRC. However she argues that there is no specific proof that these are carried out by the CSE. Documentary evidence on the Record, including a 2000 Amnesty International Report and particularly the contextual information package contained in item A.3 thereof, describes the continued persecution of individuals opposed to the government. In this material, the CSE is described as one of the institutions responsible for the arrest and detention of political opponents and journalists. Once arrested, the evidence suggests that individuals are routinely beaten and tortured and that many are tried and executed without due process. Other evidence also describes a specific instances of the treatment and fate of individuals arrested by the CSE as opposed to other organizations within the DRC's security apparatus. For instance, the following UNHCR report:

> **4.4a Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World**
>
> E/CN.4/2000/42
>
> Report on the situation of human rights in the Democratic Republic of the Congo, submitted by the Special Rapporteur, Mr. Roberto Garretón, in accordance with Commission on Human Rights resolution 1999/56 United Nations. Commission on Human Rights (UNHCHR)
>
> (Geneva: UNHCHR, January 2000)
>
> (http:/www.unhchr.ch/Huridoca/nsf/
>
> (Symbol)/E.CN.4.2000.42.En/$FILE/G0010229.pdf
>
> (Accessed 09/01/01)

> describes two instances of whipping and torture committed by the CSE at page 51. Overall, therefore, the record confirms the importance of the CSE within the state apparatus of the DRC, and furnishes sufficient reason for the Board to have inferred that it was an active participant in unlawful acts committed by the regime.

Issue 2: Did the Board err in finding that the applicant was an accomplice to any crimes which CSE committed

18 The applicant argues that she was not personally complicit in any of the crimes that the CSE may have undertaken. She argues that her reports were of a public rather than individual nature and that she did not know that they were being used for an improper purpose. She submits that, pursuant to the judgement in Sivakumar, *supra*., an individual cannot be an accomplice to an international crime merely because she knows it is occurring unless she is a leader of the organization which is committing the crime or the organization was created for a "limited, brutal purpose." If the CSE committed any crimes, the applicant argues that she is not complicit as she had no part in its chain of command.

19 The following principles have been enunciated with regards to complicity in crimes against humanity:

> 1. An individual may be an accomplice to an international crime even though a specific act or omission is not directly attributable to him (*Sumaida v. Canada (Minister of Citizenship & Immigration)* , [2000] 3 F.C. 66 (Fed. C.A.).
>
> 2. An individual who associated with a person or organization responsible for international crimes may be an accomplice to these crimes if he knowingly participated in or tolerated them (Sivakumar, supra.)
>
> 3. An individual may be an accomplice to an international crime if, having knowledge of that crime, he fails to take steps to prevent it occurring or to disengage himself from the offending organization at the earliest opportunity consistent with his own safety (*Penate v. Canada (Minister of Employment & Immigration)* (1993), [1994] 2 F.C. 79 (Fed. T.D.)
>
> 4. An individual will be an accomplice to an international crime if he provides information about others to an organization with a limited, brutal purpose with knowledge that they will likely come to harm (*Hovaiz v. Canada (Minister of Citizenship & Immigration)* , [2002] F.C.J. No. 1199 (Fed. T.D.))
>
> 5. Membership in an organization with a limited, brutal purpose leads to a presumption of knowledge as to the act which this organization is undertaking (*Harb c. Canada (Ministre de la Citoyenneté & de l'Immigration)* , [2003] F.C.J. No. 108, 2003 FCA 39 (Fed. C.A.))

20 In this case the Board found as follows:

> ...While the claimant was not in a physical sense the perpetrator of the crimes against humanity, by virtue of her employment and close relationship with the head of CSE, she was an accomplice. An accomplice is as culpable as the principle perpetrator, a

> principle set out by the Federal Court in the case of *Moreno*. [FN1] This situation can be distinguished from that in the case of *Ramirez*[FN2] as she was not merely a member of an organization which from time to time committed international offences, but was a long-time employee, specifically recruited by the head of the security agency and agreeing voluntarily to anonymously collect information on what people were saying, and report directly to the head. She testified she realized early in her employment that her reports were not being used for the benign purpose for which she assumed they would be, but continued nevertheless to feed information on protestors and others, to the CSE. She made no attempt for four years to leave her employment until she was personally involved in a conflict with Mr. Ndjoku. Therefore, the panel finds her participation in the activities of the CSE were personal, knowing and voluntary.

20 This statement seems to be consistent with the principles referred to in paragraph 19 above. In light of this and given the evidence contained in the Tribunal Record, I cannot see how this inference by the Board was patently unreasonable.

Issue 3: Did the Board err in finding that she and her daughter would not be subject to more that a mere possibility of persecution if returned to the DRC.

21 In light of the conclusions reached in respect of items 1 and 2, by virtue of section 98 of the Act, this question becomes irrelevant with regards to the principal applicant. With regards to the minor applicant, there was no evidence before the Board that she would be at risk if returned to the DRC. Notably, her father has continued to reside in the country without any negative consequences as a result of the principal applicant's actions.

22 In light of the above findings, this application is hereby dismissed.

Order

IT IS HEREBY ORDERED that:

1. This application is dismissed.

Application dismissed.

FN1 *Moreno v. Canada (Minister of Employment and Immigration,* [1994] 1 F.C. 298 (Fed. C.A.)

FN2 *Ramirez v. Canada (Minister of Employment & Immigration)* , [1992] 2 F.C. 306 (Fed. C.A.)

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