Federal Court  Cour fédérale

**Date: 20151026**

**Docket: IMM-226-15**

**Citation: 2015 FC 1211**

**Ottawa, Ontario, October 26, 2015**

**PRESENT: The Honourable Mr. Justice Gascon**

**BETWEEN:**

**LÉONIDAS NSHOGOZA**

**Applicant**

**and**

**MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA**

**Respondent**

# JUDGMENT AND REASONS

## I. Overview

[1] Mr. Léonidas Nshogoza is a citizen of Rwanda. He challenges a decision of an officer [the Officer] of the Immigration Section of the High Commission of Canada in Nairobi, Kenya refusing his application for a permanent residence visa. In her decision, the Officer rejected Mr. Nshogoza's application as a member of either the Convention Refugees Abroad class or the

Humanitarian-protected Persons Abroad class. The Officer determined that Mr. Nshogoza had no well-founded grounds to fear persecution in Rwanda. Furthermore, the Officer concluded that Mr. Nshogoza was inadmissible to Canada on grounds of criminality and serious criminality under paragraphs 36(1)(b) and 36(2)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], as he had been found guilty of "contempt of the Tribunal" by the International Criminal Tribunal for Rwanda [ICTR] and of "minimizing genocide and eliminating evidence of the genocide" by a Rwandan court.

[1] Mr. Nshogoza contends that the Officer erred in finding that he was not a Convention refugee, that the Officer's decision was unreasonable in light of the evidence on the record and that the Officer acted contrary to law in ignoring information from an employee of the Canadian High Commission in Kenya indicating that his criminal convictions would not render him inadmissible for permanent residence status. He asks this Court to quash the decision of the Officer, to order the High Commission to confirm his Convention refugee status and to grant him a permanent resident visa.

[2] For the reasons that follow, this application for judicial review is dismissed. Having considered the decision, the evidence before the Officer and the applicable law, I find no basis for overturning the Officer's decision. The decision thoroughly reviewed the evidence and the Officer's conclusions fall within the range of acceptable and possible outcomes based on the facts and the law. I am also satisfied that the Officer did not breach any principle of natural justice or the doctrine of legitimate expectations in the treatment of Mr. Nshogoza's application.

[3] The issues to be determined are as follows:

- Were the equivalency analyses conducted by the Officer between the Rwandan convictions and Canadian criminal charges and her findings that Mr. Nshogoza was inadmissible for criminality reasonable?
- Was the Officer bound in her decision by a statement apparently made by a Mr. Virani to the effect that Mr. Nshogoza's criminal proceedings would not render him inadmissible?
- Was the Officer's finding that Mr. Nshogoza was not a Convention refugee reasonable?

## II. Background

### A. *Facts*

[4] Mr. Nshogoza is a former United Nations High Commissioner for Refugees [UNHCR] employee and lawyer currently living in Nairobi, Kenya. Mr. Nshogoza, his wife and their children have been recognized as Convention refugees by the UNHCR, as well as by Amnesty International.

[5] Between 2001 and 2007, Mr. Nshogoza served with the ICTR in Tanzania as an investigator for the defence in the case of *Prosecutor v Jean de Dieu Kamuhanda*, ICTR-95-54A-T. In that case, the defendant Mr. Kamuhanda was subsequently found guilty of genocide and extermination, as a crime against humanity, and sentenced to life imprisonment. During the trial, the Trial Chamber of the ICTR ordered protective measures on behalf of victims and potential prosecution witnesses, and more specifically measures that prohibited the defence team

from meeting with prosecution witnesses without informing the prosecution and obtaining prior authorization from the Tribunal.

[6] The ICTR began contempt proceedings against Mr. Nshogoza in February 2008. In July 2009, the Trial Chamber of the ICTR found that Mr. Nshogoza had met with witnesses on two occasions, in violation of the protective measures put in place by the Tribunal. As a result, Mr. Nshogoza was found guilty of "contempt of the Tribunal" and sentenced to ten months of imprisonment by the ICTR. The ICTR Appeals Chamber unanimously upheld Mr. Nshogoza's conviction in March 2010, though two of the five appeal judges partially dissented with regard to the sentencing, stating that the ten-month sentence was excessive.

[7] In July 2011, the Gasabo High Court in Rwanda issued another judgment concerning Mr. Nshogoza. The Rwandan court found him not guilty of the charge of corruption for allegedly providing money to two witnesses to recant their testimony. However, the Court found Mr. Nshogoza guilty of "minimizing genocide and eliminating evidence of the genocide", noting that Mr. Nshogoza solicited witnesses with the intention to eliminate or question evidence. He was sentenced to six years of imprisonment.

[8] In December 2009, Mr. Nshogoza filed an application for a permanent residence visa to Canada. Counsel for Mr. Nshogoza assisted him in preparing his application, specifically by liaising with representatives from Human Rights Watch and Amnesty International and with agents from the Immigration Section of the High Commission for Canada in Kenya. These agents included a Mr. Karim Virani. On or around June 1, 2010, counsel for Mr. Nshogoza

allegedly received a phone call from Mr. Virani, who stated he had received a legal opinion from Ottawa confirming that the criminal proceedings surrounding Mr. Nshogoza's investigation work at the ICTR would not pose an obstacle or render him inadmissible for permanent residence. The legal opinion referred to by Mr. Virani was not filed before the Officer or this Court.

**B. *Decision***

[9] On July 3, 2014, the Officer denied Mr. Nshogoza's application for permanent residence in the Convention Refugees Abroad and the Humanitarian-protected Persons Abroad classes, provided at sections 144 and 146 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR]. Although Mr. Nshogoza, his wife and their children had been recognized as refugees by the UNHCR, the Officer did not believe that they were Convention refugees or persons in need of protection under the applicable provisions of the IRPA as they did not have a well-founded fear of persecution.

[10] The Officer noted Mr. Nshogoza's assertion that he was a victim of persecution from the Rwandan authorities and that he could not return to Rwanda as he would be imprisoned. The Officer however affirmed that both the Canadian government and the ICTR currently recognized that Mr. Nshogoza would now have the right to a fair and just trial in Rwanda. The Officer also stated that she did not believe that the trial and imprisonment verdicts issued against Mr. Nshogoza constituted persecution by the Rwandan authorities. The Officer further noted that Mr. Nshogoza was represented by counsel during parts of the judiciary proceedings in Rwanda and that Mr. Nshogoza chose, by his own accord, not to present himself at his trial before the Rwandan court, despite having been summoned.

[11] The Officer also observed that it was not for her to pronounce herself on the jurisdiction of the Rwandan court, the existence of immunity from prosecution and double jeopardy, as well as on the irregularities claimed by Mr. Nshogoza regarding his arrest and detention. These questions should have been or should be raised before the Rwandan justice system. In her decision, the Officer also referred to the equity letter she sent to Mr. Nshogoza in July 2013, offering him the opportunity to provide observations on the draft reasons of the Officer.

[12] The Officer further determined that Mr. Nshogoza was inadmissible to Canada for criminality under paragraph 36(2)(b) of the IRPA following his conviction for contempt of the Tribunal by the ICTR. The Officer found this "contempt of the Tribunal" charge to be equivalent to the Canadian "contempt of Court", which is an indictable offence pursuant to sections 9 and 127(1) of the *Criminal Code*, RSC 1985, c C-46 [the *Criminal Code*].

[13] The Officer also concluded that Mr. Nshogoza was inadmissible to Canada for serious criminality under paragraph 36(1)(b) of the IRPA following his conviction by the Rwandan court for "minimizing genocide and eliminating evidence of genocide". The Officer found that the Canadian equivalent of this infraction was "obstructing justice" under subsection 139(2) of the *Criminal Code*. Mr. Nshogoza had therefore been convicted of an offence outside Canada that, if committed in Canada, would be punishable by a maximum of at least ten years.

**C. *Preliminary issues***

[14] In this judicial review, Mr. Nshogoza filed a second supplementary affidavit on July 14, 2015, concerning the alleged kidnapping and possible murder of a colleague of his in June 2015. The Minister objects to the filing of this affidavit on two grounds. First, the leave order granted by this Court on April 16, 2015 provided that affidavits on behalf of Mr. Nshogoza were to be filed by May 19, 2015. Second, affidavits are not to be used in the judicial review process to file new evidence that was not before the decision-maker. The Minister argues that the facts referred to in Mr. Nshogoza's supplementary affidavit occurred after the Officer's decision and are not relevant to the current proceedings (*Ravichandran v Canada (Citizenship and Immigration)*, 2015 FC 665 at para 14). In response, Mr. Nshogoza submits that the events referred to in the supplementary affidavit support the urgency and gravity of Mr. Nshogoza's situation and that it was impossible to attest to these facts before May 19, 2015.

[15] I disagree with Mr. Nshogoza's position and find that the supplementary affidavit cannot be admitted by the Court. The case law has clearly established that a judicial review application strictly relates to the decision under review and that "the record before the reviewing court must be that which was before the decision-maker" (*Sedighi v Canada (Citizenship and Immigration)*, 2013 FC 445 at para 14; *Tabañag v Canada (Citizenship and Immigration)*, 2011 FC 1293 at para 14; *Mahouri v Canada (Citizenship and Immigration)*, 2013 FC 244 at para 14). The general rule is that no new evidence can be received on an application for judicial review.

[16] In *Connolly v Canada (Attorney General)*, 2014 FCA 294 at para 7, the Federal Court of Appeal, citing the words of Mr. Justice Stratas in *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [*AUCC*], outlined the recognized exceptions to this general prohibition. These exceptions "tend to facilitate or advance the role of the judicial review court without offending the role of the administrative decision-maker" (*AUCC* at para 20). They include: (i) an affidavit providing general background assisting in understanding the issues relevant to the judicial review; (ii) an affidavit necessary to bring evidence on procedural defects or a breach of procedural unfairness; and (iii) an affidavit highlighting the complete absence of evidence before the administrative decision-maker (*AUCC* at para 20).

[17] As Mr. Nshogoza's supplementary affidavit does not fall under any of these exceptions and raises issues of no relevance to the decision to be rendered by this Court, I conclude that it is inadmissible. It will therefore not be considered for the purpose of this judgment.

[18] Mr. Nshogoza also requested that the Court find him rehabilitated under subsection 36(3) of the IRPA and that the Court grant him a permanent residence visa on that basis. Subsection 36(3) provides that prior criminal convictions do not constitute inadmissibility in respect of a foreign national who satisfies the Minister that he has been rehabilitated. However, this request for rehabilitation was never raised by Mr. Nshogoza before the Officer. It cannot therefore be considered by the Court in this application. Making a rehabilitation finding under subsection 36(3) of the IRPA and granting a visa is not within the powers of a Federal Court judge hearing an application for judicial review.

## III. Analysis

### A. *Were the equivalency analyses conducted by the Officer between the Rwandan convictions and Canadian criminal charges and her findings that Mr. Nshogoza was inadmissible for criminality reasonable?*

[19] The first issue to be determined is whether the Officer erred in finding that Mr. Nshogoza's convictions of "contempt of the Tribunal" and of "minimizing genocide and eliminating evidence of the genocide" could be equated to criminal offences in Canada, and in concluding that Mr. Nshogoza was therefore inadmissible to Canada for reasons of criminality. Since a permanent residence visa may not be issued to a person found to be inadmissible, the issue is determinative of this judicial review.

[20] There is no dispute that the standard of review applicable to an officer's determination of equivalency under section 36 of the IRPA is reasonableness (*Lu v Canada (Citizenship and Immigration)*, 2011 FC 1476 [*Lu*] at para 12; *Abid v Canada (Citizenship and Immigration)*, 2011 FC 164 at para 11; *Sayer v Canada (Citizenship and Immigration)*, 2011 FC 144 at para 4). It is a question of mixed facts and law that attracts deference. This means that, if the decision-maker's decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law, the court is not allowed to intervene even if its assessment of the evidence might have lead it to a different outcome (*Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at para 47; *Kanthasamy v Canada (Citizenship and Immigration)*, 2014 FCA 113 at paras 81-84). Under the reasonableness standard, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, a reviewing court

should not substitute its own view of a preferable outcome (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 [*Khosa*] at para 59).

[21] At the hearing before this Court, Mr. Nshogoza challenged the equivalency drawn by the Officer between the ICTR's finding of "contempt of the Tribunal" and the *Criminal Code* charge of "contempt of Court". He argues that the ICTR charge did not require evidence of *mens rea*, as opposed to the Canadian criminal provision on disobeying lawful orders of a court. Furthermore, Mr. Nshogoza claims that he had a lawful excuse for the technical breach of the witness protection order. Lastly, Mr. Nshogoza contends that the Officer failed to take into account the dissenting reasons provided in the ICTR as to the sentencing. I note that Mr. Nshogoza did not specifically challenge the equivalency found by the Officer between the Rwandan court's "minimizing genocide and eliminating evidence of genocide" and the Canadian "obstruction of justice" charges.

[22] I do not agree with Mr. Nshogoza's arguments and find that the Officer's decision on the equivalencies was reasonable.

[23] An inadmissibility finding under paragraph 36(1)(b) or 36(2)(b) of the IRPA requires an officer to conduct an equivalency analysis between the foreign offences pondered and the equivalent suggested in Canadian legislation. Mr. Nshogoza had applied for permanent residence in the Convention Refugees Abroad or Humanitarian-protected Persons Abroad classes described at sections 144 and 146 of the IRPR. As only non-inadmissible foreign nationals can be issued a

permanent resident visa, the Officer had to determine whether Mr. Nshogoza was inadmissible in Canada under the IRPA.

[24] There is no dispute that a conviction of "contempt of the Tribunal" was issued against Mr. Nshogoza by the ICTR and was confirmed on appeal. The judgments issued by both the ICTR Trial Chamber and Appeals Chamber are detailed and thorough with respect to the offence committed by Mr. Nshogoza and its elements, and on the reasons for his conviction. Neither the Officer nor this Court is sitting in appeal of the decision of the ICTR or of its Appeals Chamber. Furthermore, even though there were dissenting opinions on sentencing in the ICTR Appeals Chamber, no judge opined that Mr. Nshogoza's conviction should be quashed or reversed.

[25] There is also no dispute that the Rwandan court found Mr. Nshogoza guilty of "minimizing of genocide and eliminating evidence of the genocide". Again, the judgment issued by the Gasabo High Court provides the factual basis leading to the conviction of Mr. Nshogoza and details on the elements of the offence he committed in Rwanda.

[26] The only question to determine is whether the Officer's equivalency findings and her resulting inadmissibility conclusions are reasonable. In *Lu*, the Court explained the methods of the equivalency analysis to be undertaken by an immigration officer (at para 14). Citing *Hill v Canada (Minister of Employment and Immigration)*, [1987] FCJ No 47 (FCA) at page 320, Mr. Justice Pinard stated that equivalency between offences can be determined in three ways: (i) "by a comparison of the precise wording in each statute both through documents and, if available, through the evidence of an expert or experts in the foreign law and determining therefrom the

essential ingredients of the respective offences"; (ii) "by examining the evidence adduced before the adjudicator, both oral and documentary, to ascertain whether or not that evidence was sufficient to establish that the essential ingredients of the offence in Canada had been proven in the foreign proceedings, whether precisely described in the initiating documents or in the statutory provisions in the same words or not"; or (iii) by a combination of one these two approaches.

[27] The Court must further look at the similarity of definition of the two offences being compared and the criteria involved for establishing the offences (*Li v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 1060 (FCA) [*Li*] at para 18). As explained by Mr. Justice Strayer, "[a] comparison of the "essential elements" of the respective offences requires a comparison of the definitions of those offences including defences particular to those offences or those classes of offences" (*Li* at para 19). In *Brannson v Canada (Minister of Employment and Immigration)*, [1981] 2 FC 141 (FCA) at para 38, the Federal Court of Appeal further stated that the essential elements of the relevant offences must be compared, no matter what are the names given to the offences or the words used in defining them.

[28] In her decision, the Officer found that Mr. Nshogoza's conviction for "contempt of the Tribunal" by the ICTR could be equated to "contempt of Court" in the Canadian *Criminal Code*. She discussed the contents of the ICTR judgments in the notes supporting her decision, including the elements of the offence, and she referred specifically to sections 9 and 127(1) of the *Criminal Code* dealing with disobeying lawful orders of a Court. The Officer observed that, if committed in Canada, Mr. Nshogoza's offence would constitute an indictable offence covered by paragraph

36(1)(b) of the IRPA. The Officer further concluded that Mr. Nshogoza's conviction for "minimizing genocide and eliminating evidence of genocide" by the Rwandan court could be equated to obstruction of justice in Canada, and she referred specifically to subsection 139(2) of the Canadian *Criminal Code*. She also discussed the contents of the Gasabo High Court in her notes. The Officer added that, if committed in Canada, such an offence would be punishable by a maximum term of imprisonment of at least 10 years and was thus covered by paragraph 36(2)(b) of the IRPA.

[29] I reject Mr. Nshogoza's argument that the *mens rea* element distinguishes the "contempt of the Tribunal" conviction by the ICTR from the Canadian "contempt of Court" offence. The evidence on the record and the judgments issued by the ICTR instead indicate that Mr. Nshogoza's intention was an element which had been proven before that tribunal. I also reject Mr. Nshogoza's argument that he would not have been found guilty in Canada as he had a legitimate excuse in meeting with the prosecution witnesses. Questioning the validity or soundness of the decision by the ICTR or by the Rwandan court was not within the purview of the Officer. Neither the Officer nor this Court can be asked to supersede the ICTR or the Rwandan court.

[30] The Officer's analysis falls within the first of the methods developed by the case law for establishing an equivalency of criminal offences under section 36 of the IRPA. I am satisfied that, with the offences and convictions detailed in the judgments of the ICTR and the Rwandan court, the Officer's assessment of these foreign offences and the elements of the equivalent Canadian offences identified by the Officer, it was not unreasonable for the Officer to conclude

to the inadmissibility of Mr. Nshogoza for criminality. The Officer did more than a mere recitation or statement of the offences and convictions in Rwanda, as she referred to the detailed foreign judgments which are part of the record. She also looked at the equivalent provisions of the Canadian *Criminal Code*, described them and referred to the specific provisions.

[31] The Officer conducted a reasonable equivalency analysis and went beyond a mere statement that Mr. Nshogoza committed certain offences, unlike the situation in *Pardhan v Canada (Citizenship and Immigration)*, 2007 FC 756 at para 14. By referring to the judgments and assessing the elements of Mr. Nshogoza's convictions in Rwanda and by specifically identifying their respective Canadian equivalents, the Officer provided an adequate reasoning on how she arrived at her conclusions. The reasoning of the Officer may be summary but it explains how she reached her equivalencies for both the "contempt of Court" and "obstructing justice" charges. When the decision is read along with the Officer's notes and the record, I conclude that the essential elements of the two offences were adequately identified by the Officer through the references to the specific Canadian provisions, and were compared to determine that they correspond to the offences and convictions described by the ICTR and the Rwandan court.

[32] The law relating to the sufficiency of reasons in administrative decision-making has evolved substantially since *Dunsmuir*, both with respect to the degree of scrutiny to which fact-based decisions such as the decision at issue in this case should be subjected, and in relation to the sufficiency of reasons as a stand-alone ground for judicial review. In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*], the Supreme Court of Canada provided guidance on how to approach

situations where decision-makers provide brief or limited reasons. The decision-maker is not required to refer to each and every detail supporting his or her conclusion. It is sufficient if the reasons permit the Court to understand why the decision was made and determine whether the conclusion falls within the range of possible acceptable outcomes (*Newfoundland Nurses* at para 16). The reasons are to be read as a whole, in conjunction with the record, in order to determine whether the reasons provide the justification, transparency and intelligibility required of a reasonable decision (*Dunsmuir* at para 47; *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 [*Agraira*] at para 53).

[33] Reasonableness, not perfection, is the standard. In this case, I find that the Officer's decision on the equivalencies has met this standard and the criteria of transparency and intelligibility of *Dunsmuir*. Under a reasonableness standard, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, a reviewing court should not substitute its own view of a preferable outcome.

**B.** ***Was the Officer bound in her decision by information received from Mr. Virani that Mr. Nshogoza's criminal proceedings would not render him inadmissible?***

[34] Mr. Nshogoza submits that he relied on the representations made by Mr. Virani to his counsel in 2010, which apparently confirmed that Mr. Nshogoza's criminal proceedings for permanent residence would not be make him inadmissible for permanent residence. Mr. Nshogoza claims that, on the basis of these representations, he waited for a number of years and chose not to apply for permanent residency elsewhere in the world. In essence, Mr. Nshogoza

argues that he thus had a legitimate expectation that his prior criminal convictions would not render him inadmissible for a permanent residence visa.

[35] In support of his position, Mr. Nshogoza relies on *Qin v Canada (Citizenship and Immigration)*, 2014 FC 846 [*Qin*]. In that case, a citizenship judge made representations, at a hearing before Ms. Qin and her counsel, that he would apply the *Koo* test (as outlined in *Re Koo*, [1992] FCJ No 1107 (FTD)) in calculating the days of residence required if it was found that Ms. Qin had been in Canada for the requisite period of days. Instead, the citizenship judge applied the stricter *Pourghasemi* test (as outlined in *Re Pourghasemi*, [1993] FCJ No 232 (FTD)). The Court found that the citizenship judge's statements regarding residency "created a legitimate expectation and therefore yielded a breach of procedural fairness" (*Qin* at para 37). Mr. Nshogoza further cites two Supreme Court of Canada decisions, *Canada (Attorney General) v Mavi*, 2011 SCC 30 [*Mavi*] at para 68 and *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)*, 2001 SCC 41 [*Mount Sinai*], to support his reliance on the doctrine of legitimate expectations.

[36] I do not agree with Mr. Nshogoza. I instead find that, in arguing that Mr. Virani's representations entitled him to a certain outcome, Mr. Nshogoza misconstrued the doctrine of legitimate expectations.

[37] The doctrine of legitimate expectations is part of the rules of procedural fairness. Such issues of procedural fairness are reviewable on the stricter standard of correctness (*Qin* at para 23; *Mission Institution v Khela*, 2014 SCC 24 at para 79). This means that when such issues

arise, the court must determine whether the process followed by the decision-maker satisfies the level of fairness required in all the circumstances (*Khosa* at para 43; *Eshete v Canada (Minister of Citizenship and Immigration)*, 2012 FC 701 at para 9).

[38] I agree with the Minister that the doctrine of legitimate expectations does not create substantive rights or cannot otherwise serve to fetter the discretion of a decision-maker who applies the law (*Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 SCR 525 at pp 557-558; *Balasingam v Canada (Citizenship and Immigration)*, 2012 FC 1368 at para 59). It is part of the duty of fairness and, as such, it only provides procedural protections. The Supreme Court of Canada, in *Agraira*, recently restated the current status of the doctrine, at paras 94-97:

> [94] The particular face of procedural fairness at issue in this appeal is the doctrine of legitimate expectations. This doctrine was given a strong foundation in Canadian administrative law in [*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817], in which it was held to be a factor to be applied in determining what is required by the common law duty of fairness. If a public authority has made representations about the procedure it will follow in making a particular decision, or if it has consistently adhered to certain procedural practices in the past in making such a decision, the scope of the duty of procedural fairness owed to the affected person will be broader than it otherwise would have been. Likewise, if representations with respect to a substantive result have been made to an individual, the duty owed to him by the public authority in terms of the procedures it must follow before making a contrary decision will be more onerous.
>
> [95] The specific conditions which must be satisfied in order for the doctrine of legitimate expectations to apply are summarized succinctly in a leading authority entitled *Judicial Review of Administrative Action in Canada*:

> The distinguishing characteristic of a legitimate expectation is that it arises from some conduct of the decision-maker, or some other relevant actor. Thus, a legitimate expectation may result from an official practice or assurance that certain procedures will be followed as part of the decision-making process, or that a positive decision can be anticipated. As well, the existence of administrative rules of procedure, or a procedure on which the agency had voluntarily embarked in a particular instance, may give rise to a legitimate expectation that such procedures will be followed. Of course, the practice or conduct said to give rise to the reasonable expectation must be clear, unambiguous and unqualified. (D. J. M. Brown and J. M. Evans, Judicial Review of Administrative Action in Canada (loose-leaf), at §7:1710; see also Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services), 2001 SCC 41, [2001] 2 S.C.R. 281 (S.C.C.), at para. 29; *Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 S.C.R. 504 (S.C.C.), at para. 68.)

[96] In *Mavi*, Binnie J. recently explained what is meant by "clear, unambiguous and unqualified" representations by drawing an analogy with the law of contract (at para. 69):

> Generally speaking, government representations will be considered sufficiently precise for purposes of the doctrine of legitimate expectations if, had they been made in the context of a private law contract, they would be sufficiently certain to be capable of enforcement.

[97] An important limit on the doctrine of legitimate expectations is that it cannot give rise to substantive rights (*Baker*, at para. 26; *Reference re Canada Assistance Plan (Canada)*, [1991] 2 S.C.R. 525 (S.C.C.), at p. 557). In other words, "[w]here the conditions for its application are satisfied, the Court may [only] grant appropriate procedural remedies to respond to the 'legitimate' expectation" (*C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, at para. 131 (emphasis added)).

[39] The proposition that the doctrine of legitimate expectations cannot give rise to substantive rights is supported by a wealth of case law. Even the cases cited by Mr. Nshogoza (*Mount Sinai* at para 22; *Mavi* at para 68; *Qin* at para 37) confirm that the doctrine of legitimate expectations only creates procedural protections.

[40] Furthermore, the legitimate expectations cannot be ambiguous. As the Supreme Court stated in *Mavi* at para 68, the representations must be within the scope of the government official's authority. In addition, the representations said to give rise to the expectations must be "clear, unambiguous and unqualified". Finally, the representations must be "procedural in nature" and must "not conflict with the decision-maker's statutory duty" (*Mavi* at para 68).

[41] An important tenet of the doctrine of legitimate expectations is indeed that it cannot operate to defeat a statutory prohibition on the process contended for (*Lidder v Canada (Minister of Employment & Immigration)*, [1992] FCJ No 212 (FTD) at para 28). As stated by Madam Justice Dawson in *Yoon v Canada (Citizenship & Immigration)*, 2009 FC 359 at para 20, "no legitimate expectation can exist that is contrary to express provisions of the [IRPR] Regulations". In other words, the doctrine cannot be used to "counter Parliament's clearly expressed intent to confer an authority to a decision-maker" (*Canada (Minister of Citizenship and Immigration) v Dela Fuente*, 2006 FCA 186 at para 19). In no case can a public authority place itself in conflict with its duty and forego the requirements of the law (*Oberlander v Canada (Attorney General)*, 2003 FC 944 at para 24).

[42] In the current case, section 11 of the IRPA specifically establishes a basic principle of refugee law and bars a visa officer from granting a visa to a person found criminally inadmissible under section 36. This is not an issue that could have been determined by Mr. Virani, and the doctrine of legitimate expectations cannot be used to fetter the discretion of the Officer or serve to trump the exercise of her statutory duty. Whatever statement was made by Mr. Virani, it could therefore not result in forbidding the Officer from considering and assessing the inadmissibility of Mr. Nshogoza on grounds of criminality. Legitimate expectations cannot be based on representations conflicting with a decision-maker's statutory duty.

[43] I further observe that the "legal opinion" apparently obtained by Mr. Virani and supporting his alleged confirmation that the criminal proceedings against Mr. Nshogoza would not render him inadmissible was not filed by Mr. Nshogoza before the Officer or this Court. In such circumstances, I am not satisfied that the representations said to have given rise to Mr. Nshogoza's expectations can be considered "clear, unambiguous and unqualified" given the lack of evidence regarding the exact scope and extent of such representations.

[44] For all those reasons, I find that Mr. Nshogoza could not claim any legitimate expectations that, in light of Mr. Virani's alleged statement, the Officer could not find him inadmissible on grounds of criminality. The present situation is quite distinct from *Qin*. In *Qin*, it was within the citizenship judge's purview to select which citizenship test to apply, and the same decision-maker was involved in the representations and the decision. Had these representations not been made, it would have been completely open for the citizenship judge to use whatever test

he chose as a citizenship judge should be provided with a measure of deference in determining the test to adopt. This is not the case here.

[45] I therefore conclude that the Officer's determination was correct and that she did not err in failing to adopt Mr. Virani's indication that Mr. Nshogoza's criminal convictions would not render him inadmissible for permanent residence status.

[46] I further note that Mr. Nshogoza's procedural protections were not breached by the Officer. An equity letter was sent to Mr. Nshogoza in July 2013. It explicitly mentioned that Mr. Nshogoza was inadmissible to Canada on the basis of criminality and provided Mr. Nshogoza an opportunity to provide representations on this issue. In her decision, the Officer referred to the information provided by Mr. Nshogoza in response to the equity letter but nonetheless concluded that Mr. Nshogoza was inadmissible on grounds of criminality. It is trite law that decision-makers are presumed to have considered all of the evidence before them, and that they are not required to make specific reference to every single piece of evidence in the record.

### C. *Was the decision by the Officer finding that Mr. Nshogoza was not a refugee reasonable?*

[47] In light of my conclusion on the preceding issues, it would not be necessary to provide an opinion on the Officer's finding that Mr. Nshogoza was not a Convention refugee. However, I will briefly discuss this issue as, in my view, it was also reasonable for the Officer to conclude as she did on this point.

[48] Mr. Nshogoza acknowledges that Canada does not need to follow blindly every decision taken by the UNHCR in determining refugee status. However, Mr. Nshogoza alleges that the Officer provided no explanations on why the decision reached by the UNHCR was dismissed. Furthermore, Mr. Nshogoza contends that the Officer failed to accept and recognize the legitimate refugee referral from Amnesty International and thus violated an alleged legal obligation of the Immigration Section of the High Commission under an agreement with Amnesty International. Mr. Nshogoza further submits that the Officer erroneously found no reasonable grounds to believe that he had no reasonable fear of persecution. Mr. Nshogoza contends that both Rwandan prosecutions of Mr. Nshogoza were politically-motivated and constituted concrete examples of the persecution, that he suffered due to the nature and purpose of his work as an ICTR defence investigator, and that the Officer unreasonably ignored many world human rights experts, including the UNHCR, stating otherwise.

[49] I disagree with Mr. Nshogoza. The applicable standard of review in assessing whether Mr. Nshogoza is a member of the Convention Refugees Abroad class or Humanitarian-protected Persons Abroad class is reasonableness (*Pushparasa v Canada (Citizenship and Immigration)*, 2015 FC 828 [*Pushparasa*] at para 19; *Sakthivel v Canada (Citizenship and Immigration)*, 2015 FC 292 at para 30; *Mohamed v Canada (Citizenship and Immigration),* 2014 FC 192 at para 12).

[50] The Officer reviewed the events giving rise to Mr. Nshogoza's refugee claim. While the Officer had to consider that Mr. Nshogoza, his wife and his children had been recognized as Convention refugees by the UNHCR, this was not determinative of the decision to be rendered by the Officer. The case law is consistent that UNHCR status is not determinative of an

application for refugee status within Canada; immigration to Canada must instead occur in accordance with the IRPA and the IRPR (*Pushparasa* at para 27; *Ghirmatsion v Canada (Citizenship and Immigration)*, 2011 FC 519 [*Ghirmatsion*] at para 57; *B231 v Canada (Citizenship and Immigration)*, 2013 FC 1218 [*B231*] at para 56).

[51] In *Ghirmatsion* at para 59, Madam Justice Snider commented that while the UNHCR refugee determination is not determinative; the Officer must still carry out her own assessment of the evidence before her, including the evidence of the UNHCR refugee status. In fact, Justice Snider equated UNHCR status with a personal and relevant consideration (*Ghirmatsion* at para 57; *B231* at para 66). In the present case, unlike in the *Ghirmatsion* case, the Officer referred to the UNHCR designation in her decision. She also explained why the UNHCR designation was not followed, namely because she did not believe that Mr. Nshogoza nor his family currently had a reasonable fear of persecution. The Officer further elaborated that Mr. Nshogoza's trial by the Rwandan authorities and the resulting prison sentence could not be equated with persecution. She therefore considered the evidence and applied the correct principles in accordance with Canadian law.

[52] I would add that refugee determination is a forward-looking exercise (*Canada (Minister of Employment & Immigration) v Mark*, [1993] 151 NR 213 (FCA) at para 4; *Demir v Canada (Citizenship and Immigration)*, 2014 FC 1218 at para 7). At the time of the Officer's decision, the Rwandan judiciary system had been recognized as functional by both Canada, in *Mugesera v Canada (Citizenship and Immigration)*, 2012 FC 32 at paras 66-68, and by the ICTR, as can be seen by the transfer of numerous files to the Rwandan authorities (as mentioned by the Officer in

her CAIPS notes). Furthermore, the fear of imprisonment following a trial is not a ground of persecution. The evidence thus did not support Mr. Nshogoza's claim of persecution.

[53] In light of the foregoing, I am satisfied that the Officer's decision on Mr. Nshogoza's claim of refugee status is reasonable on the evidence. It falls within the scope of possible, acceptable outcomes defensible in respect of the facts and the law.

## IV. Conclusion

[54] The Officer's refusal of Mr. Nshogoza's application for a permanent residence visa represented a reasonable outcome based on the law and the evidence. On a standard of reasonableness, it suffices if the decision subject to judicial review falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. Furthermore, there was no breach of procedural fairness or violation of Mr. Nshogoza's legitimate expectations. Therefore, I must dismiss this application for judicial review.

[55] Neither party has proposed a question of general importance to certify. I agree there is none.

## JUDGMENT

**THIS COURT'S JUDGMENT is that**:

1. The application for judicial review is dismissed, without costs;

2. No question of general importance is certified.

"Denis Gascon"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-226-15 |
| **STYLE OF CAUSE:** | LÉONIDAS NSHOGOZA v MINISTER OF IMMIGRATION AND CITIZENSHIP CANADA |
| **PLACE OF HEARING:** | MONTRÉAL, QUEBEC |
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| **DATED:** | OCTOBER 26, 2015 |

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| | |
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| Mr. Daniel Latulippe | FOR THE RESPONDENT |

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