

Federal Court



Cour fédérale

Date: 20120601

Docket: IMM-4530-11

Citation: 2012 FC 676

Ottawa, Ontario, June 1, 2012

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

**FLORENCE NSIMBA MUNGANGA
FAITHFULL FLORY MUSUNGU
SEPHORA JOYCE MUSUNGU
KETSIA SHARON MUSUNGU
(a.k.a. Ketsia Sharom Musungu)
FLORIBERT MUSUNGU**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants, Florence Nsimba Munganga [the Female Applicant], Floribert Musungu [the Applicant] and their three children [collectively, the Applicants], seek judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] of a decision of the Refugee Protection Division of the Immigration and Refugee Board [the Board]

dated May 27, 2011, wherein the Board determined that the Applicants are not Convention refugees or persons in need of protection [the Decision].

BACKGROUND

[2] The Applicants are a married man and woman and their three children. They fled the Democratic Republic of Congo [DRC] because they feared persecution by the government and the military.

[3] The Applicants' home was in the city of Kinshasa. However, the Applicant was a preacher and he travelled to the city of Goma to evangelize. He preached on the streets, in public places, and in hospitals. He periodically returned to Kinshasa to visit his family and they sometimes visited him in Goma.

[4] The Applicant testified that on October 29, 2008, he preached for approximately four hours to a crowd of about 2,000 people in the city of Rutshuru. Thereafter, he returned to his family in Goma. Later that day, Rutshuru was invaded by rebels under the leadership of Laurent Nkunda and that night, while the family was sleeping, four soldiers from the Congolese Armed Forces appeared at their door. The soldiers pushed the Applicant aside and came into the house. One of the soldiers recognized the Applicant from his evangelical activities and began to beat him. The soldiers accused him of being a traitor and of collaborating with the Nkunda rebels.

[5] After the beating, the Applicant alleges that he was blindfolded and taken to a detention centre in Goma, where he was held for four days. During that time he was interrogated, beaten and threatened so that he would confess to being a traitor and a rebel collaborator. On November 4, 2008, he was moved to a house in Goma where he was held captive for approximately three months. During this time he was subjected to similar treatment.

[6] On October 30, 2008, the Female Applicant went to the police station to inquire about her husband. She spoke with an inspector, who said that she should be glad that she had not been killed or raped and that she should return to Kinshasa with her children. She followed his advice.

[7] On the night of November 18, 2008, three soldiers came to the Applicants' home in Kinshasa. The soldiers asked the Female Applicant questions about her husband, threatened and assaulted her, and asked for money. The Female Applicant fled Kinshasa with her children on December 21, 2008 and sought refugee protection in Canada on December 26, 2008.

[8] On January 24, 2009, while still in captivity in Goma, the Applicant was approached by a member of the military who was kind to him and offered to help him obtain a Bible. The Applicant gave the military man the name of one of his friends who was pastor in Goma. That friend arranged to help the Applicant escape on February 7, 2009. After the escape, the Applicant went into hiding.

[9] He arrived back in Kinshasa on September 27, 2009, in search of his family and stayed at his uncle's house. On October 27, 2009, when he was not at home, the national police came to his

uncle's house and asked for him. The Applicant, on learning of the police visit, left for the village of Kimayala.

[10] While in Kimayala, the Applicant heard that the police continued to look for him in Kinshasa. They are alleged to have delivered three different summonses [the Summonses] to his friend, Hubert Banza, and his brother, Mbo Senge. Both men responded by going to the police station and there they were told that the police were looking for the Applicant.

[11] The Applicant left Kimayala and arrived in Casablanca by plane on September 13, 2010. He arrived in Canada and claimed refugee status on September 23, 2010.

THE DECISION

[12] The Board correctly noted that the Applicants' refugee claims were based on the Applicant's membership in a particular social group, namely evangelists [the Religious Ground], and imputed political opinion by virtue of his membership in that social group [the Political Ground]. His evidence was that he was perceived to be opposed to the government because of his influence as an evangelist.

[13] The Board dealt with the Religious Ground at paragraph 13 of its reasons when it noted that the US Department of State report clearly states that the constitution of the DRC provides for freedom of religion and that there were no reports that anyone was killed, detained or imprisoned on the basis of their religion. The Board therefore concluded that there was no objective basis to

support the Religious Ground. However, the Board never reached a conclusion in which it referred specifically to the Political Ground.

[14] The Board also made a number of negative credibility findings, but only the two described below are significant for present purposes.

[15] First, the Board did not believe that the Applicant was detained for three months and/or tortured [the Detention Conclusion]. The Board reached this conclusion because it found that the Applicant's oral testimony was evasive and lacked detail.

[16] Second, the Applicant failed to mention the Summonses in his oral evidence-in-chief even though they had been entered into evidence at the hearing. In the Decision, the Board noted that the Applicant was specifically asked if anything else had occurred on October 27, 2009, or at any time before he left the DRC. He said "no" and thereby failed to mention the Summonses. As a result, the Board concluded that they were not genuine and gave them no weight [the Summonses Conclusion].

DISCUSSION

[17] Although there were numerous criticisms of the Decision put forward by the Applicants, the following three are dispositive:

- (i) The Board failed to make a finding about the Political Ground.

(ii) The Board misrepresented the Applicant's evidence in reaching the Detention Conclusion.

(iii) In coming to the Summonses Conclusion, the Board misdescribed the question put to the Applicant at the hearing.

(i) The Board failed to make a finding on the Political Ground

[18] Counsel for the Respondent submitted that Board dealt with both the Religious and the Political Grounds at paragraph 22 of the Decision when it concluded that the Applicants did not have a well-founded fear of persecution "by virtue of any of the 5 Convention grounds".

[19] In dealing with this issue, I am mindful of the Supreme Court of Canada's recent decision in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 340 DLR (4th) 17. In that case, the Court observed at paragraph 16 that:

Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion... In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

[20] However, in my view, this judgment does not relieve the Board of an obligation to make a final decision which refers specifically to each of the Convention grounds advanced by the

Applicants. Since the Board failed to make a specific finding about the Political Ground, the Decision is unreasonable.

(ii) In coming to the Detention Conclusion, the Board misrepresented the Applicant's evidence

[21] In my view, the Board erred by misrepresenting the Applicant's evidence in a way that made it appear absurd.

[22] At paragraph 14 of the Decision, the Board observes that:

The panel asked the claimant to describe the three months in detention. The claimant indicated that he was beaten and tortured. The claimant demonstrated great difficulty providing details of his experience during his three month detention. As a result, the panel needed to probe for details. For example, the panel asked the claimant how often he was beaten and asked him to provide details of the mistreatment and the injuries he sustained. The claimant stated that he was beaten every other day and the worst injury was bruising. The panel asked to explain how he could be beaten every other day for three months and only sustain bruising. The claimant replied that it was mostly mental torture.

[my emphasis]

[23] The relevant portion of the transcript of the hearing reads as follows:

MEMBER: How often would they take you out of your room and mistreat you?

MALE APPLICANT: It depends; it could be every other day or it could be they leave you alone for about a week.

MEMBER: What was the worst injury you sustained... from the beatings?

MALE APPLICANT: I was not, I did not have any injuries. Basically I was not bleeding, but the fact that it was like swelling all over my body but it was you were basically being more tortured mentally.

[my emphasis]

[24] It is clear from the transcript that the Male Applicant did not state that he was “beaten every other day”, as indicated in the Decision. Because the Decision was based on a misrepresentation of the evidence, I find that the Detention Conclusion was unreasonable.

(iii) The Board misdescribed the question put to the Male Applicant at the hearing in coming to the Summonses Conclusion

[25] The Board states that it gave the Summonses no weight for two reasons. The first reason is that the Male Applicant referred to the Summonses in his PIF but made no reference to them in his oral testimony in chief. This was accurate.

[26] However, the Board also dismissed the Summonses on the basis that the Applicant did not mention them in response to a question posed by the Board. At paragraph 17 of the Decision the Board states that the Male Applicant “was specifically asked if anything else happened on October 27, 2009, or any time up to the time he left the country, and he said no.” However, the transcript shows that this question was never asked. As a result, I have concluded that the Summonses Conclusion was also unreasonable.

CONCLUSION

[27] To summarize, because the Board failed to rule on a fundamental aspect of the Applicants' claim, misstated the evidence and relied on an answer to a question that was not asked, the application will be allowed.

CERTIFICATION

[28] No serious question of general importance was posed for certification pursuant to section 74(d) of the Act.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is allowed and the matter is to be reconsidered by a different panel of the Board. The parties may file fresh evidence on the reconsideration.

“Sandra J. Simpson”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4530-11

STYLE OF CAUSE: FLORENCE NSIMBA MUNGANGA ET AL v MCI

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: March 19, 2012

REASONS FOR JUDGMENT: SIMPSON J.

DATED: June 1, 2012

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