

Federal Court



Cour fédérale

**Date: 20140313**

**Docket: IMM-4132-13**

**Citation: 2014 FC 244**

**Ottawa, Ontario, March 13, 2014**

**PRESENT: The Honourable Madam Justice Gagné**

**BETWEEN:**

**VICTORINE LOSOWA OSENGOSENKO**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] Ms. Victorine Losowa Osengosengo, a Franciscan nun from the Democratic Republic of the Congo [the DRC], seeks the judicial review of a decision by the Refugee Protection Division of the Immigration and Refugee Board [the Board], dated May 28, 2013, whereby it was determined that she did not qualify as a Convention refugee or a person in need of protection, within the meaning of sections 96 and 97(1) of the Act. The Board found that even though the applicant had received death threats from the militia controlled by the current DRC Minister of Communications, Lambert Mende, she had an internal flight alternative [IFA] in Kinshasa.

[2] The applicant argues that the Board's finding is unreasonable as her persecutors are aware of her deep ties with her religious community and so would know where to find her. Moreover, considering that Lambert Mende is a member of the government, his militia would likely have an extensive presence in Kinshasa, the country's capital.

[3] For the reasons discussed below, this application for judicial review will be granted.

### **Background**

[4] The applicant is a member of the ESWE ethnic group.

[5] In September 2008, while the DRC's Minister of Communications' militia was allegedly assaulting, killing and burning the houses of members of the ESWE ethnic group in the Sankuru district, the applicant hid two ESWE ethnic group parishioners and refused to abide by the militia's request to deliver them. As a result, the chief of the militia advised the applicant that if she did not deliver them by 8 o'clock that same night, she would be killed. In order to protect the applicant, her congregation moved her fifteen kilometres away, from Shinga to their convent in Lodja. A few months later, they moved her to Kinshasa, situated over 2000 kilometres from Lodja. Once there, the congregation made arrangements for her to leave the DRC.

[6] In September 2009, the applicant was admitted into Canada with a student visa valid until August 31, 2010. Her visa was subsequently renewed and, in June 2011, she sought asylum in Canada.

[7] The Board found the applicant's testimony to be credible. While her testimony contained some hesitations, there were no contradictions or major inconsistencies. Moreover, even though she had been in Canada for 21 months prior to her seeking refugee status, the applicant was given the benefit of the doubt with regard to her subjective fear of returning to the DRC.

[8] However, the Board held that there was an IFA for the applicant in Kinshasa and that she failed to demonstrate that her persecutors would have the interest, intention or motive to go after her, or even the capacity to find her, in such a big city. The militia she fears is mostly active in the region that she initially fled (Lodja) and the applicant provided no documentary evidence as to whether it was active in the Kinshasa region.

[9] The Board noted that the only evidence the applicant provided as to the possibility of persecution in Kinshasa was that Lambert Mende, as a member of the government, resides in the capital of the country and would personally find her. However, the applicant testified that Lambert Mende did not personally know her, and that no one in the militia even knew that she had sought refuge in Kinshasa or that she had left the country for Canada. The applicant confirmed that no one in her family living in Kinshasa has been contacted and that no one has been searching for her since the incident.

[10] The Board further noted that the congregation had originally only displaced her 15 kilometres away from the location of the initial death threat, and that she had spent 9 months in Kinshasa without any trouble.

[11] Accordingly, the Board held that it was objectively reasonable for her to once more seek refuge in Kinshasa. She has many family members, including her mother, living there, as well as her congregation—they both can support her. Furthermore, she has the ability to gain her livelihood by either being a teacher there or by living in her religious community.

### **Issues and standard of review**

[12] In his written submissions, the respondent raises a preliminary issue with regard to the applicant's affidavit. The applicant does not speak or understand English, and yet her affidavit is written in that language and does not contain a jurat of translation, contrary to subsections 80(2.1)(a) and (b) of the *Federal Courts Rules*, SOR/98-106. However, since the applicant has subsequently filed an amended affidavit, dated August 22, 2013, which contains the jurat of translation, this preliminary issue was not argued by the parties at the hearing. Accordingly, it will not be dealt with in these reasons.

[13] The applicant is mostly concerned with whether the Board used the proper test to assess the question of the IFA. Both parties cite case law suggesting that the reasonableness standard applies to findings of an IFA in a judicial review before this Court. The respondent further notes that this is a high threshold for the applicant to overcome (see *Barua v Canada (MCI)*, 2012 FC 607 [*Barua*] at para 23).

[14] As such, I will solely address the following issue: Was the Board's determination that the applicant has an IFA in Kinshasa unreasonable?

### Applicant's arguments

[15] The applicant submits that the Board failed to apply the proper test with regard to the IFA analysis. According to her, the Board should have used the test outlined in *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, 1994 FC 589 at para 12, where the Appeal division of the Federal Court held the following:

Thus, IFA must be sought, if it is not unreasonable to do so, in the circumstances of the individual claimant. This test is a flexible one that takes into account the particular situation of the claimant and the particular country involved. This is an objective test and the onus of proof rests on the claimant on this issue, just as it does with all the other aspects of a refugee claim. Consequently, if there is a safe haven for claimants in their own country, where they would be free of persecution, they are expected to avail themselves of it unless they can show that it is objectively unreasonable for them to do so.

[16] Considering the Board found her testimony to be credible, the applicant argues that it was unreasonable, based on the oral and written evidence before it, not to have believed that she would likely face persecution if returned to Kinshasa. She points to the following evidence from the transcript of the hearing as well as to two news articles that were before the Board:

- a. the militia targeting her, which is controlled by Lambert Mende, knows that she is a member of her religious order, and its members would recognize her in Kinshasa;
- b. Lambert Mende allegedly has oppressed and killed people of the ESWE ethnic group and continues to do so in the Sankuru district;
- c. Lambert Mende is a very powerful Minister of the DRC government, and is close to and protected by the President;
- d. Lambert Mende lives in Kinshasa, and has his own people in Kinshasa who could find the claimant;

- e. While Lambert Mende and his militia are not aware that the applicant's family lives in Kinshasa, she cannot live with them as her faith requires that she live within her religious community.

### **Respondent's arguments**

[17] The respondent submits that the Board member's decision was reasonable. Notably, he points to the following evidence that was before the Board:

- a. The applicant is not aware as to whether the militia is active in Kinshasa, and failed to submit any evidence in that respect;
- b. Lambert Mende has no way to recognize the applicant, as they have never met;
- c. Nobody was aware that the applicant had fled to Kinshasa or that she has since left the DRC, and there is otherwise no indication that anyone is looking for her since she left the country;
- d. None of the applicant's family members residing in Kinshasa have been contacted by the militia;
- e. She can benefit from the support of her family in Kinshasa as well as from her congregation, as she previously had done when she had lived there during that nine month period.

### **Analysis**

[18] In a refugee claim, once the issue of an IFA is raised, the burden falls on the applicant to prove, on a balance of probabilities, that an IFA does not exist or that it is unreasonable for the applicant to avail herself of it. This Court can only review that determination on the standard of

reasonableness. As the Court in *Barua* at para 23 notes, this is a very high threshold for the applicant to overcome.

[19] Nonetheless, I believe that the applicant has satisfied her burden of proof. Her testimony, found to be credible, showed that she had been the subject of death threats by Lambert Mende's militia for having harboured and refused to surrender fellow ESWE ethnic group parishioners, and, as such, she feared returning to the DRC. These death threats were sufficient to compel her first to flee her convent for another one 15 kilometres away, then move across the country to Kinshasa, and to then ultimately seek refuge in Canada. Her congregation equally feared for her safety, and consequently instigated and organized each of these moves.

[20] While she did not face any known direct threats while in Kinshasa, she nonetheless has considerable reasons to fear persecution if she were to be returned there. By all accounts, Lambert Mende is a very powerful man in Kinshasa and is aware of her refusal to surrender ESWE ethnic group members to his militia. It is legitimate for the applicant, as a nun, to insist upon living amongst her congregation. The applicant clearly explained her religious duty to live amongst her congregation, a duty that is known to Lambert Mende and his militia. Therefore, any evidence as to her seeking refuge amongst her family members should not have been determinative for the Board. Returning to the DRC as a member of this Franciscan congregation exposes her to probable and unnecessary risks to her livelihood.

[21] Moreover, it was unreasonable for the Board to identify a viable IFA because the applicant failed to submit documentary evidence to the effect that a senior Minister of a government does not

have supporters/militia in the capital city where he resides. Considering there was documentary evidence to support the existence of Lambert Mende's militia, and that they have been assaulting, killing and burning the houses of members of the ESWE ethnic group, I fail to see how it is reasonable to suggest that his militia would not also be in Kinshasa, able to engage in similar campaigns of terror generally (or a more targeted one against her personally), bearing in mind his important role amongst the upper echelons of the DRC government.

### **Conclusion**

[22] For these reasons, this application for judicial review will be granted and the file remitted back to a different member of the Board. No questions of general importance were proposed for certification and none arise from this case.



**JUDGMENT**

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

1. The applications for judicial review is granted and the file is remitted back for redetermination by a different member of the Refugee Protection Division of the Immigration and Refugee Board;
2. No questions are certified;
3. No costs are awarded.

"Jocelyne Gagné"  
\_\_\_\_\_  
Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-4132-13

**STYLE OF CAUSE:** VICTORINE LOSOWA OSENGOSENKO v THE  
MINISTER OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** MONTRÉAL, QUEBEC

**DATE OF HEARING:** MARCH 5, 2014

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

**DATED:** MARCH 13, 2014

**APPEARANCES:**

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