

# **Musansi v. Canada (Minister of Citizenship and Immigration)**

Between  
Clara Lussikila Musansi and Rudolphe Mandevo Nombe,  
applicants, and  
The Minister of Citizenship and Immigration, respondent

[2001] F.C.J. No. 65  
Court No. IMM-5470-99

**Federal Court of Canada - Trial Division**  
**Montréal, Quebec**  
**Pinard J.**

Heard: November 14, 2000.  
Judgment: January 23, 2001.  
(8 paras.)

*Aliens and immigration — Admission, refugees — Grounds, well-founded fear of persecution — Grounds, political activity — Exemptions from legislative requirements.*

Application by Musansi and Nombe for judicial review of the decision of the Refugee Division which found that they were not Convention refugees. Musansi and Nombe were married and were citizens of the Congo. They were members of a political party and claimed to have been persecuted as a result of that membership. Nombe worked for the Services d'actions et de renseignements militaires. He discovered that members of the Services were responsible for abductions in Zaire and were threatening members of the party. He did not leave his employment, but notified members of his political party about the information. Nombe stated that the Services discovered that he had done so and he was therefore at risk of persecution at its hands.

**HELD:** Application allowed. The Minister did not establish that Musansi and Nombe had any complicity in the acts of the Services that would exclude them from the operation of the Convention. The matter was referred back for reconsideration.

## **Statutes, Regulations and Rules Cited:**

Immigration Act, R.S.C. 1985, c. I-2, s. 2(1).

## **Counsel:**

Stewart Istvanffy, for the applicant.

Michel Pépin, for the respondent.

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1 **PINARD J.** (Reasons for Order):— This is an application for judicial review of a decision of the Refugee Division of the Immigration and Refugee Board (the RD) handed down on October 12, 1999, ruling that the Applicants are not refugees within the meaning of the Convention, as defined under subsection 2(1) of the Immigration Act, R.S.C. 1985, c. I-2 (the Act), as they are excluded from the application of the Convention under section F(a) of article 1.

2 The Applicants Nombe and Musansi are spouses, and both are citizens of the Democratic Republic of the Congo (ex Zaire) and members of the Parti lumumbiste unifié (PALU). They allege having been persecuted in the Congo because of their political opinions and their membership in a particular social group. At the hearing before me, counsel for the Respondent indicated his consent to allow the application for judicial review in the case of the Applicant Musansi only.

3 The Respondent's burden of proof to show that a person comes under exclusion clause 1F of the Convention is less than on the balance of probabilities. It is also well established that complicity depends on the existence of a shared common objective and on the knowledge of this objective on the part of all interested persons, essentially a question of fact (see Federal Court of Appeal, *Ramirez v. M.E.I.* (1992), 135 N.R. 390, 89 D.L.R. (4th) 173, *Moreno and Sanchez v. M.E.I.* (1993), 159 N.R. 210, and *Sivakumar v. M.E.I.* (1993), 163 N.R. 197). In my opinion, Reed J., in *Penate v. Minister of Employment and Immigration* (November 26, 1993), 93-A-292, correctly interpreted the jurisprudence when she wrote:

As I understand the jurisprudence, it is that a person who is a member of the persecuting group and who has knowledge that activities are being committed by the group and who neither takes steps to prevent them occurring (if he has the power to do so) nor disengages himself from the group at the earliest opportunity (consistent with safety for himself) but who lends his active support to the group will be considered to be an accomplice. A shared common purpose will be considered to exist. I note that the situation envisaged by this jurisprudence is not one in which isolated incidents of international offences have occurred but where the commission of such offences is a continuous and regular part of the operation.

4 On reviewing the evidence, I can find no serious element establishing the complicity of the Applicants in the acts attributed to the Services d'actions et de renseignements militaires (the SARM), where the Applicant Nombe worked as a civilian classifying social affairs files. The Court's observation that Nombe learned, in 1992, that members of SARM were responsible for abductions in Zaire seems based solely on the following testimony of the Applicant Nombe concerning newspapers he had read in 1992:

A. In general, it was reported that ... SARM and agents of SARM ... abducted a ... certain number of ... people at such a place, because they were demonstrating. It's more that type of information, of ... a general nature.

[...]

Q. So in '92, there were reports to the effect that there were abductions by members of SARM?

A. There were reports that remained reports because, as I said, I never witnessed this, either up close or from afar. So for me, it remained information ... obtained through the ... press.

[...]

Q. Do you believe what you read in the newspaper?

A. It's ... I don't know if it's true, because I don't have ... personally I have no proof of it, I was not thrilled of course. I wasn't thrilled, but I couldn't (inaudible). The one time that I saw there was a problem, I spoke up, and that is what brought us here. That did not thrill me either, but I couldn't ... on the basis only that ... a newspaper wrote, take a stand, I don't know.

5 The Applicant Nombe's answers are, in themselves, far from sufficient to establish the "personal and knowing participation" referred to in the jurisprudence mentioned above. It is true that, in the spring of 1996, the Applicant Nombe found confidential papers on his superior's desk, relating to arbitrary arrests and killings that were being prepared by SARM authorities against the leaders of PALU. Both Nombe and his spouse, in whom he confided, explained why it was not prudent for Nombe's safety to suddenly quit his job at SARM. Nombe disclosed to PALU his discovery of the confidential papers, enabling PALU to avoid disaster. Having been alerted by an acquaintance that SARM knew he and his spouse had informed PALU, that their lives were in danger, and that they were now marked as political traitors, they left Zaire in September 1996, after their house had been ransacked and their property looted. Under the circumstances, I do not see how Nombe can be reproached for not having dissociated himself from SARM immediately after having discovered the confidential documents in the spring of 1996.

6 Thus, the complicity of the Applicants, both Nombe and his spouse, an essential element for exclusion clause 1F(a) to apply, has not been established by the Respondent.

7 Consequently, the application for judicial review is allowed, the decision of the RD is quashed, and the case is referred back for a new hearing by a differently constituted Refugee Division.

8 In view of the well-established jurisprudence with regard to the application, in law, of the exclusion clause in question, and in view of a simple appreciation of the facts relating to such application, this is not a certification matter

Certified true translation: Suzanne M. Gauthier, LL.L. Trad. a.

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#### ORDER

The application for judicial review is granted. The 12 October 1999 decision of the Refugee Division is quashed and the matter is referred back for a new hearing before a differently constituted Refugee Division.

Certified true translation: Suzanne M. Gauthier, LL.L. Trad. a.