Date: 20080305

Docket: A-211-07

Citation: 2008 FCA 84

CORAM: **DÉCARY J.A.**
LÉTOURNEAU J.A.
NADON J.A.

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

appellant

and

BAGAMBAKE EUGENE MUNDERERE,
JUDITH RANGO,
CYNTHIA MUNDERERE MEREKATETE,
EUNICE MUNDERERE INGABIRE,
SARAH MUNDERERE MUGENI

respondents

Heard at Montreal, Quebec, on January 10, 2008.

Judgment delivered at Ottawa, Ontario, on March 5, 2008.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: DÉCARY J.A.
LÉTOURNEAU J.A.

Date: 20080305

Docket: A-211-07

Citation: 2008 FCA 84

CORAM: **DÉCARY J.A.**
LÉTOURNEAU J.A.
NADON J.A.

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

appellant

and

BAGAMBAKE EUGENE MUNDERERE,
JUDITH RANGO,
CYNTHIA MUNDERERE MEREKATETE,
EUNICE MUNDERERE INGABIRE,
SARAH MUNDERERE MUGENI

respondents

REASONS FOR JUDGMENT

NADON J.A.

[1] This is an appeal from a judgment of Mr. Justice Beaudry of the Federal Court, 2007 FCA 332, dated March 28, 2007, who allowed the respondents' judicial review application of a decision of the Immigration and Refugee Board – Refugee Protection Division (Board), which had dismissed their refugee claim.

[2] The appeal comes to us by way of the following question certified by Beaudry J.:

> Considering section 53 of the United Nations Handbook on Procedures and Criteria for Determining Refugee Status, and in particular the last sentence of that paragraph, "This will necessarily depend on all the circumstances, including the particular geographical, historical and ethnological context", is it an error in law to limit the analysis of the cumulative grounds to the events that occurred within one country of nationality or habitual residence, when the claimant alleges persecution on the basis of the same Convention ground in the two (or more) countries, and where the claimant's subject fear is related to events that occurred in more than one country?

THE BOARD'S DECISION

[3] On November 23, 2005, Mr. Munderere, his wife, Mrs. Judith Rango, and their three children, the respondents in this appeal, made a claim for refugee protection in Canada pursuant to sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, S.C. 2001 c. 27 (Act). In making their claim, they alleged that by reason of their Tutsi ethnicity, they would be at risk of persecution in both the Democratic Republic of Congo (DRC) and in Rwanda, countries of which they are citizens.

[4] Mr. Munderere and his wife were born in the DRC of Tutsi parents who had emigrated from Rwanda. Their three children, Cynthia Munderere Murekatete, Eunice Munderere Ingabire and Sarah Munderere Mugeni were born in Rwanda.

[5] Before reaching its ultimate conclusion, the Board considered the respondents' refugee claim in respect of both of their countries of nationality. With respect to the DRC, where the respondents lived for most of their lives, the Board concluded that should they return to that country, they would face a reasonable possibility of persecution because of their Tutsi ethnicity and their Rwandan nationality. In concluding as it did, the Board found that there was a military conflict in the eastern part of the DRC opposing the Congolese armed forces and various armed inter-ethnic

groups, in the course of which Congolese Tutsis had been targeted. The Board also found that in Kinshasa, capital of the DRC, Tutsis had been targeted either by the general population or by the authorities.

[6] With respect to Rwanda, the Board concluded that the respondents did not have a valid claim for refugee protection. In its view, although there was insecurity in the country due to the after effects of the 1994 genocide, that insecurity was faced by the entire population of Rwanda. The Board was also of the view that the respondents' claim that they would be forcibly returned to the DRC by the President of Rwanda was speculative only and, in any event, not supported by the documentary evidence. The Board further concluded that a grenade attack near Mr. Munderere's house on September 9, 2004, was an isolated and gratuitous act which was not directed at him or his family in particular. Finally, the Board dismissed the respondents' submission that the cumulative impact of incidents which occurred in both the DRC and Rwanda gave rise to a well-founded fear of persecution in Rwanda.

[7] As a result of its finding that the respondents did not have a well-founded fear of persecution should they return to Rwanda, the Board dismissed their refugee claim.

THE DECISION OF THE FEDERAL COURT

[8] Beaudry J. allowed the application for judicial review on three grounds.

[9] First, he concluded that the Board had made a patently unreasonable finding when it found that the September 2004 grenade incident was an isolated and gratuitous act. In light of the 2005 Amnesty International Report, *Democratic Republic of Congo, North-Kivu: Civilians pay the price for political and military rivalry* (2005 Amnesty International Report), which indicated that in Gisenyi, the Rwandan continuation of the Congolese town of Goma in North Kivu, where the attack had occurred, there was confrontation between diverse ethnic armed groups and targeted attacks on civilians. Beaudry J. concluded that the Board had clearly overlooked this important piece of evidence and that, as a result, its finding regarding the grenade attack was pure conjecture.

[10] Second, the Judge held that the Board had made a patently unreasonable finding in concluding that there was no objective evidence to support the respondents' fear of being ordered by the President of Rwanda to return to the DRC. For this conclusion, Beaudry J. again relied on the 2005 Amnesty International Report which, in his view, gave support to the respondents' fear that they would be forcibly returned to the DRC. More particularly, the Judge saw evidence in the 2005 Amnesty International Report that the President of Rwanda would attempt to return Congolese Tutsis to the DRC in order to change the outcome of elections in that country so as to bring North Kivu under Rwandan control. In Beaudry J.'s view, the Board could not have concluded as it did on this point, had it considered the 2005 Amnesty International Report.

[11] Third, although he acknowledged that in normal circumstances the Board did not have an obligation to consider the cumulative effect of fear of persecution arising from incidents occurring in two different countries, Beaudry J., relying in part on section 53 of the *United Nations High*

Commission for Refugees Handbook on Procedures and Criteria for Determining Refugee Status (UNHCR Handbook), concluded that in the exceptional circumstances of this case, the Board ought to have considered the cumulative impact of events of persecution which had occurred in both countries. At paragraph 34 of his Reasons, he stated his view in the following terms:

> [34] It is in light of this exceptional triangular convergence of circumstances: geographical, historical and ethnological that the Court is of the opinion that the Tribunal should have taken into consideration the cumulative impact of years of persecution that have followed the Banyamulenges, such as the applicants from Goma to Gisenyi and back to Goma to give rise to a well founded fear of persecution, even though politically, these events span the frontiers of two separate countries.

SUBMISSIONS OF THE PARTIES

[12] The appellant submits that Beaudry J. erred in law when he overturned the Board's factual determinations with respect to the grenade attack in Rwanda and the possibility that the respondents might be returned to the DRC by the President of Rwanda. Although Beaudry J. determined that the standard of review applicable to the Board's factual determinations was patent unreasonableness, the appellant submits that he did not in fact apply this standard of review and substituted his appreciation of the evidence to that of the Board. As a result, the appellant submits that this Court owes no deference to Beaudry J.'s findings.

[13] The appellant submits that the Board's conclusions concerning the grenade incident and the possibility of the respondents being returned to the DRC were not made without regard to the evidence, in particular with respect to the 2005 Amnesty International Report, and that the Board's conclusions do not conflict with the information contained in the report.

[14] With respect to the grenade incident, the appellant argues that the respondents had the burden of establishing, on a balance of probabilities, that the incident was linked to a Convention ground. Since there was no proof that the attack was motivated by reason of Mr. Munderere's ethnicity, it follows that it would have been speculation on the part of the Board to conclude that the grenade incident was linked to a Convention ground. In particular, the appellant relies on paragraph 20 of Beaudry J.'s decision, where he states that "[t]here were other reasonable inferences which could be drawn from the documentary evidence", for the proposition that the Board's conclusion was reasonable.

[15] With respect to the possibility of the respondents being returned to the DRC by the President of Rwanda, the appellant submits that the 2005 Amnesty International Report does not, in any way, support the view that those Tutsis who had relocated to the DRC had been forced to do so. The appellant says that the bulk of the evidence supports the view that Rwanda did not force its citizens to return to the DRC.

[16] Finally, the appellant argues that the Judge erred in concluding that the Board was required to consider the cumulative effect of incidents that occurred both in the DRC and in Rwanda when considering the respondents' claim for refugee protection with respect to Rwanda. First, the appellant says that the Judge could not require the Board to conduct a cumulative effect analysis, since the only incident that the respondents claimed to have experienced in Rwanda was not linked to a Convention ground. The appellant further submits that Beaudry J.'s conclusion is not supported by the *UNHCR Handbook* and is contrary to the general legal principles governing the interpretation

and application of the definition of Convention refugee. More particularly, the appellant argues that the objective component of the test requires an examination of the conditions of the country in regard to which the claim is assessed and a determination that the authorities of the country in question are either unwilling or unable to provide protection before a claimant can be found to have a well-founded fear of persecution. Thus, the appellant submits that the certified question should be answered in the negative.

[17] The respondents, on the other hand, argue that Beaudry J. applied the correct standard of review and that, as a result, his findings regarding the grenade attack in Rwanda and the possibility of the respondents being forcibly returned to the DRC cannot be overturned unless the Judge made a palpable and overriding error. The respondents further say that even on a standard of correctness, the Judge's findings are unassailable.

[18] The respondents submit that the Judge was bound to intervene in the present matter since the Board failed to consider relevant evidence. With respect to the grenade attack, the respondents submit that the Judge made two findings: that the Board's conclusion was pure conjecture and that it overlooked relevant evidence that would have supported findings inconsistent with its conclusion.

[19] With respect to the question of whether there was a possibility that the respondents would be returned to the DRC by the President of Rwanda, the respondents make no specific submissions, other than to say that the 2005 Amnesty International Report supports the Judge's conclusion.

[20] Turning to the certified question, the respondents say that the answer thereto does not dispose of the appeal, since the question of whether events that occurred in another country must be considered depends entirely on the facts of the case. They say that the question is one of mixed fact and law and that, as a result, deference is owed to the Judge's conclusion. They submit that the Judge was correct in his view that the exceptional circumstances of this case required the Board to undertake the cumulative grounds analysis. Thus, the respondents submit that to determine whether a claimant has a well-founded fear of persecution, the Board is obliged to consider the cumulative nature of all previous incidents experienced by the claimant, combined with other adverse factors such as generalized instability. In the respondents' view, the Judge correctly applied the law to the facts of this case.

[21] The respondents make one additional point. They say that, in any event, the Board erred in not considering the cumulative effect of all the events that had occurred in Rwanda, namely, the 1994 genocide, the 1996-97 period during which Mr. Munderere experienced the return of Hutu militias and the resumption of violence against Tutsis, including the death of his father, the generalized instability in Rwanda and the 2004 grenade attack.

THE ISSUES

[22] Two issues arise in this appeal:

1. Did the Judge err in law in intervening with respect to the Board's factual determinations regarding the September 2004 grenade incident and the respondents' alleged fear of being forced to return to DRC by the President of Rwanda?

2. Did the Judge err in law in requiring the Board to consider the cumulative effect of incidents that occurred both in DRC and Rwanda, when examining the respondents' claim for refugee protection with respect to Rwanda?

ANALYSIS

A. <u>The Board's Factual Determinations</u>:

[23] The question of whether Beaudry J. identified the proper standard of review applicable to the Board's factual determinations is not at issue. However, the appellant submits that the Judge failed to apply the standard of review of patent unreasonableness and substituted his own assessment of the evidence to that of the Board. I will address this question with respect to the factual determinations of the grenade attack and the respondents' alleged fear of being ordered to return to DRC by the President of Rwanda independently.

(i) The grenade incident:

[24] With respect to the grenade incident of September 2004, I am of the opinion that the Judge erred in law in intervening with respect to the Board's factual determination. In my view, it is clear that the Board considered all relevant evidence. The Board's determination must not be read in isolation, but in the context of the decision as a whole. Indeed, before concluding that the grenade incident was an isolated and gratuitous event, the Board considered the following evidence:

- the applicant's testimony that he did not know the persons who threw the grenade in September 2004 and that he went to the police, who could not help him because he could not identify his aggressors;

- the fact that the applicant and his wife continued to live and work at the same place in Gisenyi for more than a year until their departure in November 2005, and that during that time, they suffered no threats nor harassment;
- the fact that although all members of the family had passports and American visas by December 2004 or January 2005, they only left Rwanda in November 2005;
- the fact that the main applicant testified that he was waiting for his daughter Cynthia to finish school before leaving;
- the fact that the 2005 Amnesty International Report revealed that there was prevailing instability in Gisenyi, where armed groups of various ethnicities continuously confront each other with the help of Uganda, Rwanda and the DRC.

[25] After stating that there was "insecurity" in Rwanda, but that it was "the lot of all those who live there and are generally exposed to it," the Board made the following remarks at page 6 of its decision:

> In view of the general instability in Gisenyi because of the proximity of the border to Goma in the province of North Kivu in the DRC where armed groups of various ethnicities are fighting each other with the help of Uganda, Rwanda and the DRC, the panel concludes that the claimant was the victim of an isolated incident and that neither he nor his family was specifically targeted. The panel is of the view that the claimant was in the wrong place at the wrong time, especially as he is not politically active, is not suspected of having committed violent acts against anyone and was not a witness before the Gagaca courts that tried cases of genocide, which might have explained the attack on him in September, 2004.
>
> The panel is therefore of the opinion that the claimant was the victim of a gratuitous act by one or more individuals who were not targeting him in particular.

[26] It is also clear from the Board's decision that in concluding as it did, it gave weight to the fact that the respondents did not leave Rwanda until November 2005, i.e. 14 months after the

grenade attack and that during that period of time, “the claimant and his family received no threat, by telephone or other means, from anyone at all and were not harassed by the authorities.” (page 6 of the Board’s decision).

[27] It seems clear from the Judge’s reasons that he concluded that the Board’s finding with respect to the grenade attack was patently unreasonable because he did not agree with the Board’s assessment of the 2005 Amnesty International Report. In my view, Beaudry J. substituted his own appreciation of the evidence to that of the Board. It is striking that at paragraph 20 of his Reasons, the Judge states that “(t)here was other reasonable inferences which could be drawn from the documentary evidence…”. Implicit in that statement is the Judge’s view that the Board’s inference was reasonable. In my view, in the light of the evidence before it, the Board’s finding that the grenade attack was an isolated and gratuitous event and that the respondents had not been particularly targeted cannot be characterized as patently unreasonable. Consequently, there was no basis to justify the Judge’s intervention.

(ii) The respondents’ fear of being ordered to return to the DRC:

[28] I am satisfied that the Board did consider the relevant documentary evidence on this point. At page 5 of its decision, the Board stated:

> On the first point, namely the claim that President Paul Kagame of Rwanda might send Congolese Tutsis back to the DRC, the panel is of the opinion that this is pure conjecture unsupported by the documentary evidence and can draw no conclusion from it, as it is not based on any relevant facts or evidence.

[29] I have carefully reviewed the 2005 Amnesty International Report and, contrary to the Judge's view, I can find nothing in that report which supports the respondents' assertion that there was a possibility that the President of Rwanda would forcibly return thousands of Congolese Tutsis to the DRC so as to influence the outcome of the elections in North Kivu. The following passages of the 2005 Amnesty International Report are relevant:

> **B. North-Kivu's Banyarwanda communities**
>
> . . . The influx had a profoundly destabilizing effect on the region: much of the Hunde population was displaced and almost all the Tutsi population was forced to flee to Rwanda by violence perpetrated by elements among the Rwandan Hutu refugee and the Congolese Hutu populations. Many Tutsi were later encouraged to return to DRC in the course of RCD-Goma rule in the Kivus.
>
> . . .
>
> ***The controversial role of Governor Serufuli***
>
> Appointed as Governor of the province by Rwanda in 2000, Serufuli has been central to the emergence of a politico-military organization, presenting itself as a development NGO, (TPD) All for Peace and Development, which reportedly has powerful sponsors among the Congolese Banyarwanda and Rwandan Tutsi elites. Initially established to promote the repatriation of Hutu refugees to Rwanda, the TPD has also allegedly been active in the clandestine repatriation to North-Kivu of Congolese Tutsi refugees in Rwanda, in arming a largely Hutu militia in North-Kivu, the Local Defence Forces (LDF), and more recently, in distributing arms Banyarwanda civilians in North-Kivu.
>
> **B. Inflaming ethnic fears**
>
> . . .
>
> In this optic, they suspect the Banyarwanda community of hosting many "interlopers" who came from Rwanda since 1960. They fear, too, that the elections results will be distorted by Rwandan nationals crossing the notoriously permeable border to register to vote illegally and later to take part in the elections.
>
> . . .

> The expected return of thousands of Banyarwanda refugees from Rwanda to North-Kivu, could pose serious security risks during the registration and polling stage of the process.
>
> [Emphasis added]

[30] The 2005 Amnesty International Report supports the view that a number of Congolese Tutsis have returned to the DRC, but there is no indication whatsoever that the President of Rwanda has forced anyone to return to the DRC. During the hearing of this appeal, we asked counsel for the respondents to direct us to those passages of the 2005 Amnesty International Report which supported their view that they might possibly be forcibly returned to the DRC by the President of Rwanda, but he was unable to do so.

[31] In my view, the Judge substituted his appreciation of the 2005 Amnesty International Report to that of the Board and, as a result, failed to show proper deference. I therefore conclude on this point that the Board's findings were not patently unreasonable and that the Judge ought not to have intervened.

B. Cumulative Effect of Incidents:

[32] The question of whether the Board was required to consider the cumulative effect of incidents that occurred both in the DRC and in Rwanda is a question of law, to be determined on a standard of correctness. In my view, the Judge erred in concluding as he did. His conclusion is inconsistent with the general legal principles governing the interpretation and application of the definition of the term "Convention refugee".

[33] The relevant provisions contained in the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 read as follows:

Convention refugee

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

Person in need of protection

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally
(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or
(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

Person in need of protection

(2) A person in Canada who is a member of a

Définition de « réfugié »

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Personne à protéger

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

class of persons prescribed by the regulations as being in need of protection is also a person in need of protection. [Emphasis added]	**[Personne à protéger** (2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection. [Non souligné dans l'original)

[34] The rationale underlying the international refugee protection regime was explained by the Supreme Court of Canada in *Canada (A.G.) v. Ward*, [1993] 2 S.C.R. 689, at page 709, as follows:

> At the outset, it is useful to explore the rationale underlying the international refugee protection regime, for this permeates the interpretation of the various terms requiring examination. International refugee law was formulated to serve as a back-up to the protection one expects from the state of which an individual is a national. It was meant to come into play only in situations when that protection is unavailable, and then only in certain situations. The international community intended that persecuted individuals be required to approach their home state for protection before the responsibility of other states becomes engaged. For this reason, James Hathaway refers to the refugee scheme as "surrogate or substitute protection", activated only upon failure of national protection; see The Law of Refugee Status (1991), at p. 135. With this in mind, I shall now turn to the particular elements of the definition of "Convention refugee" that we are called upon to interpret.
>
> [Emphasis added]

[35] Although the question before us was not before the Supreme Court in *Ward*, above, the following passages, found at pages 712, 725, 726 and 751 to 754 of that decision, are relevant for present purposes:

> **p. 712:**
>
> ...The test [of a well-founded fear of persecution] is in part objective; if a state is able to protect the claimant, then his or her fear is not, objectively speaking, well-founded. Beyond

this point, I see nothing in the text that requires the state to be complicit in, or be the source of, the persecution in question.

...

p. 725:

... Absent some evidence, the [refugee] claim should fail, as nations should be presumed capable of protecting their citizens. Security of nationals is, after all, the essence of sovereignty. Absent a situation of complete breakdown of state apparatus, such as that recognized in Lebanon in *Zalzali*, it should be assumed that the state is capable of protecting a claimant.

…

p. 726:

> Although this presumption increases the burden on the claimant, it does not render illusory Canada's provision of a haven for refugees. The presumption serves to reinforce the underlying rationale of international protection as a surrogate, coming into play where no alternative remains to the claimant. Refugee claims were never meant to allow a claimant to seek out better protection than that from which he or she benefits already. [*Minister of Employment and Immigration v. Satiacum* (1989), 99 N.R. 171 at page 176].

…

p. 751-52:

In considering the claim of a refugee who enjoys nationality in more than one country, the Board must investigate whether the claimant is unable or unwilling to avail him- or herself of the protection of each and every country of nationality. Although never incorporated into the Immigration Act and thus not strictly binding, paragraph 2 of Art. 1(A)(2) of the 1951 Convention infuses suitable content into the meaning of "Convention refugee" on the point. This paragraph of the Convention provides:

Article 1

A... .

(2) …

> In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on a well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

As described above, the rationale underlying international refugee protection is to serve as "surrogate" shelter coming into play only upon failure of national support. When available, home state protection is a claimant's sole option. The fact that this Convention provision was not specifically copied into the Act does not render it irrelevant. The assessment of Convention refugee status most consistent with this theme requires consideration of the availability of protection in all countries of citizenship.

…

p. 753:

… The exercise of assessing the claimant's fear in each country of citizenship at the stage of determination of "Convention refugee" status, before conferring these rights on the claimant, accords with the principles underlying international refugee protection. Otherwise, the claimant would benefit from rights granted by a foreign state while home state protection had still been available. …

…

p. 754:

As explained above, the well-foundedness of a claimant's fear of persecution can be grounded in the concept of "inability to protect", assessed with respect to each and every country of nationality. …

[Emphasis added]

[36] Thus, in order to succeed on his or her refugee claim, a claimant must not only have a subjective fear of persecution, but also demonstrate that his fear is objectively well-founded. A country’s inability to protect a claimant is a fundamental element in the determination of whether

his refugee claim is objectively well-founded. If the state is able to protect a claimant, then the fear of persecution is not objectively well founded (see *Ward*, above, pages 711-12).

[37] The presumption that a state can protect its citizens reinforces the principle of international refugee protection that will be given when a claimant has no other alternative (see *Ward*, pages 725-26).

[38] When a claimant enjoys nationality in more than one country, he must demonstrate that he is unable or unwilling to avail himself of the protection of each country of which he is a national (see *Ward*, pages 751).

[39] Hence, the purpose of the refugee protection system is to protect a person who has a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion in regard to a given country and who is unable or unwilling to avail himself or herself of the protection of that country. Consequently, paragraph 53 of the UNHCR Handbook, which speaks to the issue of the cumulative effect of past incidents and on which the learned Judge relied, must therefore be read in that context. Paragraph 53 reads as follows:

> In addition, an applicant may have been subjected to various measures not in themselves amounting to persecution (e.g. discrimination in different forms), in some cases combined with other adverse factors (e.g. general atmosphere of insecurity in the country of origin). In such situations, the various elements involved may, if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution on "cumulative grounds." Needless to say, it is not possible to lay down a general rule as to what cumulative reasons can give rise to a valid claim to refugee status. This will necessarily depend on all the circumstances, including the particular geographical, historical and ethnological context.
>
> [Emphasis added]

[40] The issue discussed in paragraph 53 of the UNHCR Handbook was addressed by this Court in *Retnem v. Canada (M.E.I)* (1991), 132 N.R. 53 (F.C.A.). At page 55 of his Reasons for the Court, MacGuigan J.A. stated:

> In other words, he [the claimant] made an argument that the cumulative acts of harassment by the authorities amounted to persecution in the sense of the Refugee Convention. This is an argument which found favour with this Court in *Mirzabeglui v. M.E.I.*, no. A-538-89, decided January 28, 1991. I would also refer to the reasons for decision of Thurlow C.J. in *Oyarzo v. M.E.I.*, [1982] 2 F.C. 779 at 781:
>
> > [S]ince it is the foundation for a present fear that must be considered, such incidents in the past are part of the whole future and cannot be discorded entirely as a basis for fear, even though what has happened since has left them in the background.
>
> Hence even though the claimant did not flee the country for some years after his two-week detention and torture in 1984, that incident is still current as a basis for fear when linked with all of the smaller previous and subsequent harassment he endured. In my opinion the Board's failure to deal with the cumulative nature of the persecution the claimant alleged is a patent error of law.
>
> [Emphasis added]

[41] More recently, in *Mete v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 840, 46 Imm. L.R. (3d) 232 (F.C.), Madam Justice Dawson dealt with a claimant's argument that the Board had erred in failing to take into account, in the determination of his refugee claim, the cumulative nature of various acts of harassment and attacks that had been directed against him. In answering the question before her, she enunciated at page 233 of her Reasons the following principles, which I accept:

> [4] The following three legal principles are not controversial. First, in *Rajudeen v. Canada (Minister of Employment and Immigration)* (1984), 55 N.R. 129, the Federal Court of Appeal defined persecution in terms of: to

> harass or afflict with repeated acts of cruelty or annoyance; to afflict persistently; to afflict or punish because of particular opinions or adherence to a particular creed or mode of worship; a particular course or period of systematic infliction of punishment directed against those holding a particular belief; and persistent injury or annoyance from any source.
>
> [5] Second, in cases where the evidence establishes a series of actions characterized to be discriminatory, and not persecutory, there is a requirement to consider the cumulative nature of that conduct. This requirement reflects the fact that prior incidents are capable of forming the foundation of present fear. See: *Retnem v. Canada (Minister of Employment and Immigration)* (1991), 132 N.R. 53 (F.C.A.). This is also expressed in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status ("Handbook on RefugeeStatus") in the following terms, at paragraph 53: [Citation omitted]
>
> [6] Third, it is an error of law for the RPD not to consider the cumulative nature of the conduct directed against a claimant. See: *Bobrik v. Canada (Minister of Citizenship and Immigration)* (1994), 85 F.T.R. 13 (T.D.) at paragraph 22, and the authorities there reviewed by my colleague Madam Justice Tremblay-Lamer.

[42] These authorities make clear that the Board is duty bound to consider all of the events which may have an impact on a claimant's claim that he or she has a well founded fear of persecution, including those events which, if taken individually, do not amount to persecution, but if taken together, may justify a claim to a well founded fear of persecution. However, they do not provide an answer to the question before us, i.e. whether the Board had a duty to consider incidents or events which took place in a country other than the one in regard to which the claimant seeks refugee status.

[43] The fact that a refugee claimant must demonstrate that he is unable or unwilling to avail himself of the protection of each country of which he is a national explains, in my view, why the case law pertaining to the cumulative effect of incidents doctrine has not addressed the issue before

us. In all of the cases, the question at issue concerned incidents which had occurred in the same country, i.e. the country in regard to which the claimant was seeking refugee status (see *Retnem*, above; *Oyarzo v. Canada (M.E.I.)*, [1982] 2 F.C. 779 (F.C.A.) (QL); *Madelat v. Canada (M.E.I.)*, [1991] F.C.J. No. 49 (F.C.A.) (QL); *Bursuc v. Canada (M.C.I.)*, 2002 FCT 957 (F.C.T.D.), 223 F.T.R. 155; *Toli v. Canada (M.C.I.)*, 2002 FCT 334 (F.C.T.D.); *Canagasurim v. Canada (M.C.I.)* (1999), 175 F.T.R. 285).

[44] I cannot accept the respondents' submission that the Judge correctly applied the law regarding the cumulative grounds of persecution principle and that he did not adopt an approach that was inconsistent with the general legal principles of refugee law. In my view, there can be no other answer but that the Judge erred in so concluding.

[45] The plain fact is that whether a claimant relies on a single or a number of events taken together, he still has the obligation to satisfy the Board that, at the time of the hearing, he has a well founded fear of persecution in regard to the country from which he seeks protection. He has to show that by reason of a Convention ground, he is unable or unwilling to avail himself of the protection of that country. Thus, in the present matter, are the respondents unable or unwilling to avail themselves of the protection of Rwanda or, to put it in a different way, is Rwanda able to protect the respondents should they return?

[46] The Board found that by reason of the events which occurred in the DRC, the respondents had a well founded fear of persecution should they be forced to return to that country. However, I

have difficulty with the proposition that such events can serve to ground a well founded fear of persecution in regard to Rwanda since, in my view, the events which occurred in the DRC cannot serve to determine whether Rwanda is unable to protect the respondents. The only issue, insofar as the respondents' claim is directed at Rwanda, is whether or not that country can protect them should they return. Consequently, I see no basis whatsoever for the conclusion that the events which occurred in the DRC ought to have been considered by the Board in regard to the respondents' claim of a well founded fear of persecution should they return to Rwanda.

[47] The fact that cumulative reasons based on a "particular geographical, historical and ethnological context" (paragraph 53 of the UNHCR Handbook) can give rise to a valid claim to refugee status does not alter the fact that each claim must be determined in respect of a given country. As the Supreme Court stated in *Ward*, *supra*, at pages 751-52:

> In considering the claim of a refugee who enjoys nationality in more than one country, the Board must investigate whether the claimant is unable or unwilling to avail him- or herself of the protection of each and every country of nationality. Although never incorporated into the Immigration Act and thus not strictly binding, paragraph 2 of Art. 1(A)(2) of the 1951 Convention infuses suitable content into the meaning of "Convention refugee" on the point. This paragraph of the Convention provides:
>
> …
>
> As described above, the rationale underlying international refugee protection is to serve as "surrogate" shelter coming into play only upon failure of national support. When available, home state protection is a claimant's sole option. The fact that this Convention provision was not specifically copied into the Act does not render it irrelevant. The assessment of Convention refugee status most consistent with this theme requires consideration of the availability of protection in all countries of citizenship.
>
> [Emphasis added]

[48] Therefore, I agree with the appellant that it would be contrary to the whole system of refugee protection to consider events that occurred in the DRC to determine whether the respondents can find protection in Rwanda. Further, there is nothing in paragraph 53 of the UNHCR Handbook which could justify an expansion of the cumulative effect of incidents doctrine to events that occurred in two different countries.

[49] For these reasons, I believe that the certified question should be given a negative answer, with the following caveat. As a matter of principle, events which occur in a country other than that in respect of which a claimant seeks refugee status should not be considered. However, there may be exceptional cases in which such events would be relevant to the determination of the threshold question, to wit whether the country where the claimant seeks refugee status can protect him or her from persecution. I do not want to rule out such a possibility. This case, however, is not one of those cases. In the present matter, it is clear that the events which occurred in the DRC and which led the Board to conclude that the respondents have a well-founded fear of persecution in regard to that country have no bearing on Rwanda's ability to protect them.

[50] One final matter. The respondents submit that irrespective of the issue giving rise to the certified question, the Board failed to conduct a cumulative grounds analysis of all the events and incidents that occurred in Rwanda. More particularly, they say at paragraphs 87 to 90 of their Memorandum of Fact and Law:

> [87] As argued before the Court below, the tribunal erred in failing to take all of the past incidents that occurred **in Rwanda** into consideration, and failing to consider the cumulative impact of all of these events on the Respondents' fear of persecution.
>
> [88] The RPD accepted the following facts as proven: that Rwanda was ravaged by genocidal violence that targeted Tutsis in 1994; that a situation of generalized instability and insecurity continues to reign in Rwanda; and that the male principal Applicant was subject to a grenade attack in Rwanda in 2004.
>
> [89] However, the principal male Applicant also described in his PIF the incidents that he witnessed and the events that he survived during his stay in Rwanda in 1996 and 1997 and the fact that his father was violently killed during this period when Hutu militias were returning to Rwanda and resuming their attacks on the Tutsi civilians.
>
> [90] The Applications Judge did not address this issue, as it was superseded by his broader finding that the events that occurred in both the DRC and in Rwanda had to be considered cumulatively. However, it remains that the RPD erred in failing to consider the cumulative impact of the past events that had occurred in Rwanda, whether or not it was obliged to consider the DRC events.

[51] Although it is correct that neither the Board nor the Judge squarely addressed this issue, I am satisfied that the Board's silence does not constitute a reviewable error, given that the respondents cannot show that the grenade incident was linked to a Convention ground, that the other incidents referred to by the respondents occurred some seven to eight years prior to the grenade incident and the fact that the Board was fully aware and indeed pointed out that there was a prevailing insecurity in Rwanda.

DISPOSITION

[52] For these reasons, I would allow the appeal with costs, set aside the judgment of the Federal Court and I would dismiss the respondents' application for judicial review. Finally, I would answer the certified question as follows:

Certified question: Considering section 53 of the United Nations Handbook on Procedures and Criteria for Determining Refugee Status, and in particular the last sentence of that paragraph, "This will necessarily depend on all the circumstances, including the particular geographical, historical and ethnological context", is it an error in law to limit the analysis of the cumulative grounds to the events that occurred within one country of nationality or habitual residence, when the claimant alleges persecution on the basis of the same Convention ground in the two (or more) countries, and where the claimant's subject fear is related to events that occurred in more than one country?

Answer: NO, except where the events which occur in a country other than that in respect of which a claimant seeks refugee status are relevant to the determination of whether the country where a claimant seeks refugee status can protect him or her from persecution.

"M. Nadon"
J.A.

"I agree.
Robert Décary J.A."

"I agree.
Gilles Létourneau J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-211-07
STYLE OF CAUSE:	M.C.I. v. MUNDERERE et aL
PLACE OF HEARING:	Montreal, QC
DATE OF HEARING:	January 10, 2008
REASONS FOR JUDGMENT BY:	NADON J.A.
CONCURRED IN BY:	DÉCARY J.A. LÉTOURNEAU J.A.
DATED:	March 5, 2008

APPEARANCES:

Me François Joyal	FOR THE APPELLANT
Me Jared Will	FOR THE RESPONDENT

SOLICITORS OF RECORD:

John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE APPELLANT
Me Jared Will Montreal, QC	FOR THE RESPONDENT