

Federal Court



Cour fédérale

**Date: 20171221**

**Docket: IMM-1570-17**

**Citation: 2017 FC 1187**

**Ottawa, Ontario, December 21, 2017**

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

**BETWEEN:**

**ANESU CEPHAS JUNIOR SIBANDA  
(A.K.A ANESU SIBANDA)**

**Applicant**

**and**

**THE MINISTER OF IMMIGRATION,  
REFUGEES AND CITIZENSHIP CANADA**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] This is an application for judicial review by Anesu Cephas Junior Sibanda (the “Applicant”) pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act, SC 2001, c 27* (IRPA). On March 15, 2017, a member of the Refugee Protection Division of the Immigration and Refugee Board of Canada (the “Member”) determined that the Applicant was

neither a Convention refugee nor a person in need of protection. The Member refused the Applicant's refugee claim (the "Decision"), primarily on the ground that he was not credible. The Applicant seeks the Member's Decision be set aside and the matter be referred back for redetermination by a differently constituted panel.

## II. Evidence

[2] The Applicant is 25 years old and a citizen solely of Zimbabwe. He and his family are supporters of the Movement for Democratic Change ("MDC"), an opposition political party. Prior to leaving Zimbabwe for the United States in August 2011, the Applicant was engaged in activities in support of the MDC. For instance, in December 2010, he put up posters for an MDC rally and attended that rally in January 2011. For this, he was arrested, interrogated, slapped, and subsequently released. In March 2011, the Applicant attended an MDC house party that was broken up by the police. While fleeing, he was struck on his back. In August 2011, the Applicant left Zimbabwe to pursue his post-secondary education in the United States.

[3] From the United States, the Applicant continued to support the MDC through donations to the party. In June, July and August 2016, the Applicant sent money to his mother in Zimbabwe via "MoneyGram" to donate on his behalf.

[4] On September 22, 2016, the police visited the Applicant's parents' house in Bulawayo, Zimbabwe. His parents hid, and his sister told the police that the parents were not at home. The police searched the residence and discovered the donation receipts. They asked the Applicant's sister about the donation receipts, threatening and mistreating her. They then informed her that

they would beat and arrest her brother, should he return to Zimbabwe, for funding “enemies of the state.” Out of fear for their lives, the Applicant’s parents and sister fled to Botswana that evening.

[5] On January 8, 2017, the Applicant left the United States. Upon arriving at the Port of Entry (“POE”) in Canada, he made a claim for refugee protection.

### III. Issues

[6] There is one central issue that arises in this matter: did the Member err in fact and in law when it impugned the Applicant’s credibility by basing its decisions on erroneous findings of fact and law?

### IV. Analysis

#### A. *Standard of Review*

[7] The Member’s finding with respect to the Applicant’s credibility is reviewable upon a standard of reasonableness, as it is a question of mixed fact and law.

In *Dunsmuir v New Brunswick*, 2008 SCC 9, the Supreme Court of Canada explained the role of a court in conducting a review on the reasonableness standard. Notably, it includes inquiries into the qualities that make a decision reasonable, including both the process of articulating the reasons and the outcome. On judicial review, reasonableness is concerned with the existence of justification, transparency and intelligibility within the decision-making process. But it is also

concerned with whether the decision falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law. In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para. 15, the Supreme Court of Canada affirmed that a reviewing court may look beyond the reasons under review and examine the record to assess the reasonableness of a decision.

## B. *Credibility*

[8] It is trite law that when a claimant testifies and swears to the truth of certain allegations, a presumption is created that those allegations are true unless there are reasons to doubt their truthfulness: *Maldonado v Canada (Minister of Employment and Immigration)*, [1979] F.C.J. No. 248 at para. 5 (*Maldonado*). Adverse credibility findings based on implausibility may only be made in the “clearest of cases” and the decision-maker has a duty to justify such findings with clear reference to the evidence: *Valtchev v Canada (MCI)* 2001 FCT 776 at paras.7 and 8 (*Valtchev*). Applying this principle in *Peter v. Canada (Citizenship and Immigration)*, 2015 FC 619 at para 7 (*Peter*), Mr. Justice Campbell wrote:

[...] To find that a person is lying is a serious matter. Convincing reasons must support reaching such a conclusion. It is not every contradiction, discrepancy, or inconsistency that can ground such a finding. Each such incident must be carefully considered in the context in which it arises to reasonably and fairly determine whether its existence is evidence going to prove that a lie has been, or is being, told. If such a conclusion is reached, the reasons for reaching it must be carefully and clearly explained.

[9] I am deeply concerned about the credibility analysis presented by this Member in this Decision. Applying the principles discussed in *Peter* to the case at hand, it is clear that the Member takes minor inconsistencies to draw sweeping negative credibility inferences across the

entirety of the Applicant's evidence, rather than carefully considering these alleged discrepancies in context. I will develop some examples in the discussion that follows.

(1) Knowledge of the MDC / Political Opinion

[10] The Member opens the discussion on credibility with the professed expectation that, "... [t]he claimant is a young man with a university degree from the USA and the panel expected his oral evidence be more forthcoming and articulate with regards to his political opinion" (Decision, para. 6). The Member indicates that the Applicant "...lacked credibility in that he was unable to describe his alleged political opinion with any clarity and coherence" (Decision, para. 7).

[11] The Applicant provided substantial evidence and testimony which illustrates his knowledge and opinion about the political situation in Zimbabwe. For example, he knew that the MDC was founded in 1999. He knew that David Coltart was formerly a government Minister. He knew that the main faction of the MDC is the MDC-T and that its leader is Morgan Tsvangirai. He knew that Morgan Tsvangirai was a member of the government and that he stopped being part of the Government of National Unity in 2013. He knew about the formation of the People First Party, knew that it is led by Joice Mujuru, and knew the circumstances under which she left the governing party. He knew that last elections took place in 2008 and 2013, that the next elections are scheduled to take place in 2018, and that a coalition was forming in opposition to the government for those elections. He knew about the #ThisFlag movement, and knew that the movement is led by Pastor Evan Mawarire. He knew about his country's constitutional revision process, including changes to the presidential term limits and the

inclusion of human rights provisions. It is also true that the Applicant did not know about the MDC party structure, the name one faction of the MDC (namely, the “MDC-N”), and the name of the MDC-N’s leader. He was also unsure about the year that Morgan Tsvangirai became the Prime Minister.

[12] The Decision shows no evaluation or analysis of what the Applicant *knew* in relation to what he did *not know*. Instead, the Member drew a negative credibility inference because the Applicant lacked some specific knowledge. In my view, the Applicant’s testimony demonstrates a degree of knowledge about the political situation in his country that is consistent with what one might reasonably expect of a 25 year old person. Not to be forgotten is the fact that he has been absent from Zimbabwe for the past 6 years, and thus one might even say that he possesses an impressive knowledge of his country’s history and politics. Similar to the facts in the *Maldonado* case cited above, the Member has drawn conclusions about the Applicant’s political opinion that not only appear to ignore substantial portions of the evidence, but also contradict his testimony and sworn affidavit. In so doing, the Member committed a reviewable error.

[13] Furthermore, there are multiple statements about the Applicant’s political knowledge that are misconstrued or factually misstated in the Decision. The Member finds that the Applicant “...knew nothing about the MDC Youth Assembly” and “...did not know anything about MDC chapters in North America” (Decision, para. 11). Nowhere in the transcript does the Member ask what the Applicant knew of the MDC Youth Assembly. Instead, he was asked whether he had ever been a member of the MDC Youth Assembly and whether he had ever volunteered for it, and the Applicant responded to both questions in the negative (Certified Tribunal Record

(“CTR”), p. 234). Nowhere in the transcript does the Member ask the Applicant what he knew about MDC chapters in North America. Rather, he was asked whether he was aware of the MDC chapter in the United States. He responded by noting that he had heard about a chapter in Indiana (CTR, p. 226).

[14] A misapprehension of oral testimony is not only a problem for drawing credibility inferences; it can be fatal to a decision: *Gur v. Canada (Citizenship and Immigration)*, 2012 FC 992; *Hosini v. Canada (Citizenship and Immigration)*, 2014 FC 1007. In the case at hand, the Member drew a negative credibility inference with respect to the Applicant’s political opinion – a cornerstone of this case – on the basis of a misapprehension of his testimony. As such, I find that having done so, the Member committed a reviewable error.

(2) Implausibility: Donations to the MDC

[15] The Member finds it “implausible” that the Applicant sent money to his mother to donate to the MDC on his behalf. The Member in its Decision states:

...Firstly, when asked why the claimant did not directly send money to the MDC in USA, he testified he wanted to support the MDC in Bulawayo. When asked why then did he not send the money directly to the MDC party and write down his name, the claimant had no explanation. The claimant’s evidence concerning sending money through his mother to MDC party in Bulawayo lacks rationality and common sense.

[Decision, para. 16]

[16] I have two concerns about this implausibility finding. First, the account of the Applicant’s testimony is, again, factually incorrect. The Applicant was only asked whether he

knew about the MDC chapter in the United States, and why he did not donate through it. He never testified that he wanted to support the “MDC in Bulawayo,” and when asked why he did send his donation through the MDC in the United States, he was not without an explanation – he testified that he thought it was “...more direct to just send it home to [his] mom” (CTR, p. 226). Thus, the implausibility finding by the Member – that is, that the money did not go to the MDC and therefore the Applicant’s name would not be on the list of donors in the Bulawayo chapter of the MDC – is regrettably based upon the Member’s own version of evidence rather than that of the Applicant. Considering that issue of the donations is central to this claim, this error is particularly serious.

[17] Second, the Decision is absent any reasons for which the Member rejects the Applicant’s explanation for donating through his mother as implausible. This Court has held that implausibility findings are to be restricted to the clearest of cases: *Valtchev; Chen v. Canada (Citizenship and Immigration)*, 2014 FC 749; *Meng v. Canada (Citizenship and Immigration)*, 2015 FC 365. In cases of alleged implausibility, a decision-maker cannot simply assert that an individual’s choice is irrational or lacks common sense when confronted with an explanation. Reasons must be given. The absence of those reasons, and the much more serious error of improperly drawing credibility inferences from a misapprehension of the testimony, renders the Member’s implausibility finding on this crucial area of the evidence unreasonable.

(3) Delay

[18] The Member draws a negative credibility inference “...with respect to the claimant’s failure to seek protection at the earliest opportunity in the USA or five previous times the



claimant entered Canada as a visitor” (Decision, para. 22). Although the Applicant explained that he did not file a claim on those occasions because his brother advised him to concentrate on his studies and because he thought the situation in Zimbabwe would improve, the Member rejects this explanation, finding that the Applicant “... did not demonstrate to me that he had any ongoing knowledge of what was happening over the years in the MDC party” (Decision, para. 22).

[19] I have already explained why it was improper, in my view, to draw a negative credibility finding based on the Applicant’s lack of specific knowledge about the MDC’s structure and organization. However, the use of this lack of knowledge to discredit the Applicant’s view about the improving situation in Zimbabwe is unintelligible. The two are hardly related. On the contrary, the Applicant gave cogent reasons why he thought the situation was improving:

There was...there was a constitution. There was a new constitution that was introduced and it had provisions to protect people from being torture or....or attacked. And if....and they were going to investigate any human rights violations. If...if there was a...it’s...it’s...it hasn’t been applied until now. I thought if...I thought it would be applied.

[Emphasis added]

[CTR, p. 218]

[20] At no point in the Decision did the Member address this explanation. By ignoring this evidence, and by the failure to even comment on its weight in the Decision, the Member committed a serious reviewable error. It is yet another example, like in *Maldonado*, of the Member drawing a conclusion without regard to relevant, uncontradicted testimony. Thus, the negative credibility inference was improperly drawn.

IV. Conclusion

[21] While I have refrained from commenting on all credibility findings in the Decision, it is my view that the above discussion exposes sufficient reviewable errors with respect to credibility to render it unreasonable.

V. Certification

[22] Counsel for both parties was asked if there were questions requiring certification, they each stated that there were no questions arising for certification and I concur.

**JUDGMENT in IMM-1570-17**

**THIS COURT'S JUDGMENT is that**

1. The decision under review is set aside and the matter referred back for redetermination by a differently constituted panel.
2. There is no question to certify.

"Shirzad A."

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Judge

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

**DOCKET:** IMM-1570-17

**STYLE OF CAUSE:** ANESU CEPHAS JUNIOR SIBANDA, (A.K.A ANESU SIBANDA) v THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP CANADA

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** NOVEMBER 30, 2017

**JUDGMENT AND REASONS:** AHMED J.

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