Date: 20080206

Docket: IMM-1585-07

Citation: 2008 FC 156

Ottawa, Ontario, February 06, 2008

PRESENT: The Honourable Orville Frenette

BETWEEN:

GERTRUDE NGWENYA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) of a decision of the Refugee Protection Division (RPD) dated March 28, 2007 in which the Panel Member (Member) denied refugee status to the Applicant, Gertrude Ngwenya.

[2] The Applicant is a citizen of Zimbabwe where the ruling political party is the Zimbabwe African National Union – Patriotic Front ("Zanu-PF"). In June 2000, the Applicant left Zimbabwe and traveled to the United States of America (USA), via South Africa. It was in her testimony at the

hearing, before the Member, that she felt no fear of persecution at that point in time, but left Zimbabwe in an attempt to support her children as a single mother.

[3] For a period of approximately 11 months, the Applicant remained in the USA, with the exception of traveling briefly to England in December 2000. At some point in this period of time, she learned that her daughter had fled Zimbabwe and was thought to be in Canada. On June 21, 2001, the Applicant entered Canada in search of her daughter. Finding herself unsuccessful in this search, and unable to return to the USA due to lack of immigration status, she was permitted by Canadian Immigration authorities to voluntarily depart to Zimbabwe in early July 2001.

[4] The Applicant testified at her RPD hearing that, upon her arrival at the Zimbabwe airport, she was questioned by officials regarding her activities abroad and was accused of being a "spy for the West". She remained in Zimbabwe for a period of approximately three weeks, but left again after receiving harassing visits from members of the Zanu-PF at her home. The Applicant went to South Africa for several months and then, in October 2001, went to England, where she applied for a student visa, but did not seek asylum. At or about this same time, her oldest daughter was granted refugee status in Canada.

[5] With the help of an agency, the Applicant left England and re-entered the USA in October 2002. She made an application to study in the USA which was denied, but again, she did not seek legal advice, or refugee status. In December 2002, the Applicant's second daughter made a claim for asylum in Ireland. On November 16, 2005, the Applicant entered Canada and applied for status

as a convention refugee based on her fear of persecution due to her political opinion and that of her immediate family members.

I. Decision

[6] Due to adverse findings made against the Applicant's credibility because of inconsistencies in her evidence, and a finding that the Applicant failed to prove both the subjective and objective elements of her claim, the Member determined that the Applicant was not a Convention refugee based on her actual or perceived political opinion, or that of her family members. The Member also found that the Applicant was not "a person in need of protection" in accordance with section 97(1)(a) and (b) of the IRPA.

II. Issues

[7]
a. Were the Member's adverse findings on credibility patently unreasonable?
b. Was the Member's finding that the Applicant lacked the element of subjective fear patently unreasonable?
c. Was it reasonable for the Member to conclude there was no objective basis for the Applicant's fear of persecution, despite the fact that her daughters have made successful refugee claims?

III. Standard of review

[8] The expertise of the RPD in assessing credibility goes to the core of its jurisdiction and such assessments should not be set aside unless they are found to be patently unreasonable, *Xu v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1701; *Griffiths v. Canada (Solicitor General)*, 2006 FC 127 at para 16; *Harusha v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 2004.

IV. Credibility findings

[9] Credibility and assessment of evidence by the Immigration Board must be respected unless they are patently unreasonable, i.e. based on an erroneous finding of fact that is made in a perverse or capricious manner without regard to the material before it, *Akinlolu v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 296 (QL) at para 14; *Kanyai v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 850 at para 9.

[10] The Board can find that an applicant is not credible because of implausibilities and inconsistencies in the evidence, *Aguebor v. (Canada) Minister of Employment and Immigration)*, 160 N.R. 315, [1993] F.C.J. No. 732 (QL) [*Aguebor*]. The Board can make findings based on implausibilities, common sense and rationality, *Shahamati v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 415 (F.C.A.) at para 2.

[11] This standard applies equally to the findings of the Member with respect to the Applicant's lack of subjective fear, *Abawaji v. Canada (Minister of Citizenship and Immigration),* 2006 FC 1065 at para 10. The determination of whether the harassment or sanctions a claimant fears are sufficiently serious to constitute persecution is a question of mixed fact and law and therefore subject to a standard of reasonableness simpliciter, *Sagharichi v. Canada (Minister of Employment and Immigration)* (1993), 182 N.R. 398.

V. Analysis

A. Adverse findings regarding the Applicant's credibility

[12] Due to several inconsistencies between the Applicant's *viva voce* evidence and the written documentation, the Member made adverse findings regarding the Applicant's credibility. Counsel for the Applicant submits that the Member engaged in an overly microscopic review of the evidence and wrongly concluded that the Applicant contradicted her oral testimony. It is true that the Federal Court of Appeal in *Attakora v. Canada (Minister of Employment and Immigration),* [1989] 99 N.R. 168 [*Attakora]*, cautioned the Refugee Board against being "over-vigilant in its microscopic examination of the evidence", but after a careful consideration of the tribunal record and the Member's decision, I fail to see how such an examination occurred in this instance.

[13] As is required, see *Hilo v. Canada (Minister of Employment and Immigration)* (1991), 130 N.R. 236, the Member cited clear examples of what she perceived as inconsistencies, and explained how they impacted her findings on credibility. Specifically, the Member pointed to the fact that the

Applicant's Personal Information Form (PIF) sets out that "my family member and I have been the target of the ruling party since the year 2000", when in fact, it was in the Applicant's oral testimony that her confrontations with the Zanu-PF did not begin until 2001. She admitted during the hearing that only her daughter had been a target in 2000. Further, the Applicant's PIF stated she was "assaulted by Zanu-PF members at home," asked where her daughter was, and pressured to attend meetings. In oral testimony, the Applicant said she was visited repeatedly – sometimes late at night – by members of the Zanu-PF, asked where her daughter was and pressured to attend meetings. However, she made no mention in her testimony of being assaulted, despite being asked numerous times about these incidents and prompted for further details. The Member wrote on page 3 of her reasons:

> …When questioned about this issue a second time, the claimant stated that the Zanu-PFmembers came to her family home in an attempt to persuade them to attend meetings and join the party. She indicated that they would knock on the door and on one occasion kicked the door, but when asked if they did anything else, she responded "no",…

The Member found the Applicant had purposefully provided evidence in her PIF that was not correct in an attempt to embellish her alleged risk and/or fear of return to Zimbabwe.

[14] The Member also pointed to inconsistencies with respect to the Applicant's alleged membership in the Movement for Democratic Change (MDC) Party. The Applicant responded in the negative when asked during her interview with the Immigration Officer whether she had an association with any groups, societies or organizations, yet indicated she was a "believer" of the "ZAPU-PF/MDC" from 1963-2005 on her Background Information Form (Schedule I to her PIF). From this contradiction, the Member concluded that the Applicant was not a long-standing member

of the MDC Party. It is the position of the Applicant that the Member rejected the evidence of MDC membership "without any reasonable basis", but I disagree. The Applicant did not indicate her membership on any of her forms, and could only provide a receipt for a recent payment of dues dated September 2006 for a MDC Party card. Thus, there was insufficient evidence of a "long-standing" membership. The Member also based her findings, in part, on the fact that the Applicant did not attempt to participate with the MDC Party during her relatively lengthy time spent in the United Kingdom or in the USA, which both have active chapters of this MDC Party.

[15] Another inconsistency noted by the Member was the conflicting reasons the Applicant gave for her return to Zimbabwe in 2001. The Applicant initially said she went back to look for her daughter and to "check out the situation and gain information". Later, the Applicant testified that she was going to stay in Zimbabwe. When asked which reason was the correct one, the Applicant answered that her return was for both reasons. What I find most troubling, is not necessarily the inconsistencies in the Applicant's reasons for returning to Zimbabwe, but the fact that she returned at all. The Applicant testified that she was, at that time, afraid to return to Zimbabwe because she had heard that the Zanu-PF was pressuring people to join the Zanu-PF Party, yet she did not make a claim for refugee status while in Canada. The Applicant's submissions on this application state that she did not make a claim for status at that time because that "was not her intentions for going to Canada other than to locate her daughter". However, if she genuinely wanted to locate her daughter, why did she first attempt to re-enter the USA? (para 3 *supra*).

[16] These examples of inconsistencies led the Member to draw adverse findings of credibility against the Applicant's testimony and to find that she had embellished her claim in her PIF. The analysis undertaken by the Member is distinguishable from *Attakora* and *M.M. v. Canada (Minister of Employment and Immigration)* (1991), 15 Imm.L.R. (2d) 29 (F.C.A.) [*M.M.]*, where the Court took issue with the Boards' microscopic approach to evidentiary inconsistencies. In *Attakora*, the claimant (while testifying through an interpreter) said he escaped through a hole the approximate size of a soccer ball. The Board in that case engaged in an analysis of whether the claimant's body frame could fit through such a hole. On review, the Court stated, "the comparison [of the hole to the soccer ball] is a homely one and hardly lends itself to microscopic analysis." The inconsistencies noted by the Board in *M.M.* dealt with the frequency of times the claimant was required to report to the IPKF camp, her precise date of arrest and the precise distance from the camp to her home. The Court determined these inconsistencies, "while not-insignificant, were not central to the appellant's claim." Conversely, the inconsistencies pointed to by the Member in the Applicant's case go to the very core of the claim: the existence of political membership and the degree and validity of harassment/persecution. In addition, the Boards in both *Attakora* and *M.M.* found the claimants had subjective fear, which further separates these decisions from the present case.

B. Failure to prove subjective fear

[17] As previously stated, the Member found that the Applicant had not established that she held a subjective fear of persecution upon her return to Zimbabwe. This finding is based in part on the adverse findings against the Applicant's credibility discussed above, but also on the conduct of the Applicant since leaving Zimbabwe.

[18] It took the Applicant over four years, after leaving Zimbabwe for the second time in late July 2001, to make her refugee claim in Canada in November 2005. During this period of time, the Applicant spent significant time in both the United Kingdom and in the USA and did not make a refugee claim in either country. This evidence shows there was both a serious delay in the Applicant's application for Canadian refugee status; and (connectedly) a failure to claim in other countries before arriving in Canada.

[19] Refugees are not obliged to seek asylum in the first country they reach, however a failure to make a claim at the first safe opportunity to do so can impugn the Applicant's credibility and contribute to a finding of a lack of subjective fear, *Gavryushenko v. Canada (Minister of Citizenship and Immigration),* [2000] F.C.J. No. 1209 (Q.L.); *Bobic v. Canada (Minister of Employment and Immigration),* 2004 FC 1488 [*Bobic*]. This is particularly true if the claimant was in countries which would have offered protection if the claim was well founded, and if the claimant can offer no reasonable explanation for failing to claim refugee status.

[20] When questioned why she did not seek legal help or asylum in the U.K., the Applicant testified that she applied for status as a student. The Applicant further noted that she had heard that England was sending people back to Africa, and was afraid to make a claim for asylum, for fear of deportation. When her application to study was denied in the U.K., the Applicant sought the help of an agency to travel to the USA. When asked by the Member why she did not seek legal advice in America, the Applicant initially answered that she did not have adequate funds, and then later said it

was because she had no legal status. When asked what her "plan" was going to be upon arriving in the USA she stated at page 19 of the Record of Hearing:

> …-- I was in the United States before, and seeing the life in the United States that there's not even police that may be will be following you unless maybe you've committed a crime, or done something bad in the country. That's how they maybe came decide to send you back.
>
> So I decide -- I just thought in the United States, I'll be able to be sneaking around, working and surviving.

[21] In the present case, the Member offered the Applicant opportunities to explain her decisions to not seek protection in the USA and the U.K., however, the Member did not find the Applicant's explanations with respect to her concern surrounding the immigration systems in the other countries valid. In rejecting the explanations, the Member noted that the Applicant's 10 month stay in London was related to the fact she was awaiting an answer on her application for study status. Such an application would have allowed authorities to know her whereabouts, which is not consistent behavior for someone who fears deportation. The Applicant's fear of seeking advice in the absence of "status" appears to be based on her reasoning that she could not approach immigration or legal authorities without some kind of status to "fall back on" in the event her application was denied. However, the Member noted that the Applicant made a refugee claim in Canada, without having any kind of status to fall back on.

[22] In view of these reasons, the Member did not find the Applicant's explanations convincing, in particular given the lengthy amount of time the Applicant spent in the other countries. Indeed, the amount of time the Applicant spent in other countries is quite long, relatively speaking. For

example, in *Bobic* at paragraph 6, the Court found it strange that the applicant had passed through 5 countries on his way to Canada without making a claim in any of them, "…despite being in England for one month and France for three days." The Court continued to state that if the applicant had truly feared for his life, he would have applied at the first available opportunity and that his actions were inconsistent with a subjective fear of persecution.

[23] The lengthy amount of time that the Applicant spent in other countries resulted in a substantial delay before her claim was made to Canadian authorities. Similar to a failure to seek protection in other countries, the issue of delay can go to the existence of a subjective fear of persecution, *Huerta v. Canada (Minister of Employment and Immigration)* (1993), 157 N.R. 225 *[Huerta]*. In certain exceptional situations, a claimant's delay may be so extreme that it is nearly determinative of the claim, see *Cruz v. Canada (Minister of Employment and Immigration)*, (1994) F.C.J. No. 1247 (QL). In most cases, however, delay is a relevant element which the tribunal may take into account in assessing both the statements and the actions and deeds of a claimant. In *Huerta* the claimant arrived in Canada as a tourist on December 25, 1988 and did not claim refugee status until April 26, 1989. The Board in *Huerta* found it hard to see the claimant's conduct as the conduct of a person who says she fears for her life. In the present case, the Member drew the same conclusion, see also *Ilie v. Canada (Minister of Citizenship and Immigration)*, [1994] F.C.J. No. 1758 (QL); *Lopez v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1318; *Riadinskaia v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 30 (QL). Taking all the evidence as a whole, it cannot be said that the Member's conclusion on the Applicant's lack of subjective fear was patently unreasonable.

C. The Applicant's fear of persecution lacked an objective basis.

[24] The Member's reasons also addressed the absence of an objective, well-founded fear of persecution with respect to the Applicant's claim for refugee status. There are several components to the Applicant's evidence which are relevant to such a determination. The first is any evidence of past persecution, which would include the questions and accusations that the Applicant testified she faced at the airport by officials, and the visits that members of the Zanu-PF paid to her home. The dividing line when acts of harassment will be defined as persecution (as contemplated by the IRPA), can be difficult to draw. This is a determination of mixed fact and law, reviewable on a standard of reasonableness simpliciter. In other words, the test is not whether the Court would come to the same conclusion, but whether it was reasonable for the RPD to find as it did. Here, I find that it was.

[25] With respect to the airport incident, the Member accepted that the Applicant "may have been harassed at the airport" but was not satisfied that the questioning she faced was persecutory in nature, and adds that there was no evidence to suggest the Applicant was threatened or faced any risk of physical harm. Evidence of physical harm is certainly not necessary to prove persecution, *Amayo v. Canada (Minister of Employment and Immigration)*, [1982] 1 F.C. 520 however the potential harm must be sufficiently serious to warrant international protection. The Member did not accept, as credible, the evidence regarding the visits to the Applicant's home, and/or felt that part of the Applicant's story was embellished. Given the nature of the incidents described in the evidence,

in combination with the Member's adverse findings of credibility, the Member's decision cannot be said to have been unreasonable.

[26] The Applicant's alleged membership in the MDC Party is the second issue relevant to determining whether she has an objectively reasonable fear of persecution. When analyzing the nexus between a well-founded fear of persecution based on political opinion, the Board must consider all of the evidence about the claimant's activities and must consider how these activities will be perceived by authorities in the claimant's country. I am satisfied that the Member here did consider the recently dated MDC membership card and the recent payment of MDC dues in Toronto, and did not ignore this evidence as is submitted by the Applicant. The Applicant testified that she has been a member of the MDC since 1999. Not only could the Applicant not offer any documentary evidence to corroborate this testimony, she had no other information about her participation with the MDC besides "attending meetings in Zimbabwe" from which, she testified that she suffered no repercussions. Based on this evidence, the Member found the Applicant was not a member of the MDC Party, and further found that she was not being targeted by the Zanu-PF as a result of any political views, actual or imputed.

[27] Finally, the fact that the Applicant's two daughters have been successful in their respective refugee claims in Canada and Ireland, is relevant to the determination of whether an objective basis exists for the Applicant's fear of persecution, but by no means determines the well-foundedness of the Applicant's fear in this case. Each case must be determined on its own merits and the circumstances of the claimant's family members cannot be considered indirect persecution of the

claimant, see *Pour-Shariati v. Canada (Minister of Employment and Immigration)* (1997), 215 N.R. 174 (C.A.) [*Pour-Shariati*]. The Applicant's submission that the Member failed to consider the fact that her daughters have been granted protection is not persuasive. The Member clearly acknowledges these facts at the beginning of her decision.

[28] When determining whether there exists an objective basis for a claimant's alleged fear, the test is whether there is a reasonable chance that persecution would take place were the applicant returned to his country of origin, *Adjei v. Canada (Minister of Employment and Immigration)* [1989] 2 F.C. 680 (C.A.). Previous Board decisions have been over-turned because the Court found that the Board sought to be *convinced* of persecution, rather than looking for a reasonable chance. In the present case, the Member uses language such as "the panel is unable to conclude that the claimant had a *reasonable* fear for her life". In my view, this demonstrates the correct test was applied. The Member made this determination due to the insufficient and conflicting evidence on pivotal issues such as the visits by members of the Zanu-PF to the Applicant's home, and her affiliation with the MDC. The Member does not reference any data regarding the current situation in Zimbabwe, however such references are not necessary here given her findings on the absence of any basis for the Applicant's claim. I find that it was not unreasonable for the Member, after hearing the evidence first-hand and drawing the negative inferences that she did with respect to credibility, to determine that the Applicant's alleged fear of persecution was not reasonable held.

[29] Indirect persecution is not a basis for claiming refugee status, *Pour-Shariati; Rafizade v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 359 (QL). In this case, if the

Applicant's daughters were or could have been subject to direct persecution in Zimbabwe, she was not subject to it.

VI. Person in need of protection

[30] Neither the decision of the Member, nor the submissions of the parties on this application gave the issue of whether the Applicant is a "person in need of protection" much attention. Based on the findings of the Member, affirmed on this decision, with respect to lack of objective fear of persecution, it cannot be said that the Applicant would be at risk of torture or risk for her life or face a risk of cruel and unusual treatment or punishment should she return to her native country. I am not persuaded that the elements of section 97(1)(a) and (b) of the IRPA are satisfied.

VII. Zimbabwe

[31] The negative image of the state of Zimbabwe presented by the media and the press, about its political regime and abuse of human rights must not induce a court in refugee claims to pre-judge a claim before hearing the particular facts of each case.

[32] The Applicant relies heavily upon two recent decisions of our court concerning Zimbabwe, allowing judicial review against negative decision of the Immigration Board, *Musiyiwa v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 181; *Malunga v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1259.

[33] In the two above cases, it was established that the claimants were either members of MDC or had participated in anti-government demonstrations and were identified as MDC supporters by a local Zanu-PF organizer.

[34] In the present case, such evidence was not made in front of the Board.

[35] For the reasons above, I find that the Member did not err in her decision and I would dismiss the application. The parties are given seven days to present questions for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application be dismissed. The parties have seven days from the date of this order to present questions for certification.

"Orville Frenette"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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