

Date: 20080429

Docket: IMM-1441-07

Citation: 2008 FC 543

Ottawa, Ontario, April 29, 2008

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

CLEMENT ALEXANDER JUMBE

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] In 2005, Mr. Clement Alexander Jumbe sought refugee protection in Canada based on his fear of political persecution in Zimbabwe. A panel of the Immigration and Refugee Board dismissed his claim, primarily on the basis that it did not believe Mr. Jumbe's fear was genuine. Mr. Jumbe argues that the Board's conclusion was unreasonable in light of the evidence. He asks me to overturn the Board's decision and order a new hearing.

[2] I agree that the Board erred and will grant this application for judicial review.

I. Issue

[3] Was the Board's conclusion that Mr. Jumbe's behaviour was inconsistent with a genuine fear of persecution reasonable?

[4] I should note that Mr. Jumbe argued that there were other areas in which the Board erred, such as its handling of the documentary evidence supporting his claim. However, given that the Board rejected his claim primarily because of an absence of subjective fear, and I am satisfied that the Board erred on this ground, I need not deal with the other issues Mr. Jumbe raised.

II. Analysis

1. Factual Background

[5] Mr. Jumbe worked as a teacher for many years and ultimately became school principal. He also served as a District Education Officer and a National Coordinator for UNICEF. In the latter capacity, he supervised a national HIV/AIDS Life Skills program. Funds for that program were discontinued in 2002 when Zimbabwe withdrew from the Commonwealth. At that point, Mr. Jumbe took over his wife's manufacturing business and acted as a consultant. He also began work on a PhD thesis on the subject of HIV/AIDS in South Africa.

[6] Mr. Jumbe testified that he had been detained and questioned by the Central Intelligence Organization (CIO) in 1999 after his brother had inadvertently rented property to persons conspiring

to overthrow the head of state of a neighbouring country. This appears to have been an isolated and relatively minor incident. Mr. Jumbe traveled outside the country several times after that incident and did not seem to encounter any major difficulties on his return.

[7] More important is the fact that Mr. Jumbe's son was a member of the Movement for Democratic Change (MDC), a political party active in the area where the family resided. He fled Zimbabwe in 2001 and was granted asylum in the United Kingdom. Mr. Jumbe's wife was also granted refugee protection in the UK. Two other children found asylum in Denmark. Another son is a student in the United States. Mr. Jumbe's claim rests primarily on his perceived association with the MDC. He claims to have been targeted by the rival Zanu-PF party.

[8] The incident that gave rise to Mr. Jumbe's departure occurred in May 2005. After the election that spring, a gang of youths supporting the Zanu-PF destroyed Mr. Jumbe's factory. He says that the youths threatened him personally when he visited the site after the destruction. They accused him of betraying his country. After a month of settling personal affairs and living with his brother to avoid being seen at home, Mr. Jumbe left Zimbabwe. As he had a valid passport, visas permitting him to visit the United Kingdom and the United States, and an open-ended plane ticket, he traveled first to England to visit his wife and then to the US to see his son. Just before his visa expired, he left the US for Canada. He claimed refugee status on arriving at the Canadian border on December 23, 2005. Since then, he has been recognized as a "scholar at risk" which has enabled him to obtain funding to continue his doctoral studies at the University of Toronto.

2. The Board's Decision

[9] The Board concluded that Mr. Jumbe's conduct was inconsistent with a genuine fear of persecution. In particular, the Board noted that:

- Mr. Jumbe did not leave Zimbabwe until a month after the destruction of his factory;
- He did not seek asylum in either the United Kingdom or the United States when he had ample opportunity to do so; and
- When he arrived at the Canadian border, he did not mention the fact that he had been threatened by Zanu-PF youths.

3. Discussion

[10] Mr. Jumbe argues that the Board's conclusion that he did not behave in a manner consistent with a real fear of persecution was unreasonable. First, Mr. Jumbe explained to the Board that he needed to stay in Zimbabwe for a short period of time in order to wind up the family's business affairs. During most of that time, he stayed with his brother so that he would not be seen by Zanu-PF supporters. The Board did not explain why Mr. Jumbe's explanation for his one-month stay in Zimbabwe was unacceptable.

[11] Second, Mr. Jumbe explained to the Board why he did not claim asylum in the United Kingdom or the United States. He had valid visas for both countries, so he could safely travel and

stay there while the visas were in force. Accordingly, he took the opportunity to visit family members and obtain their advice. He took action to obtain refugee protection when his other options ran out. True, Mr. Jumbe could have made a refugee claim elsewhere. He stated that he wanted to come to Canada where there was a greater chance of making a successful claim, greater likelihood of achieving family reunification and a greater opportunity for him to continue his doctoral studies.

[12] Certainly, the Board was entitled to consider whether Mr. Jumbe's explanation cast doubt on his claim to fear political persecution in Zimbabwe, along with all of the other evidence. But the Board concluded that Mr. Jumbe's failure to claim elsewhere, in itself, proved "that he did not have a subjective fear". Indeed, the Board stated that Mr. Jumbe had failed to rebut the presumption that refugee claimants will seek asylum at the first opportunity. As I understand it, there is no such presumption and, therefore, no burden of proof on refugee claimants to rebut it. Rather, a claimant's behaviour and testimony must be considered by the Board, along with the other evidence, to determine whether he or she has a genuine fear of persecution. The Board was entitled to consider Mr. Jumbe's evidence and his explanation for coming to Canada and to explain how it negated the existence of genuine fear. But it was not enough for the Board simply to state that the failure to claim elsewhere, in itself, proved an absence of subjective fear.

[13] Third, Mr. Jumbe was asked at the Canadian border to identify the persons he feared in Zimbabwe. He said that he was afraid of the government, the Zanu-PF and the CIO. He was not asked to describe the incidents leading up to his departure from Zimbabwe or to give further details about why he was afraid. In my view, in light of the questions put to him, it was unreasonable for

the Board to conclude that Mr. Jumbe's answer displayed a lack of fear of those persons he claimed had threatened him.

[14] Based on the foregoing, I am satisfied that the Board's conclusion that Mr. Jumbe did not fear persecution in Zimbabwe was unreasonable. I understand that others in Mr. Jumbe's circumstances might have left Zimbabwe sooner and claimed refugee protection earlier. However, his personal resources and means, and the opportunities at his disposal to visit and consult with family members and others before arriving in Canada, do not necessarily defeat or claim to fear political persecution, given the other evidence. Accordingly, I must allow this application for judicial review and order a new hearing before another panel of the Board. Neither party proposed a question of general importance for me to certify, and none is stated.

JUDGMENT

THIS COURT'S JUDGMENT IS that

1. The application for judicial is allowed. The matter is referred back to the Board for a new hearing before a different panel;
2. No question of general importance is stated.

“James W. O’Reilly”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1441-07

STYLE OF CAUSE: JUMBE v. M.C.I.

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: March 15, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT:** O'REILLY J.

DATED: April 29, 2008

APPEARANCES:

Geraldine MacDonald

FOR THE APPLICANT

Leena Jaakkimaninen

FOR THE RESPONDENT

SOLICITORS OF RECORD:

GERALDINE MACDONALD
Toronto, ON

FOR THE APPLICANT

JOHN H. SIMS, Q.C.
Deputy Attorney General of Canada
Toronto, ON

FOR THE RESPONDENT