Date: 20080204

Docket: IMM-885-07

Citation: 2008 FC 143

Ottawa, Ontario, February 4, 2008

PRESENT: The Honourable Orville Frenette

BETWEEN:

ITAYI TAFADZWA INNOCENT MUPESA (a.k.a. Itayi Mupesa)
ZIONE MUPESA
TIKONDWE NATHAN TAFADZWA MUPESA (a.k.a. Ticondwe Nathan Mupesa)

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The principal applicant, Itayi Mupesa, his wife, Zione Mupesa, and their son, Tikondwe Nathan Mupesa, bring this application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated February 7, 2007. In that decision, the Board concluded that the applicants were not Convention refugees or persons in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the *Act*).

I. Facts

[2] The principal applicant and his son are both citizens of Zimbabwe. The principal applicant's wife is a citizen of Malawi and a Zimbabwean permanent resident.

[3] The applicants seek refugee protection in Canada because of a fear that, if returned to Zimbabwe, they will be persecuted because of the principal applicant's perceived political opinion. The applicants allege that their fear is premised on the principal applicant's participation in student demonstrations against the Zimbabwean government of Robert Mugabe in 1998, as well as his support for the "No" campaign in a 2000 constitutional referendum designed to give President Mugabe more power. The principal applicant alleges that as a result of his participation in these events, his name has been placed on a list of student activists who were subsequently targeted by the government after the referendum's rejection.

[4] As well, the principal applicant further alleges that his name is on a list of members of the Zimbabwe Congress of Trade Unions (ZCTU), a result of the fact that his primary employment was as a diesel plant fitter for caterpillar machinery. The principal applicant alleges that in times of extreme unrest, members of the ZCTU have been threatened and targeted by the government.

[5] The applicants claim that as a result of the principal applicant's background, it was necessary for them to leave Zimbabwe in order to find, in the words of the principal applicant, "a safe place to live for me and my family." In February 2002, the female and child applicants left

Zimbabwe for Great Britain on Malawian passports. The principal applicant, fearing possible deportation upon arrival in Great Britain, obtained a U.S. student visa and left Zimbabwe for Abilene, Texas in July 2002. He was joined by his wife and son on October 9, 2003.

1. Specific pertinent facts

[6] The adult applicants married in Zimbabwe in 2001. Their son, the minor applicant, was born in February 2001. The female applicant, a citizen of Malawi, left Zimbabwe for the United Kingdom (UK) in 2002.

[7] The principal applicant said he was fearful of travelling to the UK on a Zimbabwe passport because a large number of Zimbabweans were deported at the port of entry.

[8] He obtained that Zimbabwean passport and a student visa from the United States of America (USA) when he travelled in July 2002, settling to study in Abilene, Texas.

[9] Between July 2000, September 2000, July 2001 and August 2001, he travelled freely in and out of Zimbabwe. He remained in the USA until 2006 after having been refused a work permit in 2005. He had no means of support because his brother-in-law ceased to finance his studies.

[10] He did not apply for asylum status in the USA. In his Personal Information Form (PIF) dated May 2, 2006, he states he learned he could seek refugee status in Canada, following which the

applicants entered Canada in April 2006, claiming refugee status. Their claim was heard on December 19, 2006.

[11] In her PIF, the female applicant wrote she could not return to Malawi for economic reasons and because she was a woman. She did not testify at the Board hearing.

2. Documentation

[12] The applicants presented a documentation package about the situation in Zimbabwe in 2005-2006, including a U.S. Department of State "Country Reports on Human Rights Practices-2005", released in March 2006, which, in general, describes a very poor government human rights record, including politically-motivated killings and kidnappings, torture, rape and abuse of persons perceived to be opposition supporters. Security and police violation of human rights is rampant.

[13] Citizens returning from abroad are questioned about their activities in other countries and some of the citizens' passports are seized.

3. The decision under review

[14] The applicants were represented by counsel at the Board hearing held on December 19, 2006. The principal applicant testified while the female applicant did not; however, her affidavit formed part of the record.

[15] The Board member, Clive Joakim, in a five page decision rendered on February 7, 2007, considered the applicants allegations on the basis of Convention refugee or persons in need of protection pursuant to sections 96 and 97 of the *Act*. He determined after analysis the following facts:

(A) that the male claimant had not established a profile, which would have attracted adverse attention of the ZANU-PF government of the day;

(B) that he obtained a Zimbabwean passport without difficulty and entered freely in and out of that country between 2000 and 2002;

(C) that he would not be persecuted in Zimbabwe if he returned, because of his profile and because he had not been particularly active;

(D) that the applicants had not proven, by their actions, any subjective fear if they returned to Zimbabwe; and

(E) that the applicants seemed to be “asylum shopping” rather than seeking protection at the earliest opportunity.

[16] The member mentioned that he was aware of the documentary evidence on Zimbabwe where the human rights record was poor but the claimants faced the same generalized risk of harm faced by the population at large.

[17] The Board did not make any adverse credibility findings in reaching its decision, but rather rejected the applicants' claim on the ground that they did not possess a well-founded fear of persecution. As the Board stated at page 2 of its Reasons:

> I find that the claimants do not have a well-founded fear of persecution in Zimbabwe or Malawi (female claimant) for a Convention reason. In addition, there is nothing in the profiles of any of the claimants to suggest that, on a balance of probabilities, they face a risk to their lives or other cruel and unusual punishment, nor do substantial grounds exist to believe that they face a danger of torture if returned to their respective countries of citizenship.

II. The issues

A. Does the principal applicant possess a political profile such that he or his family would attract adverse attention from the Zimbabwean government?

B. Does the issuance of a passport and the entering and exiting freely from Zimbabwe have a determinative role to play?

C. Does the failure to claim asylum in the USA have any incidence on the refugee claim in Canada?

D. Did the board err by not addressing directly the claims of the principal applicant's wife and child?

III. The standard of review

[18] The Board's primary determination in rejecting the applicants' refugee claims was that they did not possess a well-founded fear of persecution in Zimbabwe or Malawi for a Convention reason.

In *Musiyiwa v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 181, Mr. Justice O'Keefe held that the standard of review applicable to the Board's determination that an applicant's fear of persecution was not objectively well-founded is that of patent unreasonableness: see also *Hasan v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1537.

[19] Accordingly, the Board's decision will only be set aside if it is "clearly irrational" or "evidently not in accordance with reason": *Law Society of New Brunswick v. Ryan*, 2003 SCC 20.

IV. Analysis

A. Does the principal applicant possess a political profile such that he or his family would attract adverse attention from the Zimbabwean government?

[20] The applicants claim that the principal applicant's political and union profile opposing the Zimbabwean government and re-election of President Mugabe would put them in danger of being harmed if they returned to that country.

[21] They also claim that the Board ignored or failed to consider aspects of documentary evidence supporting their submission. The respondent submits that the Board assessed the documentary evidence and its conclusion is based upon it.

[22] The decision clearly shows that the written reasons demonstrate that the Board did consider the documentary evidence and reached conclusions regarding the poor human rights record and abuse by the government-backed militia.

[23] Furthermore, the Board is presumed to have considered all of the evidence before it: *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425 (QL).

[24] The Board's conclusion about the principal applicant's profile, particularly his lack of political activity since 2002, is based upon the evidence.

[25] I therefore cannot find any reasonable error in this finding.

B. Does the issuance of a passport and the entering and exiting freely from Zimbabwe have a determinative role to play?

[26] The principal applicant submits that the Board misinterpreted the evidence with respect to the issuance of a passport in July 2000 and the entering and exiting freely from 2000-2002. He cites the case of *Veres v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 124 (T.D.), to support the proposition that the Board could not "ignore reasonable explanations and to treat the evidence as though the explanations were never given".

[27] The respondent pleads that the Board rightly considered the issuance of the passport and the unrestricted travel of the applicant solely to show his lack of fear.

[28] I cannot find any reviewable error on this point.

C. Does the failure to claim asylum in the USA have an adverse effect on the refugee claim in Canada?

[29] The applicants submit that the Board committed a reviewable error because it considered:

> …It is thus incumbent upon those truly facing persecution at home to secure protection at the earliest opportunity and then continue to study. The claimants, in not making a claim in the US have in my view exhibited no subjective fear. [RPD decision, p.4]

[30] The respondent answers that although this interpretation of the evidence is not entirely determinative, it was open to the Board to interpret it as it did from the evidence, since the actions of the applicants showed lack of subjective fear. The principal applicant admitted that the main reason he left the USA was because he could not pay for his school fees. He effectively admitted to "asylum shopping". Case law establishes that it is a fact that can be considered, but a refugee seeker is not obliged to seize the first opportunity to claim refugee status: see *Gavryushenko v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1209 (T.D.) (QL); *Owusu-Ansah v. Canada (Minister of Employment and Immigration)*, [1989] F.C.J. No. 442 (C.A.) (QL).

[31] In the present case, the board did not commit a reviewable error on this issue.

D. Did the board err by not addressing directly the claims of the principal applicant's wife and child?

[32] The applicants submit that the case law requires a separate treatment for their claims, quoting *Iruthayathas v. Canada (Minister of Citizenship and Immigration)*, [1994] F.C.J. No. 1202 (QL), *Chehar v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 1698 (QL), *Seevaratnam v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 694 (QL) and especially *Mohacsi v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 429 (*Mohacsi)*.

[33] In *Mohacsi*, the claim between the principal applicants raised conflicts as to the reasons why they sought refugee status. Both produced a PIF and both testified before the Board.

[34] Mr. Justice Martineau concluded that the impugned decision either ignored the evidence or failed to give additional reasons why it rejected the wife's and minor children's applications for refugee status. This was considered a reviewable error.

[35] In the present case, the factual situation is different. The applicants provided one single application, but only the principal applicant testified, speaking for all. The female applicant had signed a PIF but she did not testify or present other evidence.

[36] The respondent therefore assumes that she did not swear to the truth of the PIF narrative.

[37] Accordingly, the respondent submits that all three applicants relied entirely on the principal applicant's claim against Zimbabwe and that the Board did not err in failing to address the female applicant's fear if returned to Malawi.

[38] Support for this argument is found in *Akramov v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 122, where Mr. Justice Beaudry concluded that since the Board found that the principal applicant had not clearly established the circumstances surrounding his claim, then it was not unreasonable for the Board to conclude that the secondary applicants had not established their claims either. However, in that case Mr. Justice Beaudry was clear in stating at paragraph 31 that justification for the Board's decision was based on the fact that the secondary applicants did not testify or submit independent PIFs, thereby meaning that the Board could only reach "a conclusion in their case by relying on the evidence submitted by the principal applicant."

[39] Therefore, there was no sworn evidence as to her claim of cruel treatment as a female if she returned to Malawi. The applicants themselves did not refer to any new evidence, and the Board relied solely on the principal applicant's evidence.

[40] Furthermore, the decision refers only to the "claimants" at pages 3 and 4 of the decision:

> …There is not a serious possibility that the claimants will be persecuted for a Convention reason or face serious harm if they return to Zimbabwe. The female applicant has made no claim in respect of Malawi.
>
> [...]

> …The claimants, in not making a claim in the US have in my view exhibited no subjective fear. They hear that Canada was accepting refugees and so can be seen to be "asylum shopping", rather than urgently seeking protection at the earliest opportunity.
>
> …Having said that, it is my view that these claimants face a generalized risk of harm faced by the population at large in Zimbabwe.
>
> [Emphasis added]

[41] Also, there is no independent evidence except that of the principal applicant, who acted as representative of the child. Therefore, the Board did not commit any reviewable error on this point.

[42] In the case at bar, it is clear from the record that the principal applicant's wife did not testify at the hearing, produced no evidence and her PIF is not sworn evidence.

[43] It was therefore unreasonable to expect the Board to render a separate decision for her without specific separate evidence.

[44] In all of these reasons, I must conclude that the applicants have not shown that the Board has committed any reviewable errors.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application is dismissed. No questions for certification were submitted.

"Orville Frenette"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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