Date: 20090415

Docket: IMM-4774-08

Citation: 2009 FC 383

Ottawa, Ontario, April 15, 2009

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

NYENYE MANDIPA CHIYEDZA MUNYATI
CHIDO TAGIRENYIKA MUNYATI

Applicants

and

MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to s. 72 (1) of the *Immigration and Refugee Protection Act,* S.C. 2001, c. 27 (Act) for judicial review of a decision of a Board of the Refugee Protection Division of the Immigration Refugee Board (Board), dated October 3, 2008 (Decision), refusing the Applicants' claim to be deemed Convention refugees or persons in need of protection under section 96 and section 97 of the Act.

BACKGROUND

[2] The Principal Applicant of the original application to the Board, Lucia Munotyei Munyati (Ms. Munyati), is a citizen of Zimbabwe who was born on October 9, 1962. She divorced her husband, Nigel Munyati, in 1995, in Zimbabwe.

[3] The Male Applicant, Chido Munyati, was born January 8, 1985 and is a citizen of Zimbabwe. The Female Applicant, Nyenye Munyati, was born February 13, 1989 and is also a citizen of Zimbabwe. The Male and Female Applicants are the children of Ms. Munyati and the sole Applicants on this judicial review. The Board has already found Ms. Munyati to be a convention refugee.

[4] In November 1999, Ms. Munyati, in the course of her employment with Gainsborough Estate agents in Harare, Zimbabwe, facilitated the sale of a property, which had been earmarked for a Zimbabwe African National Union-Patriotic Front (ZANU-PF) member, to an official of Movement for Democratic Change (MDC). As a result, Ms. Munyati was suspended and later dismissed from her employment.

[5] Ms. Munyati joined the MDC in November, 1999 and helped in fundraising for the party prior to the June 2000 parliamentary elections. In July, 2000, Ms. Munyati attended an MDC rally at Rufaro Stadium in Harare, Zimbabwe. She was apprehended at the rally and taken to Mbare Police

Station where she was detained overnight. She was groped by men who had already been detained, and one woman was raped.

[6] Ms. Munyati was frightened by this experience and decided to leave the country. She went to the United Kingdom (UK) on September 17, 2000 and obtained a student visa in 2001, but was unable to attend college because she could not afford the fees. Instead, she worked illegally as a caregiver. She returned to Zimbabwe on July 21, 2002 to visit her mother who was ill with breast cancer. She then returned to the UK on August 30, 2002.

[7] Ms. Munyati again returned to Zimbabwe on May 11, 2003, when her mother's condition deteriorated. She spent the day at the hospital and went to her parents' home in the evening. As she approached, she saw ten young men waiting outside her parents' house. They asked for money to support ZANU-PF. Ms. Munyati declined to provide the men with money, explaining that she needed the money to pay for her mother's medical expenses and possibly her funeral expenses. She was then accused of spying for the British and having plenty of British currency. She refused to chant ZANU-PF slogans and denounce the MDC. The youths began to beat her and continued until she fell down. They left her when she pretended to pass out. After some time Ms. Munyati made her way into the house where she called her brother. He took her to Harare Central Hospital.

[8] Ms. Munyati's mother passed away on May 13, 2003. After the funeral, Ms. Munyati went to live with her mother's sister in Gandanzara village. She was unable to raise the funds to return to the UK until September of 2003. During that time she had met a man called Itai Moyo and started a

relationship. This became a long distance love affair when she returned to the UK. Mr. Moyo persuaded Ms. Munyati to return to Zimbabwe and possibly marry him.

[9] Ms. Munyati returned to Zimbabwe on an Emergency Travel Document in June of 2004. She found Mr. Moyo to be abusive. He also extorted money from her by threatening to report her to the ZANU-PF. Ms. Munyati then applied for another passport and returned to the UK in October of 2004. However, she resumed her long distance relationship with Mr. Moyo.

[10] While in the UK, Ms. Munyati attended MDC vigil meetings. In September 2005, Ms. Munyati's ex-husband sent their daughter to the UK to live with her. Mr. Moyo persuaded Ms. Munyati to return to Zimbabwe, which she did on July 26, 2006. She did not take her daughter with her. At 10 p.m. on the night she arrived, Mr. Moyo told her that he was going to make her pay for humiliating him by running away. He then raped her and threw her out of the house. She made her way to her sister's home and her sister took her to a clinic the following day. Ms. Munyati tried to file a report with the police but was told that she should have made the report immediately. Ms. Munyati's sister bought her a plane ticket to go to the United States where her children were. Ms. Munyati arrived in the US on August 3, 2006. She and the Female Applicant came to Canada on August 11, 2006 and made refugee claims that same day. The Male Applicant arrived in Canada on September 26, 2007 and made a refugee claim that same day.

[11] Nigel Munyati had moved to the US in 1999 and had taken his children with him. He received a job offer in Africa in 2005 and sent the Female Applicant to visit her mother for a few

weeks in September 2005 when she was living in the United Kingdom. The Female Applicant never heard from her father again, so she stayed with her mother.

[12] The Male Applicant received all of his secondary schooling and his business degree in the United States between 2000 and 2007. The Female Applicant received all of her elementary and middle school education, as well as part of her high school education, in the United States from 1999-2005. In 2005, when she joined her mother in the UK, she resumed her high school education in the UK.

[13] The Applicants attended the hearing of their claims on August 25, 2008.

DECISION UNDER REVIEW

[14] The Board found that Ms. Munyati was a Convention refugee, but that the Female and Male Applicant were not Convention refugees or persons in need of protection.

Male Applicant

[15] The Board noted that the Male Applicant did not provide testimony at the hearing beyond confirming his birth place. In his PIF, the Male Applicant claimed to rely upon his mother's narrative and claimed that he would be a target of government forces in Zimbabwe who would use him to get at his mother.

[16] The Board found that Ms. Munyati was a supporter of the MDC and that she had been targeted by local ZANU-PF supporters. She was also at risk of being identified as an MDC supporter by her former boyfriend, Mr. Moyo.

[17] The Male Applicant left Zimbabwe in 1999 and resided in the US before coming to Canada. There was no evidence that he had any political affiliation and his sole basis for needing protection was his association with his mother. The Board relied upon documentary evidence for the proposition that people who return to Zimbabwe after a long absence abroad may be subject to detention and enquiries at the airport. However, this largely refers to returnees who file for asylum in the UK. The evidence was that Ms. Munyati was known only as an MDC supporter in a localized area. There was no more than a mere possibility that the Male Applicant would be persecuted should he return to Zimbabwe, either upon arrival at the airport or elsewhere.

Female Applicant

[18] The Female Applicant also did not provide testimony at the hearing. In her PIF, she stated that she was scared to return to Zimbabwe because of what had happened to her mother and that she did not want the same thing to happen to her. She also stated that she cannot live by herself or go back to Zimbabwe on her own.

[19] The Female Applicant went to the US in June of 1999 when her father relocated there. She returned to Zimbabwe on three occasions: July 2002, July 2003 and June of 2004 on family matters.

There was no evidence that she encountered any difficulties on any of these occasions, despite the trouble her mother had in May 2003 when she was beaten for failing to co-operate with ZANU-PF youths. There was also no evidence that the Female Applicant has supported, or supports, the opposition in Zimbabwe, or that she has been identified as an opposition supporter. The Board relied upon the same documentary evidence as it did for the Male Applicant.

ISSUES

[20] The Applicants submit the following issues on this application:

1) Did the Board err in law in its interpretation and application of the definition of a Convention refugee as defined in Section 96 of the Act?
2) Did the Board err in law in basing its Decision on an erroneous finding of fact that was made in a perverse or capricious manner or without regard to the material before the Board?
3) Did the Board render a Decision that is unreasonable having regard to the evidence before it so as to amount to an error of law?
4) Did the Board err by ignoring evidence and misinterpreting the evidence including testimony, documentary evidence and human rights records?

STATUTORY PROVISIONS

[21] The following provisions of the Act are applicable in these proceedings:

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.

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.

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

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

Article 1 of the Convention Against Torture; or

sens de l’article premier de la Convention contre la torture;

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(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,

(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) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(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) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l’incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Person in need of protection

Personne à protéger

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

(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.

STANDARD OF REVIEW

[22] Issues 1 and 2 deal with errors in law to which a standard of correctness applies: *Singh v. Canada (Minister of Citizenship and Immigration)* 2002 FCT 588 at paragraph 22.

[23] Issue 3 deals with whether the Board rendered an unreasonable Decision. The pre-*Dunsmuir* standard of review in relation to a refugee board decision is outlined in *Kathirkamu v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 592 (F.C.T.D.) as follows:

> 32 In Aguebor, supra, the Federal Court of Appeal discussed the standard of review for Refugee Division decisions at paragraph 4:
>
> > There is no longer any doubt that the Refugee Division, which is a specialized tribunal, has complete jurisdiction to determine the plausibility of testimony: Who is in a better position than the Refugee Division to gauge the credibility of an account and to draw the necessary inferences? As long as the inferences drawn by the tribunal are not so unreasonable as to warrant our intervention, its findings are not open to judicial review.
>
> 33 The Court should not seek to reweigh evidence before the Board simply because it would have reached a different conclusion. As long as there is evidence to support the Board's finding of credibility and no overriding error had occurred, the decision should not be disturbed.

[24] Issue 4 deals with whether the board erred by ignoring or misinterpreting the evidence, to which, pre-*Dunsmuir*, the standard of reasonableness *simpliciter* has been applied: *Al Yamani v. Canada (Minister of Citizenship and Immigration)*, [2000] 3 F.C. 433 (F.C.T.D.) at paragraph 20.

[25] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review": *Dunsmuir* at paragraph 44. Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of "reasonableness" review.

[26] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[27] Thus, in light of the Supreme Court of Canada's decision in *Dunsmuir* and the previous jurisprudence of this Court, I find, with the exception of issues 1 and 2, the standard of review applicable to be reasonableness. When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir* at paragraph 47. Put another way, the Court should only intervene if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

ARGUMENTS

The Applicants

[28] The Applicants submit that the family is a recognized social group within the meaning of Convention refugee: *Al-Busaidy v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 26 (F.C.A.) (*Al-Busaidy*); *Pour-Shariati v. Canada (Minister of Employment and Immigration)*, [1995] 1 F.C. 767 (F.C.T.D.); *Casetellanos v. Canada (Solicitor General)*, [1995] 2 F.C. 190 (F.C.T.D.) (*Casetellanos*) and *Serrano v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 570 (F.C.T.D.).

[29] They say that the Board erred in failing to consider whether or not the same considerations that applied to their mother should apply to them; for example, whether Mr. Moyo would out them if they were to return to Zimbabwe. The failure of the Board to consider this possibility on the basis of the Applicants' membership in a particular social group is a serious error.

[30] The Applicants rely upon many of the documents that they submitted to the Board which made it clear that one need not be an actual member of the opposition party in Zimbabwe in order to face a serious possibility of persecution in that country. One supporter in a family, or even a mere suspected or perceived supporter, is enough. The Board failed to assess the Applicants' claims on this basis; particularly that as children of a member of the opposition party they would be perceived or suspected of being supporters of that opposition party.

[31] The Applicants submit that the Officer's failure to consider the claims on the basis of membership in a particular social group is an error. The Applicants rely upon *Gutierrez v. Canada (Minister of Citizenship and Immigration)* (2000), 189 F.T.R. 274 (F.C.) at paragraphs 33 and 45:

> 33. It was the CRDD's obligation to consider each of the Convention grounds advanced by the applicants as the basis of their well-founded fear of persecution. This proposition was made clear in Ward, supra, at 745.
>
> …
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> 45. As I see it, the nexus issue in this case does not present itself as starkly as counsel for the respondent would have it because it fails to take into account the evidence before the CRDD. Counsel for the applicants points out the applicants advanced the basis for a well-founded fear of persecution because of membership in the Gonzalez family, led some evidence in respect of that fear and the CRDD failed to consider that ground explicitly. I agree with that submission. In the circumstances, it would be unwise and unprudent to go further in the matter and make an assessment on the evidence or deal with issues which may arise before the applicants' refugee claims are reconsidered.

[32] The Applicants concede that not all family members of a persecuted person are automatically Convention refugees and that some link to Convention grounds is required: *Granada v. Canada (Minister of Citizenship and Immigration)* 2004 FC 1766.

[33] The Applicants conclude, however, that the link in this case is the perceived political opinion; they are the children of a member of the opposition party in Zimbabwe. The Applicants allege that it is established in the documentary evidence that was before the Officer that a mere suspicion of involvement in the opposition in Zimbabwe is sufficient to attract persecutory consequences.

[34] The Applicants point out that nothing in the Respondent's submissions deals with the two errors identified by the Applicants. The Respondent simply seeks to give reasons why the Board may have reached its conclusions, but such reasons are not the reasons given by the Board.

The Respondent

The Panel Did Not Err in Assessing the Applicants' Claim

[35] The Respondent submits that the law is well established that, to be a Convention refugee as a member of a familial social group, the risk must be directed towards an applicant as a member of the family, and not simply towards a family member: *Musakanda v. Canada (Minister of Citizenship and Immigration)* 2007 FC 1300 (F.C.T.D.).

[36] There was no evidence that the Applicants would be targeted by the ZANU-PF, or that they were being sought due to their mother's support of the MDC. The Female Applicant had returned to Zimbabwe on three separate occasions and she had not experienced any difficulties. One cannot be deemed a Convention refugee because one has a relative who is being persecuted: *Devrishashvili v. Canada (Minister of Citizenship and Immigration),* [2002] F.C.J. No. 1528 (F.C.T.D.).

[37] The family can only be considered to be a social group in cases where there is evidence that the persecution is against the family members as a social group: *Al-Busaidy; Casetellanos; Addullahi v. Canada (Minister of Citizenship and Immigration),* [1996] F.C.J. No. 1433 (F.C.T.D.)

and *Lakatos v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 657 (F.C.T.D.).

[38] The Respondent says that membership in the social group formed by the family is not without limitations and requires some proof that the family in question is itself, as a group, the subject of reprisals and vengeance, or that the Applicants are targeted and marked simply because they are members of the family: *Canada (Minister of Citizenship and Immigration) v. Bakhshi*, [1994] F.C.J. No. 977 (F.C.A.) and *Granada v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 2164 (F.C.). However, in this case, the Board considered the Applicants potential risk and found that they would not be targeted, as the knowledge about their mother's support of the MDC was localized. Persecution against one family member does not entitle all family members to be considered refugees: *Pour-Shariati v. Canada (Minister of Employment and Immigration)*, [1997] F.C.J. No. 810 (F.C.A.) and *Marinova v. Canada (Minister of Citizenship and Immigration)* 2001 FCT 178.

[39] The Respondent cites *Casetellanos* at paragraph 28 which states that "[o]ne will not, for example, be deemed to be a Convention refugee just because one has a relative who is being persecuted."

ANALYSIS

[40] For reasons given by the Respondent, I do not think that the Officer was wrong to reject the Applicants' claim that they were at risk simply because they were members of the same family as Ms. Munyati. The Applicants were not living with their mother and, even though the Female Applicant had visited Zimbabwe on three occasions, there was no evidence that she had been targeted. See *Granada v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 2164 at paragraph 16.

[41] However, the Board places a great deal of emphasis, at least as regards the Female Applicant, on the fact that she returned to Zimbabwe on three occasions (in 2002, 2003 and 2004) on family matters and experienced no problems.

[42] What this leaves out of account, however, in the important role played by Mr. Moyo, the mother's former boyfriend who persuaded Ms. Munyati to return to Zimbabwe in July 2006. The mother's fear of Mr. Moyo was that he would out her and that he would do the same with her children in order to get back at her. The Officer accepted her story and he also accepted that "there is now someone in the form of Mr. Moyo who bears a good deal of animosity towards her and would no doubt not hesitate to out her if he heard she had returned to Zimbabwe."

[43] Neither of the Applicants has been in Zimbabwe since their mother's relationship with Mr. Moyo finally broke down and it became apparent that he had a great deal of animosity towards Ms.

Munyati and would not hesitate to out her. This was also an important risk factor for the Applicants that the Officer overlooked. The Officer was reassured by the fact that the Female Applicant had experienced no problems on those occasions when she had returned to Zimbabwe in the past. But neither of the Applicants has been to Zimbabwe since Mr. Mayo began his vendetta.

[44] The Officer's failure to appreciate this significant factor and to take it into account in his reasons means that the Officer committed a reviewable error: *Wei v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 390 (F.C.T.D.); *Mui v.Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1294 at paragraph 28.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application is allowed and the matter is returned for reconsideration by a different officer.
2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-4774-08
STYLE OF CAUSE:	NYENE MANDIPA CHIYEDZA MUNYATI ET AL APPLICANTS and MINISTER OF CITIZENSHIP & IMMIGRATION RESPONDENT
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 4, 2009
REASONS FOR :	RUSSELL, J.
DATED:	**April 15, 2009**

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