

Federal Court



Cour fédérale

**Date: 20120613**

**Docket: IMM-7870-11**

**Citation: 2012 FC 739**

**Toronto, Ontario, June 13, 2012**

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

**BETWEEN:**

**LUYANDA BEST MSIBI**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**REASONS FOR ORDER AND ORDER**

[1] The present Application concerns a decision of the Refugee Protection Division (RPD) in which the Applicant, a citizen of Swaziland, was determined not to be a Convention Refugee or a person in need of protection.

[2] The Applicant's claim had two elements: a s. 96 claim based on his perceived sexual orientation, and a s.97 claim based on his occupation of his grandmother's farm and the related violent threats from the community and the village Chieftain to evict him and confiscate the

property. The Applicant's PIF presented these independent claims as merged on the basis that his perceived sexual orientation amplified his risk and prevented him from receiving protection.

[3] With respect to the whole of the Applicant's claim, the RPD made a finding of negative credibility based on an inconsistency between the Applicant's Port of Entry Notes (POE) and his later filed Personal Information Form (PIF). The RPD states the following:

The claimant's port-of-entry (POE) notes reference the land dispute between the claimant and the chieftaincy in his grandmother's village, but do not refer to the claimant having been targeting because of his perceived homosexuality. As far as the claimant's allegations that he was persecuted prior to his departure because of his perceived sexual orientation as a homosexual, the claimant's Personal Information Form (PIF) narrative is inconsistent with the claimant's form IMM 5611 found in the POE notes.

(Decision, para. 12)

[4] When asked why there was no mention of his perceived homosexuality, the Applicant responded in the following way:

CLAIMANT: The aspects of it, when I arrived there ...

MEMBER: Um-hum.

CLAIMANT: ... I wanted to tell the whole story ...

MEMBER: Um-hum.

CLAIMANT: ... like from beginning to the end ...

MEMBER: Um-hum.

CLAIMANT: ... but then when ... once I was telling her, she told me to stop like everything I am going to tell the judge like the whole story.

MEMBER: So there is like a fair amount here and you ... the word gay does not come at all.

CLAIMANT: At that time, no, because I was drained out from the fight [*sic*].

(Certified Tribunal Record, pp. 125 – 126)

[5] Counsel for the Applicant submits that a POE note is not expected to be as fulsome as one would expect in the PIF narrative, and relies upon the decision in *Abbey v Canada (Minister of Citizenship and Immigration)*, IMM-954-05 (20060112) to argue that great care should be taken in engaging in such a comparison and making an ensuing finding of negative credibility. In my opinion, the RPD's conclusion about the contradiction is unreasonable. This is so, because other evidence exists on the record going to prove the Applicant's claim being an affidavit of the Applicant's Pastor who sheltered the Applicant following the threats made by the Chieftain.

[6] The RPD rejected the affidavit of Pastor Thulani Nxumalo on the following findings:

The claimant provided an affidavit sworn by Pastor Thulani Nxumalo on July 1, 2011. This affidavit reiterates the claimant's allegations set out in his PIF narrative and appears to rely exclusively on information provided by the claimant.

[Emphasis added]

(Decision, para. 14)

In my opinion, the RPD misconstrued the Pastor's affidavit which clearly distinguishes between what the Pastor was told by the Applicant and came to believe, and what the Pastor attests to from his own observation and participation in fact scenario in issue. The Pastor's evidence goes to corroborate the Applicant's testimony and the essential features of his claim. I find that it was a reviewable error for the RPD not to have properly considered the Pastor's evidence before coming to the finding of negative credibility on the basis of the comparison undertaken.

**ORDER**

**THIS COURT ORDERS that:**

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

“Douglas R. Campbell”

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Judge

Federal Court



Cour fédérale

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** IMM-7870-11

**STYLE OF CAUSE:** LUYANDA BEST MSIBI v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** Toronto

**DATE OF HEARING:** June 12, 2012

**REASONS FOR ORDER  
AND ORDER:** CAMPBELL J.

**DATED:** June 13, 2012

**APPEARANCES:**

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