

Federal Court



Cour fédérale

Date: 20170111

Docket: IMM-2516-16

Citation: 2017 FC 40

Ottawa, Ontario, January 11, 2017

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

**CLIVE WILLIAM NEETHLING
LAVINA GERTRUDE NEETHLING
BRADLEY BRONNIE BOTHA
ASHLEIGH MAGARET NEETHLING AND
KYE BRONNIE BOTHA**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of the Refugee Appeal Division [RAD] that confirmed a Refugee Protection Division [RPD] decision which had concluded that the Applicants are neither Convention refugees nor persons in need of protection. This

application is made pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA].

[2] Clive Neethling [the Principal Applicant], his wife, Lavina Gertrude Neethling [together the Grandparents], their daughter Ashleigh Neethling, her common law partner, Bradley Bronnie Botha [together the Parents], and their minor son Kye Bronnie Botha, sought refugee protection pursuant to sections 96 and 97(1)(a) and (b) of the IRPA.

[3] The four adult Applicants are dual citizens of Zimbabwe and South Africa. The minor Applicant is a South African citizen.

[4] The Applicants all self-identify as individuals of mixed race, or as coloured (i.e., bi-racial). The evidence about their skin colour is that they appear to be white. What is significant is that none of the Applicants have black skin.

[5] The Principal Applicant moved to South Africa during a period of political turmoil in 2002 in Zimbabwe. His wife and their daughter joined him later in South Africa.

[6] Once they became established, the Grandparents lived in Musina in the province of Limpopo, South Africa, and the Parents lived with their son in Johannesburg. The adult Applicants all claimed refugee status on the basis of their fear of harassment, and possible death at the hands of black South Africans and discrimination at the hands of “white” South Africans.

[7] From 2002 until 2015, the Grandparents and Parents lived in South Africa without difficulty. However, the Grandparents “spaza” (a small shop) was set on fire in April 2015 and one of their pets was killed. There were also two break-ins by black South Africans at their home later that month, and their cell phone and laptop were stolen. They reported these events to the police.

[8] On April 22, 2015, black South Africans arrived at the gate of the Parents’ home and shouted “go back home”. The Parents did not contact authorities because they believed that the police were not assisting foreigners during this period.

I. The RPD Decision

[9] The Applicants were self-represented before the RPD.

[10] The RPD found that they were credible witnesses. Their allegations that their homes and the “spaza” were attacked, in part because of their race, were accepted.

[11] However, the RPD found that the attacks were also caused by their wealth, as the Applicants are middle-class, white South African nationals who were gainfully employed and who lived in middle-class neighborhoods.

[12] The RPD concluded that the Applicants subjective fear of returning to South Africa was not objectively well founded. The RPD acknowledged that xenophobia exists in South Africa but said that it tends to manifest in poor areas against foreigners who are black or vulnerable

persons. This finding is inconsistent with the Applicants' profile. Thus, the RPD found that there was no more than a mere possibility that the Applicants would face persecution on their return to South Africa.

II. The RAD Decision

[13] The Applicants retained counsel for the RAD appeal.

[14] The RAD did not agree with the RPD that the Applicants were attacked because of their race. It concluded that they were attacked because they were perceived to be foreigners. The RAD also noted that the attack on the Grandparents' spaza was unusual in light of documents which showed that the usual targets were foreign nationals who ran spazas in townships and informal settlements.

[15] The RAD concluded as follows:

The RAD has reviewed all of the evidence in the record concerning the xenophobic attacks in South Africa. The RAD notes that these attacks were episodic. They occurred in 2008 and then again in 2015. The RAD further notes that the principal Appellant and his wife have lived in South Africa since 2002 and apparently encountered no serious trouble because of their race or their immigrant status until 2015. They were able to find good jobs, establish a home and obtain South African citizenship. They testified that there was racial prejudice and discrimination, and they wanted to get out of Africa, but no evidence has been provided that they have been persecuted.

The Appellant, Bradley Bronnie Botha, testified that his experience has been similar. He and his wife have lived in South Africa for more than 10 years. They have been continually employed throughout this time, and they did not experience any problems until the 2015 incident when people broke into their home. They indicated that the attack was the result of their identity as

Zimbabwean immigrants, an incident associated with broader xenophobic attacks against foreigners.

The Appellant testified they were forced to hide in the garden when their home was attacked and then move to a hotel for a few days before returning to their home. No evidence was disclosed that they encountered any further problems after this incident.

The RAD finds that the evidence is mixed as to police and security forces response to these xenophobic incidents. Country documentary evidence indicates that increased immigration from Zimbabwe, Mozambique and Somalia has resulted in xenophobic violence by police and vigilantes. This document further indicates that sporadic attacks continued in 2013.

[16] Ultimately, the RAD agreed with the RPD's conclusion.

III. The Issues

- A. Was it reasonable to reject the new evidence?
- B. Was the Documentary Evidence reasonably assessed?

A. *Was it reasonable to reject the new evidence?*

[17] The RAD declined to accept an affidavit and two letters which confirmed various aspects of the Applicants' testimony before the RPD. The RAD concluded that these documents could have been available before the RPD. In my view, this was a reasonable conclusion.

B. *Was the Documentary Evidence reasonably assessed?*

[18] The RAD relied on documents including the 2014 US Department of State Report [the DOS Report] to construct a profile of those likely to be attacked in South Africa. The conclusion was that xenophobic attacks were made by black South Africans against small shop keepers in

poor areas who were either black or members of ethnic minorities from foreign countries. Since the Applicants did not fit this profile, their refugee claims were rejected.

[19] However, the Applicants submit that the DOS Report pre-dated the events of April 2015. The Applicants testified that they were targeted and that their evidence was believed. Therefore, since the Applicants were targeted and were not blacks, they say it was unreasonable to reject their refugee claims based on the profile in the DOS Report.

[20] This submission is not persuasive. The question is whether there is more than a mere possibility of persecution. In my view, the DOS Report showed that the events experienced by the Applicants in April 2015, were uncharacteristic. In these circumstances, the Decision was reasonable.

[21] For all these reasons, the application will be dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"Sandra J. Simpson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

STYLE OF CAUSE: CLIVE WILLIAM NEETHLING, ASHLEIGH
MAGARET NEETHLING, BRADLEY BRONNIE
BOTH, KYE BRONNIE BOTH, LAVINA
GERTRUDE NEETHLING v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: DECEMBER 14, 2016

JUDGMENT AND REASONS: SIMPSON J.

DATED: JANUARY 11, 2017

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