

Date: 20071130

Docket: IMM-6423-06

Citation: 2007 FC 1259

Ottawa, Ontario, November 30, 2007

PRESENT: The Honourable Madam Justice Dawson

BETWEEN:

CHARITY MALUNGA

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Charity Malunga is a citizen of Zimbabwe who claimed refugee protection on the basis of her political opinion. She says that she is a supporter of the Movement for Democratic Change party (MDC) in Zimbabwe and, as such, she fears persecution by members of the ruling party, the Zanu-PF.

[2] Her claim to refugee protection was rejected by the Refugee Protection Division of the Immigration and Refugee Board (RPD or Board) because it did not believe her testimony.

Notwithstanding the thorough and thoughtful submissions of counsel for the Minister, the application for judicial review is allowed because the RPD erred in law by failing to make clear credibility findings. Further, notwithstanding its credibility concerns, the RPD, on the evidence before it, erred in law by failing to assess the consequences arising from Ms. Malunga's acknowledged membership in the MDC.

The Board's credibility findings

[3] The Board began its credibility analysis as follows:

Because of a significant number of inconsistencies in her evidence, implausibilities, and some significant omissions in her PIF narrative, the panel has serious questions about the veracity of the central allegation made by the claimant, that she fears she will be killed by the Zanu-PF if she returns to Zimbabwe because of her experiences with the Zanu-PF which led her to flee Zimbabwe. The panel's reasons follow. [underlining added]

[4] The Board then reviewed its five concerns with Ms. Malunga's testimony:

- (i) Her demeanor. The RPD noted that it had to remind Ms. Malunga on several occasions to be responsive to its questions and observed that it found her responses to appear to be "on the evasive side".
- (ii) On the same day that Ms. Malunga's counsel filed a medical report with the Board, counsel also filed an amendment to her Personal Information Form (PIF). The amendment qualified a statement made in her PIF that her finger was broken in a beating by Zanu-PF militia. In the amendment, she stated that her previously broken finger was again hurt in the beating. From this, the RPD concluded that Ms.

Malunga had "at the very least and embellished her injuries and at worst, contrived all of them as well as the incident with the militia".

- (iii) The RPD found a "serious unexplained inconsistency" in Ms. Malunga's testimony because she wrote in her PIF that the Zanu-PF militia had told her that she "had 30 days to live". At the port of entry, she had told an immigration officer that "I had 30 days to leave or they would kill me".
- (iv) The RPD found a further "serious omission" from her PIF narrative. At the port of entry, she had written in her background declaration that "[s]omeone came to where I worked and signed to me that he was going to kill me". In her PIF, she had simply written that "[t]hese assailants also went to my place of work to persecute me". (The PIF expressly stated that the narrative was a summary and that further details would be provided at the hearing).
- (v) Ms. Malunga testified about a telephone threat she received in which the caller advised her that they were coming over to kill her. The Board found it to be implausible that anyone meaning to harm Ms. Malunga would "telegraph his intention".

[5] The Board then concluded its credibility analysis as follows:

It may be that if examined individually, some of the panel's findings might not, each on its own, sustain an overall finding on non-credibility. However, the panel finds that it is the cumulative effect of the inconsistencies, implausibility and significant omission which leads it to disbelieve the claimant and to conclude that she does not face a serious possibility of being persecuted if she returns to Zimbabwe.

With respect to the claimant's MDC card filed in evidence, the panel finds that membership in the MDC in and of itself cannot provide the basis of a well-founded fear of persecution absent a finding that such a fear has been found to be credible. The panel therefore cannot place weight on the mere MDC membership of being supportive of the underlying facts of the claimant's story.
[underlining added, footnotes omitted]

Applicable legal principles

[6] It is trite law that the Board's credibility findings are findings of fact that are to be reviewed on the most deferential standard of review. However, there are two other principles of law that are also relevant to the Board's decision.

[7] First, the Board is required to make clear findings as to what evidence it believes or disbelieves. See, for example, *Pour v. Canada (Minister of Employment and Immigration)*, [1991] F.C.J. No. 1282 (C.A.) and *Bains v. Canada (Minister of Employment and Immigration)* (1993), 63 F.T.R. 312.

[8] Second, the Board is required to assess any evidence that it finds to be credible. This is because a finding of incredibility does not prevent a person from being found to be a refugee if other evidence meets the test for refugee status. See: *Attakora v. Canada (Minister of Employment and Immigration)* (1989), 99 N.R. 168 (F.C.A.).

Application of the law to the Board's decision

[9] As set out above, at no point in its reasons does the RPD state what evidence it finds was or was not credible. The Board appears to have accepted that Ms. Malunga is a member of the MDC; however, the Court is left in doubt as to whether the Board disbelieved all of Ms. Malunga's testimony or only "the veracity of the central allegation". As such, the Board erred in law and its decision will be set aside.

[10] The Board further erred by failing to consider the consequences that flowed from Ms. Malunga's membership in the MDC. While the Board correctly noted that mere membership did not make Ms. Malunga's evidence to be true, the country condition documentation before the Board required an assessment of the consequence of such membership.

[11] For example, the 2005 United States Department of State report for Zimbabwe reported that:

- Throughout the time Ms. Malunga claimed to be persecuted, persons perceived to be supporters of the opposition were singled out for assault or intimidation.
- Zanu-PF supporters, sometimes with government support or acquiescence, intimidated and abused persons perceived to be associated with the opposition.

[12] While I accept counsel for the Minister's submission that Ms. Malunga would have had to be known or perceived to be a MDC supporter in order to attract persecution, she testified before the RPD that she participated in an anti-government demonstration, distributed t-shirts and pamphlets on behalf of the MDC, and was identified as an MDC supporter by a local Zanu-PF organizer. Unknown and unascertainable from the Board's reasons is what, if any, part of that testimony was

accepted as truthful. On the evidence before it, the Board was obliged to consider whether Ms. Malunga's membership in the MDC could establish a well-founded fear of persecution.

Other concerns

[13] The errors described above require that the Board's decision be set aside and that Ms. Malunga's claim for protection be considered afresh by a different member of the RPD.

[14] It is important that such consideration be *de novo* and that the member not be influenced at all by the Board's credibility findings in this case. This is important in this case because I find the majority of the Board's credibility findings to be patently unreasonable.

[15] To briefly illustrate:

- (i) Counsel for the Minister fairly acknowledged that the RPD erred when it characterized Ms. Malunga's evidence to having "30 days to live" versus "30 days to leave or they would kill me" as a "serious unexplained inconsistency". While counsel valiantly argued that it was nonetheless an inconsistency, any inconsistency is, in my respectful view, a distinction without a difference. As Ms. Malunga explained in her evidence, but the RPD did not appear to appreciate, she had 30 days to leave or her persecutors would kill her after 30 days. As she said, after 30 days "if they see me existing me [*sic*] they will kill me".

- (ii) Two concerns arise in respect of the Board's concern about the failure of the PIF to explain the workplace threat in as much detail as Ms. Malunga explained at the port of entry. First, the RPD must always distinguish between the situation where a matter is omitted entirely from the PIF and a situation where the oral evidence merely adds detail. In the latter case, an adverse inference should generally not be drawn. Second, the significance of a material omission from a PIF is that it gives rise to a concern that the later testimony is not true, but rather an afterthought designed to strengthen the claim. This concern does not arise when the information was disclosed at the port of entry, prior to the preparation of the PIF.

- (iii) The Board reached its decision that it was implausible that Ms. Malunga would receive a death threat that gave her time to flee her home, without apparently considering the possibility that the purpose of the telephone call was not to warn, but rather to intimidate. The Board should have considered whether that was an equally plausible explanation before finding Ms. Malunga's testimony to be implausible.

[16] Finally, I note that the Board's concerns with respect to Ms. Malunga's demeanor were only expressed at the hearing after it vigorously questioned her about the above three matters.

[17] For these reasons, the application for judicial review is allowed. Counsel posed no question for certification, and I agree that no question arises on this record.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is allowed and the decision of the Refugee Protection Division dated November 16, 2006 is hereby set aside.
2. The matter is remitted to a different panel of the Refugee Protection Division for redetermination *de novo* in accordance with these reasons.

“Eleanor R. Dawson”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6423-06

STYLE OF CAUSE: CHARITY MALUNGA, Applicant
and
THE MINISTER OF CITIZENSHIP AND
IMMIGRATION, Respondent

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: NOVEMBER 14, 2007

**REASONS FOR JUDGMENT
AND JUDGMENT:** DAWSON, J.

DATED: NOVEMBER 30, 2007

APPEARANCES:

KINGSLEY I. JESUOROBO FOR THE APPLICANT
BRIDGET O'LEARY FOR THE RESPONDENT

SOLICITORS OF RECORD:

KINGSLEY I. JESUOROBO FOR THE APPLICANT
BARRISTER & SOLICITOR
TORONTO, ONTARIO

JOHN H. SIMS, Q.C. FOR THE RESPONDENT
DEPUTY ATTORNEY GENERAL OF CANADA