Date: 20071130

Docket: IMM-4431-06

Citation: 2007 FC 1264

Ottawa, Ontario, November 30, 2007

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

PATRICK KWANAYI TARUVINGA
MELLODY MUSHINGA
NYASHA TARUVINGA
MUTSA TARUVINGA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA

Respondents

REASONS FOR ORDER AND ORDER

[1] Mr. Patrick Kwanayi Taruvinga and his wife, Mellody Mushinga, are citizens of Zimbabwe; their two children are citizens of the United States (collectively referred to as the Applicants). The Applicants claim protection in Canada. Mr. Taruvinga fears persecution due to his support for the Zimbabwe Congress of Trade Unions (ZCTU) and as a member of the Movement for Democratic Change (MDC). Ms. Mushinga is seeking refugee status as a family member of a ZCTU supporter and as a MDC member herself. The minor children are seeking refugee status as family members of a ZCTU supporter.

[2] In a decision dated July 13, 2006, a panel of the Refugee Protection Division of the Immigration and Refugee Board (the Board) determined that the Applicants were neither Convention refugees, pursuant to s. 96 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), nor persons in need of protection, pursuant to s. 97(1) of IRPA. The Applicant seeks judicial review of the decision

Issues

[3] In general terms, there are two issues:

1. Was the Board's conclusion that the Applicants were not Convention refugees, based primarily on its finding of adverse credibility of Mr. Taruvinga, patently unreasonable?
2. In concluding that the Applicants were not persons in need of protection pursuant to s. 97 (1) of IRPA, did the Board err by failing to have regard to the evidence before it?

Analysis

Section 96 Determination

[4] The Board found that the determinative issue in the Applicants' refugee or s. 96 claim was the lack of credibility of Mr. Taruvinga. The Board based its conclusion on a number of inconsistencies and problems with Mr. Taruvinga's testimony. In brief, the Board noted the following:

- Mr. Taruvinga testified he deliberately stayed away from work during a 1999 stay way, but wrote in his Personal Information Form (PIF) that he "genuinely could not find means to get to work";

- Mr. Taruvinga stated he had to sign a warning letter in his PIF, but when questioned, he could not recall the particulars of the letter. Furthermore, he initially said the letter was a line or two with no consequences listed, then later he indicated it was a page long and began listing various consequences;

- Mr. Taruvinga did not mention his problems with his supervisor and two Central Intelligence Organization agents at the port-of-entry, despite this being the pivotal reason he left his job and Zimbabwe.

[5] The Board also noted that Mr. Taruvinga came to the United States with his wife in 2000, on a student visa which expired in 2003. Mr. Taruvinga did not seek asylum in the United States prior to coming to Canada in 2005. What made this even more problematic was that two siblings of Mr. Taruvinga made asylum claims in the United States. The Board concluded that the Applicants' actions in not claiming asylum in the United States demonstrated a lack of subjective fear.

[6] The Applicants submit that the Board committed at least seven errors in reaching its adverse credibility finding.

[7] As acknowledged by the Applicants, the standard of review of a factual determination of the Board, such as a finding of credibility or plausibility, is that of patent unreasonableness. Indeed, the Board is in a better position than the Courts to gauge credibility or plausibility (*Aguebor v. (Canada) Minister of Employment and Immigration*, [1993] F.C.J. No. 732 (C.A.) (QL)). However,

to the extent issues of procedural fairness are raised, the Court must determine whether the requirements of procedural fairness are met based on a standard of correctness. The Court need not apply the pragmatic and functional analysis.

[8] In spite of the many alleged errors raised by the Applicants, I am not persuaded that the Board's finding of adverse credibility should be disturbed. When this portion of the decision is reviewed in its totality, other than a few minor problems of no consequence, I can see no error that warrants the Court's intervention.

[9] Two alleged errors were highlighted during oral submissions. I will provide further comments on these two areas of concern. The first relates to the failure of the Applicants to claim asylum in the United States and the second is an alleged breach of fairness by the Board in failing to put certain discrepancies to Mr. Taruvinga.

[10] The Applicants argue that the Board erred by inferring that a failure to seek advice regarding asylum at the first opportunity indicated a lack of subjective fear (*Hue v. Canada (Minister of Employment and Immigration)*, [1988] F.C.J. No. 283 (C.A.) (QL); *Yoganathan v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 511 (T.D.) (QL); *Gyawali v. Canada (Minister of Citizenship and Immigration*), 2003 FC 1122) and by failing to take Mr. Taruvinga's explanation into account.

[11] It is well-established that the Board may find that the Applicants' delay is not consistent with those of people having a subjective fear of persecution (*Bello v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 446 (T.D.) (QL); *Heer v. Canada (Minister of Employment and Immigration)*, [1988] F.C.J. No. 330 (C.A.) (QL)). Additionally, it is open to the Board to note the lack of a reasonable explanation of a failure to claim refugee status in a country that is signatory to the *Convention Relating to the Status of Refugees*, Can. T.S. 1969 No. 6 (*Natynczyk v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 914; *Naivelt v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1261; *Ibis v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 86 (T.D.) (QL)). Nor, in my view, did the Board fail to consider the explanations of Mr. Taruvinga. The Board is not required to accept a claimant's explanations if it finds them to be implausible or unreasonable (*Sinan v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 87 at para. 11). There is no reviewable error.

[12] The Applicants further submit that, in failing to confront Mr. Taruvinga with certain discrepancies in his testimony, the Board violated the principal of natural justice that an individual has the "right to know the case against him or her" (*Gracielome v. Canada (Minister of Employment and Immigration)*, [1989] F.C.J. No. 463 (C.A.) (QL)).

[13] With respect to this alleged error, I first note that the case of *Gracielome*, above, does not stand for the proposition that all discrepancies in oral testimony must be highlighted by the Board. In *Gracielome*, the majority of the Federal Court of Appeal found that there was no contradiction

between the applicant's testimony and the evidence before the Court. In *dicta,* Justice Hugessen noted:

> It is worth noting that in none of the three cases were the applicants confronted with the alleged contradictions or asked for explanations. On the contrary, it is apparent that each example was found by the majority after the fact from a painstaking analysis of the transcripts of the evidence

[14] With respect to the case at bar, I observe that the Board did highlight to Mr. Taruvinga the discrepancy between his oral testimony and his PIF as to whether there were consequences in the warning letter:

Member:	It didn't say what kind of consequences?
Principal Claimant:	No, it was kind of vague. They were saying, including into or losing a job, getting (inaudible) calling for another meeting again…
Member:	So there were consequences?
Principal Claimant:	Yes ma'am.
Member:	So why did you say there wasn't consequences?
Principal Claimant:	(inaudible) (Tribunal Record, p. 361).

[15] Second, an identical argument to that of the Applicants' in the case at bar was advanced and rejected in *Ayodele v. Canada (Minister of Citizenship and Immigration),* [1997] F.C.J. No. 1833 at paras. 14-17 (T.D.) (QL). In rejecting the Applicants' submissions here, I adopt Justice Gibson's reasons in *Ayodele*:

> On the face of the material before me there is nothing that would indicate that here the contradictions were uncovered by a "painstaking analysis of the transcripts of the evidence." The hearing of this matter took place in one, apparently rather brief, sitting. I was not able to find anything in the certified tribunal record to indicate that the panel members relied on a transcript. Further, the applicant was represented by counsel. I think it is fair to assume that any contradictions in the applicant's testimony would have been as apparent to counsel as to the CRDD members. In such specific circumstances, to have a decision fail, by reason only of the failure on

> the part of the CRDD members to put the contradictions to a represented applicant goes well beyond what I take to be the position enunciated in Gracielome and places what, in my view, is an unwarranted burden on members of the CRDD. To reiterate, the Applicant was represented. Presumably, counsel was attentive to the testimony. It was open to counsel to examine or reexamine his or her client on any perceived inconstencies [sic] without coaching from the CRDD members (*Ayodele*, above at para. 17). [emphasis added.]

[16] In sum, the decision of the Board with respect to the s. 96 refugee claim should stand.

Section 97(1) Determination

[17] A claim for protection made under s. 97(1) of IRPA may raise facts and issues that are not part of or covered by an analysis under s. 96. In this case, Mr. Taruvinga described one of his fears of returning to Zimbabwe in his PIF as follows:

> The Mugabe regime views Zimbabwean nationals returning from abroad as supporters of the opposition Movement for Democratic Change (MDC). Particular suspicion is reserved for those Zimbabwean nationals who return from Western democracies like Canada, where the ZANU-PF is derided. The longer that a Zimbabwean citizen has been immersed in a democratic society, the greater the Mugabe regime's hostility is towards them should they repatriate.

[18] The Board, having determined that the Applicants' claim for refugee protection should fail, turned its mind to this aspect of the claim.

> Although the panel found the claimants were not credible with respect to their past persecution and/or that their memberships in the MDC have given them a profile as to come to the attention of the Zimbabwean authorities, the panel still considered whether their residence abroad would cause them a risk of cruel and unusual treatment or punishment, or a danger, believed on substantial grounds to exist, of torture, upon their return.
>
> The panel has not been provided with any updated information regarding the treatment of deportees returning to Zimbabwe when there are no elections.

> Based on the lack of evidence, the panel is therefore unable to conclude [the Applicants are persons in need of protection]. [emphasis added.]

[19] The Board was correct to conduct a separate s. 97 analysis. The Applicants' claim under s. 97, that their residence abroad could place them in danger, is not based on a Convention ground. Furthermore, there is other evidence beyond the Applicant's own testimony, in particular, the *Zimbabwe: Country Reports*, which supports the possibility that the Applicants could be persecuted should they return to Zimbabwe as failed asylum seekers or simply due to their long sojourn in a Western democratic country.

[20] In the case at bar, the Board's general finding was that it did not have "updated information regarding the treatment of deportees". I have reviewed the *Zimbabwe: Country Reports* and agree with the Applicants that the report describes several instances of violence committed between December 17, 2004 and August 31, 2005, against failed asylum seekers returning to Zimbabwe (U.K., Home Office Science and Research Group, *Zimbabwe: Country Reports* (2005) at 154-156). I also agree with the Applicants that the *Zimbabwe: Country Reports* provides a chronology of events which indicates that the last parliamentary election took place in Zimbabwe on March 31, 2005 (U.K., Home Office Science and Research Group, *Zimbabwe: Country Reports* (2005) at 160).

[21] The *Zimbabwe: Country Reports* was included in the Toronto Documentation Package: Zimbabwe, dated March 2006. The date of the Board's decision is July 13, 2006. I fail to see how objective, credible evidence which is less than a year old, included in a documentation package that is only several months old, which directly pertains to the issue of returnees, does not provide

"updated information" sufficient for a s. 97 analysis in the case at bar. Given that its general finding is not supported by the record, and given that the issue was directly raised in the Applicant's PIF, I find the Board acted patently unreasonably.

Remedy

[22] Having found that the Board erred in its s. 97 analysis, I will send the matter back to the Board for re-determination. The question that arises is whether the Board should be directed to reconsider the entire claim or only the findings made pursuant to s. 97. At the hearing of this matter, I advised the parties of my conclusions and requested that the parties provide me with their written submissions on this question.

[23] The Respondent argues that there is no need for re-determination on the s. 96 findings as this Court concluded that there was no error in that conclusion.

[24] Not surprisingly, the Applicants submit that the Court should send back this matter for re-determination of all aspects of the claim. The position of the Applicants is that a newly-constituted panel "should be allowed to exercise its decision making authority regarding the credibility findings if it chooses to do so". The Applicants submit that one aspect of the danger to returning asylum seekers is whether they would be perceived as traitors upon their return. This, in their view, requires that the Board revisit the evidence related to Mr. Taruvinga's level of activism in opposition activities, a matter that is also integral to the refugee determination.

[25] I tend to agree with the Applicants. Although the questions appear to be completely separate, the Applicants raise an issue that may require a panel to reconsider aspects of the s. 96 claim. Accordingly, a decision of this Court that a newly-constituted panel must restrict its review to only s. 97 may present evidentiary problems. This case is one where a re-determination of all aspects of the claim is warranted.

[26] Neither party proposed a question for certification. I agree that this case does not raise a question of general importance.

ORDER

THIS COURT ORDERS that

1. The application for judicial review is allowed, the decision of the Board dated July 13, 2006 is quashed and the matter sent back to a different panel of the Board for re-determination; and

2. No question of general importance is certified.

"Judith A. Snider"

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Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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