

Date: 20071211

Docket: IMM-6250-06

Citation: 2007 FC 1300

Ottawa, Ontario, December 11, 2007

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

**TAVONGA MUSAKANDA
BABRA MUSAKANDA NEE FROST
(a.k.a. BABRA MUSAKANDA)**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated November 2, 2006, which found that the applicants were neither Convention refugees nor persons in need of protection.

The applicants requested that the decision be set aside and the matter referred back to a newly constituted panel of the Board for re-determination.

Background

[2] Tavonga Musakanda and his wife, Babra Musakanda (née Frost) (the applicants) and their children, Glenn Tavonga Musakanda and Gregg Musakanda, are all citizens of Zimbabwe. As the principal applicant, Tavonga Musakanda alleged that he had a well-founded fear of persecution in Zimbabwe based on his perceived political opinion as a supporter/member of the Movement for Democratic Change (MDC) and being deemed an opponent due to decisions he made while working in the capacity of senior manager at Trust Merchant Bank. The circumstances which led to the principal applicant's claim for refugee status were set out in the narrative portion of his Personal Information Form (PIF).

[3] During 1998 and 1999, a number of non-governmental organizations discussed forming a common front to oppose the ZANU-PF, who were in power at the time in Zimbabwe. The discussions culminated in the formation of the Movement for Democratic Change in September 1999. As a result, many urban professionals including bankers were targeted. The principal applicant alleged that during this time, anonymous people appeared at his village demanding information about his background and activities. Moreover, he alleged that government agents visited the bank where he worked as a senior manager. The principal applicant alleged that the

ZANU-PF politicians were concerned about opposition supporters' access to their bank accounts and private information.

[4] The principal applicant alleged that in 2001 the ZANU-PF activists attacked premises belonging to his brothers and assaulted his nephew, who suffered serious injuries. The principal applicant alleged that his entire family then held a special meeting and resolved that the principal applicant and his nephew needed to flee Zimbabwe for their own safety. However, the principal applicant appears to have continued to work at the bank. He alleged having faced a number of difficulties during his work including receiving threats both personally and to his supervisor.

[5] In April 2001, the principal applicant travelled to the U.S. on holiday. The principal applicant alleged that while in the U.S., he received notice from his supervisor that the Central Bank wanted to investigate him for an alleged contravention of the exchange control guidelines. The principal applicant alleged that his supervisor advised him not to return to Zimbabwe until he had been cleared of the matter. The principal applicant eventually returned to the bank after having been cleared of wrongdoing. He alleged that he found himself under renewed pressure to do what the CIO operatives wanted. The principal applicant resigned from his position at the Trust Merchant Bank in 2001 and began working for the CFX Merchant Bank in April 2002. Due to his work at the CFX Merchant Bank, the principal applicant alleged to have been labelled an enemy of the government's indigenization policy. The principal applicant alleged that as a result of this labelling, his home was ransacked in February 2003. The principal applicant alleged making a report to the police, but it did not yield any results as the matter was never investigated. The principal applicant

alleged that the threats against him regarding his work at the bank continued and in fact escalated as major decisions regarding the bank's future were being contemplated.

[6] The principal applicant alleged that on July 2, 2005 plain-clothed police unexpectedly appeared at his home and hauled him down to the police station. The principal applicant alleged that he was accused of failing to stop when the President's motorcade passed, but he never saw the motorcade. The principal applicant alleged that he was assaulted with a stick and punched.

[7] In 2005, the principal applicant went to the U.S. where he was legally entitled to remain for three months. The principal applicant alleged that he did not file for refugee status in the U.S. because he had been told that Zimbabwe nationals were routinely refused political asylum and deported back to Zimbabwe. The applicants decided to come to Canada and on February 21, 2006 applied for refugee status at the Port of Entry. An immigration hearing was held on September 20, 2006 and a decision rendered on November 2, 2006. In its decision, the Board found that the adult claimants were not Convention refugees, nor persons in need of protection. The Board found the two minor claimants (the applicants' two children) to be at risk of being targeted by the youth militia and as such, found them to be Convention refugees. This is the judicial review of the Board's decision to refuse the parents' (the applicants') applications.

Board's Decision

[8] The Board began its decision by enumerating the three central issues to the claims: (1) credibility concerns arising from the principal applicant's testimony, (2) reavailment, and (3) failure to claim elsewhere.

[9] With regards to the principal applicant's testimony, the Board found that he was neither a credible nor trustworthy witness for the following reasons:

- The Board found that it was highly implausible that a person being targeted by the authorities would be able to rise through the ranks of the bank if he was also being threatened by those in control.
- The Board found it highly improbable that the applicant's supervisor would put himself at risk by providing a glowing representation of the principal applicant who was seen to be anti-regime.
- The Board was of the opinion that if the principal applicant was being targeted by the current regime and high ranking officials, it was unlikely that bank officials would clear his name of any wrongdoing in relation to the investigation of alleged infractions of bank policy.
- The Board found on a balance of probabilities that the principal applicant had not been labelled as anti-ZANU-PF and was not being targeted as alleged, in part because the principal applicant had failed to mention that he is a member of the MDC in his CIC documents and his PIF.

- The Board found the principal applicant's story about being assaulted by police officers a contrived one as it was highly implausible that the police would release a person being watched and targeted for approximately the last five years.

[10] With regards to the issue of re-availment, the Board found that taking into consideration the alleged threats faced by the principal applicant, it was improbable that a person being targeted would re-avail himself to the protection of the country he fled. As such, the Board drew an adverse inference with respect to the principal applicant's subjective fear.

[11] With regards to the failure to claim refugee status elsewhere, the Board found the principal applicant's explanation that a lawyer had advised him not to, not to be reasonable. The Board found that the principal applicant's testimony reflected a lack of subjective fear by not applying for protection.

[12] For all these reasons, the Board found that the applicants were not Convention refugees, nor were they persons in need of protection. The Board went on to address whether the applicants' minor children were Convention refugees by virtue of the risk of being targeted by the youth militia. The Board found that the minor children were Conventions refugees.

Issues

[13] The applicants submitted the following issues for consideration:

1. Did the Board commit a major error when it failed to consider the fact that there were compelling grounds for extending protection to all four members of the Musakanda family?
2. Was the Board's decision patently unreasonable in that it splits a family apart?

[14] I would rephrase the issues as follows:

1. What is the appropriate standard of review?
2. Did the Board err in finding that the applicants were not Convention refugees, nor persons in need of protection?

Applicants' Submissions

[15] The applicants submitted that the Board committed a major error when it failed to consider the fact that there were compelling grounds for extending protection to all four members of the Musakanda family. The applicants also submitted that the Board should have considered their eligibility as Convention refugees on the basis of their membership in the particular social group of the family.

[16] The applicants also submitted that the Board's decision is patently unreasonable because it effectively splits a family apart. The applicants submitted that under the terms of the decision, the minor sons are faced with an uncertain future, deprived of the love, guidance and stability they require to assimilate into Canadian society. The applicants submitted that to divide a functional family in such a cruel and arbitrary manner represents a capricious and perverse reading of the Act.

Respondent's Submissions

[17] The respondent submitted that the appropriate standard of review is patently unreasonable (*Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Chen v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 551).

[18] The respondent submitted that the law is well established that to be a Convention refugee as a member of the familial social group, the risk must be directed towards the applicant as a member of the family, and not simply towards their family member. The respondent submitted that in the present case, there was no evidence that the applicants (the parents) would be targeted by the youth militia. One cannot be deemed to be a Convention refugee because one has a relative who is being persecuted (*Devrinishvili v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 1528). The family is only considered to be a social group for the purposes of the Convention where there is evidence that the persecution is taking place against the family members as a social group (*Al-Busaidy v. Canada (Minister of Employment and Immigration)* (1992), 139 N.R. 208 (F.C.A)). Membership in the social group requires proof that the family itself, as a group, is the subject of reprisals and vengeance (*Canada (Minister of Citizenship and Immigration) v. Bakhshi*, [1994] F.C.J. No. 977 (F.C.A.); *Granada v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 2164).

[19] The respondent submitted that these factors are not present in this case. The principal applicant submitted his claim based on his fear of the ZANU-PF due to his alleged activities related to his employment. The applicants have not challenged any of the Board's findings in this regard.

[20] The respondent submitted that this Court has held that the concept of family unit is not part of the Convention and therefore, not part of the criteria to be examined when determining whether an individual qualified as a Convention refugee (*Kanagaratnam v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 1069 (F.C.T.D.) at paragraph 12).

Analysis and Decision

[21] **Issue 1**

What is the appropriate standard of review?

The appropriate standard of review for overall determinations of the Board is patent unreasonable (*Chen* above).

[22] **Issue 2**

Did the Board err in finding that the applicants were not Convention refugees, nor persons in need of protection?

The applicants submitted that the Board's decision was patently unreasonable because it failed to consider the applicants under the Convention refugee social group of the family and because the Board's decision effectively separated the family. While I agree that the unfortunate

reality is that the Board's decision has the potential to separate this family, I am bound by the well-established law.

[23] As the respondent submitted, the jurisprudence is clear that one cannot be deemed to be a Convention refugee because one has a relative who is being persecuted (*Devrishashvili* above at paragraph 9). Moreover, the family is only considered to be a social group for the purposes of the Convention where there is a nexus between the persecution and the Convention ground, (*Al-Busaidy* above). There was no evidence before the Board that this was the case. The principal applicant's refugee application was based on his perceived political opinion. The minor claimant applicants were assessed on the risk of them being recruited by the youth militia in Zimbabwe. There was no evidence before the Board that the family as a unit was being persecuted. Consequently, I find that this aspect of the Board's decision was not patently unreasonable.

[24] As for the applicants' submission that the decision is patently unreasonable because it effectively separates the family unit, this is not one of the considerations that the Board must make in determining a claimant's application. As Justice Rothstein held in *Kanagaratnam* above at paragraph 12:

While in the broadest sense, Canada's refugee policy may be founded on humanitarian and compassionate considerations, that terminology in the Immigration Act and the procedures followed by officials under it, has taken on a particular connotation. Humanitarian and compassionate considerations normally arise after an applicant has been found not to be a Convention refugee. The panel's failure to consider humanitarian and compassionate factors in its Convention refugee determination in this case was not an error.

The Board did not err in failing to consider the separation of the family unit.

[25] The applicants also submitted at the hearing of this matter, that the Board failed to consider the profile of the principal applicant, namely, that he is a senior banker and that government agents targeted such professionals. At the hearing, the respondent stated that the decision of the Board concerning the credibility of the applicants had not been challenged.

[26] The Board, at page 3 of its decision stated:

Credibility

The central issue in this claim are whether it is credible that the principal claimant and his family members were being targeted by Zanu-PF supporters.

a) because he is a member of the MDC

b) because he followed the bank's policies and refused to issue loans with any collaterals.

The panel finds the principal claimant to be neither a credible nor a trustworthy witness.

[27] The Board then proceeded to address the allegations of the principal applicant that he was being targeted because of his conduct as a banker and concluded that the principal applicant was not being targeted as alleged. This disposes of the principal applicant's argument that the Board failed to consider his profile as a banker.

[28] The application for judicial review must therefore be denied.

[29] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[30] **IT IS ORDERED that** the application for judicial review is denied.

“John A. O’Keefe”

Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

The *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA):

<p>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,</p> <p>(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or</p> <p>(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.</p> <p>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</p> <p>(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of</p>	<p>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:</p> <p>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;</p> <p>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.</p> <p>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:</p> <p>a) soit au risque, s’il y a des motifs sérieux de le croire, d’être soumise à la torture au</p>
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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 themselves 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.

(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.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6250-06

STYLE OF CAUSE: TAVONGA MUSAKANDA
BABRA MUSAKANDA NEE FROST
(a.k.a. BABRA MUSAKANDA)

- and -

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: November 19, 2007

**REASONS FOR JUDGMENT
AND JUDGMENT OF:** O'KEEFE J.

DATED: December 11, 2007

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