

Date: 20080711

Docket: IMM-5247-07

Citation: 2008 FC 855

Ottawa, Ontario, July 11, 2008

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

**DONAVINE NDAYIKEJE
LIONEL GAHINYUZA
(A.K.A. LIONNEL GAHINYUZA)**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Donavine Ndayikeje and her cousin Lionel Gahinyuza seek review, under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, of a decision of the Refugee Protection Division of the Immigration and Refugee Protection Board dated October 26, 2007, in which the Board determined that the Applicants are neither Convention refugees nor persons in need of protection.

[2] The Board's decision turns on its finding that the evidence of Donavine Ndayikeje was not credible. The Board found that there were issues of unexplained inconsistencies and significant omissions with respect to her evidence, including evidence concerning material parts of the claim. It was submitted that the Board had engaged in a microscopic examination of the evidence and that omissions and inconsistencies focused on matters that were not material to the claim. It was also submitted that the Board erred in relying on statements made by Donavine Ndayikeje in the Port of Entry Notes contrary to this Court's decision in *Sawyer v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 1140, 2004 FC 935. In short, it was submitted that the Board's findings were not reasonable. I do not accept that submission.

[3] The Applicants, citizens of Burundi, made a claim for refugee protection on July 26, 2006, on the basis of their political opinion and membership in a particular social group under sections 96 and 97 of the Act. The Applicants fear persecution at the hands of the National Liberation Front, a rebel group in Burundi. Secondly, they fear persecution at the hands of the government.

[4] Donavine Ndayikeje alleged that she was abducted by rebels from the NLF on February 10, 2006, and was detained in a rebel camp. When she arrived at the camp she discovered that her cousin Lionel Gahinyuza was already there. The Applicants were required to steal food from the civilians while at the camp. Approximately three months later they fled and went to stay with their aunt in Burundi. They travelled to Canada via the United States of America.

[5] It was uncontested that the passport with which Donavine Ndayikeje travelled had significant irregularities: the birth date differed from that Ms. Ndayikeje provided on her Personal Information Form, the date on the passport is 1979 and is absent a month and day whereas Ms. Ndayikeje says she was born in 1984. Ms. Ndayikeje's explanation for the discrepancy was that the passport had been obtained for her by a pastor who was trying to organize a visit to a prayer group in France. She suggested that her birth date had been confused with that of another student. She had not provided the pastor with any formal birth documents; she believed that he had obtained her information from the school. She also testified at the hearing that she did not accompany the pastor to the passport office when he obtained the passport; he did everything himself.

[6] The Board, for a number of reasons, was not convinced by her explanation. In my view the evidence that in Burundi one must apply for and pick up the passport in person was sufficient to cast a dark cloud on this part of her evidence.

[7] The Board also found that she had not taken reasonable steps to replace her identity documents. She testified that when she noted the discrepancies in the passport she obtained proper identity documents from Burundi which she then mailed to her lawyer in November 2006. They were never received. This was not noted by Ms. Ndayikeje until just prior to the Board hearing. The Board observed that she had more than one year to obtain the proper documents and that it was not credible that Ms. Ndayikeje should wait so long to determine from her lawyer whether they had been received. That finding was open to it on the evidence presented.

[8] Accordingly, the Board found that Ms. Ndayikeje had failed to provide acceptable documents establishing her identity as required by section 106 of the Act. That section provides that the Board must take into account, in assessing an applicant's credibility, whether the applicant possesses acceptable identity documents. If, as in this case, such documents are not presented, then the Board must consider whether a reasonable explanation for the lack of such documents has been provided or whether reasonable steps have been taken to obtain the necessary documents. That is precisely the process the Board followed here. Its assessment and conclusion is reasonable based on the evidence of Ms. Ndayikeje.

[9] The Board continued with its assessment of the claim that the Applicants feared returning to Burundi because of their fear of the NLF. The Board identified four more credibility concerns.

[10] First, prior to the hearing Ms. Ndayikeje only alleged a fear of the NLF. At the hearing she also asserted having a fear of the Burundi government officials. Her explanation for the discrepancy was that she was previously "traumatized and scared". The Board found it implausible that she would have been traumatized and scared when she completed her PIF as she did so with the assistance of her lawyer at a time when she was well removed from Burundi. The Board found that this recent statement had been made to embellish her claim for refugee status and that it was entitled to draw an adverse inference as to her credibility. That finding and inference was reasonable, in my view. Further, with reference to the Applicants' submission that the Board engaged in a microscopic examination of the evidence, I note that the agent of fear is a material fact in her claim.

[11] Second, at the hearing Ms. Ndayikeje asserted for the first time that she had witnessed the NLF rebels making an example of escapees by capturing and killing them. She testified that she saw this happen more than four times during the three months she was held by the rebels. Again her explanation why she had not previously mentioned this was that she was “scared”. Again, the Board did not accept that as a credible explanation for the omission of such an important allegation. Again, the Board drew an adverse inference from what it held was a recent fabrication. Its finding and inference was reasonable, in my view. Further, with reference to the Applicants’ submission that the Board engaged in a microscopic examination of the evidence, I note that the allegation that rebels seek out and kill escapees is a fact that is very material to the allegation that the Applicants fear returning to Burundi because of the rebels. It is also of some note that there was no evidence presented, other than Ms. Ndayikeje’s oral testimony, that rebels do pursue escapees to recapture and kill them.

[12] Third, there was an inconsistency between Ms. Ndayikeje’s statement to the officer at the port of entry and her PIF as to the circumstances of her capture. In the POE Notes she stated that the capture occurred when she was at school. In the PIF and oral testimony she stated that it occurred on her way home from school, after a 30 minute bus ride. Her explanation for the discrepancy was that she was tired when she entered Canada. The Board did not accept that as a satisfactory explanation given that her capture was such a pivotal event.

[13] The Applicants submit that this Court in *Sawyer* cautioned against using POE Notes in the manner used here by the Board. The Respondent relies on Justice Dawson’s reasons in

Puvaneswaran v. Canada (Minister of Citizenship and Immigration), 2006 FC 1543, as standing for the proposition that the Board may rely on the POE Notes in the context of responses to standard questions. In this case I find that no error was made by the Board in comparing the explanation given by the Applicant to the port of entry officer and her later explanation. Ms. Ndayikeje did not deny making the statement to the port of entry officer, nor did she deny that the POE Notes were an accurate reflection of what she had said at that time. Despite counsel's suggestion that the POE Notes are ambiguous, that was not a position advanced by Ms. Ndayikeje when the Board questioned her. Accordingly, in my view, the Board's assessment and finding was reasonable and open to it based on the evidence. Again, this was a material fact in the application before the Board.

[14] Lastly, in the POE Notes Ms. Ndayikeje asserted that the pastor had gone alone to the U.S. Embassy to obtain a visa to the U.S., whereas at the hearing and in her PIF she stated that she had accompanied him. Here again, her explanation was that she was tired when making the earlier statement. The Board did not find that to be a reasonable explanation because, except for this and the details related to where she was captured, the document provided an otherwise consistent story. In my view, based on the totality of the evidence before the Board, that finding was reasonably open to it.

[15] Accordingly, because the adverse finding regarding credibility was reasonably open to the Board based on the unexplained inconsistencies and significant omissions in the evidence of Ms. Ndayikeje, the Board's findings meet the standard of reasonableness. The Board committed no reviewable error, and this application for judicial review is dismissed.

[16] Neither party proposed any certified question nor is there any.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is dismissed.
2. There is no question certified.

“Russel W. Zinn”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5247-07

STYLE OF CAUSE: DONAVINE NDAYIKEJE
LIONEL GAHINYUZA
(A.K.A. LIONNEL GAHINYUZA) v.
THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: July 9, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT:** ZINN J.

DATED: July 11, 2008

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