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Docket: IMM-4433-06

Citation: 2007 FC 922

Ottawa, Ontario, September 17, 2007

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

**CYNTHIA SEKAI MESIKANO
RICHARD NWANGI KABUTHA**

Applicant(s)

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent(s)

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review by the principal claimant, Cynthia Sekai Mesikano, and her husband, Richard Nwangi Kabutha, from a decision of the Refugee Protection Division of the Immigration and Refugee Board delivered on July 26, 2006.

Background

[2] Ms. Mesikano is a citizen of Zimbabwe. She left that country bound for the United States in April 1999 and she remained there for almost 7 years. In February 2006, she came to Canada and sought refugee protection.

[3] Ms. Mesikano's protection claim was based on alleged incidents of politically-motivated persecution directed both at her and at her father by supporters of the Mugabe regime. Given her lengthy absence from Zimbabwe, much of the evidence of current risk concerned matters involving her father, which were connected to her only by association.

[4] Ms. Mesikano said that during her employment in the mid-1990's with a company run by her father, she and other employees were active in the staging of political protests in Harare. Those protests led to government retaliation against certain labour leaders and activists. Ms. Mesikano claimed that in 1998 during a political demonstration she was beaten by the police, and on at least one other occasion, she and her father were stopped by the police on the way to work. Her father was questioned but they were allowed to proceed. At no time was Ms. Mesikano's identity recorded by the authorities. Police and political intimidation continued against her father and, in December 1998, the government imposed a ban on work stoppages. Thereafter, Ms. Mesikano declined to participate in further public demonstrations for reasons of personal safety.

[5] In early April 1999, Ms. Mesikano's father obtained a Malawian passport for her which allowed her to leave Zimbabwe and to obtain a visa to enter the United States. She remained in the United States, mostly without status, until 2006 when she came to Canada and sought refugee protection. Her explanation for failing to seek asylum in the United States was that she believed that such a claim would fail.

[6] According to Ms. Mesikano, her father continued to face political persecution in Zimbabwe including an arrest and a beating in 2004. More recently, he has been beset by Mugabe supporters who have attempted to confiscate his business interests. He has resisted those actions through the courts.

[7] Mr. Kabutha is a citizen of Kenya and his claim to protection was brought with respect to that country. Mr. Kabutha met Ms. Mesikano in the United States and, like her, he lived there for a time without status. Mr. Kabutha's Personal Information Form (PIF) made a loose connection to Ms. Mesikano's protection claim in the following passage:

1. I fear being deported to my country of nationality, Kenya, with my Zimbabwean wife, Cynthia Mesikano. This is because Kenya has extradition treaties with many countries and if Zimbabwean President Mugabe declared her a criminal then she would be extradited. Mugabe, so prone to defying the rule of law, has a long history of doing this.
2. My wife's extradition, based on false allegation that she is a criminal, is especially likely because my wife's family is persecuted by Mugabe's severely repressive Zimbabwe African National Union – Popular Front (ZANU-PF).

3. In addition, the Kenyan Government is strong supporter of President Mugabe and strongly favoured President Mugabe's re-election

[Quoted from original text]

[8] Notwithstanding the above described "risk", Mr. Kabutha's testimony to the Board clearly acknowledged an absence of any fear should he be returned to Kenya. His evidence on that issue was as follows:

Member: So am I correct, then, in recording your answer as saying, with respect to yourself, you don't have any fear really of returning to Kenya?

Claimant (Mr. Kabutha): You are correct, sir.

The Board Decision

[9] It is apparent that the Board had no difficulty with Ms. Mesikano's credibility. What it concluded was that her evidence failed to establish an objective basis for a fear of persecution in Zimbabwe. It noted that Ms. Mesikano had been absent from Zimbabwe for over seven years and that, even during her time there, she was never specifically targeted by the authorities for her political activism. On the few occasions when she was victimized, she readily acknowledged that she was essentially in the wrong place at the wrong time. The Board recognized that Ms. Mesikano's father was in a position of apparent risk but it found nothing in the evidence to establish to its satisfaction that Ms. Mesikano would be at risk through that family association.

[10] The Board went on to reject Ms. Mesikano's explanation for failing to seek asylum in the United States during her several years of residency there.

[11] Finally, the Board rejected Mr. Kabutha's claim to protection on the basis that his own admissions negated any fear of a return to Kenya.

Issues

- [12] (a) What is the standard of review for the issues raised on this application?
- (b) Did the Board commit any reviewable error in its decision?

Analysis

[13] All of the issues raised by the Applicants on this application are fact or evidence-based and the standard of review is, therefore, patent unreasonableness: see *Perera v. Canada (Minister of Citizenship)*, 2005 FC 1069, [2005] F.C.J. No. 1337 at para. 14.

[14] The principal argument advanced on behalf of Ms. Mesikano was that the Board erred by failing to address the evidence of generalized risk in Zimbabwe faced by political opponents to the current regime. It was asserted that the country condition evidence established that Zimbabwe was essentially a "failed state" held together by the force of President Mugabe's personal will. It was claimed that the Board ignored this essential evidence.

[15] This argument has no merit. The Board did acknowledge the existence of serious human rights abuses in Zimbabwe but it also concluded that Ms. Mesikano would not be a person of interest to the authorities. This finding was entirely consistent with her own testimony including the following exchange:

Member: During all the time you left Zimbabwe – so by that, I mean all the time you’ve been both in the United States and in Canada, since 1999 to the present – I guess from what you’re saying, you’ve kept in contact with your father.

Claimant (Ms. Mesikano): Yes.

Member: Frequently? Periodically?

Claimant (Ms. Mesikano): Periodically.

Member: And has he told you in all that time that you were being sought by any authorities at all? You in particular ---

Claimant (Ms. Mesikano): No.

Member: --- being sought by any of the authorities?

Claimant (Ms. Mesikano): No.

[16] The Board's finding that Ms. Mesikano would face nothing more than a generalized risk in Zimbabwe was consistent with her evidence that she had not been singled out for persecution during her time there notwithstanding the apparent risk faced by her father. The Board was also entitled to consider that Ms. Mesikano had been away from the country for more than seven years and that her father was using judicial processes to protect his threatened business interests. Those were relevant

risk factors which the Board could fairly consider in assessing the level of risk faced by Ms. Mesikano.

[17] In the case of Mr. Kabutha, no serious argument was advanced that he faced any risk of persecution in Kenya. The Board's finding on that point was consistent with his own testimony and, therefore, cannot be impugned.

[18] The Board's risk determinations were, therefore, well supported by the evidence before it and in no way can its decision on that issue be described as unreasonable, let alone patently unreasonable.

[19] Ms. Mesikano's challenge to the Board's finding of delay is also unmeritorious. This argument is an invitation to the Court to reassess her explanation for that delay and that, of course, is not the proper role of the Court on judicial review. On this issue, I would adopt the analysis of my colleague Justice Richard Mosley in *Gonzalez v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1595, [2005] F.C.J. No. 1965, where he held:

[17] The applicant submits that the Board erred in concluding that her evidence as to why she did not make a claim in the United States was vague and asserts that she provided plausible explanations for the delay. It is well settled that delay in making a refugee claim is an important factor which the Board may consider in weighing a claim for refugee protection: *Heer v. Canada (Minister of Employment and Immigration)*, [1998] F.C.J. No. 330 (QL). In this case, a delay of over four years suggests a lack of a subjective fear of persecution and it was open to the Board to reject the applicant's explanations. The applicant, in effect, is asking the Court to make its own assessment of her reasons and substitute its opinion for that of the Board. Unless

the finding was patently unreasonable, which I do not find, there is no basis for the Court's intervention.

[20] As a result, this joint application for judicial review is dismissed. Neither party proposed a certified question and no issue of general importance arises on this record.

JUDGMENT

THIS COURT ADJUDGES that this application for judicial review is dismissed.

“ R. L. Barnes ”

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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AND JUDGMENT BY:** BARNES, J.

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