**Date: 20071030**

**Docket: IMM-5455-06**

**Citation: 2007 FC 1121**

**Ottawa, Ontario, October 30, 2007**

**PRESENT: The Honourable Mr. Justice Phelan**

**BETWEEN:**

**NORMA MUHWATI**
**MILKA DAISY MUHWATI**
**EDMORE ZVIKOMBORERO**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

## I. INTRODUCTION

[1] The Applicants, a mother (Norma), her daughter (Daisy) and her son-in-law (Edmore), were denied refugee status by the Refugee Protection Division (RPD) of the Immigration and Refugee

Board. In view of the Court's conclusion on this case, it would not be helpful to outline in detail the facts of this case. This is a case of credibility findings which must be sent back to the RPD.

## II. FACTUAL BACKGROUND

[2] The Applicants made their claim for refugee protection due to a fear of returning to Zimbabwe. The mother claimed to be afraid of her husband; the married couple feared harm from the wife's jealous ex-lover.

[3] The RPD Member denied the claim on the basis that none of the Applicants' stories were credible. It is apparent from a reading of the transcript of the hearing that the Member was, from the outset, dubious about not just the believability of the stories but also the overall truthfulness of each of the Applicants.

[4] The Applicants have raised the errors in factual findings and alleged that the Member had exhibited bias against them.

[5] Counsel for the Respondent, quite properly and consistent with the high standards of counsel for the Crown, acknowledges that there were problems with some of the factual conclusions reached by the Member. Despite the concessions, counsel argued that there were a number of findings which were sustainable on the standard of patent unreasonableness mandated by *Aguebor v. Canada (Minister of Employment and Immigration)* (1993), 160 N.R. 315 (F.C.A.).

## III. ANALYSIS

### A. *Errors*

[6] In my view, the Member erred in his credibility findings because he misappreciated critical facts, as the Respondent's counsel acknowledged. Two examples are sufficient. In one instance, the Member drew an adverse credibility finding from an answer that a doctor did not perform any tests. It was apparent that the witness thought of tests as something like blood tests – the Member thought asking 31 questions constituted a test. In another instance, the Member did not accept Norma's evidence as to the existence of a woman's shelter whereas the U.S. DOS report referred to the very same shelter and support group for battered women.

[7] There are other instances of the Member drawing adverse credibility conclusions from an incorrect understanding of facts.

[8] These errors tainted the whole process against each Applicant even though the finding may have been directed against one or more Applicants. These errors are sufficient to justify a new hearing.

### B. *Bias*

[9] The Applicants made a serious allegation against the Member. The basis of the allegation is the manner in which the Member conducted the hearing.

[10] The case law establishes that antagonism during the hearing, which includes unreasonably aggressive questioning or comments about testimony, gives rise to a reasonable apprehension of bias. (*Gooliah v. Canada (Minister of Citizenship and Immigration)* (1967), 63 D.L.R. (2d) 224 (Man. C.A.); *Golomb v. Ontario (College of Physicians and Surgeons)* (1976), 68 D.L.R. (3d) 25 (Div. Ct.))

[11] In *Quiroa v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 271, I indicated that there is an appropriate tone and demeanour to the adjudicative process necessary to ensure that a member hearing a case is not seen to have reached a conclusion prematurely.

[12] In the Federal Court of Appeal's reasons in *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198, the reverse order questioning was upheld in part because the tone and style of questioning was more important than the order of questioning.

[13] In the present case, there was no RPD officer to question the Applicants; therefore the Member had to take a more active role than is usual. However, the Applicants were represented by counsel who made no objection to the nature, tone or manner of the Member's questioning. It cannot be said that there was no opportunity to address issues of over-zealous questioning. However, even if there is no objection, if fairness is compromised, the process cannot stand.

[14] Given my earlier finding, I need not reach a final conclusion whether this allegation justifies overturning the decision. It should be sufficient to say that there is a way for a member to question

an applicant, probe the credibility of the story, without demeaning or attacking the witness or insulting them. The Member did not avail himself of these techniques of probing but respectful questioning perhaps due to the frustrating and confusing evidence of the Applicants.

## IV. CONCLUSION

[15] Therefore, this application for judicial review will be granted, the decision set aside and the matter remitted back to the RPD for a new hearing before a different member.

[16] There is no question for certification.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that** this application for judicial review will be granted, the decision set aside and the matter remitted back to the RPD for a new hearing before a different member.

"Michael L. Phelan"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-5455-06 |
| **STYLE OF CAUSE:** | NORMA MUHWATI, MILKA DAISY MUHWATI, EDMORE ZVIKOMBORERO<br><br>and<br><br>THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | Toronto, Ontario |
| **DATE OF HEARING:** | October 29, 2007 |
| **REASONS FOR ORDER AND ORDER:** | Phelan J. |
| **DATED:** | October 30, 2007 |

**APPEARANCES:**

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| Mr. Bernard Assan | FOR THE RESPONDENT |

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