

Date: 20080501

Docket: IMM-4095-07

Citation: 2008 FC 568

Toronto, Ontario, May 1, 2008

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

FUNGAI NYOKA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction and Background

[1] Fungai Nyoka is a citizen of Zimbabwe who fled that country in March of 2000, resided in the United States without seeking its protection until April 2006 when she crossed the Canadian border at Windsor to seek asylum. Her claim was denied by the Refugee Protection Division (the tribunal) on September 17, 2007. She seeks a review of that decision in this judicial review proceeding.

[2] The central element of her fear is the Government in Zimbabwe and its controlling party the African National Patriotic Front (ZANU-PF) because of her involvement in what became the main opposition party, the Movement for Democratic Change (MDC).

[3] She alleges she was active in 1999 in the MDC at the early stages of the establishment of that political party in which her brother then and now has a leadership role. Her activities in the MDC are said to have diminished when she resided in the United States but re-ignited when she came to this country.

[4] She alleges her activities in the MDC in 1999 forced her to flee Zimbabwe where she was employed as an Executive Secretary at the Development Bank. She says she received several threatening phone calls and experienced an attempted break-in at her apartment in Harare both of which she attributes to the militant youth militia of the ZANU-PF.

II. The tribunal's Decision

[5] The tribunal first found she was affiliated with the MDC as she had produced a membership card. It found, however, "the claimant could not provide credible or trustworthy evidence related to her allegations of past persecution by militias or government agents because of her brother's political activities as well as her activities with the MDC...".

[6] The tribunal discovered a major contradiction in the applicant's testimony which focussed on when the notorious Border Gezi or Green Bombers, a wing of the ZANU-PF had been

established. Referring to a British Home Office Report, the tribunal stated the Green Bombers and the ZANU-PF's Youth Militia were formed in 2001 which is after the applicant fled the country because of them. The tribunal wrote:

The panel assigns significant weight to the accounts in the Home Office Report and finds that the Border Gezi and ZANU-PF Youth Militia were formed in 2001, which would be well after the time the claimant left for the United States. As such, the panel finds that the claimant did not receive telephone threats and that her door was not vandalized as she testified. This finding is further supported by the lack of evidence provided in support of the claims of vandalism, such as a photo of the door, a note from the neighbour who saw the men at the door, or a report from the landlord. The claimant was asked to explain why she did not have an affidavit or any evidence of the vandalism from her neighbour, and she explained that she did not ask for an affidavit. The panel found this explanation unreasonable as the alleged vandalism to her door was the issue which forced the claimant and her son into hiding and pushed her to leave Zimbabwe.

[Emphasis mine]

[7] The tribunal determined she could not provide any evidence of the calls pointing out her brother's affidavit did not mention such calls or the vandalism despite her evidence she had told her brother about them. The tribunal found a contradiction in her testimony with that contained in her brother's affidavit relating to whether she had experienced any trouble at work. She said no but her brother wrote the Green Bombers found out the applicant was his sister and this information "did not go down well with some workmates". The tribunal also pointed to the fact she had not mentioned the telephone threats and vandalism to her door at the Point Of Entry (POE) interview.

[8] As to the applicant's past persecution, the tribunal concluded:

Because of the omission of the telephone threats and vandalism from both the claimant's POE notes and her brother's affidavit; because of

the lack of credible evidence in support of the claims; and because the claimant's allegations of being threatened by ZANU-PF Youth Militia in 1999 is not supported in the documentary evidence, the panel finds that the claimant has not provided credible evidence in support of her claim.

[9] The tribunal then discussed and concluded she did not have a well founded fear of persecution upon her return to her country of nationality. It based this conclusion on her failure to seek refugee status in the U.S., on her low profile in MDC activities when she was in Zimbabwe noting the party was in its formative period, her non involvement with the MDC in the U.S. and her peripheral involvement with that party while in Canada.

[10] The tribunal also found her fear of persecution on account of her brother's political activities was not well founded principally because she could not provide any evidence her brother and the remaining members of the family had experienced any problems in Zimbabwe. The tribunal also concluded her fear of being interrogated at the airport and arrested because she had been living abroad for such a long time was not well founded because she had an explanation for living abroad – two failed marriages – which would be believed by the authorities and, moreover, the documentary evidence referring to the British Home Office Report dated April 2006 “indicates a reduction in the number of politically motivated killings and harassment”. On this point the tribunal wrote:

The report indicates that: “Individuals targeted for harassment, torture, and killing tended to be active members of the opposition or high-level ZANU-PF members in disfavour with the ruling party.”

[Emphasis mine]

[11] The tribunal summarized and concluded its findings this way in terms of sections 96 and 97 of the *Immigration and Refugee Protection Act*:

The claimant has failed to provide credible evidence to support her allegations of past persecution in Zimbabwe. The claimant has failed to demonstrate that her past and present involvement in the MDC party would raise her profile among government officials in Zimbabwe. The claimant has also failed to provide credible evidence that her family has been persecuted because of her brother's political involvement. As such, the panel finds that the claimant does not face a serious possibility of persecution should she return to Zimbabwe. For the same reasons, the panel finds that the claimant would not be subject personally to a risk to her life, or a risk of cruel and unusual treatment or punishment, or a danger, believed on substantial grounds to exist, of torture, if she returns to Zimbabwe.

[Emphasis mine]

III. The applicant's arguments

[12] The applicant raises three arguments:

- First, in breach of natural justice, the tribunal made a significant error which is the foundation for its finding that some of the applicant's testimony was not credible. This error relates to when the Youth Militia and Green Bombers were formed. The issue of when these organizations had been formed was not raised at the hearing. The only explanation is that the tribunal member, doing his own research, discovered this fact but such finding was contrary to available documentary evidence which the applicant proposed to submit to the Court.
- Second, the tribunal failed to conduct a section 97 analysis.

- Third, the tribunal failed to consider relevant evidence on then current country conditions which is directly contrary to one of its main findings.

IV. Analysis

(a) the standard of review

[13] In this case, the applicable standard of review depends on the issue being decided. Breach of fairness by the tribunal commands no deference from this Court. Failure to comply with a statutory requirement (the conduct of a section 97 analysis) is an error of law reviewable on the correctness standard and failure to consider relevant evidence is a breach of paragraph 18.1(4)(d) of the *Federal Courts Act* resulting in unreasonable decision.

(b) Conclusions

[14] The applicant has persuaded me the three errors he identified are substantiated and dictate this judicial review be allowed.

[15] In the circumstances, I am prepared to admit the applicant's new evidence which establishes the Border Gezi and the militant Youth Militia were active during the 2000 parliamentary elections in direct contradiction to the tribunal's finding and consistent with the applicant's testimony.

[16] There is no question the tribunal's error as to whether ZANU-PF wings such as the youth movement and the Green Bombers was significant. The real question, however, is whether the error was determinative because the tribunal had other reasons to question the applicant's fear.

[17] It is a well accepted principle that in a judicial review proceeding the evidentiary record before the Court must be the same as it was before the tribunal subject to two exceptions: to establish a jurisdictional error or where the finding is made in breach of natural justice or procedural fairness (See *McFadyen v. Canada (Attorney General)* 2005 FCA 360 at paragraph 15).

[18] I am of the view the tribunal's finding on when the Green Bombers and the ZANU-PF youth group was established was arrived at in breach of natural Justice because the tribunal found its evidence on the point by conducting its own research which purportedly spawned a contradiction which was not put to the applicant for comment. Not only was the contradiction not blatant or obvious it did not even arise during the hearings. See *Rasih v. Canada (Minister of Citizenship and Immigration)* 2004 FC 1379 and *Qureshi v. Canada (Minister of Citizenship and Immigration)* 2007 FC 912.

[19] In the circumstances, I find the tribunal's error was determinative of the tribunal's finding the applicant had not suffered past persecution in Zimbabwe before she fled. The tribunal said, based on this erroneous finding, it did not believe the applicant had received threats and was the target of a vandalism attempt. Without more, in my view, it would be problematic to quash the tribunal's decision on this error alone. There was more however.

[20] Counsel for the applicant has substantiated a second error made by the tribunal and that is its failure to acknowledge, consider and discuss relevant documents.

[21] Those documents are contained in the applicant's application record and are exhibit E submitted at the hearing and exhibit F the public announcement dated July 13, 2007 from the U.S. State Department on the risks of travelling to Zimbabwe because of the Government's authorization to its security forces to suppress all dissent and to "use violence including lethal force against anyone that the Government perceives as an opponent". These documents paint a very different picture than the one portrayed by the tribunal which gives rise to a duty to comment, analyse and say why it did not accept this evidence. The tribunal did not do so.

[22] Finally, the tribunal erred in not conducting a section 97 analysis in the circumstances of this case. Several recent decisions of this Court, in the particular context of the situation in Zimbabwe at the time have ruled that a separate section 97 analysis was required:

- Where a finding had been made that an applicant was a MDC member (See, *Malunga v. Canada (Minister of Citizenship and Immigration)* 2007 FC 1259 and *Maimba v. Canada (Minister of Citizenship and Immigration)* 2008 FC 226).
- Where nationals are returning from abroad because they are perceived as supporters of the MDC (See *Taruvinga v. Canada (Minister of Citizenship and Immigration)* 2007 FC 1264).

[23] These errors by the tribunal warrant this Court's intervention.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this judicial review application is allowed, the tribunal's decision is quashed and the applicant's refugee claim is remitted for reconsideration by a differently constituted panel. No certified question was proposed.

“François Lemieux”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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