Date: 20080708

Docket: IMM-376-08

Citation: 2008 FC 845

Ottawa, Ontario, July 8, 2008

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

CHIPO SEKERAMAYI
SYDNEY TONDERAI MARINGAPASI SEKERAMAYI

Applicants

and

THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated December 24, 2007 concluding that the applicants are not Convention refugees or persons in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA).

FACTS

[2] The principal applicant, Chipo Sekeramayi, is a 28-year-old citizen of Zimbabwe; her minor son is a five-year-old citizen of the United States. On August 1, 2006, the applicants arrived in Canada and forwarded claims for refugee protection on the basis of the principal applicant's political opinion and the fact that her father is a "high profile" member of the governing Zimbabwe African National Union – Patriotic Front (the ZANU-PF).

[3] In 1998, the principal applicant left Zimbabwe and moved to the United States with her mother to attend school. In 1999, the principal applicant entered into a relationship with George James Maringapasi, an active supporter of the Zimbabwe opposition party, Movement for Democratic Change (MDC). The couple's relationship resulted in the birth of the minor applicant. The relationship ended in October 2003.

[4] The principal applicant states that during her relationship with Mr. Maringapasi, she became increasingly involved in the MDC, which angered both her family and the ZANU-PF. The principal applicant states that during this time she began to experience significant pressure from her family to end the relationship. She also states that she began to receive many threatening letters and phone calls warning her to "disassociate" herself from the MDC.

[5] The principal applicant states that if returned to Zimbabwe, she will be subjected to torture, imprisonment, or even death at the hands of the ZANU-PF. Accordingly, on August 1, 2006, she advanced this claim for refugee protection under sections 96 and 97 of the IRPA.

Decision under review

[6] On December 24, 2007, the Board concluded that the applicants are neither Convention refugees nor persons in need of protection. The basis of the Board's decision was that the applicants "failed to establish an objective or subjective basis for their claim." With respect to the principal applicant's son, the Board held at page 2 that there was no evidence establishing why the child feared returning to the United States:

> The designated representative, Chipo Ruvimbo Sekeramayi, did not allege that there were any reasons for Sydney to fear persecution on Convention grounds in the United States, or that removal to the United States would be a risk to his life, or a risk of cruel and unusual treatment or punishment, or a danger, believed on substantial grounds to exist, of torture.
>
> Thus, the Panel is not satisfied that the minor claimant has a claim against the United States of America, as there is no well-founded fear of persecution, or a risk to life or of harm from his country of origin.

[7] With respect to the principal applicant's claim, the Board found that she would not be at risk at the hands of her family upon return to Zimbabwe, stating at page 4:

> … The Panel is not persuaded that the claimant's father will harm or have her harmed should she return to Zimbabwe. This finding is strengthened by the fact that she is no longer in a relationship with [Mr. Maringapasi], which is the only condition that her father has ever placed on her.

Further, the Board found that many of the letters and e-mails sent to the principal applicant were not of a threatening nature and did not contain threats to her life or safety.

[8] Finally, the Board assessed the principal applicant's involvement in the MDC, finding that while she joined the party in 2000 or 2001, her participation was "very minimal." Further, the Board

found that since arriving in Canada in 2006, the principal applicant has not been active in the MDC because her recognizable family name often causes her to be met with hostility by other party members. On this basis, the Board concluded at page 5 of its decision:

> The principal claimant, based on a balance of probabilities, has failed to establish that she would be persecuted should she return to Zimbabwe. Therefore, the Panel finds that the principal claimant has not established a well-founded fear of persecution, by reason of her actual or perceived political opinion or membership in a particular social group. Therefore, the Panel concludes that the principal claimant is not a Convention refugee.

ISSUES

[9] The applicant raises two issues for consideration:

1. Did the Board err in applying an incorrect standard of proof with respect to its section 96 analysis; and
2. Did the Board err by ignoring the objective evidence that the principal applicant was a person in need of protection by virtue of her membership in the MDC?

STANDARD OF REVIEW

[10] The first issue before the Court is a question of law subject to review on a standard of correctness: see *Mugadza v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 122, [2008] F.C.J. No. 147 (QL) at para. 10.

[11] The second issue concerns the Board's factual findings, which are entitled to the highest level of curial deference. In the past, this meant that such findings would only be set aside if found

to be patently unreasonable: see *Aguebor v. Canada (Minister of Citizenship and Immigration)* (1993), 160 N.R. 315 (F.C.A.). However, as a result of the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9 (QL), it is clear that the standard of patent unreasonableness has been eliminated, and that reviewing courts must confine their analysis to two standards of review, those of reasonableness and correctness. Accordingly, the deference to be accorded to the Board's factual findings mandates that the second issue be reviewed on a standard of reasonableness according to a spectrum which warrants a high level of curial deference.

ANALYSIS

Issue No. 1: <u>Did the Board err in applying an incorrect standard of proof with respect to its section 96 analysis?</u>

[12] The proper legal test for determining whether or not an applicant is a Convention refugee under section 96 of the IRPA is whether there is a reasonable chance or serious possibility that the claimant would be persecuted should he or she be returned to their country of citizenship. As the Supreme Court of Canada held in *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593 at paragraph 120, in considering the meaning of "Convention refugee" in paragraph 2(1)(a) of the former *Immigration Act*, R.S.C. 1985, c. I-2, repealed:

> ¶ 120 Both the existence of the subjective fear and the fact that the fear is objectively well-founded must be established on a balance of probabilities. In the specific context of refugee determination, it has been established by the Federal Court of Appeal in *Adjei v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 680, that the claimant need not prove that persecution would be more likely than not in order to meet the objective portion of the test. The claimant must establish, however, that there is more than a "mere possibility" of persecution. The applicable test has been expressed as

> a "reasonable possibility" or, more appropriately in my view, as a "serious possibility". …

[13] In the case at bar, the applicant argues the Board erred in applying the more stringent balance of probabilities standard to is finding that the applicant would not be at risk of persecution on a Convention ground if returned to Zimbabwe. In support, the applicant points to the Board's reasons, where it states at page 5:

> The principal claimant, based on a balance of probabilities, has failed to establish that she would be persecuted should she return to Zimbabwe. Therefore, the Panel finds that the principal claimant has not established a well-founded fear of persecution, by reason of her actual or perceived political opinion or membership in a particular social group. Therefore, the Panel concludes that the principal claimant is not a Convention refugee.
>
> [Emphasis added.]

[14] The respondent, however, submits that the Board did not err in incorrectly applying the balance of probability standard to its finding that the applicant was not a Convention refugee under section 96 of the IRPA. Rather, according to the respondent, when the Board made reference to the balance of probabilities standard in the above-noted passage, it was doing so in relation to the "long and detailed analysis" of the applicant's evidence, and not in relation to the risk of persecution that the applicant may face upon return to Zimbabwe.

[15] In reviewing the Board's decision, I find that the Board addressed the standard of proof issue at two points in its analysis. First, at page 4, the Board stated in reference to an e-mail received by the principal applicant in 2007:

> … Based on the claimant's failure to provide the purported letter from the embassy and the most recent e-mail from her cousin, which specifically indicates that her father and the family wish to repair their damaged relationship, the Panel finds that the claimant has failed to establish that she suffers a reasonable possibility of persecution or harm should she return to Zimbabwe.
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> [Emphasis added.]

The Board's second reference to the appropriate standard to be applied is the aforementioned passage at page 5, where it states:

> The principal claimant, based on a balance of probabilities, has failed to establish that she would be persecuted should she return to Zimbabwe.

[16] As Mr. Justice Mandamin recognized in *Mugadza*, above, at paragraph 21, the Board's reasons must be taken as a whole and considered in light of the two "slightly different tests" that are applied under a section 96 analysis:

> ¶ 21 The Board's reasons are to be taken as a whole. In *I.F. v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1856, 2005 FC 1472 at paras. 24, Justice Lemieux in deciding whether the board erred in its application of the section 96 test by setting out two slightly different tests held:
>
> > In this case, looking at the impugned decisions as a whole, I find the tribunal expressed itself sufficiently and did not impose an inappropriate burden on the applicants. The tribunal conveyed the essence of the appropriate standard of proof, that is, a combination of the civil standard to measure the evidence supporting the factual contentions and a risk of persecution which is gauged by not proving persecution is probable but by proof there is a reasonable chance or more than a mere possibility a claimant would face persecution.

[17] In the case at bar, the two references cited above are the Board's only two references to the proper standard of proof to be met under section 96 of the IRPA. Accordingly, in considering the Board's reasons as a whole in conjunction with the proper standard that must be met under section 96 of the IRPA – namely the existence of a serious possibility of persecution – I am not convinced that the Board's reference to the balance of probabilities in the second passage was made with respect to the weighing of the evidence as suggested by the respondent. It is clear in reading the passage that the Board was applying the balance of probabilities to the degree of risk the applicant would face if returned to Zimbabwe relates to her membership in he MDC party.

[18] Given this, I find that the Board failed to clearly articulate and apply the proper legal test to the applicants' claim under section 96 of the IRPA. Accordingly, I must set the decision aside and return the matter to the Board for redetermination by a differently constituted panel.

Issue No. 2: **Did the Board err by ignoring the objective evidence that the principal applicant was a person in need of protection by virtue of her membership in the MDC?**

[19] While I have already concluded that the Board's decision must be set aside on the basis that it failed to apply the correct test under section 96 of the IRPA, I also find that the principal applicant raises sufficient grounds for setting aside the Board's decision on the basis of its treatment of her membership in the MDC.

[20] In their submissions, the applicants argue that the Board erred by failing to consider the objective documentary evidence that MDC members in Zimbabwe continue to face a serious risk of

persecution by sole virtue of their membership in the MDC. In support, the applicants point to my recent decisions in *Chavi v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 53, [2008] F.C.J. No. 63 (QL) and *Maimba v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 226, [2008] F.C.J. No. 296 (QL).

[21] In both cases, I concluded that even where the Board rejects the applicant's credibility and/or the subjective basis of the applicant's claim, there may be instances where, having accepted the applicant's identity, the objective documentary evidence is such that the applicant's particular circumstances make him or her a person in need of protection: see also *Kandiah v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 181, [2005] F.C.J. No. 275 (QL).

[22] In the case at bar, the Board provides the following comments at page 5 regarding the principal applicant's membership in the MDC:

> The claimant joined the MDC party in 2000 or 2001. Her participation in the party was "very minimal." Nor has she been active in the party since her arrival in Canada because of her recognizable family name. …

[23] While the Board concluded that the principal applicant was only minimally involved in the MDC while in the United States and not active at all since arriving in Canada, it did accept that she was a member of the party, having joined "in 2000 or 2001." Given the Board's acceptance of this evidence, it was required to assess whether the principal applicant's membership in the MDC placed her at an objective risk of harm if she was returned to Zimbabwe. However, no such consideration is provided.

[24] This is particularly troubling given the fact that the U.S. Department of State Report for Zimbabwe clearly states that membership in the MDC is sufficient to place a person at risk of persecution if returned to Zimbabwe. I recognized this fact in *Chavi*, above, at paragraph 14:

> ¶ 14 The U.S. Department of State Report [for Zimbabwe] is objective evidence that membership in the MDC is sufficient to place a person at risk of harm. …

I made a similar finding in *Maimba*, above, at paragraph 24.

[25] Given the Board's finding that the applicant was a member of the MDC, the Board was required to consider what effect that membership had on whether the applicant would be at risk of harm if returned to Zimbabwe. As Mr. Justice Evans (as he then was) held in *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35, the Board has a burden of explaining why it did not consider objective documentary evidence that appears to squarely contradict its finding of fact. In the case at bar, the Board failed to satisfy that burden and, accordingly, committed an unreasonable error that is subject to the intervention of this Court.

[26] On this basis, the Board's decision must be set aside and remitted to a differently constituted panel for redetermination.

[27] Neither party proposed a question for certification. The Court agrees that this case does not raise a question which should be certified for appeal.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed; and

2. The refugee claim is remitted to the Board for redetermination by a differently constituted panel of the Board.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-376-08
STYLE OF CAUSE:	CHIPO SEKERAMAYI, SYDNEY TONDERAI MARINGAPASI SEKERAMAYI v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ON
DATE OF HEARING:	June 26, 2008
REASONS FOR JUDGMENT AND JUDGMENT:	KELEN J.
DATED:	July 8, 2008

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