

Federal Court



Cour fédérale

Date: 20180731

Docket: IMM-402-18

Citation: 2018 FC 800

Ottawa, Ontario, July 31, 2018

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

**THE MINISTER OF CITIZENSHIP
AND
IMMIGRATION**

Applicant

and

YOLANDA SABENI

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision by the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada, dated December 21, 2017 [the Decision], which determined that the Respondent is a Convention refugee. The Applicant, the

Minister of Citizenship and Immigration [the Minister], seeks to set aside the Decision and refer the matter back to the RPD for redetermination.

[2] As explained in greater detail below, this application is dismissed, because the Minister has not demonstrated that the Decision is unreasonable, in relation to either the RPD's finding that the Respondent had established her identity as a national of Zimbabwe or its finding that she had established a well-founded fear of persecution in Zimbabwe based on her political opinion. These findings are within the range of acceptable outcomes, based on the law and the evidence before the RPD.

II. **Background**

[3] The Respondent arrived in Canada on September 3, 2017, at a border crossing from the United States, having previously flown to the US from South Africa. She was accompanied by her family, consisting of her common-law spouse and their two children. All four members of the family sought refugee protection in Canada upon arrival. It appears undisputed that the Respondent's spouse is a permanent resident of South Africa and that her two children are citizens of South Africa.

[4] The Respondent's name and national identity are a matter of dispute in this application. When she presented at the Canadian border, she was carrying a South African passport in the name of Felicia Noluthanda Khumalo. However, she claims that she is a citizen of Zimbabwe named Yolanda Sabeni.

[5] The Respondent's refugee claim is based on alleged fear of the ruling political party in Zimbabwe, the Zimbabwe African National Union – Patriotic Front [ZANU-PF]. She claims that she and her family were associated with the opposition party, the Movement for Democratic Change [MDC] and that she was sexually assaulted by a government official with the ZANU-PF in 2005 when she was 18 years old. She says that she then fled South Africa and was assisted by an MDC official in obtaining a South African passport under a false name.

[6] The Respondent's spouse also claimed refugee protection based on fear of the ZANU-PF. He claims to be an MDC supporter and alleges that he moved to South Africa in 2004 due to threats by the ZANU-PF against members of the MDC. He subsequently obtained permanent resident status in South Africa. The couple met in 2005, shortly after the Respondent arrived in South Africa. Their children were born in that country.

[7] The decision by the Respondent and her family to leave South Africa was precipitated by an event that they allege occurred on December 17, 2016. They allege three armed men forced them into their house and told them to lie on the floor and sing ZANU-PF slogans. They left South Africa on July 13, 2017, and travelled to the US before arriving in Canada on September 3, 2017, and claiming protection.

III. **Refugee Protection Division Decision**

[8] The Minister intervened and participated in the hearing of the refugee claims of the Respondent and her family. While the Decision that is the subject of this application for judicial review addressed the claims of the Respondent, her spouse, and their two children, it is only the

determination related to the Respondent that has been challenged by the Minister. For the reasons explained below, the RPD accepted the Respondent's claim but rejected the claims of her family members.

A. Respondent's Claim

[9] The RPD considered each of the refugee claims separately. It found the Respondent to be credible and therefore believed her allegations in support of her claim. The RPD noted that the Respondent testified in a direct and straightforward manner and that there were no material inconsistencies or contradictions between her testimony and the rest of the evidence that were not satisfactorily explained.

[10] The RPD first addressed the issue of the Respondent's identity, finding that she had established on a balance of probabilities her identity as a national of Zimbabwe through her testimony and the documents filed, including her birth certificate and school documents. In arriving at this conclusion the RPD noted the Minister's submission that her South African passport was *prima facie* evidence that she was a national of South Africa, but it accepted her testimony that she had falsely obtained it, with the assistance of a man associated with the MDC. The RPD also noted documentary evidence indicating that identification documents may sometimes be obtained through fraud in South Africa, which corroborated the Respondent's testimony. It therefore found that the South African passport was fraudulent.

[11] The RPD considered the Minister's argument that that the Respondent had not provided any identification documents with a photo in support of the Zimbabwean identity she claimed.

However, it found her explanation for this evidentiary gap, that she left Zimbabwe when she was 18 years old and had not by that age obtained a passport or driver's license, to be reasonable. It also considered an inconsistency in the spelling of the Respondent's Zimbabwean surname in some of the documents (as some used the name "Sabheni"). However, the RPD accepted her explanation that she and her family members have used both spellings, that she pronounces her name with the addition of the "h", but that her real name is written without the "h".

[12] The RPD also noted that it had no reason to doubt the authenticity of the Respondent's birth certificate and that she provided many credible details about her family and her life in Zimbabwe. She was also able to provide details about her schooling in Zimbabwe, her activities with the MDC, and the country's geography and political situation. The RPD noted, and shared, credibility concerns raised by the Minister with respect to the death certificates of the Respondent's parents and sister. However, taking into account the totality of the evidence, it found those credibility concerns were not sufficient to make a negative finding with respect to the Respondent's identity. The RPD was therefore satisfied that she is a national of Zimbabwe.

[13] Having concluded that the Respondent's South African passport was fraudulent, and that she therefore has no legal status there, the RPD considered whether she could obtain permanent resident status there through her spouse, who the RPD found to be a permanent resident of South Africa. While noting that this was a possibility, the RPD observed that such an application would be subject to administrative discretion and, given that she had lived under a false identity in South Africa using documents obtained by fraud, the RPD concluded that it was unlikely she would be able to obtain status. It therefore assessed her claim against Zimbabwe only.

[14] The RPD found that the Respondent had established that she has a well-founded fear of persecution based on her political opinion and membership with the MDC. It accepted that she has been a member of the MDC since 2002 and that she was sexually assaulted by a ZANU-PF official in 2005. The RPD also noted her testimony that all of her family members were MDC supporters and her description of her mother and one of her sisters being denied medical care because of their political affiliations.

[15] While the Respondent had not claimed refugee protection in South Africa, the RPD accepted her testimony that she did not know anything about the availability of such protection when she fled Zimbabwe at the age of 18, and that she was able to live in South Africa safely under her new identity. The RPD also asked her about returns to Zimbabwe in 2013 and 2015. She gave explanations which the RPD again considered reasonable.

[16] Following reference to the documentary evidence as being consistent with the Respondent's alleged fear, notwithstanding the recent change in presidency in Zimbabwe, the RPD found that the Respondent had established a well-founded fear of persecution. It briefly considered both the availability of state protection in Zimbabwe and the possibility of an internal flight alternative but found that neither precluded the acceptance of her claim.

B. Spouse's Claim

[17] The determinative issue for the Respondent's spouse's claim was exclusion under Article 1E of the Refugee Convention. The RPD found him to be credible and believed his allegations in support of his claim. However, it accepted that he was a permanent resident of South Africa and

found that he did not rebut the presumption of state protection in South Africa and that he can live reasonably safely in that country. The RPD therefore found that the Respondent's spouse was excluded from protection. It nevertheless considered his claim against Zimbabwe and found that he did not establish that he is a Convention refugee or person in need of protection.

[18] In arriving at this latter conclusion, that the RPD noted the spouse's testimony that he does not think that the authorities in Zimbabwe are looking for him or that he is at risk to go back to Zimbabwe. Rather, he had returned to Zimbabwe numerous times over the years, including living there for a few months, without any issues with the authorities. He had also been able to renew his Zimbabwean passport and identity card.

C. Children's Claims

[19] The RPD accepted that the children are citizens of South Africa. It considered the analysis of the availability of state protection to the Respondent's spouse in South Africa to apply equally to the children and, taking into account that minimal efforts to seek protection in that country had been made, the RPD found that the minor claimants had not rebutted the presumption of state protection. It therefore found that they were not Convention refugees or persons in need of protection.

IV. Issues and Standard of Review

[20] The Minister raises two issues for the Court's consideration:

- A. Did the RPD err in finding that the Respondent had established her identity as a national of Zimbabwe?

- B. Did the RPD err in finding that the Respondent had established a well-founded fear of persecution in Zimbabwe based on her political opinion?

[21] The parties agree, and I concur, that the standard of reasonableness governs the Court's review of the issues raised by the Minister.

V. **Analysis**

- A. *Did the RPD err in finding that the Respondent had established her identity as a national of Zimbabwe?*

[22] The Minister argues that the RPD erred, in considering the Respondent's identity, by preferring her testimony and her tertiary Zimbabwean identity documents over the South African passport (with visas issued by the United States and Germany), national identity card and driving license. The Minister relies on jurisprudence that there is a *prima facie* presumption that a passport holder is a national of the country of issue (see *Becirevic v Canada (Minister of Citizenship and Immigration)*, 2015 FC 447 at para 8; *Abedalaziz v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1066 at para 42; *Canada (Minister of Citizenship and Immigration) v Kabunda*, 2015 FC 1213 at para 22; and *Canada (Minister of Citizenship and Immigration) v Inarukundo*, 2015 FC 314 [*Inarukundo*] at para 7-8).

[23] However, as the Respondent points out, the presumption explained in these authorities is a rebuttable one. In the present case, the RPD considered the Minister's submission that the South African passport was *prima facie* evidence that the Respondent was a national of South Africa. I read the Decision as concluding that the Respondent had rebutted the presumption.

[24] The Minister submits that this conclusion was unreasonable, because there was no indication that the South African documents were lacking in security features, and this Court has held that evidence of widespread forgery in a country is not, by itself, sufficient to reject foreign documents as forgeries (see *Inarukundo* at paras 7-8). However, the RPD concluded that the South African passport was fraudulent, not based only on the documentary evidence that identification documents may sometimes be obtained through fraud in South Africa, but based on acceptance of the Respondent's testimony that she obtained the false identification documents through the assistance of a man associated with the MDC.

[25] The RPD's credibility findings are critical to this finding. The RPD found the Respondent to be credible and believed her testimony. Credibility is the heartland of the RPD's jurisdiction, the Court must give significant deference to such findings, and there is no basis in the present case for the Court to interfere with the RPD's assessment of the Respondent as a credible witness. The RPD did not reach its conclusion that the passport was fraudulent based on a lack of security features. Indeed, I do not read the Decision as suggesting that the passport was not, at least in form, an authentic passport. Rather, the point is that the RPD accepted the Respondent's testimony that the passport was obtained fraudulently from the South African authorities under a false identity through the intervention of the man associated with the MDC.

[26] In challenging the RPD's Decision, the Minister also argues that it unreasonably analysed the inconsistency in the spelling of the Respondent's surname in the Zimbabwean documents. The Minister submits that the Respondent's explanation of this inconsistency was not coherent, as she initially testified that she spells her name "Sabeni" and that her siblings use "Sabheni", but she subsequently testified that she spells her name "Sabheni" although "Sabeni" appears on her formal documents. I have reviewed the portions of the transcript to which the Minister refers and find nothing unreasonable in the RPD's findings on this point. While it may have been available to the RPD to find an inconsistency in the Respondent's testimony, and drawn an adverse credibility conclusion therefrom, it was within the range of acceptable results for it to have accepted the Respondent's explanation that both spellings are used in her family and that there was a difference between the spelling she uses and that which appears on her formal documents.

[27] The Minister also refers to other inconsistencies in the evidence before the RPD, surrounding the age at which the Respondent fled Zimbabwe, her activities with the MDC in South Africa, the occasions on which she returned to Zimbabwe, and issues with medical care received by her family members attributable to their relationship with the MDC. Again, while some of these points could have supported adverse findings, I find nothing in these portions of the evidence that undermines the RPDs favourable assessment of the Respondent's credibility.

[28] The Minister notes that the Zimbabwean documents included death certificates for members of the Respondent's family, two of which bear a provincial registry stamp that predates the registration date of death. When asked about this at the hearing before the RPD, the Respondent suggested that this might be the result of a clerical error, but she provided no further

statement or affidavit from her brother, who had obtained the documents, to support this explanation. Again, the RPD's assessment of this point is within the range of acceptable outcomes. The RPD did not overlook this concern. It expressly considered the point, agreed with the Minister that it raised credibility concerns, but concluded, taking into consideration the totality of the evidence, that these concerns were not sufficient to make a negative finding with respect to the Respondent's credibility.

[29] In conclusion on this issue, I find no basis to interfere with the RPD's conclusions on the Respondent's identity.

B. Did the RPD err in finding that the Respondent had established a well-founded fear of persecution in Zimbabwe based on her political opinion?

[30] The Minister argues that the RPD accepted that the Respondent had a well-founded fear of persecution in Zimbabwe based on her political opinion without regard to the evidence before it.

[31] There was evidence that the Respondent had returned to Zimbabwe on occasions in 2013 and 2015, which could be relevant to her subjective fear. The Minister submits that there were inconsistencies in her testimony surrounding these returns, as she initially stated that she felt invincible because of her new identity but later said that she was sometimes afraid and testified that there were hardships associated with living under a false identity. The Minister also pointed out that the Respondent was travelling with her spouse, whom they suspected was being

investigated by Zimbabwe's Central Intelligence Organization [CIO]. I have reviewed the hearing transcript excerpts to which the Minister refers. I find little inconsistency in the evidence, which I read as explaining that, while the Respondent recognized there was risk, she took comfort from her new identity. In analysing this issue, the RPD noted the Respondent's explanation, including the fact that the visits to Zimbabwe were to bring her brother food needed for his family and to accompany her husband to a cultural ceremony, and accepted her explanation that she felt it was safe to go back for short periods of time. I find nothing unreasonable in this analysis.

[32] The Minister also submits that the Decision is difficult to reconcile with the RPD's conclusion that the Respondent's spouse had failed to establish a well-founded fear of persecution in Zimbabwe. The Minister points out that the spouse testified to fear of the Zimbabwean authorities, because he had been investigated by the CIO, because of his political activities with the MDC in South Africa, and because his aunt is a well-known MDC activist and an MDC member of parliament. However, the evidence surrounding the two claimants' circumstances was not the same. As expressly noted by the RPD, the Respondent's spouse testified that he did not think the authorities in Zimbabwe were looking for him or that he is at risk to return there. In fact, he had returned to Zimbabwe numerous times, including living there for a few months, and had not had any issues with the authorities. There is an intelligible basis for the RPD's different findings with respect to the two claimants, and the rejection of the spouse's claim does not undermine the reasonableness of the RPD's acceptance of the claim of the Respondent.

[33] Finally, the Minister notes that the Respondent fled Zimbabwe more than 12 years ago and that she does not know whether the ZANU-PF official who assaulted her is still alive. The Minister argues that the RPD failed to address in its reasons the effect of this passage of time or the fact that, while the Respondent relies upon the association of her family name with the MDC, other family members have not had any issues in Zimbabwe, despite their surname and their support for activities with the MDC. While I agree with the Minister that the Decision does not include an analysis of these particular points, I do not find that they represent a basis to interfere with the Decision. It is trite law that the RPD is presumed to have considered all the evidence before it, and I do not find this evidence to represent inconsistencies with the RPD's conclusions sufficient to displace that presumption. The points raised by the Minister could have formed the basis for a different decision by the RPD, but the decision at which the RPD arrived is within the range of acceptable outcomes.

[34] Having found that the Decision is reasonable, this application for judicial review must be dismissed. Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-402-18

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

No question is certified for appeal.

“Richard F. Southcott”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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