**Date: 20080130**

**Docket: IMM-1324-07**

**Citation: 2008 FC 122**

**Ottawa, Ontario, January 30, 2008**

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

**BETWEEN:**

**MASTER MUGADZA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] Master Mugadza (the "Applicant") applies for judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (the "IRPA") of a decision made by the Refugee Protection Division of the Immigration and Refugee Board (the "Board"), dated March 2, 2007, wherein it was determined that the Applicant is not a Convention refugee nor a person in need of protection under sections 96 and 97 of the IRPA.

[2] I have concluded that the test applied by the Board has not met the standard established by the Federal Court of Appeal in *Adjei v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 680. My reasons follow.

**FACTS**

[3] The Applicant is a citizen of Zimbabwe. He resided in Harare and had a family farm in Chivu where his mother lived. He alleges he became a target of the secret police, the Zimbabwe Central Intelligence Organization (tbe "CIO"), because of his son's involvement in Zimbabwe's main opposition party, the Movement for Democratic Change ("MDC"). The Applicant claims his son was chairman of the MDC ward in Norton, Zimbabwe.

[4] The Applicant says he is not an active member of the MDC. He alleges that he came to the attention of the CIO as a result of attending an MDC meeting in Norton that his son was chairing. Norton is some 40 minutes away by car from Harare and 100 kilometres from Chivu. The MDC meeting in Norton was broken up by the CIO. His son apparently was forewarned of the impending raid, escaped and went into hiding. The Applicant said he was apprehended, and then interrogated and beaten by the CIO in an attempt to find out his son's location. The Applicant says he reported the assault to the police who were unresponsive. The Applicant felt he had no choice but to flee the country.

[5] The Applicant obtained a visa to the United States of America. He left Zimbabwe on May 10, 2006 and travelled to the United Kingdom via South Africa arriving on May 11, 2006. The

Applicant's wife and their five children were in the United Kingdom where she was studying on a student visa. He left for the United States where he remained for three and one half weeks before claiming refugee status in Canada on June 8, 2006.

[6] The Applicant makes his claim for refugee status based on having a fear of persecution by reason of political opinion and his son's involvement in the MDC. He advanced his claim for refugee protection under sections 96 and 97 of IRPA.

[7] The Board found that the Applicant was not credible and that he will not face a serious possibility of persecution in Zimbabwe nor will his removal to Zimbabwe subject him personally to a risk to his life or risk of cruel or unusual punishment.

**ISSUES**

[8] The Applicant submits that the Board erred by failing to apply the correct test for determination of his Convention status under section 96 of the IRPA. The Applicant further submits that the Board erred in making its credibility findings and by failing to consider documentary evidence.

[9] I will address the following issues arising in this matter:

1. Did the Board err in law in its interpretation of section 96 of the IRPA when finding that the Applicant was not a Convention refugee?
2. Did the Board err in making its credibility findings?

**STANDARD OF REVIEW**

[10] In order to prove that one is a Convention refugee, an applicant must demonstrate they have a well-founded fear of persecution The standard of proof a refugee applicant must meet to establish an objective basis for his fear of persecution is a matter of law as it derives from the interpretation of section 96 of the IRPA in keeping with Canada's international obligations with respect to refugees (see s. 3(2)(b) of the IRPA). The standard of review of this question of law is correctness *(Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100 at para. 37).

[11] The standard for review of findings on credibility by a Refugee Protection Board which has expertise in determining questions of fact is patent unreasonableness *(Aguebor v. Canada (Minister of Citizenship and Immigration)* (1993), 160 N.R. 315 (F.C.A.)).

**ANALYSIS**

**Did The Board Err In Law In Its Interpretation Of Section 96 Of The IRPA When Finding That The Applicant Was Not A Convention Refugee?**

**Applicant Submissions**

[12] The Applicant submits the proper test for determining whether or not an applicant is a Convention refugee is whether there is a reasonable chance or serious possibility that the claimant would be persecuted should he be returned to his country of nationality. The Applicant states that the standard of proof is less than a balance of probabilities but more than a mere possibility of persecution upon return. The Applicant relies on *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593 at para. 120 and *Ponniah v. Canada (Minister of Employment and Immigration)*, [1991] F.C.J. No 359 (F.C.A.).

[13] The Applicant submits that the Board applied a higher standard and points to the Board's reasons where it states:

> The panel rejected the claimant's credibility in regard to material aspects of his claim and was not persuaded, on a balance of probabilities, that he was targeted by the authorities of his country or that he will be personally targeted in the future if he returns (emphasis added).

[14] The Applicant submits that the use of the words "on a balance of possibilities" and "he will be" demonstrates that the Board applied a higher standard in its section 96 analysis than has been established in case law. The Applicant relies on several cases, including *Chen v. Canada (Minister of Citizenship and Immigration),* [1997] F.C.J. No. 118 at para.. 15, where this Court has found a board has erred by setting the standard of proof an applicant has to meet to obtain Convention status as being on the balance of probabilities,

[15] The Applicant acknowledges the Board referred to the proper test later in its reasons but submits that, if it cannot be determined which test the Board applied, its decision is in error.

**Respondent Submissions**

[16] The Respondent argues that notwithstanding that the Board may have used the wrong terminology at the start of its reasons, the Board clearly stated the correct test after its analysis. The Respondent submits, having regard to the whole of the Board's reasons, it is clear that the Board did apply the correct test in the latter portion of its reasons.

[17] The Respondent submits that the Board's reasons are to be taken as a whole. The Respondent points to *Chan v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1417 at para. 14, where Justice Dawson makes reference to considering a board's decision in its entirety in circumstances where the section 96 test is articulated in more than one way.

[18] The Respondent refers to *Ghose v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 343 at para. 22. In that case, this Court found that although the board had stated the correct test at the onset of its reasons, the board's use of the wrong test after the analysis portion resulted in error. The Respondent notes that the Court gave weight to the latter coming as it did after the analysis portion of its reasons. The Respondent also refers to *Carpio v. Canada (Minister of Citizenship and Immigration)*, [1994] F.C.J. 383 at para. 14, for the proposition that the stated standard of proof in the introductory paragraphs of a board decision was in the nature of "boiler plate" and should not be given much weight. The Respondent submits that the Board's misstatement at the beginning of its reasons should be similarly treated.

[19] The Respondent submits the question to be determined is whether the misstatement of the legal test in the introduction of the decision leaves the Court in doubt as to what standard of proof the Board actually applied. The Respondent submits that the statement of the correct legal test in the key concluding analysis portion of the decision indicates the Board applied the correct standard of proof.

**Analysis**

[20] The legal test or standard of proof to be met by an applicant for refugee status asserting a fear of persecution was addressed by the Federal Court of Appeal in *Adjei*, above. Justice MacGuigan, considering the proper interpretation of section 2(1)(a) of "Convention refugee" in the former *Immigration Act*, the forerunner to s. 96(a) IRPA stated:

> However, the issue raised before this Court related to the well-foundedness of any subjective fear, the so-called objective element, which requires that the refugee's fear be evaluated objectively to determine if there is a valid basis for that fear.
>
> It was common ground that the objective test is not so stringent as to require a probability of persecution. In other words, although an applicant has to establish his case on a balance of probabilities, he does not nevertheless have to prove the persecution would be more likely than not. Indeed, in *Arduengo v. Minister of Employment and Immigration* (1982) 40 N.R. 436, at 437, Heald J.A. said:
>
> > Accordingly, it is my opinion that the board erred in imposing on this applicant and his wife the requirement that they would be subject to persecution since the statutory definition supra required only that they establish "a well-founded fear of persecution". The test imposed by the board is a higher and more stringent test than that imposed by the statute.
>
> […]
>
> We would adopt that phrasing, which appears be equivalent to that employed by *Pratte J.A. in Seifu v. Immigration Appeal Board* (A-277-822 (dated January 12, 1983):
>
> > … [I]n order to support a finding that an applicant is a convention refugee, the evidence must not necessarily show that he "has suffered or would suffer persecution"; what the evidence must show is that the applicant has good grounds for fearing persecution for one of the reasons specified in the Act.

> What is evidently indicated by phrases such as "good grounds" or "reasonable chance" is, on one hand, that there need not be more than a 50% chance (i.e., a probability), and on the other hand that there must be a more than a minimal possibility. We believe this can also be expressed as a "reasonable" or even a "serious possibility", as opposed to a mere possibility.

[21] The Board's reasons are to be taken as a whole. In *I.F. v. Canada (Minister of Citizenship and Immigration)*, 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.

[22] In *Alam v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1407 at paras. 6, Justice O'Reilly stated:

> [t]his is an awkward standard of proof to articulate. This Court has recognized that various expressions of this standard are acceptable, so long as the Board's reasons taken as a whole indicate that there the claimant was not put to an unduly onerous burden of proof.

[23] The conflicting portions of the Board's decision are as follows:

Page 1 of the Board's reasons:

> The panel rejected the claimant's credibility in regard to material aspects of his claim and <u>was not persuaded, on a balance of probabilities</u>, that he was targeted by the authorities of his country or

> that he will not be personally targeted in the future if he returns (emphasis added).

Page 6 of the Board's reasons:

> In light of all the aforementioned inconsistencies, the panel concludes that the event of April 20, 2006, never occurred and that the claimant is not being sought by Zimbabwe's secret service or anyone else in his country.
>
> The panel finds that the claimant will not face a serious possibility of persecution in Zimbabwe (emphasis added).
>
> Having taken into account all of the evidence, the panel further finds that the claimant's removal to Zimbabwe will not subject him personally to danger, believed on substantial grounds to exist, of torture, and will not subject him personally to a risk to his life, or a risk of cruel and unusual treatment or punishment, under Section 97(1) of the *Immigration and Refugee Protection Act*. Therefore, the claimant's claim fails on all three grounds under the *Immigration and Refugee Protection Act*.

[24] The first statement is not a mere "boiler plate" expression of the standard of proof. It sets out its conclusion, after referencing the Board's credibility findings, that the Applicant has not persuaded the Board on "the balance of probabilities" that he will be "targeted by the authorities" on return to Zimbabwe. The first statement cannot be disregarded as a mere misstatement.

[25] The two excerpts are the Board's only discussion on the subject of persecution in its reasons. Considering the Board's reasons as a whole, I cannot determine which standard the Board used to evaluate the Applicant's section 96 Convention refugee status.

[26] I find that the Board failed to clearly articulate and apply the proper legal test for the Applicant's section 96 Convention refugee claim.

[27] Having found that the Board committed an error in law by failing to clearly articulate and apply the correct test under section 96 of the IRPA and in light of its cursory section 97 analysis, I need not consider its credibility findings.

**CONCLUSION**

[28] The Board articulated two tests for consideration of the Applicant's section 96 Convention refugee claim, the first being the possibility of persecution on the "balance of probabilities", the second being a "serious possibility", the latter being the correct test. On review of the whole of the reasons, I cannot say that the Board applied the correct test, that being a "serious possibility" of persecution if the Applicant returns to Zimbabwe.

[29] I conclude that the Board decision should be quashed and a new hearing to consider the Applicant's claim under both sections 96 and 97 ordered before a different panel of the Board.

## JUDGMENT

**THIS COURT ORDERS AND ADJUDGES that:**

1. The application for judicial review is allowed, the decision of the Board is quashed, and a new hearing before a different panel of the Refugee Protection Board is ordered.

2. No question of general importance is certified.

"Leonard S. Mandamin"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | IMM-1324-07 |
| **STYLE OF CAUSE:** | MASTER MUGADZA v. MCI |
| **PLACE OF HEARING:** | Toronto, Ontario |
| **DATE OF HEARING:** | January 22, 2008 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | Mandamin, J. |
| **DATED:** | January 30, 2008 |

**APPEARANCES:**

| | |
|---|---|
| Jack Davis | FOR THE APPLICANT |
| Manuel Mendelzon | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| DAVIS & GRICE<br>Barristers & Solicitors<br>Toronto, Ontario | FOR THE APPLICANT |
| JOHN H. SIMS, QC<br>Deputy Attorney General of Canada | FOR THE RESPONDENT |