Date: 20080609

Docket: IMM-4257-07

Citation: 2008 FC 724

Ottawa, Ontario, June 9, 2008

PRESENT: THE CHIEF JUSTICE

BETWEEN:

GEORGE GURAJENA
ANNAH GURAJENA
GEORGE TAKURA GURAJNA (a minor)
SHINGIRAI EMMANUEL GURAJENA (a minor)
TADIWA COURTLAND GURAJENA (a minor)

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUGMENT AND JUDGMENT

UPON the application for judicial review of the determination, dated September 20, 2007, by the Refugee Protection Division that the principal applicant George Gurajena is excluded from refugee protection pursuant to Article 1F(b) of the Convention, that the other applicants are not Convention refugees and that none of the applicants is a person in need of protection;

UPON review of the parties' application records and the tribunal record and upon the hearing of June 2, 2008 in Toronto, Ontario and by conference call on June 3, 2008;

[1] It may be that in some cases proof of a valid warrant issued by a foreign country would constitute "serious reasons for considering" that the applicant committed a serious non-political crime within the meaning of Article 1F(b) of the Convention: *Qazi v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1204 at paragraph 18. The Federal Court of Appeal has also suggested that in other situations a warrant, in combination with other evidence, may be persuasive that the threshold of "serious reasons for considering" has been met: *Xie v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 250 at paragraph 23. In any event, where evidence of a warrant is the sole evidence relied upon by the Refugee Protection Division, the panel must "go further" and determine whether the applicant is credible if, as in this case, the principal applicant alleges that the charges referred to in the warrant are fabricated: *Qazi* at paragraph 19.

[2] Against this legal background, I find that the panel made two errors, the first of which is dispositive of this application for judicial review.

[3] First, the panel relied on the fact that the "charges were re-laid in March 1999" on the basis of reported information from Interpol Harare. In my view, this information referring to "central crime register 1419/3/99", without the production of the "new" warrant itself, does not establish that a second warrant was issued. The information in the e-mail and the fax at pages 323 and 324 respectively of the tribunal record was not sufficient to conclude that a second warrant existed. The panel concluded that the 1998 "charges were dropped" and the principal applicant's bail money was returned to him in February 1999. In light of this conclusion, the material before the panel could not

support this finding: “the evidence … is clear that a warrant for his arrest is outstanding”. This error alone warrants the Court’s intervention and requires a new hearing.

[4] Second, in its reasons, the panel concludes that the principal applicant is excluded under 1F(b) prior to assessing the credibility of his denial that the second warrant existed and his assertion that the charges were fabricated. A more coherent set of reasons should have addressed the principal applicant’s credibility concerning the “fresh” warrant prior to any conclusion that he was excluded. It was only when reviewing the refugee claims of the *other* applicants that the panel made the negative credibility finding concerning the principal applicant.

[5] Also, it would have been prudent for the panel to determine whether the principal applicant was a Convention refugee or a person in need of protection in the event its exclusion finding was found to be in error: *Moreno v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 912 at paragraph 60 and *Brzezinski v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1008 at paragraph 33. Here, the panel, in referring to *Xie v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 250 at paragraph 38, may have misunderstood the Court of Appeal’s statement that the Refugee Protection Division (R.P.D.) exceeded its jurisdiction in dealing with the risk of torture upon return to the country of citizenship after making the exclusion determination. I do not read *Xie* as meaning that the R.P.D should not proceed to an inclusion analysis under sections 96 and 97 of the *Immigration and Refugee Protection Act* as an alternative finding in the event that its exclusion determination under section 98 is found to be in error on judicial review. Considerations of time and expense should encourage panels to do so. Indeed, in

Xie the panel did the inclusion analysis under sections 96 and 97 and found that refugee protection under section 97 would have been granted had the claimant not been excluded under Article 1F(b).

JUDGMENT

THIS COURT ORDERS ADJUDGES that:

1. This application for judicial review is granted and the matter is referred for redetermination to a differently constituted panel of the Refugee Protection Division.
2. Neither party suggested the certification of a serious question and none will be certified.

"Allan Lutfy"
Chief Justice

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-4257-07
STYLE OF CAUSE:	GEORGE GURAJENA ET AL. and MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	June 2 and 3, 2008
REASONS FOR JUDGMENT AND JUDGMENT:	THE CHIEF JUSTICE
DATED:	June 9, 2008

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