

DECIDED
16 July 2012

Immigration and Refugee Board Refugee Protection Division Commission de l'immigration et du
statut de réfugié Section de la protection des réfugiés RPD File No. / No dossier SPR : MB1-01906
MB1-01907 Private Proceeding Huis clos Claimant(s) Demandeur(e)s d'asile
XXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXX Date(s) of Hearing Date(s) de
l'audience June 20, 2012 Place of Hearing Lieu de l'audience Ottawa, Ontario Date of decision
Date de la décision July 16, 2012 Panel Tribunal Alexander George Johnstone Claimant's Counsel
Conseil du demandeur d'asile Tshiombo Achille Kabongo Tribunal Officer Agent du tribunal
Susan Lindsay Designated representative Représentant désigné N/A Minister's Counsel Conseil
du ministre N/A [1]

- [1] The claimants are citizens of Namibia. The principal claimant is the designated representative for her minor child. His claim is based on her narrative. The claimants came to Canada on XXXXX 2011 and claimed for protection on arrival. The claimants are claiming for protection because of their particular social group under section 96 of the Immigration and Refugee Protection Act (IRPA). They are also claiming for protection because their lives are at risk and they are at risk of cruel or unusual punishment under Section 97 (1) of the IRPA. SUMMARY OF ALLEGATIONS (from the principal claimant's PIF)
- [2] The principal claimant has never been married and has XXX children born from different relationships. The main reason the principal claimant is seeking protection in Canada is because her son, the co-claimant, is a XXXXX who faces a "high risk of death following widespread XXXXXX XXXXXXXXX by which doctors in my country."
- [3] The principal claimant's parents deaths were linked to witchcraft. After her parents deaths, her uncles and their sons began fighting over the principal claimant's inheritance; they wanted her homestead as well as their own. The uncles and cousins started to sell the principal claimant's XXXX in spite of her opposition. She was cursed by her relatives who told her she would die like her parents had. A few months later things started to happen at her home. Her elder brother "died after having seen a big dead snake which was placed on our doorstep." A week later another brother fled to XXXXXX after he saw a "big bowl of blood with a dead owl inside it." The principal claimant believes her uncles were using black magic in order to get rid of her and her siblings so that the uncles can take over the XXXXXXXXXXXX.

- [4] The claimant was told that in 2010 XXX men were apprehended and charged with the disappearance and death of XXXXXXX in northern Namibia. She has heard that in "Tanzania, Burundi, and Namibia in particular" XXXX are killed for black magic rituals.

DETERMINATION

- [5] The claimants' identities are accepted on the basis of their genuine passports.
- [6] After considering all the documentary evidence and oral testimony, I find that the claimants are not Convention Refugees nor are they persons "in need of protection." Their claims are rejected.

ANALYSIS

- [7] The determinative issue is credibility and in the alternative, state protection. NEXUS
- [8] There are two different grounds to these claims. The first is that the claimants fear harm from other family members over an inheritance. This is a family feud and a purely criminal matter. As such there is no nexus to s 96 of the IRPA for this ground. It is only a s 97 issue. The second ground is that the claimants fear being harmed because the son is an XXXX. This is clearly a particular social group and the principal claimant, as his mother, also has a nexus under s 96. CREDIBILITY
- [9] The principal claimant was asked if she believes in witchcraft and she says she does. The claimant was made aware that I do not. However I also indicated that it is clear that a belief in witchcraft can lead to very real behaviours which can form the basis for a well-grounded fear. The killing of XXXX for their magical qualities is an example of [erroneously held] beliefs leading to persecutory behaviour. The issue for this claim under s 96 is whether fears for her son's safety are objectively well-founded.
- [10] The claimants filed several reports at C/1 on the killings of XXXX. A XXXXXXXX article discusses the problem in Tanzania and notes similar violence in "east and central Africa". Namibia, located in the south western corner of Africa, is not mentioned in the article at all.
- [11] A BBC article discusses the problem in Burundi [adjacent to Tanzania]. There is no mention of Namibia.
- [12] The XXXXXXXX newspaper discusses XXXXX in Tanzania. There is no mention of Namibia.
- [13] The principal claimant was asked if she had any documentary evidence to show me regarding her PIF statement about the alleged 2010 incident in northern Namibia. She said she had tried but that she did not. She said it was highly publicised event. The principal claimant has retained professional counsel and has had over a year to prepare for this hearing. In this context I do note that the 2011 US DoS report does mention, in one sentence, reports of a single incident in 20XX ["During the year there were reports that XXXXXX persons were killed and that their body parts were missing or mutilated, factors consistent with ritual killings. No arrests had been made by year's end."]. The current US DoS states: "In

contrast to 20XX, there were no reports that persons with XXXXX were murdered and that their body parts were missing or mutilated factors consistent with ritual killings."

- [14] On a balance of probabilities, while I do not dispute that this event may have occurred, I find that it likely did not happen in Namibia. Had it done so, in 11 months claimant and counsel could have found documentary records of the incident. Furthermore even if it did happen in Namibia, from my review of all the documentary evidence it appears to be have been a "one of" incident and does not reflect a systemic risk of persecution in Namibia.
- [15] Moreover, there is no mention of the hunting and murder of XXXXX in Namibia as major problem in any of the sources in the IRB binder for Namibia including the US Department of State report, Freedom House and Amnesty. The claimants filed not a single document to establish that the risks to XXXXX in Namibia exist.
- [16] The claimant also testified that she has a X year old daughter who is also XXXX still resident in Namibia. She testified that the daughter is currently hiding but said that at another point in her testimony that Namibia is too small a country to hide in and that in consequence there is no possibility of an IFA. The principal claimant was asked if in the past XXX years had there been any attempts to harm of kidnap her daughter and she said no. The fact that she left her XXXX daughter in Namibia taints her alleged subjective fears for her XXXX son. The fact that there have never been any attempts to harm the daughter in XXX years taints the objective basis of that alleged subjective fear.
- [17] Given all the above, the claimant has failed to establish that her subjective fear for her son's safety is objectively well founded. This is fatal to their claims under section 96. STATE PROTECTION
- [18] In the alternative, both elements of these claims - under s 96 for the son, and s 97 - the family feud, also fail under the issue of state protection. As reflected by COMACHO (FC 830 2007) , " in the absence of a compelling explanation, a failure to pursue state protection opportunities within the home state will usually be fatal to a refugee claim ...at least where the state is a functioning democracy." "As noted by the Federal Court of Appeal in Carillo, the decision of the Supreme Court in Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689 stressed that refugee protection is a surrogate for the protection of a claimant's own state. When that state is a democratic society, [such as Estonia], the quality of the evidence necessary to rebut the presumption will be higher. It is not enough for a claimant merely to show that his government has not always been effective at protecting persons in his particular situation: Canada (Minister of Employment and Immigration) v. Villafranca (1992), 18 Imm. L.R. (2d) 130 (F.C.A.). In Hinzman v. Canada (Minister of Citizenship and Immigration), 2007 FCA 171, at paragraph 57, the judge wrote that "a claimant coming from a democratic country will have a heavy burden when attempting to show that he should not have been required to exhaust all of the recourses available to him domestically before claiming refugee status." As stated in KIM (FC 1126 2005), a "subjective reluctance to engage the state" does not rebut the presumption of adequate state protection.

- [19] In 2011 FC 242, the Federal Court said: Refugee protection is a surrogate protection which is comes into effect only when protection is unavailable anywhere in the applicant's home state (*Ward v. Canada (Minister of Employment and Immigration)*, [1993] 2 S.C.R. 689, [1993] S.C.J. No. 74 (QL) at paragraph 18). ... Subject to a complete breakdown of the state apparatus, states are presumed to be able to protect their citizens (see *Ward* above, at paragraph 50). An applicant bears the onus to rebut this presumption on a balance of probabilities with "clear and convincing evidence confirming a state's inability to protect" (*Ward* above, at paragraph 50). The applicants must show that the state is not providing adequate protection. The protection provided by the state does not have to be effective at all times in order to be adequate (*Gomez Espinoza v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 806 at paragraph 30). Likewise, as the nature of refugee protection is forward-looking, evidence that the state did not provide adequate protection to its nationals in the past will not always be sufficient to overcome the burden on the applicants. ... The Federal Court of Appeal has recently addressed the burden of proof and the standard of proof required to rebut the presumption of state protection, first in *Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, and subsequently in *Canada (Minister of Citizenship and Immigration) v. Carillo*, 2008 FCA 94. In that last case, the Court insisted that the applicant bears both an evidentiary and legal burden; he or she must introduce evidence of inadequate state protection, and must convince the trier of fact on a balance of probabilities that the evidence adduced establishes that the state protection is inadequate. Moreover, the evidence does not only have to be reliable, but it must also have sufficient probative value to meet the applicable standard of proof.
- [20] The principal claimant was asked if she ever sought help from NAMPOL, the police and she said no. She was asked if she ever sought help from the Ombudsman's office and she said no. she was asked if she ever went to a magistrate's court for help and she said no. She was asked if she ever consulted the Woman and Child Protection Unit (WCPU) of the NAMPOL and she said no. She was asked if she ever sought to get a protection/restraining order against her relatives for herself and her son and she said no.
- [21] The principal claimant was asked if she ever sought state protection and she said "No, I never did." Asked why not, she replied I never did because what we are going through is witchcraft." She said that "the state can not protect us against witchcraft."
- [22] According to the US1: "Namibia is a multiparty democracy. ... international observers characterized the election as generally free and fair. Security forces reported to civilian authorities. Three predominant human rights abuses in the country included police use of excessive force, poor detention center conditions, and violence and discrimination against women and children, including rape, child abuse, and child labor. Other human rights problems included prolonged pretrial detention and long delays in trials, harassment and political intimidation of opposition members, and official corruption. Other societal abuses included discrimination against ethnic minorities and indigenous people; child trafficking,

mostly for use as labor; and discrimination and violence based on sexual orientation and gender identity. The government took steps to prosecute or punish officials who committed abuses, whether in the security services or elsewhere in the government, although impunity occurred. ... children The Ministry of Home Affairs and Immigration, in partnership with UNICEF, continued its efforts to provide birth certificates for newborns at clinics and hospitals throughout the country, including through mobile registration vans and establishing birth registration offices at 11 high-volume hospitals. Education: Although the constitution provides children under the age of 16 with the right to compulsory, tuition-free, and universal primary and junior secondary education (grades one through 10), the numerous fees - including for uniforms, books, boarding costs, and school improvement - placed a heavy burden on poor families and precluded some children from attending. In general, more girls than boys were enrolled in secondary schools. Many San children and children from destitute families did not attend school, but the government continued to provide mobile schools for children who lived in semi-permanent settlements. In 2010 approximately 1,500 girls dropped out of school due to pregnancy. In June the Ministry of Education hosted a conference to address the education system's deficiencies and the cabinet adopted the conference's recommendations in December. Child Abuse: Child abuse was a serious problem, and authorities vigorously prosecuted crimes against children, particularly rape and incest. According to police records and media reports, in 2010 at least 800 children and juveniles were murdered, raped, or assaulted during the year. The true incidence of child abuse was thought to greatly exceed the number of reported cases. Child Marriage: The law prohibits marriage before the age of 18; however, child marriage occurred. Harmful Traditional Practices: Female genital mutilation rarely was practiced. The women's rights organizations Sister Namibia and the Women's Leadership Center continued to condemn cultural practices of initiation sex for young girls, including dry sex (the practice of applying astringents to the vagina before sexual intercourse to enhance male pleasure) and the stretching of the labia minora. Sexual Exploitation of Children: The law criminalizes the actions of both the client and the pimp in cases of sexual exploitation of children under 18 years of age, and also criminalizes child pornography and child prostitution. The minimum legal age for consensual sex is 16, and the penalty for statutory rape is a minimum of five years in prison. Possession of, or international trade in child pornography is also illegal. The government continued to provide training for police officials to improve the handling of child sex abuse cases. Centers for abused women and children worked to reduce the trauma suffered by abused children. NGOs that work with sex workers reported that most child prostitution occurred without third-party involvement, as a means of survival among HIV/AIDS orphans and other vulnerable children. Often, children sold themselves in this way for food, clothing, or other items or money. The existence of HIV/AIDS orphans - although declining for the first time - increased the vulnerability of children to sexual abuse and exploitation. Infanticide: During the year, the media reported numerous cases in which parents, usually young mothers, abandoned and sometimes killed newborns for whom they felt they were not able to care. For example, in December a leading newspaper reported that a young mother first tried to abandon her infant child and then

buried it alive. In 2008 staff at a waterworks facility in Windhoek estimated they discovered an average of 13 newborn bodies every month amongst the human waste flushed down toilets. Anecdotal evidence suggests this trend continues. A 2011 public survey conducted by the Government of Namibia, the Legal Assistance Center, and UNICEF indicated that the main reasons mothers abandon their babies was that the father denies paternity, the mother is a student, or the mother does not know about other options, such as adoption....

[23] Freedom House Namibia² is a 2 on its scale of 1 to 7 freedom index with 1 being the highest.

[24] The principal claimant did not reasonably exhaust all avenues of state protection open to her. Namibia is a democratic state. She also failed to provide clear and convincing evidence rebutting the presumption of state protection. Her subjective reluctance to approach the state because she believes it is powerless against witchcraft does not meet the threshold of clear and convincing evidence rebutting the presumption. These failures are fatal to her claim for protection.

CONCLUSION

[25] For the above noted reasons, I find that the claimants are not "Convention Refugees" nor are they "persons in need of protection". Their claims are rejected. Alexander George Johnstone Alexander George Johnstone July 16, 2012 Date /ds 1 National Documentation Package for Namibia, issued 4 June 2012 and adduced on 18 June 2012, Tab 2.1 US DoS Report, dated 24 May 2012. 2 Ibid, Tab 2.3 Freedom House 2011. REFUGEE PROTECTION DIVISION / VENDETTA / CUSTOM / PERSECUTION BY FAMILY MEMBERS / STATE PROTECTION / FEMALE / SON / NEGATIVE / NAMIBIA

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