



THE HIGH COURT

2023/676 JR

[2024] IEHC 477

BETWEEN:

S.A. (ZIMBABWE and SOUTH AFRICA)

APPLICANT

AND

THE CHIEF INTERNATIONAL PROTECTION OFFICER,

THE MINISTER FOR JUSTICE and

THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL

RESPONDENTS

JUDGMENT of Ms .Justice Mary Rose Gearty delivered on the 4th of July 2024

1. Introduction

1.1 This Applicant came to Ireland from South Africa. She was refused refugee status and subsidiary protection on the basis that she is from South Africa and can return there safely. She submits that she is from Zimbabwe and that the decision to refuse her application is based on errors in respect of her identity, which should persuade me to quash that decision, despite the fact that the errors are based, in part, on misinformation given by the Applicant.

1.2 The attribution of South African citizenship to this Applicant involved rejecting strong evidence that she is from Zimbabwe and relying on incorrect facts. If

that finding on nationality is incorrect, the decision maker has not considered the correct country of origin information. This issue is a material one.

- 1.3 The finding is fundamental and is such that it could not be addressed on appeal. A preliminary decision as to nationality led to the application being considered as part of a fast-track process. The Applicant changed her story after obtaining legal advice. The International Protection Officer (“IPO”) nonetheless made the finding of nationality on the combined basis of answers initially given by the Applicant and an incorrect recitation of the facts in relevant documents.
- 1.4 This conclusion reflects the paramount importance of correct facts as a basis for a finding on nationality and the importance of country of origin information.
- 1.5 This judgment requires consideration of details that would tend to identify the Applicant. All names have been changed and other details have been redacted.

2. Incorrect Facts: from the Applicant and in the IPO Summary

- 2.1 The Applicant arrived in Ireland from South Africa on [date redacted]. She filled out a questionnaire 3 days after her arrival in which she stated that she was a citizen of South Africa and had been born there in August, giving a date and year. She was then interviewed and referred to xenophobic attacks on her by “her own people” because she had married a foreigner, namely, her Zimbabwean husband. She and her husband have children who remain in South Africa. Both parents have applied for protection here in Ireland.
- 2.2 The Applicant obtained access to a lawyer in December, 2023. Her lawyer wrote a letter to the International Protection Office saying that she had not previously had the benefit of legal advice, she was a native of Zimbabwe and was born on a date in August but a different day, two years earlier. The letter continued:
“The error in relation to our client’s nationality has arisen as she understood that she should complete the questionnaire by reference to the country from which she came and not her country of origin. Our client had been living in South Africa but is a citizen of Zimbabwe.”

We note that our client was issued with a letter to attend you for interview on the 13th of December... She has been notified that her case is to be made subject to an accelerated decision making process as her country has been deemed a safe Country of Origin. This is clearly in error and we ask that you confirm by return that this interview has been cancelled and that her case is no longer subject to an accelerated procedure."

Certified copies of her birth certificate and passport were enclosed.

- 2.3 Several points arise in respect of this claim: the first is to note is that one decision had already been made by the time the letter was written, namely, that the Applicant was from South Africa, but this decision was based on her answers in the questionnaire. The second is that the "error" as to nationality, as her solicitor characterised it, could not be explained by the fact that the Applicant thought she was being asked which country she came from. The questionnaire was phrased clearly and referred to the country of her birth. This explains, in part, the initial decision that the Applicant's country of origin was South Africa. Her lawyers sought to reopen this issue before the IPO interview.
- 2.4 The third point is that the date of birth given in her questionnaire was inconsistent with that set out in the solicitor's letter in two particulars; only the month of birth was the same. These three points explain why the IPO reached the finding he did and it would be unassailable but for the following issues which are fatal to an otherwise understandable decision.
- 2.5 The documents attached to this Applicant's solicitor's letter were a birth certificate and a passport. Both appear to be authentic documents and both confirm the date of birth now claimed by the Applicant, and appear to confirm that she is from Zimbabwe. Her marriage certificate, which had also been before the IPO, provides further support for her claim.
- 2.6 The Applicant had answered the questionnaire in the name "*Zandile Cecili Manela*" and her name, according to her birth certificate, was "*Cacile Manala*", where her mother's surname is recorded as "*Manala*". Her date of birth in the certificate is as it appears in the passport. If the names are correct in the certified

documents, even allowing for the addition of her mother's maiden name as part of her own name, the Applicant mis-spelled her name and her mother's name in the questionnaire, leaving out or transposing letters in each case.

2.7 In her passport, the Applicant's photograph appears and she is identified as "Cacile Sibindi". Her date of birth is given in the birth certificate. Her first name is as set out in her birth certificate. The new surname on her passport is explained by a marriage certificate, also exhibited by the Applicant, which names her as "Cacile Sibindi" and names her husband as "Philani Sibindi". The passport was issued over 10 years ago and has now expired. The marriage certificate was not sent in her lawyer's letter but was before the IPO.

2.8 The section 35 interview proceeded in December, after the Applicant had obtained legal advice and after her solicitor's letter, referred to above, was sent. During the interview, the Applicant repeated her claim that she was born in Zimbabwe and that the details in the questionnaire were incorrect. She referred to the birth certificate in order to explain the name used in the questionnaire, pointing to her mother's name. She told the interviewer that she and her husband had bought identity documents in South Africa, that they had owned a business there but that because they were from Zimbabwe, they had been targeted for attack as foreigners in South Africa.

2.9 The Applicant said:

"I wish someone had told me not to put in where I have come from".

She gave this explanation as to why she claimed to be South African:

"I was going according to my ID. It said I was born in South Africa.

Q: You also provided a different name and date of birth than... in the Zimbabwean passport which you submitted. Why did you give a different name and date of birth?

A: because that is what is on my ID. That is what they registered me under... I had the documents from South Africa. If I was stopped on the road and you asked my name I would give the name on my document. Only the document proves who you are."

The Applicant repeated that she had to hide behind the identity documents which she claimed to have bought in South Africa.

2.10 The Applicant was asked questions about South Africa, which she answered with apparently accurate details, but this is not surprising as it is accepted that she had lived there for some years. She was not asked about Zimbabwe, but when being asked about her schooling, she described two institutions in Zimbabwe as being the schools she attended growing up.

2.11 The Applicant also claimed to the IPO that she was from the Ndebele tribe although, in the questionnaire, she had claimed to be from the Zulu tribe of South Africa. When asked about this, she replied that they were the same.

3. The Impugned Decision

3.1 The IPO who considered this application set out his findings in a detailed, 18-page report. He listed the documents he had considered and their status, including: the Applicant's Zimbabwean passport and birth certificate (both listed as originals), her South African National Identity Card (also listed as an original), an original Zimbabwean birth certificate belonging to her husband, and a copy of her marriage certificate.

The IPO decided (at page 5): ... *it is accepted on the balance of probabilities that the applicant is a national of South Africa for the following reasons:*

... the applicant submitted her original South African National Identity Card, which was issued on [date redacted]. It is further noted that she had been issued with a South African passport, which she used to travel to Ireland from South Africa and which she used to obtain a UK visa. The applicant was asked whether these documents were genuine or fraudulently obtained and she replied: "No, it's real. If you check it in the system, we are there. We are South African. ANC wanted to get Mandela out of prison and they wanted us to go and vote. They gave us IDs for 3000 Rand" She was asked whether she was considered a South African citizen and she replied yes.

When the applicant first applied for International Protection and completed her questionnaire, she claimed that she was a South African citizen, that she was born in South Africa and that she resided in South Africa from the time she was born until the time she left South Africa in 2022. She also provided the name "Zandile Cacili Manela" and a date of birth of [redacted]. Prior to the applicants s. 35 interview, correspondence was received from her legal representative dated 5th December 2022 stating that the applicant is a Zimbabwean national and had mistakenly claimed when completing her questionnaire that she was a South African citizen. It was also noted in this correspondence that her name and date of birth is "Cacile Sibindi" [date redacted], which is different from the name and date of birth provided to this office by her when she applied for International Protection. It was submitted by her legal representative that the applicant had misunderstood the questions she had been asked in relation to her nationality in her questionnaire. No explanation was offered in relation to the different name, date of birth or the fact that she had claimed to have been born in South Africa and had lived there all of her life.

When the applicant attended her s. 35 interview, she stated "When I came here, I said that I was from South Africa and I filled my form and I said I was from South Africa, but I am not from South Africa. I wish someone had told me not to put in where I have come from". Although she submitted an original Zimbabwean passport during her s. 35 interview and an original Zimbabwean birth certificate, it is noted that the passport was issued in 2010 and is now expired and both documents contain the name 'Cacile Sibindi' with a date of birth of [Redacted] despite the applicant originally claiming that her name was 'Zandile Cacili Manela' with a date of birth of [redacted] when she first applied for International Protection."

3.2 The IPO found, incorrectly, that the two Zimbabwean documents record this Applicant's name as "Sibindi" and that this was not the name she gave on arrival. That explains his decision but it is clear that this is incorrect. He appears to have taken the view that Ms. Sibindi is a different person, with a different date of birth. In fact, the passport, birth certificate and marriage certificate

combine to suggest this is the same person and offer support for the view that, if this is the same person, she is Zimbabwean. They also tend to show, if they are authentic, that she gave a wholly inaccurate account in her questionnaire, which will be a matter for a future decision maker to consider in terms of credibility, as always, in light of the European Asylum Support Office (“EASO”) Guidelines on Assessing Evidence.

3.3 The IPO made frequent references to the Applicant’s questionnaire in the written report, including her repeated claim to being a South African citizen. When she was questioned about discrepancies, the IPO noted her reply: *“Okay when they mobbed us and they say you married a foreigner, you need to hide again behind the ID.”* The IPO commented that none of the responses provided by the Applicant offered any reasonable explanation for the significant discrepancies in her claim, and concluded that: *“If the Applicant was a Zimbabwean national she would have been expected to state this at the time, given that it is central to her claim.”*

3.4 This does not necessarily follow. When an applicant for international protection arrives, in possession of two sets of identity papers as occurred here, it is, undoubtedly, better for her claim if she offers a true account in the first instance. It is still incumbent on the decision maker to assess what appear to be authentic documents, to consider explanations that are given and to give an accurate recitation of the underlying facts and documents. This may be particularly important if corrections are made after an applicant obtains legal advice although, in this case, her solicitors appear to continue her explanation that she misunderstood the questions.

3.5 In *M.H. v. IPAT*, [2023] IEHC 372, at paragraphs 80 to 81 of her judgment, Phelan J. discussed the importance of considering documents, authenticated or otherwise, in forming a view of the facts. Here, there is no suggestion that the Zimbabwean documents are inauthentic, although one has expired. This leads to the unsatisfactory position that the IPO has taken a view that the Applicant is lying (which must be correct, the only outstanding issue being which version

is untrue?) but has also opted for a nationality that is contradicted by otherwise strong evidence but without explaining how that can be done in this case.

3.6 The written determination of the IPO expressly considers the Zimbabwean passport and birth certificate, again at page 7. In this regard, the IPO comments: *“they [the documents] are in a different name and contain a different date of birth than the name and date of birth originally provided by the applicant. The applicant has failed to provide any reasonable explanations for these significant inconsistencies relating to her identity, date of birth, nationality and place of birth”*.

3.7 The IPO refers to the Applicant’s South African papers and concludes:

“in light of all the significant credibility issues noted above surrounding the applicant’s nationality and identity, and in the absence of any reasonable explanations for them, it is not accepted that she is a Zimbabwean national. Given the fact that the applicant claimed to be a South African national when she first applied for International Protection and given the fact that she has submitted her original South African ID card and travelled using a genuine South African passport, the applicant’s claim will be assessed based on her being a South African national”.

3.8 The IPO relied heavily on the initial claims made by this Applicant. The decision does not mention the apparent authenticity of the Zimbabwean documents, incorrectly recites her surname in one, and rejects her account of being Zimbabwean, accepting the South African documents. The IPO refers to the discrepancies in the Zimbabwean documents compared to her answers. His decision ignores the Applicant’s apparent knowledge of school system in Zimbabwe and the explanation afforded by her married name. While it is in line with the Applicant’s initial claim, the decision also ignores the solicitor’s letter which tried to correct what the Applicant had, until then, asserted.

3.9 Some of the facts recorded in the decision of the IPO are incorrect. In the normal course of events, this might not be material, particularly where the Applicant herself initially gave incorrect details. Given that the alleged discrepancies are stated as a significant credibility issue for this Applicant, it is perhaps

significant to note that most questions as to her name are answered by noting the difference between her maiden name and her married name.

3.10 The argument was made that the IPO was never given the specific answer that the name on her passport was her married name. This is certainly so. However, I note that the IPO had a list of documents available, including a copy marriage certificate, a duplicate from the original register, of the Applicant. Here, her husband's name is listed as "*Philani Sibindi*". In his decision, at page 3, the IPO repeats the answer given by the Applicant in her questionnaire, at question 4.2, which lists her dependent's name as "*Philani Manela*". The IPO had a birth certificate for the Applicant's husband which is not in the papers before the Court. The pattern of an alias being used in the questionnaire is repeated, namely, that the Applicant initially sought to present herself as South African with a different, but similar date of birth, using her maiden name and bestowing that name on her husband. This name was reflected in papers she alleged that she had bought. There is no specific decision recorded as to what the Applicant's husband's name is, nor do I know what is on his birth certificate.

3.11 Having considered the errors as to fact which formed the basis for the finding, the timing of the questionnaire and the fact that the Applicant received legal advice only after she had initially offered misleading information, I am satisfied that the decision that the Applicant was not Zimbabwean was reached on an incorrect basis, namely that apparently authentic documents recorded different names. The main reason given was that the documents were inconsistent with her initial answers, but not only were the documentary inconsistencies incorrectly recorded, her initial answers were jettisoned by her after obtaining legal advice.

3.12 The fact that the Applicant had received legal advice in the meantime contributes to the conclusion that the decision must be reviewed. It is, of course, open to the decision maker to find, again, that the Applicant was lacking in

credibility or indeed that she is South African, but such a decision must be based on an accurate assessment of the various documents provided by her. It is open to a decision maker to rely on the many inconsistent facts set out by the Applicant herself in order to reject some or all of her claim. The assessment of the weight of the evidence may include considering the position of this Applicant before and after she had obtained legal advice. This is part of the process of weighing the evidence fairly, although in this case it may result in a similar decision. That is a finding of fact which is not for this Court to make.

3.13 Phelan J. commented in *M.H.*, (paragraphs 82 to 86) on the assistance to be found in the EASO Guidelines. They do not have binding effect in Ireland as the State has not opted into the recast procedural Directive 2013/32/EU. But the Guidelines are the product of considerable expertise and, as Phelan J. noted, are an authoritative guide to practice in this area.

3.14 I have considered refusing the application on the basis that at least one version offered by this Applicant must be untrue but that would be tantamount to replacing the decision of the IPO with my own decision, which is not my role. Nor would it reflect any assessment of the reasons an initial application may be misleading. It is possible that a robust decision may be reached as to nationality, or dual nationality if that is possible, and that the application will require a consideration of the country of origin information in Zimbabwe. These are all possible outcomes, none of which I can predict at this point.

3.15 As Cooke J. held in *I.R. v. Minister for Justice & Ors* [2009] IEHC 353:

4) The assessment of credibility must be made by reference to the full picture that emerges from the available evidence and information taken as a whole, when rationally analysed and fairly weighed. It must not be based on a perceived, correct instinct or gut feeling as to whether the truth is or is not being told.

5) A finding of lack of credibility must be based on correct facts, untainted by conjecture or speculation and the reasons drawn from such facts must be cogent and bear a legitimate connection to the adverse finding."

3.16 This was a finding as to a material fact which was based on incorrect facts and did not relate to the information taken as a whole, including the chronology of events. The finding of nationality is fundamental to the claim. The ultimate decision also affects the process; the application will be dealt with under an accelerated process if the Applicant is not Zimbabwean, as South Africa has been deemed a safe country of origin.

4. Appeal vs. Review

4.1 As set out, the IPO has reviewed the details of this application and has come to a decision on an incorrect assessment of relevant documentary evidence. This would not, and should not, necessarily lead to a conclusion that the IPO decision should be quashed. The Applicant is entitled to a full re-hearing by the International Protection Appeals Tribunal (“IPAT”).

4.2 The Respondent relies on this argument in tandem with the submission that the errors are not material. As noted above, due to the fundamental nature of the decision, identifying her nationality, this decision affects every argument she makes. Furthermore, the effect of that decision is to accelerate the process of her application. For these reasons, I am satisfied that this is a material error. This finding is also in line with *B.W. v R.A.T.* [2017] IECA 296 where the Court of Appeal held that a material concern is one which is capable of affecting the outcome of the appeal. This appears to me to be such a concern.

4.3 This alone is not sufficient to justify granting *certiorari* unless the error is such that it cannot be corrected on appeal or is so fundamental that it has effectively deprived the applicant of one of the layers of protection available to her. This area of law was recently summarised by Phelan J. in *E.S.O. v IPO and Others* [2023] IEHC 197 and I gratefully adopt her characterisation of this principle:

“...in the normal course, only a flaw which is so fundamental as to deprive the decision maker of jurisdiction is sufficient to support an application by way of judicial review.

An applicant must demonstrate a clear and compelling case that an injustice has been done that is incapable of being remedied on appeal..."

4.4 As set out in *Stefan v. Minister for Justice* [2001] 4 I.R. 203, [2001] IESC 92:

"The applicant is entitled to a primary decision in accordance with fair procedures and an appeal from that decision. A fair appeal does not cure an unfair hearing."

In *F.O. v Refugee Appeals Commissioner* [2009] IEHC 300, Cooke J. held that the court should intervene *"only in the rare and exceptional cases where it is necessary to do so in order to rectify a material illegality in the report which is incapable of or unsuitable for rectification by appeal; which will have continuing adverse consequences for the applicant independently of the appeal; or is such that if sought to be cured by the appeal, will have the effect that the issue or that some wrongly excluded evidence involved, will not be reheard but will be examined only for the first time on the appeal."*

4.5 There is no process whereby IPAT can remit this to an IPO for reconsideration and, if IPAT reaches a different conclusion, it will be the first time the applicant will be considered as Zimbabwean national.

5. Conclusions

5.1 Errors in recording the details from documents supplied by the Applicant, combined with initially misleading answers given by her, led this IPO to make a finding on nationality which appears to be refuted by authentic identity documents. This potentially changes the country of origin, which means that the correct information has not yet been considered at all if the IPO decision on nationality changes when the documents are considered in light of all the facts.

5.2 The finding of fact on nationality in this case led to the application being dealt with in an accelerated process. IPAT can deal with most errors but in this case, the whole process is affected and any appeal hearing becomes, to a very large extent, a first instance hearing before IPAT.

5.3 The case will be remitted for reconsideration. My provisional view is that an award of costs should be made in favour of the Applicant. The matter will be listed in order to hear the parties on the orders required on Tuesday, 9th July.