Federal Court Cour fédérale

Date: 20241023

Docket: IMM-11946-22

Citation: 2024 FC 1665

Ottawa, Ontario, October 23, 2024

PRESENT: The Honourable Madam Justice Ngo

BETWEEN:

MARTINS PETER NWOKOLO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant is a citizen of Nigeria who was excluded from refugee protection under Article 1F(b) of the United Nations Convention Relating to the Status of Refugees [Convention] based on his employment as a senior traffic warden. The Applicant alleges a breach of natural justice during his hearing before the Refugee Protection Division [RPD] of the Immigration and Refugee Board as the Respondent had identified different articles under the Convention that

were incorrectly selected prior to the hearing; and that the RPD erred on its findings refusing his claim. On appeal, the Refugee Appeal Division [RAD] did not find that there had been a breach of procedural fairness and confirmed the RPD's decision that the Applicant is neither a Convention refugee nor a person in need of protection [Decision]. The Applicant seeks judicial review of the RAD's Decision.

[2] For the reasons set out below, the application for judicial review is dismissed. The Decision is not unreasonable.

II. Background and Decision Under Review

[3] The Applicant was a senior traffic warden with the Nigerian police force for thirty-five years before retiring. Throughout his career, he rose in ranks from Constable to become an Assistant Superintendent of Traffic. The Federal Government of Nigeria through the Police Commission recognized his service with a certificate of meritorious service.

[4] In 2005, the Applicant became a pastor in the Chapel of Power Ministries. In 2018, he refused to take a position as a chief priest which led him to be threatened and relocated within Nigeria. In 2019, to flee his persecutors, he travelled to the United States, then entered Canada and claimed refugee status.

[5] On April 11, 2022, the RPD found serious reasons to consider that the Applicant committed, under Article 1F(b) of the Convention, serious non-political crimes prior to entering Canada, namely extortion and bribery. The RPD found that the police force as well as the traffic

wardens are highly corrupt and that members of these forces are expected to contribute to this system of returns. Hence, even though the Applicant alleges that he has never taken any bribes or extorted people as a traffic warden, the RPD found that there were serious reasons to consider that the Applicant participated in those activities. The RPD concluded that he was a person referred to in section 98 of the *Immigration and Refugee Protection Act* [IRPA] and is therefore excluded from the definitions of Convention refugee or person in need of protection.

[6] On November 14, 2022, the RAD upheld the RPD's decision that the Applicant was excluded from refugee protection.

III. Issues and Standard of Review

[7] The issues in this case are whether there was a breach of procedural fairness and whether the RAD's Decision was unreasonable.

[8] The Applicant argues a breach of procedural fairness in finding him excluded from refugee protection. The Respondent identified other articles of exclusion on the form when he sought to intervene before the RPD. The Applicant contends that the exclusion under Article 1F(b) was added at the outset of the hearing, late in the proceedings, which prevented the Applicant to respond properly. Additionally, the Applicant alleges that the Decision is unreasonable as the RAD erred in its application of the factors to assess complicity from *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 [*Ezokola*].

[9] The parties agree that the applicable standard of review on the merits of the Decision is reasonableness (*Canada* (*Minister of Citizenship and Immigration*) *v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 10, 25). A determination that a claimant is excluded from protection under Article 1F(b) of the Convention is reviewable on a standard of reasonableness (*Dos Santos E Silva v Canada (Citizenship and Immigration)*, 2023 FC 341 at para 11; *Gyateng v Canada (Immigration, Refugees and Citizenship)*, 2022 FC 1660 at para 31; *Brown v Canada (Citizenship and Immigration))*, 2022 FC 736 at para 22).

[10] I agree that the applicable standard of review on the merits of the Decision is reasonableness. To avoid intervention on judicial review, the decision must bear the hallmarks of reasonableness – justification, transparency and intelligibility (*Vavilov* at para 99). A reasonable decision will always depend on the constraints imposed by the legal and factual context of the particular decision under review (*Vavilov* at para 90). A decision may be unreasonable if the decision-maker misapprehended the evidence before it (*Vavilov* at paras 125-126). The party challenging the decision bears the onus of demonstrating that the decision is unreasonable (*Vavilov* at para 100).

[11] A claim of procedural fairness is determined on a standard of review more akin to the standard of correctness. The Court must analyze whether the proceedings were fair in light of all the circumstances (*Baker v Canada (Minister of Citizenship and Immigration*), 1999 CanLII 699 (SCC), [1999] 2 SCR 817 [*Baker*] at paras 21 to 28; *Canadian Pacific Railway Limited v Canada (Attorney General)*, 2018 FCA 69 at paras 54-56; *Lipskaia v Canada (Attorney General)*, 2019 FCA 267 at para 14).

[12] The fundamental question remains whether the applicant knew the case to be met and whether he or she had a full and fair opportunity to respond to it. The duty to act fairly is twofold: (1) the right to a fair and impartial hearing before an independent decision-maker, and (2) the right to be heard (*Fortier v Canada (AG)*, 2022 FC 374 at para 14; *Therrien (Re)*, 2001 SCC 35 at para 82). Everyone is entitled to a full and fair opportunity to present his or her case (*Baker* at para 28).

IV. Analysis

A. *There was no breach of procedural fairness*

[13] The bulk and focus of the Applicant's submissions at the hearing related to the allegation that he was not aware that the subject matter of the RPD hearing would be Article 1F(b) of the Convention, that he was caught by surprise by the Respondent's amendment at the outset of the hearing and was unprepared for the hearing. He did not understand that his hearing would be based on an exclusion under Article 1F(b).

[14] The RAD found that there was no breach of procedural fairness. This conclusion is not unreasonable based on the record before the RAD. I also find that the Applicant did not raise allegations of procedural fairness at the earliest practical opportunity during the RPD process, and cannot raise these allegations now on judicial review.

[15] It is well established that the requirements of the duty of fairness are eminently variable and must be determined on a case-by-case basis (*Baron v Canada (Attorney General)*, 2023 FC 1177 at paras 22-24).

[16] It is also trite law that a party that knows of a procedural flaw, effect or irregularity with an administrative process must raise it with the administrative decision-maker as soon as reasonably possible. It must give the first-instance decision-maker a chance to address the matter before any harm is done, to try to repair any harm or to explain itself. A party, knowing of a procedural problem at first instance, cannot stay still in the weeds and then, once the matter is in the appellate court, pounce (*Hennessey v Canada*, 2016 FCA 180 at para 21; see also *Irving Shipbuilding Inc. v Canada (Attorney General)*, 2009 FCA 116 at para 48; *Canada (Minister of Transport, Infrastructure and Communities) v Farwaha*, 2014 FCA 56 at para 113; *Kozak v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 124 at para 66).

[17] A party's failure to raise a breach of procedural fairness allegation at the earliest practical opportunity will amount to an implied waiver (*Highway v Peter Ballantyne Cree Nation*, 2023 FC 565 at paras 56-57, citing *Muskego v Norway House Cree Nation Appeal Committee*, 2011 FC 732 at para 42).

[18] At the hearing, the Applicant focused on the Respondent's Amended Notice of Intervention [Notice] that was filed on December 1, 2021. In the Notice, the boxes beside Articles 1F(a) and 1F(c) of the Convention were checked. However, as the Respondent rightfully pointed out, the text in the Notice stated that, "there are serious reasons for considering that the

claimant has committed serious non-political crimes in Nigeria prior to entering Canada." As such, I agree with the Respondent that while the wrong boxes were checked, the particulars in the text of the Notice related to the language for Article 1F(b).

[19] More importantly, at the beginning of the RPD's first hearing on December 9, 2021, the Respondent clarified that there was an error in the Notice where the wrong articles were checked. The Respondent identified the text accompanying this section in the Notice. The RPD addressed this issue with the Applicant, who was represented by counsel. Counsel confirmed that he received the Notice specification and had no comment on this matter.

[20] The Applicant did not ask for an adjournment of the hearing. As the other two articles of the Convention were not the subject matter of the Minister's intervention, only Article 1F(b) remained.

[21] The hearing proceeded but was not completed in December 2021. The parties returned to the RPD on February 24, 2022, for a continuation of the hearing. Both parties were also permitted to file additional documentary evidence in the meantime.

[22] The second RPD hearing took place two months after the first one, and the transcript of the second RPD proceedings also confirms that Applicant explicitly stated his intention to make submissions only on Article 1F(b) of the Convention. During this hearing, the Applicant argued thoroughly on the reasons why Article 1F(b) of the Convention should not apply to him. He also provided written submissions on this issue.

[23] The Applicant was represented by counsel before the RPD. He had the opportunity to raise a breach of procedural fairness, whether it be raising an objection to the Respondent's correction or seeking an adjournment of the hearing. There were multiple opportunities: at the first RPD hearing, in the two months between the two hearings, during the second hearing and following the second hearing. However, the Applicant never took these opportunities to raise any issue of procedural fairness before the RPD. I find that he has waived the right to do so on judicial review.

[24] Furthermore, upon reviewing the record that was before the RAD, including the transcripts of the RPD hearings, it was clear that the Applicant was aware that Article 1F(b) of the Convention would be the only subject matter of the RPD hearing. He availed himself of the opportunity to provide additional documentary evidence and further submissions to the RPD on the issue of Article 1F(b) of the Convention. He knew the case he had to meet and had a fulsome opportunity to defend himself throughout the proceedings. I am satisfied that there was no breach of procedural fairness in any event.

[25] The RAD considered the record before the RPD in concluding that there was no breach of procedural fairness. I see no reason to disturb this finding.

[26] I also reject the Applicant's argument about his previous counsel's incompetence or that he failed to explain to the Applicant the implication of Article 1F(b). The Applicant has only made bold statements in this regard. Furthermore, he has not complied with the Federal Court's *Consolidated Practice Guidelines for Citizenship, Immigration, and Refugee Protection*

Proceedings (June 24, 2022; last amended October 31, 2023) and as a result, there is no evidence before this Court from the previous counsel.

B. *The Decision is reasonable*

[27] While the issue of procedural fairness was the Applicant's focal point at the hearing, I have also considered the reasonableness of the Decision.

[28] The Applicant's main contention on the merits of the RAD's Decision is how it applied the complicity analysis as described in *Ezokola*. He also challenges the RAD's credibility findings.

[29] The Supreme Court described the "complicity factors" to be considered included the size and nature of the organization, the part of the organization with which the claimant was most directly concerned, the claimant's duties and activities within the organization, the claimant's position or rank in the organization, the length of time the claimant was in the organization (particularly after acquiring knowledge of the group's crime or criminal purpose), the method by which the claimant was recruited and the claimant's opportunity to leave the organization (*Ezokola* at para 91).

[30] The Applicant argued that as a senior warden in the smaller traffic control section of the national police force, he should not be caught automatically under the crimes associated with the larger organization. The Applicant contends that the RAD failed to consider his evidence about

his lack of knowledge about the corruption of the police force, and his religion and faith that run contrary to corruption.

[31] I agree with the Respondent that the RAD considered evidence of the endemic and hierarchical nature of corruption (extortion and bribery) among traffic wardens in its analysis of the complicity factors under *Ezokola* and the national documents relating to this section, contrary to the Applicant's submissions. The RAD also considered the Applicant's testimony in light of this objective evidence in assessing his credibility. His testimony was found to be vague, evasive and contradictory. The Applicant is asking the Court to reweigh the evidence by considering the evidence and coming to a different conclusion, which it cannot do on judicial review.

V. Conclusion

[32] For the reasons above, I do not find that the Decision was unreasonable. It was transparent, intelligible and coherent, and responsive to the evidence that was before the decision-maker. The application for judicial review is therefore dismissed.

[33] There was no question for certification.

JUDGMENT in docket IMM-11946-22

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. There is no question for certification.

"Phuong T.V. Ngo"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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