Federal Court  Cour fédérale

Date: 20111125

Docket: IMM-6318-10

Citation: 2011 FC 1367

Ottawa, Ontario, November 25, 2011

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

WYCLIFF CHRISTBELL MWESIGWA
(a.k.a WYCLIFF CHRISTB MWESIGWA)

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant seeks to set aside a decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada (the Board), dated September 24, 2010, which found him to be neither a Convention refugee nor a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, 2001, c. 27 (*IRPA*). The principal ground of argument is that the Board breached the principles of natural justice when it declined his request for an adjournment in order that he might obtain and instruct counsel. As a secondary ground, the applicant contends that the Board erred in finding that there was no credible basis for his claim that

he faced persecution in Uganda. For the reasons that follow, the application for judicial review is dismissed.

The Facts

[2] The applicant left Uganda in 1999 and entered the United States (U.S.) under his true name using a Ugandan passport. In 2000, he made an asylum claim alleging that he was a citizen of Rwanda and a fear of persecution based on his life and experiences in Rwanda. His claim in the U.S. was accepted and he obtained permanent resident status in the U.S. on that basis.

[3] After living in the U.S. for nine years, the U.S. Bureau of Citizenship and Immigration Services notified the applicant that it had obtained information that he was not a citizen of Rwanda, as he had claimed. The applicant was summoned to appear at an asylum revocation hearing on February 21, 2008. In response, the applicant requested a 90 day adjournment of the hearing to produce documents then departed the U.S. for Canada and did not return.

[4] The applicant filed a refugee claim upon his arrival in Canada. His Personal Information Form (PIF) was, as in the U.S., based on a fabricated Rwandan identity. The applicant retained counsel to represent him at his refugee hearing, which was ultimately scheduled for September 23, 2010.

[5] Three months before the hearing, on June 23, 2010, the Minister of Citizenship and Immigration Canada (the Minister) notified the applicant that he intended to intervene in the hearing. The Minister advised that information had been obtained from the U.S. and Ugandan

governments confirming the applicant's identity as a Ugandan. The Minister's disclosure included a statement from the U.S. Department of Homeland Security noting that a Notice to Appear at an asylum revocation hearing had been issued to the applicant.

[6] Two weeks later, on July 6, 2010 the applicant's former counsel withdrew as counsel of record.

[7] The refugee hearing was held on September 23, 2010. The applicant testified that he spoke with two lawyers prior to the hearing but that they did not have time to represent him. He could not recall their names. On the eve of his refugee hearing however he found an immigration consultant who told him he could not represent him on such short notice but advised him to appear and request a 30 day adjournment. The applicant followed this advice and requested a 30 day adjournment in order to obtain and instruct counsel.

The Decision Under Review

[8] The Board denied the request for an adjournment on the grounds that the applicant had more than two months to obtain counsel and in approaching only two lawyers, did not demonstrate a serious effort to proceed on the day of the hearing. The Board also found that granting the request would unreasonably delay adjudication of the applicant's claim.

[9] It was only after the Board rejected the request for an adjournment that the applicant conceded that his PIF was almost entirely untruthful, based as it was on the applicant's false identity as a Rwandan. It contained false information with respect to the applicant's place of birth,

nationality, ethnicity, first language, his alleged employment and education in Rwanda and false information regarding his arrest and detention by Rwandan authorities.

[10] The Board concluded that the applicant was still a permanent resident of the U.S. and, in consequence, was excluded from the refugee protection process by virtue of section 98 of the *IRPA*, which incorporates Article 1E of the United Nations' *Convention Relating to the Status of Refugees*, [1969] Can TS No 6 (the *Convention*) into Canadian law. In reaching this conclusion, the Board relied on the applicant's U.S. Refugee Travel Document which identified him as a U.S. permanent resident, valid until January 31, 2016, and his U.S. permanent resident card. The applicant testified that these were both genuine documents and that he had relied on them to gain admission as a temporary resident in Canada at Toronto's Pearson International Airport in 2008. The Board asked the applicant whether he had any evidence that a deportation order had been issued against him. The applicant replied that he had no such evidence. The Board concluded that the applicant held permanent resident status in the U.S.

[11] The Board's finding that the applicant was a permanent resident of the U.S. and thus precluded from refugee protection in Canada was sufficient to dispose of the matter before it. Nevertheless, the Board continued and examined the substance of the applicant's claim. The Board found that the applicant had not established his identity as a Ugandan citizen and that, in any event, there was no credible basis to his claim of risk of persecution.

[12] The applicant did not provide any evidence to corroborate either his identity as a Ugandan citizen or the persecution he alleged he faced in Uganda. The Board concluded that the only

evidence on the issue of persecution was the applicant's uncorroborated testimony, which was lacking in meaningful precision or detail.

[13] The Board gave no weight to the applicant's testimony about his identity or the events said to give rise to his persecution in Uganda. The Board noted that the applicant had misrepresented his identity in both Canada and the U.S. for a period of 10 years and, up until the June 23, 2010 disclosure by the Minister and the denial of the adjournment, seemed prepared to continue to do so. The Board noted that the applicant's "change of heart appears to have come about only subsequent to the disclosure of the Minister of June 23, 2010". As the applicant did not introduce any evidence to prove his identity or nationality as a Ugandan, the Board also concluded that the applicant had not discharged his burden of establishing his identity.

The Issues

[14] As noted, the crux of the applicant's argument is that the Board erred by refusing to grant his request for an adjournment to obtain counsel. Issues of procedural fairness are to be reviewed on a correctness standard, but whether the Board erred in its assessment of the evidence of the risk of persecution, the applicant's identity is reviewed on a reasonableness standard.

Misconduct Disentitling the Applicant to Relief

[15] The remedies of *certiorari*, *mandamus* prohibition, *quo warranto* are, in origin and substance, extraordinary and discretionary. They are extraordinary in that the decision of the tribunal, board or individual lawfully mandated to make the decision is set aside by the Court. They are discretionary in that the right to anyone of them may be denied for reasons including

prematurity, mootness, waiver, impermissible collateral attack, conduct, the existence of an alternate remedy, or on the basis of a broader assessment of the balance of convenience between the parties. This common law principle is reflected in section 18.1(3) of the *Federal Courts Act* (RSC, 1985, c F-7) which provides that the Court *may*, on application, grant relief. The Supreme Court of Canada has observed that "[t]he use of permissive, as opposed to mandatory, language in s. 18.1(3) preserves the traditionally discretionary nature of judicial review": *Canadian Pacific Ltd v Matsqui Indian Band*, [1995] 1 SCR 3, para 31. In *Mining Watch Canada v Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 SCR 6 at para 52 the Supreme Court of Canada affirmed that:

> …the fact that an appellant would otherwise be entitled to a remedy does not alter the fact that the court has the power to exercise its discretion not to grant such a remedy, or at least not the entire remedy sought. However, because such discretionary power may make inroads upon the rule of law, it must be exercised with the greatest care.

[16] More recently, the Court of Appeal reviewed the long antecedence of this principle in Canadian jurisprudence in *Canada (Border Services Agency) v C.B. Powell Limited*, 2010 FCA 61.

[17] In *Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, [2006] FCA 14, the Federal Court of Appeal canvassed the discretionary nature of prerogative relief and outlined the considerations that should inform the exercise of discretion to withhold relief that might otherwise be forthcoming. After stating the principle that "… if satisfied that an applicant has lied, or is otherwise guilty of misconduct, a reviewing court may dismiss the application without proceeding to determine the merits or, even though having found reviewable error, decline to grant relief", Evans JA, writing for the Court, continued:

> In exercising its discretion, the Court should attempt to strike a balance between, on the one hand, maintaining the integrity of and preventing the abuse of judicial and administrative processes, and, on the other, the public interest in ensuring the lawful conduct of government and the protection of fundamental human rights. The factors to be taken into account in this exercise include: the seriousness of the applicant's misconduct and the extent to which it undermines the proceeding in question, the need to deter others from similar conduct, the nature of the alleged administrative unlawfulness and the apparent strength of the case, the importance of the individual rights affected and the likely impact upon the applicant if the administrative action impugned is allowed to stand.

[18] The first two considerations identified by the Court of Appeal, the seriousness of the misconduct and its materiality or nexus to the proceedings, are acutely applicable in this case. The immigration and refugee system depends, for its effective and principled operation, on forthright, comprehensive and truthful testimony from those who seek entry to Canada. The work of the Board, the Federal Courts and public confidence in the immigration and refugee system is not enhanced by according discretionary relief to those who advance a claim through fabrication, half-truths and lies. In consequence, prerogative relief is discretionary and may be refused where the applicant has engaged in misconduct, such that to grant an equitable or prerogative remedy would undermine the Court’s process or bring the administration of justice into disrepute.

[19] For over a decade the applicant deceived U.S. and Canadian immigration authorities as to the true facts as to his identity and circumstances of his claim for protection under the *Convention*. The deceit permeated all aspects of his claim. He conceded that he lied as to his place of birth, nationality, ethnicity, first language, employment and education. He conceded that he fabricated the story of his arrest and detention by Rwandan authorities. It was only when the truth was later

discovered by the U.S. government, transmitted to the Minister (of Citizenship and Immigration) who subsequently indicated an intention to rely it, and his adjournment request denied, that the applicant finally chose to tell the truth.

[20] The applicant's misconduct was pervasive, persistent and deliberate and had a direct and material nexus to the adjudicative process in issue. To grant this application for judicial review would in effect, reward the applicant for his conduct and erode public confidence in the Canadian refugee determination process.

[21] The discretion to dismiss an application on discretionary grounds has to be carefully exercised, as the supervisory jurisdiction of superior courts is directed to ensuring that decisions are made in accordance with the law, Evans JA, in *Thanabalasingham* identified several criteria that should inform the exercise of discretion. I have already discussed the seriousness of the misconduct, its materiality to the issue to be determined, and the importance of preventing abuse of administrative process. I turn now to the nature of the alleged administrative unlawfulness and the apparent strength of the case. This necessitates and analysis of the merits of the case, as it provides further content and context to the decision to dismiss this application.

Failure to grant the adjournment request

[22] The applicant argues that exclusion is one of the more complex issues that confronts a Board. Exclusion requires a determination whether the claimant enjoys the rights and obligations of a national in a safe country. The gravamen of the error in the exercise of discretion, it is alleged, is that the Board addressed the exclusion analysis on the basis that the applicant was a permanent

resident of the U.S. The case becomes complex, it is contended, if it is assumed that the applicant is no longer a permanent resident, or may in the future, no longer be a U.S. permanent resident. It is contended that the Board ought to have considered the issue of complexity on the basis of this assumption, particularly in light of the fact that Rule 48(4)(k) of the *Refugee Protection Division Rules* (SOR/2002-228) requires, by mandatory language, that complexity be considered on deciding whether to grant an adjournment.

[23] A decision whether to grant an adjournment is discretionary. Complexity is but one criterion and the weight or value to be given to it will, provided the outcome falls within the broad parameters of reasonableness, not be disturbed. Additionally, there is no absolute right to counsel in immigration matters. The presence or absence of counsel is not determinative of the fairness of the hearing: *Wagg v Canada*, 2003 FCA 303, [2004] 1 FCR 206. To ensure that the hearing is fair, the applicant must be able to participate meaningfully. The question is whether the absence of counsel resulted in unfairness such that this Court's intervention is warranted. Here, the applicant indicated that he understood the Board's explanation of exclusion. The applicant indicated he was ready to proceed without counsel at two different points in the hearing.

[24] It is important, in assessing the ultimate fairness of the hearing, to recall that the applicant did not bring any documents to the hearing to show that his permanent resident status had been revoked. The applicant had two years to address the effect of his status in the U.S. for his Canadian refugee claim and to prepare for his hearing. He was represented by counsel for almost that entire length of time. Even though he fled the U.S. upon notice of an asylum revocation hearing, he had ample opportunity to determine his status in the U.S. and obtain any documentation necessary to

establish that he had lost protection in the U.S. Even if exclusion had not been specifically raised at the outset of his hearing, in Canada, his former counsel would have recognized the need to investigate his status in the U.S., given the length of time the applicant resided in the U.S. In any event, by June 23, 2010, the date of the Minister's disclosure, the applicant would have known, or ought to have known, that exclusion was in issue.

[25] In sum, the denial of the adjournment neither undermined the fairness of the hearing nor was it unreasonable. The applicant was aware of, but chose not to disclose, facts which might have rendered his case so complex such that an adjournment might have been granted. The applicant had two years to adduce evidence of his status, or lack thereof, in the U.S., or to introduce the facts which might have rendered his case complex so as to make the refusal to grant an adjournment unreasonable. On the facts before the Board there was no evidence that the applicant took any steps to obtain evidence that would, in fact, change the factual foundation of his claim.

The Claim under Section 96

[26] The Board also considered the substance of the applicant's refugee claim. The applicant alleged that in 1999, he was detained on two occasions by the state security services in Uganda because of his acquaintance with an officer in the Ugandan army who was suspected of opposing the government. He provided no documentation to support this claim. Given the absence of any corroborating evidence in support and the vagueness the permeated his evidence, the Board's rejection of the claim was reasonable. There were also ample grounds to support the Board's finding that the applicant was not credible. In light of the applicant's willingness to misrepresent his identity to Canadian and U.S. officials for over eleven years, the Board reasonably gave little weight

to the applicant's testimony of these alleged events in Uganda. As there was no reviewable error in the Board's finding that the applicant was not credible and had not established a serious possibility of persecution in Uganda I would not, regardless of my ruling on misconduct, intervene on the basis of any error with respect to either the identity analysis or the merits of the applicant's refugee claim.

Faulty recording

[27] There was a break in the transcript of the proceedings before the Board. The applicant submits that an incomplete transcript does not allow a reviewing court to adequately assess the reasonableness of the findings on credibility.

[28] Lack of a record does not pre-emptively constitute a breach of procedural fairness. The analysis remains contextual. The Board produced a substantially complete transcript and only a small portion appears missing. Any deficiencies in the transcript did not impede the argument on this judicial review; moreover the applicant did not identify which portions of his testimony were not recorded and how the missing portions of the transcript prejudiced his application for judicial review. Procedural fairness is not breached on mere speculation that an unformed or unarticulated argument might be lurking in gaps in the record. In any event, the applicant does not resile from the facts material to the exclusion analysis. This argument fails.

Conclusion

[29] To return to the point of principle, having examined the merits of the claim in accordance with the criteria in *Thanabalasingham*, this is an appropriate case within which the discretion to dismiss on the basis of conduct is warranted. The application for judicial review is dismissed by

reason of the applicant's mendacious conduct which disentitles him to any of the equitable remedies this Court has the jurisdiction to grant.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be and is hereby dismissed. No question for certification has been proposed and none arises.

"Donald J. Rennie"
Judge

ANNEX A

***Immigration and Refugee Protection Act*, 2001, c. 27**	***Loi sur l'immigration et la protection des réfugiés* (L.C. 2001, ch. 27)**
98. A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.	**98.** La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.
United Nations' *Convention Relating to the Status of Refugees*, [1969] Can TS No 6	***Convention relative au statut des réfugiés des Nations Unies*, R.T. Can. 1969 n^{o} 6**
E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.	**E.** Cette Convention ne sera pas applicable à une personne considérée par les autorités compétentes du pays dans lequel cette personne a établi sa résidence comme ayant les droits et les obligations attachés à la possession de la nationalité de ce pays.

ANNEX B

Rule 48(4) of the *Refugee Protection Division Rules* (SOR/2002-228) sets out eleven factors a member must consider when deciding an application for adjournment, one of which is complexity.

Refugee Protection Division Rules (SOR/2002-228)	**Règles de la Section de la protection des réfugiés (DORS/2002-228)**
48.	**48.**
[…]	[…]
Factors	Éléments à considérer
(4) In deciding the application, the Division must consider any relevant factors, including	(4) Pour statuer sur la demande, la Section prend en considération tout élément pertinent. Elle examine notamment :
(*a*) in the case of a date and time that was fixed after the Division consulted or tried to consult the party, any exceptional circumstances for allowing the application;	*a*) dans le cas où elle a fixé la date et l'heure de la procédure après avoir consulté ou tenté de consulter la partie, toute circonstance exceptionnelle qui justifie le changement;
(*b*) when the party made the application;	*b*) le moment auquel la demande a été faite;
(*c*) the time the party has had to prepare for the proceeding;	*c*) le temps dont la partie a disposé pour se préparer;
(*d*) the efforts made by the party to be ready to start or continue the proceeding;	*d*) les efforts qu'elle a faits pour être prête à commencer ou à poursuivre la procédure;
(*e*) in the case of a party who wants more time to obtain information in support of the party's arguments, the ability of the Division to proceed in the absence of that information without causing an injustice;	*e*) dans le cas où la partie a besoin d'un délai supplémentaire pour obtenir des renseignements appuyant ses arguments, la possibilité d'aller de l'avant en l'absence de ces renseignements sans causer une injustice;
(*f*) whether the party has counsel;	*f*) si la partie est représentée;
(*g*) the knowledge and experience	

of any counsel who represents the party;

(*h*) any previous delays and the reasons for them;

(*i*) whether the date and time fixed were peremptory;

(*j*) whether allowing the application would unreasonably delay the proceedings or likely cause an injustice; and

(*k*) the nature and complexity of the matter to be heard.

g) dans le cas où la partie est représentée, les connaissances et l'expérience de son conseil;

h) tout report antérieur et sa justification;

i) si la date et l'heure qui avaient été fixées étaient péremptoires;

j) si le fait d'accueillir la demande ralentirait l'affaire de manière déraisonnable ou causerait vraisemblablement une injustice;

k) la nature et la complexité de l'affaire.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6318-10
STYLE OF CAUSE:	WYCLIFF CHRISTBELL MWESIGWA (a.k.a WYCLIFF CHRISTB MWESIGWA) v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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