

Federal Court



Cour fédérale

Date: 20120327

Docket: IMM-4367-11

Citation: 2012 FC 364

Ottawa, Ontario, March 27, 2012

PRESENT: The Honourable Madam Justice Bédard

BETWEEN:

MAKENGO NSIALA NARA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] of a decision made by the Refugee Protection Division of the Immigration and Refugee Board (the Board) on May 19, 2011, wherein it rejected Mr. Makengo Nsiala Nara's (the applicant) application for refugee protection in Canada. The Board determined that the applicant was neither a Convention refugee within the meaning of section 96 of the Act, nor a person in need of protection within the meaning of section 97 of the Act.

I. Background

[2] The applicant is a citizen of the Democratic Republic of Congo (DRC) and of the Republic of South Africa (RSA).

[3] He studied medicine at the University of Kinshasa and began his career as a physician in October 1987, working in a hospital in Kinshasa.

[4] The applicant's claim is based on the following allegations.

[5] In January 2001, while practicing medicine in the DRC, security forces arrested him without reason, detained him, tortured him and injected him with drugs. The security forces wanted him to sign some documents contradicting genuine medical reports about patients who were mistreated by government forces.

[6] The applicant was able to escape four days later by bribing one of the prison wardens. Believing that he would never be safe in the DRC, he left the country and made his way to the RSA, leaving his family behind in Kinshasa.

[7] At first, the applicant thought that he would be unable to stay in the RSA, as he arrived as an undocumented migrant; the RSA does not accept refugee claims from other African countries. However, he discovered that he could re-certify as a doctor and practice medicine in remote areas of the RSA where other physicians would not want to work. He passed the licensing exams and

secured employment in a remote province in the RSA. His ten-year employment contract restricted his work to public hospitals in the province of Limpopo. Through this process, he also obtained an exemption that allowed him to secure citizenship in the RSA as well as maintain his DRC citizenship.

[8] The applicant began working at the Dr. Cn Phatudi Hospital near the town of Tzaneen in Limpopo. Eventually, social problems developed in the area in which the applicant was working. There were electricity and water supply disruptions and, on these occasions, the locals went to the hospital to get water. At one point, the hospital authorities prevented the doctors from providing water to the local population. In retaliation, the local population began holding xenophobic rallies and threatened the foreign doctors who worked at the hospital.

[9] In April and September 2005, burglars broke in to the applicant's house and stole from him. He faced continued threats and the locals treated him like a "demon or a witch" because he lived alone, without a family. The applicant faced particular vulnerability because his accent made it obvious that he was a foreigner. He was unable to relocate because his registration to work as a doctor was limited to the area in which he was living and working.

[10] The local police knew about the incidents and occasionally provided the applicant with security agents and sent patrols in an effort to protect him. However, they were unable to restore safety to the area.

[11] In December 2005, the applicant learned that his family had made its way to Canada. He applied for a visa to visit his family but the Canadian embassy refused his application. The applicant attempted to enter Canada from the United States (US) on June 4, 2006 but was refused entry. He returned to the RSA.

[12] The situation in the RSA continued to deteriorate. In May 2007, two people attacked the applicant with a gun on his way home from work. They threatened to kill him and assaulted him. The assailants ran away when someone approached. The incident left the applicant seriously injured.

[13] Fearing for his life, the applicant eventually resigned from his job in July 2007, left the RSA the same month, and went to the US. He attempted to enter Canada in August 2007 through the Fort Erie border and was refused entry, once again. The applicant lived as an illegal alien in the US starting on January 24, 2008. He finally entered Canada illegally in February 2009 and claimed refugee protection in March 2009.

II. Decision under review

[14] The Board determined that the applicant was neither a Convention refugee, nor a person in need of protection. The determinative issues were a lack of nexus to a Convention ground and the existence of adequate state protection.

[15] The applicant claimed refugee protection against both his countries of nationality but the Board limited its analysis to the applicant's claim against the RSA. The Board stated that, according

to section 96 of the Act, claims must be established against all countries of nationality. Accordingly, once the RSA claim failed, it was not necessary to proceed to an analysis of the applicant's claim against the DRC.

[16] The Board accepted the applicant's testimony as credible.

[17] The Board made several findings.

[18] First, it found that the applicant's experiences did not amount, singularly or cumulatively, to persecution on Convention grounds. The Board determined that the claimant fears being a victim of crime which does not give rise to protection under the Convention. The Board stated that the claimant fears xenophobia in the RSA, but found that the fact that the RSA accredited him as a foreign-trained doctor and gave him citizenship within a few months of his improperly documented arrival was hardly consistent with xenophobia. The Board further found that the three incidents described by the applicant amounted to random criminal acts and not to xenophobic attacks. The Board excerpted several statements from various country conditions documents, explaining that poverty and crime is rampant in the RSA. On the basis of this documentary evidence, the Board affirmed that it was persuaded that crime is widespread in the RSA and was not limited to naturalized citizens or rooted solely in xenophobia. The Board insisted that being a victim of crime does not provide nexus to the Convention.

[19] The Board acknowledged that, while the applicant's Congolese origin "may have played a part in the incidents he experienced, they remain[ed] at their core criminal acts which, according to

the documentary evidence, are widespread in South Africa and not limited to foreign nationals, or persons perceived to be foreigners”.

[20] Second, the Board determined that the applicant was not a person in need of protection. It found that the applicant did not face a danger of torture in the RSA. It also determined that the applicant did not face a personalized risk to his life because of xenophobic violence in the RSA. The Board cited the US Department of State Report for the year 2009, which stated that, although xenophobic attacks on foreign African migrants remained a problem, the attacks did not occur on the same scale as they did the previous year. The Board concluded the following:

[16] Given the personal situation of the claimant, as a foreign-trained doctor, recruited by the government to work in ill-served parts of the country, and his own declared experience, the panel is not persuaded that he faces a personalized risk to his life, on a balance of probabilities.

[21] Third, the Board found that, even if the risks feared by the applicant were personalized, he failed to rebut the presumption of state protection. The Board found that the applicant’s evidence about the police investigations into the attacks that he experienced in May 2007 showed that he had received adequate state protection in the past. The Board acknowledged that the police may not be perfect in the RSA but considered, after having reviewed the evidence, that in light of the relevant jurisprudence, adequate state protection would be forthcoming to the claimant if he were to return to the RSA, as had been previously provided.

III. Issue

[22] The single issue to be determined in this case is whether or not the Board’s decision was reasonable.

IV. Standard of review

[23] Neither party made any submissions regarding the applicable standard of review. However, the issue at bar relates to the Board's assessment of the evidence before it. It is well established that the Board's decisions on whether an applicant meets the criteria of a Convention refugee or a person in need of protection, or whether an applicant has rebutted the presumption of state protection, are all findings that are reviewable under the reasonableness standard (*Canada (Minister of Citizenship and Immigration) v Huntley*, 2010 FC 1175 at para 35-37, 375 FTR 250 [*Huntley*]).

V. Analysis

A. *Applicant's submissions*

[24] The applicant challenges the Board's decision on three grounds.

[25] First, he argues that the Board erred in determining that he did not establish a nexus to a Convention ground. The applicant insists that his own evidence, which was not challenged, was that the attacks he experienced were based in part on xenophobia. The documentary country evidence also supports the existence of xenophobia against non-RSA national Africans. The applicant argues that the Board itself acknowledged that his Congolese origin may have contributed to him becoming a target of violence. The applicant argues that mixed motives are enough to establish a nexus to a Convention ground when they include a Convention ground and relies on *Shahiraj v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 453 at para 20, 205 FTR 199 [*Shahiraj*] to support his argument. Therefore, as the Board determined that the violence that he suffered was at

least partially motivated by xenophobia, it should have concluded that he had established a nexus to a Convention ground.

[26] The applicant argues that *Huntley*, above, on which the Board relied, is distinguishable from the case at bar; *Huntley* dealt with a claim involving a white farmer. Further, the Board found that there was no evidence of mixed motives.

[27] Second, the applicant argues that in its section 97 analysis, the Board failed to conduct a forward-looking assessment of the risks that he would face if he were to return to the RSA and limited its analysis to his past experience. The applicant insists that the documentary evidence, which is dated after he left the RSA, establishes that xenophobia against foreign African migrants remained a problem and that there was a serious possibility that he would be subjected to xenophobic attacks upon his return.

[28] Third, the applicant argues that the Board erred in determining that he failed to rebut the presumption of state protection. The applicant contends that the Board ignored objective country conditions evidence that demonstrates that the RSA police do not provide adequate state protection against xenophobic violence.

B. Respondent's submissions

[29] The respondent refutes the applicant's arguments; he argues that the Board's decision was reasonable and suggests that the applicant is asking the Court to reweigh evidence.

[30] First, the respondent maintains that the applicant did not demonstrate a nexus to a Convention ground. The Board acknowledged that the attacks suffered by the applicant may have, in part, been due to his Congolese origins. However, the Board noted that these attacks did not amount to persecution and were in fact, three random attacks. The respondent insists that the evidence did not establish that the attacks were motivated by xenophobia. Therefore, while the respondent concedes that mixed motives could establish a nexus, in this case, the Board was not satisfied that the applicant's experiences were attributable to xenophobia.

[31] The respondent argues that the applicant's case distinguishes from *Shahiraj*, above, because in *Shahiraj*, this Court found that the applicant was not randomly targeted for extortion, but rather was targeted in part because his brother had ties to militants (at para 20).

[32] Second, the respondent argues that the Board's section 97 analysis was also reasonable. The Board determined that the applicant did not face a personalized risk in the RSA. The respondent submits that it was reasonable for the Board to characterize the risk that the applicant faces as a generalized risk of violence. There was no evidence that demonstrates that his risk was not the same risk faced by all other citizens. The respondent further argues that the Board's analysis was prospective; the Board acknowledged that xenophobic attacks remain a problem in the RSA, but that they are in fact declining.

[33] Third, the respondent argues that the Board's analysis of the adequacy of state protection was also reasonable. The Board assessed the documentary evidence. It further considered that the police in the RSA were responsive to the applicant. In his Personal Information Form, the applicant

indicated that the police offered him security agents from time to time and sent patrols for a period of three months. After the incident in May 2007, the police arrested the attackers and they were subsequently jailed for six months. It was reasonable, in these circumstances, for the Board to consider that state protection would be forthcoming for the applicant as it had been in the past. The Board acknowledged that state protection in the RSA was not perfect, but determined it was adequate and that the applicant did not rebut the presumption with clear and convincing evidence.

C. Discussion

[34] I find that the Board's assessment of the evidence and its reasoning on certain aspects of the applicant's claim are unreasonable.

[35] First, the Board found that the applicant had not established a nexus to a Convention ground. On this issue, the Board held that the fact that the RSA government had accredited the applicant as a foreign-trained physician and given him citizenship within a few months of his arrival, was "hardly consistent with xenophobia." With respect, I fail to see the relevance of this finding, considering that the applicant does not fear xenophobic attacks from the government but rather from the local community where he practiced. In my view, the Board insisted on an irrelevant consideration (his accreditation by the RSA authorities) but failed to take into account the personal circumstances of the applicant. More specifically, the Board failed to consider that xenophobia against the applicant and other foreign doctors developed as a reaction from the local community to the hospital's decision that prevented doctors from supplying the locals with water.

[36] Furthermore, the Board concluded that the applicant had experienced three isolated and random attacks. However, although there were no credibility issues, the Board failed to consider the applicant's allegations that the attacks occurred in a context where the local residents were holding xenophobic rallies (para 29 of the applicant's affidavit), and were persecuting foreign people (para 32 of the applicant's affidavit). The Board also seems to have ignored the applicant's statements that, upon his return to the RSA in June 2006, the xenophobia in the community was growing (para 36 of the applicant's affidavit).

[37] The respondent argues that, in his testimony, the applicant failed to link the attacks to xenophobic motives. My reading of the transcript of the hearing before the Board does not lead me to the same conclusion. First, I note that the quality of the transcription is far from adequate as there are numerous missing or inaudible portions of the applicant's testimony. I also note that the Board member never questioned the applicant in relation to the incidents that occurred in 2005 and that the questions he asked in relation to the May 2007 incident, were general in nature. Moreover, the applicant tried to raise the xenophobic issue, however, his testimony is almost incomprehensible in that regard. The Board member did not question the applicant further to try to understand his allegations. The following excerpts from the transcript illustrate my point:

CLAIMANT: When I was trying to get, they come to me, oh Dr. Nara, Dr. Nara. They knew me already.

MEMBER: Yes

CLAIMANT: They were targeting.

MEMBER: Right

CLAIMANT: (inaudible) they were seeing me coming back. Then they come with ... the ... the gun. If you continue to make us

(inaudible) for not (inaudible) we're going to shoot you just ... just now. Then I say, okay.

MEMBER: So they ... threatened you.

CLAIMANT: Yes.

MEMBER: Why were they threatening you?

CLAIMANT: Later on I knew the story because sometime when the people they come to ... to threaten you, you never know their position ...

MEMBER: Right

CLAIMANT: ... or what is their story. You will find out just maybe after the incident happened.

MEMBER: Right ... But ... but ... at ... at ... at the time of the incident, were you aware of why you were being threatened?

CLAIMANT: I was not aware, but because of the previous experience last year, whatever, I say I just (inaudible) sometime they are just too much asking. I do not know figure which way they are.

MEMBER: So they're threatening you, and at this point you don't know why they're threatening you.

CLAIMANT: Yes.

MEMBER: They threaten to kill you. They ... they're ... they tell you verbally, we're going to kill you.

CLAIMANT: Verbal

[...]

CLAIMANT: The police, even themselves, they were suspecting people. They even talk to the people there, and I was hearing the local language.

MEMBER: Right

CLAIMANT: They say you are doing like this because those people, they are the foreigner. If they were the local people you

should be in trouble. They blaming all the people. They know everyone the things are there.

MEMBER: Okay

CLAIMANT: So if this police is protecting the ... the ... people, even the 2008 incident which one you were referring to, they kill 16. The police there were, and some of the people they were ... (inaudible), they were killed by the same police people, the ... black. So the police they are there, but they are looking of that xenophobia, because in their mind also they are the ... foreigner (inaudible) for they coming to get their (inaudible) in the real, which one the local people they shoot (inaudible). Se we are not treated like the same quality. I am like a second national there.

[*Sic* throughout]

[38] This Court previously determined that when there are mixed motives for targeting an individual for crime or violence and at least one of the motives can be connected to a Convention ground, this may be sufficient to establish a nexus (*Gonsalves v Canada (Minister of Citizenship and Immigration)*, 2011 FC 648 at para 29 (available on CanLII) [*Gonsalves*]). In fact, once the Board notes that at least one of the motives for targeting an individual is linked to a Convention ground, the Board has a duty to consider whether a nexus exists (*Sopiqoti v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 95 at para 14, 124 ACWS (3d) 555).

[39] Had the Board considered all of the applicant's evidence and questioned him further about the xenophobic component of his claim, its assessment of whether the mixed motives were sufficient to establish a nexus to a Convention ground might have been different.

[40] Second, the Board concluded that the applicant failed to establish, on a balance of probabilities, that he faced a personalized risk to his life. However, the rationale for this finding is

somewhat difficult to understand. The Board based its finding on two elements: on the fact that the applicant was a foreign doctor recruited by the government to work in ill-served parts of the country and on the applicant's own experience. As mentioned above, I fail to see the relevance of the applicant's employment conditions to the Board's analysis, given that the risk that he faced was related to the xenophobic behaviour of the local residents in his community and not to the conduct of government officials. Moreover, the Board referred to the applicant's experiences without giving any explanation as to why he found that these experiences failed to establish a personalized risk.

The Board cited an excerpt from the 2009 US Department of State Report indicating that xenophobic attacks on foreign Africans remained a problem, but that the attacks were less frequent than the previous year. However, the Board does not explain the bearing of this documentary evidence which recognizes that xenophobic attacks still occur, nor does it explain how this evidence was sufficient to set aside the applicant's evidence about the xenophobic conduct of the citizens of his own local community. In my view, these elements were central to the applicant's claim.

[41] Third, the Board concluded that the applicant failed to rebut the presumption of state protection. The Board based its finding on the fact that the authorities did indeed respond when the applicant was assaulted. However, the Board failed to consider the particular circumstances of the applicant who was working in a relatively closed community and, moreover, that he was confined to that community. Had the Board recognized the xenophobic component of the attacks that the applicant experienced combined with his particular employment situation, it may have analyzed the adequacy of state protection with a different perspective.

[42] For all of these reasons, I am of the view that the Board failed to consider relevant evidence that was central to the applicant's claim, thus rendering its decision unreasonable. Furthermore, each case is fact specific and the conclusions reached by the Board, and by this Court in other cases, cannot be simply transposed to this case.

[43] For the foregoing reasons, this application for judicial review is allowed. The parties did not propose any question for certification and none arise in this case.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed and the applicant's claim for refugee protection is sent back for re-determination by a different panel.

No question is certified.

“Marie-Josée Bédard”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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