Federal Court  Cour fédérale

Date: 20140530

Docket: IMM-5863-13

Citation: 2014 FC 520

Ottawa, Ontario, May 30, 2014

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

FELIX EBERECHUK NWOBI

Respondent

JUDGMENT AND REASONS

[1] The respondent, Mr. Felix Eberechuk Nwobi, is an Igbo Christian with Nigerian citizenship. On October 14, 1991, there were violent clashes between Muslims and Christians in the northern Nigerian city of Kano. Mr. Nwobi participated in burning down a mosque after a violent riot in which Igbo Christians, including his uncle, aunt and their child, were killed and churches and other property were destroyed. Fearing for his life because he burnt down the mosque, Mr. Nwobi moved to the city of Kaduna and then again to the southern city of Ibadan.

In September 1992, Mr. Nwobi fled to Germany where he obtained a European Union residence permit. In 2006, after being laid off from his job and being ineligible for unemployment benefits, he agreed to transport cocaine from Cologne to Munich for 500 Euros. He was arrested and charged with possession of 300 grams of cocaine for the purpose of trafficking. He pled guilty and was sentenced to three years and nine months in prison. He was released on July 15, 2010 and given a permit to stay in Germany for three additional months. On October 15, 2010, he came to Canada and claimed refugee status.

[2] The Minister of Public Safety intervened, alleging that Mr. Nwobi was inadmissible under Article 1F(b) of the *United Nations Convention Relating to the Status of Refugees*, July 28, 1951, [1969] Can TS No 6 [the Convention] on the basis that he had committed a serious non-political crime in Germany. Had his offence been committed in Canada, it would be punishable by a maximum term of life imprisonment. Consequently, the Minister argued that he should be excluded by virtue of section 98 of the *Immigration and Refugee Protection Act*, SC 2001 c 27 [IRPA] which provides that "a person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or person in need of protection." However, in its decision dated August 15, 2013, the Refugee Protection Division, Immigration and Refugee Board [the Board] found Mr. Nwobi to be a Convention refugee by virtue of section 96 of the IRPA and held that he was not excluded from refugee protection pursuant to section 98 of the IRPA and Article 1F(b) of the Convention.

[3] The present applicant, the Minister of Citizenship and Immigration [the Minister], now challenges the legality of this decision on two grounds. First, the Board's finding that possession

of cocaine for the purpose of trafficking is not a serious non-political crime is unreasonable. Second, as a subsidiary ground of attack, the Board has also failed to consider whether the respondent's role in burning down a mosque in Nigeria constitutes a serious non-political crime. The Minister does not challenge the Board's findings regarding the respondent's credibility or his fear of persecution.

[4] The parties agree that the Board's determination of exclusion from refugee protection pursuant to section 98 of the IRPA involves questions of mixed fact and law, and thus should be reviewed against the standard of reasonableness: *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404 at paragraph 14, [2009] 4 FCR 164 [*Jayasekara*]. While the Board's analysis involves "some degree of discretion" as the Court of Appeal states, the Board's decision must "[fall] within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47, [2008] 1 SCR 190).

[5] The Court is of the opinion that the finding of non exclusion under Article 1F(b) made by the Board in this case is not an acceptable and defensible outcome in respect of the facts and law. At the outset, however, it must be emphasized that a conviction for possession of cocaine for the purposes of trafficking does not automatically make a person inadmissible under Article 1F(b). As the Board correctly pointed out, the presumption of seriousness may be rebutted by consideration of the five factors identified in *Jayasekara*: the elements of the crime, the mode of persecution, the penalty prescribed, the facts and the mitigating and aggravating circumstances underlying the conviction (at paragraph 12).

[6] The Minister concedes that the Board was well aware of the Federal Court of Appeal's decision in *Jayasekara*, which it identifies in the impugned decision as "a leading case" with respect to the interpretation of Article 1F(b) of the Convention. There is a presumption of seriousness where, in the absence of any political factors, the offence, if committed in Canada would have been punishable by a maximum term of at least ten years. Yet, the presumption is not absolute and can be rebutted following the Board's assessment of all the surrounding circumstances (*Jayasekara* at paragraph 44; *Feimi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 262 at paragraph 22, 406 FTR 14 [*Feimi*] confirmed by the Federal Court of Appeal, 2012 FCA 325, 442 NR 374).

[7] The Court has upheld decisions by the Board where a range of "mitigating and aggravating factors" have been taken into account. These include: admission of guilt by the claimant, a favourable plea bargain and a troubled childhood (*Gudima v Canada (Minister of Citizenship and Immigration)*, 2013 FC 382, [2013] FCJ 405); the claimant's age, lack of previous convictions, limited amount of drugs and fact that the substance contained methamphetamine as opposed to pure methamphetamine (*Sanchez v Canada (Minister of Citizenship and Immigration)*, 2013 FC 913, 19 Imm LR (4th) 275; as well as the claimant's refugee status and life in a marginalized neighbourhood (*Shire v Canada (Minister of Citizenship and Immigration)*, 2012 FC 97, [2012] FCJ 111]. In *Vucaj v Canada (Minister of Citizenship and Immigration)*, 2013 FC 381 at paragraphs 38-40, 431 FTR 53, the Court accepted the judicial review of a claimant in part because the Board had failed to examine mitigating and aggravating factors. These included the claimant's addiction to painkillers resulting from an injury occurred during a criminal gang fight, his cooperation with authorities and his role as an instrumental key

witness for the Crown as well as the lack of weapons in the drug trafficking offence and that absence of serious injury resulting from the offence.

[8] However, as stated by the Court in *Partida v Canada (Minister of Citizenship and Immigration)*, 2013 FC 359, 430 FTR 197 [*Partida*], the Board "cannot simply list relevant mitigating/aggravating factors and then come to a conclusion without evaluating why the mitigating factors, when weighed against other aspects of the crime, did not have the weight to rebut the presumption of the seriousness of the crime" (at paragraph 6, referring to *Guerrero v Canada (Minister of Citizenship and Immigration)*, 2010 FC 384 [*Guerrero*]). There must be an actual balancing by the Board of the mitigating and aggravating factors to show how the lack of violence and weapons would mitigate the presumptively serious offence of possession of cocaine for the purpose of trafficking. If there is any such "balancing" by the Board, it would be in three paragraphs of the decision (paragraphs 16, 17 and 18) which both parties agree are the only problematic ones.

[9] While the Board noted that "Canada considers drug trafficking to be a serious crime, and a person convicted of such an offence could face imprisonment for life", it apparently refused to accept that it "should be considered as harmful as murder, rape, arson or armed robbery because of the harm inflicted upon society" [emphasis added]. But why so? The answer to this question of "lesser harm" is provided with the following observation and finding made by the Board:

> On July 11, 2013 sub-section (3) of section 5 of the *Controlled Drugs and Substance Act* was modified, and now indicates the minimum punishment of imprisonment to be imposed on a person convicted of trafficking in a substance included in Schedule I. There is a minimum punishment of imprisonment for a term of one year if the person used or threatened to use violence in committing

> the offence; if the person carried, used or threatened to use a weapon in committing the offence; or if the person was convicted of a designated substance offence or had served a term of imprisonment for a designated substance offence within the previous ten years. This would indicate to the tribunal that trafficking in cocaine could well be treated as a summary conviction offence. [emphasis added]

[10] In the next two paragraphs, the Board goes on to note that that there was no evidence that Mr. Nwobi used or threatened to use violence, was carrying a weapon or was previously convicted of a designated substance offence. The Board also noted that Mr. Nwobi was not involved in the distribution or sale of cocaine and that this appeared to be the only time he was ever involved in drug trafficking. In addition, the Board noted that person who had employed Mr. Nwobi to transport cocaine received a ten year sentence in Germany while Mr. Nwobi was sentenced to three years and nine months. The Board stated that "the sentence imposed in Germany would indicate that German authorities did not believe that the claimant's involvement merited a more severe punishment."

[11] First and foremost, I entirely agree with the Minister's learned counsel that the Board completely misunderstood Parliament's intention and misread the amendments made in 2013 to the *Controlled Drugs and Substances Act*, SC 1996, c 19 [CDSA]. Indeed, counsel for Mr. Nwobi concedes the Board misstated the law: while the CDSA provides for a minimum mandatory imprisonment term where there are aggravating factors, it does not lessen penalties for trafficking. Thus, both parties agree that the trafficking cocaine could not be treated as a summary conviction offence. Yet counsel for Mr. Nwobi submits that this error did not have any real impact on the decision because Mr. Nwobi would not have received the mandatory minimum sentence if he had committed the offence in Canada since it did not involve any of the

enumerated aggravating circumstances. I respectfully disagree with her. The Board misinterpreted the CDSA as lessening the seriousness of the crime where there were no aggravating factors. It was for this reason that the Board emphasized the lack of such weapons or violence. Thus the Board's comment regarding a "summary conviction offence" was not merely a statement on the seriousness of the *penalty* in Canada, but rather an erroneous belief that certain manifestations of the offence, itself, could be less serious under Canadian law. Thus although the Board correctly noted that the maximum penalty for trafficking is life imprisonment, the Board was under the false view that the crime for which Mr. Nwobi was convicted could, as a possible summary conviction offence, have a maximum penalty of only six months imprisonment pursuant to section 787(1) of the *Criminal Code*, RSC 1985, c-14 [Criminal Code].

[12] In my humble opinion, the error of law made by the Board is determinative and taints its conclusion that the respondent "did not commit a serious non-political crime in Germany". I also find that the Board erred in considering the tougher sentence served by the person who paid the respondent to traffic cocaine. In *Jayasekara* at paragraph 44, the Court of Appeal stated that "factors extraneous to the facts and circumstances underlying the conviction" are not to be taken into account in considering the seriousness of the offence. The fact that the drug distributor received a more severe sentence is extraneous to the facts and circumstances underlying the respondent's conviction. It does not indicate that Mr. Nwobi's sentence was any less serious: he received a sentence of almost four years in prison. While the present judicial review is welcomed solely on the basis of the Board's decision regarding Mr. Nwobi's exclusion for his conviction in

Germany, I will address the Minister's secondary contention that the Board also erred in not considering whether burning down a mosque in Nigeria constitutes a serious non-political crime.

[13] The Minister argues that burning down the mosque in Nigeria constitutes arson under section 434 of the Criminal Code, an indictable offence for which a person is liable to imprisonment for a term not exceeding 14 years. The Minister submits that even though its representative did not raise this issue at all in its notice of intervention or during the hearing, the Board was nonetheless required to determine if the exclusion clause was applicable. Counsel for Mr. Nwobi, on the other hand, argues that the Minister had an obligation to raise the burning of the mosque as a potential ground for exclusion. Failure to do so precludes the Minister from now raising this factor in the judicial review. During the hearing, counsel for Mr. Nwobi seemed to liken the proposed preclusion to the doctrine of estoppel: the Minister had a full and fair opportunity to raise the issue during the inadmissibility hearing but did not. It is now unfair that the Minister can raise a new issue on judicial review.

[14] Counsel for Mr. Nwobi identified jurisprudence stating that if a claimant does not advance a claim at a hearing, the RPD cannot be faulted for not dealing with it. In particular in *Emamgongo v Canada (Minister of Citizenship and Immigration*), 2010 FC 208, [2010] FCJ 244 [*Emamgongo*], the Court reaffirmed that the Board did not err in failing to provide an analysis of the claim under section 97 of the IRPA as separate and distinct from the analysis of the claim under section 96 where the Board had already found that there was no evidence that the applicants were in need of protection. In my opinion this jurisprudence is different since it is based on the rationale that if the evidentiary basis for both claims is the same, given that the

claimant had not provided further information for a section 97 claim, then there is no need to proceed on a separate 97 analysis (see also *Ayaichia v Canada (Minister of Citizenship and Immigration)*, 2007 FC 239 at paragraphs 19-20, 309 FTR 251 cited in *Emamgongo*).

[15] Moreover, while the jurisprudence of this Court affirms that "within the context of an application for judicial review, the Court cannot decide a question which was not raised before the authority whose decision is being reviewed" (*Tozzi v Canada (Attorney General)*, 2007 FC 825 at paragraph 22; citing *Toussaint v Canada (Labour Relations Board)*, 160 NR 396 at paragraph 5, [1993] FCJ 616 (FCA), the Court in the present case does not seek to decide the question of whether Mr. Nwobi should be excluded under Article 1F(b) of the Convention based on burning a mosque. The Court would certainly overstretch its role if it sought to do so. However, the Court does have the discretion to consider whether the Board erred in failing to raise this as a possible ground for exclusion even if the parties did not raise it themselves.

[16] It must be stressed that the Board's role in determining whether a person is inadmissible under Article 1F(b) of the Convention on the basis that he had committed a serious non-political crime is distinct from the role of a judge in civil litigation. In *Ospina Velasquez v Canada (Minister of Citizenship and Immigration)*, 2013 FC 273 at paragraph 15, 429 FTR 143, Justice Gleason considered whether the Board erred in finding that the claimant was inadmissible under Article 1F(b) of the Convention even though the Minister had not intervened. While the claimant did not dispute the Board's jurisdiction "to inquire into exclusion on its own motion given the duty and role of the Board under the IRPA", he claimed that the Board did not give adequate weight to the fact the Minister chose not to intervene (at paragraph 13). In rejecting this claim

Justice Gleason stated that "the Board is not bound to accept the position of a party in any case and, instead, is required to carry out its statutory duty of applying the IRPA. Under the Act, the RPD's role is an inquisitorial one" (at paragraph 15).

[17] Justice Gleason referred to the Board Chairperson's Guideline 7 Concerning Preparation and Conduct of a Hearing in the Refugee Protection Division which states that:

> 2.1 Under the IRPA, RPD members have the same powers as commissioners who are appointed under the Inquiries Act. They may inquire into anything they consider relevant to establishing whether a claim is well-founded. This means that they define what issues must be resolved in order for them to render a decision.
>
> 2.2 A member's role is different from the role of a judge. A judge's primary role is to consider the evidence and arguments that the opposing parties choose to present; it is not to tell parties how to present their cases. Case law has clearly established that the RPD has control of its own procedures. The RPD decides and gives directions as to how a hearing is to proceed. The members have to be actively involved to make the RPD's inquiry process work properly.

[18] Moreover, this Court has found that a Board may be bound to consider grounds not raised by parties. In *Varga v Canada (Minister of Citizenship & Immigration)*, 2013 FC 494 at paragraph 5, 18 Imm LR (4th) 96 [*Varga*], Justice Rennie recently held that the Board had to "consider any ground raised by the evidence even if not specifically identified by the claimant: *Canada (Attorney General) v Ward*, [1993] 2 SCR 689; *Viafara v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1526 at paragraph 13." In particular, he stated that "[t]he failure of the Board to address a ground of persecution, raised on the face of the record, is a breach of procedural fairness" (at paragraph 6). While the decision in *Varga* is rooted in the view that the Board must draw the claimant's attention to a point which could materially improve the outcome

of the claimant's case, it nonetheless indicates that the Board, having an inquisitorial role, is not limited to the pleadings of the parties where the evidence on the record speaks otherwise, or in addition, to those pleadings (at paragraph 7, citing the English Court of Appeal in *R v Special Adjudicator Ex p. Kerrouche* (No 1) (1997), [1997] EWCA Civ 2263, [1997] Imm AR 610).

[19] The Board has the important responsibility of ensuring that Canada meets its obligations under the Convention by not providing shelter to people to whom there are serious reasons for considering that they have committed war crimes or crimes against humanity, serious non-political crimes or are guilty of acts contrary to the purposes and principles of the United Nations. Thus, the Board cannot be limited to considering the grounds raised by either the applicant or the respondent where a ground for exclusion is at the very heart of the claim. In this vein, the Court concludes that the Board has erred in failing to consider or enquire into other possible grounds of exclusion that is at the heart of the claim. In the current case, Mr. Nwobi's claim for refugee status revolves around his participation in burning down a mosque.

[20] For these reasons, the application must succeed. The Board's finding of non exclusion under Article 1F(b) of the Convention taints its ultimate conclusion that Mr. Nwobi is a "Convention refugee" in virtue of section 96 of the IRPA. Counsel agree that there is no question of general importance warranting certification by the Court.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is allowed. The Board's decision is set aside and the matter is referred back to the Board for a new hearing and redetermination of the refugee claim by another member of the Board. No question is certified.

"Luc Martineau"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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