Federal Court  Cour fédérale

Date: 20091124

Docket: IMM-5178-08

Citation: 2009 FC 1203

Ottawa, Ontario, November 24, 2009

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

FRIDAY MICHAEL OGUNLUYA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72 (1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of a decision by the Refugee Protection Division of the Immigration and Refugee Board (Board), dated November 5, 2008 (Decision), which refused the Applicant's application to be deemed a Convention refugee or person in need of protection under sections 96 and 97 of the Act.

BACKGROUND

[2] The Applicant is a Nigerian citizen who is seeking protection from his stepmother in Nigeria. The dispute between the Applicant and his stepmother resulted from the Applicant's request to be given a portion of his late father's business which was willed to him but which remains under the control of his stepmother.

[3] The stepmother refused to relinquish the business, threatened the Applicant's legal counsel, and assaulted the Applicant. After the Applicant pursued his request further, he was beaten by the police who warned him to stop making attempts to access the property. The police also warned the Applicant that he had two months to leave Nigeria, after which he would be killed.

[4] The Applicant reported this beating to the police, who told him that they were unable to assist him. Rather, they informed the Applicant that he should leave Nigeria. The Applicant then fled to Canada and applied for refugee status.

DECISION UNDER REVIEW

[5] Although the Board initially had some concern about a discrepancy in the Applicant's submissions, the Board determined that the Applicant was credible. The Board made this determination based on the presumption of truth established in *Maldonado v. Canada (Minister of*

Employment and Immigration), [1980] 2 F.C. 302, the consistency between the Applicant's testimony and his Personal Information Form, as well as the supporting affidavits of his brother, his friend, and his doctor. Consequently, the Board accepted that the Applicant had a dispute with his stepmother and that the police provided him with "little assistance."

[6] The Board then examined whether an internal flight alternative existed for the Applicant. The Board found that an internal flight alternative did exist because the Applicant had left Nigeria two years prior, and there was no evidence to demonstrate that the police would be looking for him outside of the area inhabited by the Applicant's stepmother. Although the Board found that "it is not unreasonable to speculate that the NPF may owe the claimant's stepmother a few favours," it nevertheless determined that there was no evidence to show that the police would have any interest in the Applicant on a nation-wide scale. Rather, the Board determined that the Applicant's stepmother was "simply a local businesswoman with some connection to the local police." Consequently, the Board determined that the Applicant could relocate to another part of Nigeria without the fear of persecution.

ISSUES

[7] The Applicant raises the following issue on this application:

1) Was the Board's overall assessment of the totality of the evidence unreasonable?

STATUTORY PROVISIONS

[8] The following provisions of the Act are applicable in these proceedings:

Convention refugee	Définition de « réfugié »
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	*a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	*b*) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
Person in need of protection	Personne à protéger
97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality,	97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle

a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

STANDARD OF REVIEW

[9] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review" (*Dunsmuir* at paragraph 44). Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of "reasonableness" review.

[10] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[11] The Applicant submits that the appropriate standard of review in this instance is reasonableness. I agree with this submission. In *Diagana v. Canada (Minister of Citizenship and*

Immigration), 2007 FC 330, the Court determined that appropriate standard of review with regard to the consideration of the totality of the evidence before the RPD was patent unreasonableness. Based on the changes made by the Supreme Court in *Dunsmuir*, the appropriate standard of review for this question in the current case is reasonableness.

[12] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir* at paragraph 47. Put another way, the Court should only intervene if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

ARGUMENTS

The Applicant

The Board failed to consider the totality of the evidence

[13] The Applicant contends that the Board erred in its determination of the existence of an internal flight alternative. Since the Board accepted the Applicant's evidence and testimony as credible, it clearly erred in finding that an IFA existed. While the Applicant's evidence was accepted by the Board, the Board then completely disregarded his evidence in finding that there was no proof that the police would be after him outside of his stepmother's locality. The Board's finding

is contrary to the evidence that the Board had previously determined to be credible, i.e., that the Applicant would be sought "anywhere" and that he would be "a dead man."

[14] Consequently, the Board erred in finding that an IFA existed for the Applicant. A similar error was made in the case of *A.T.V. v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1229, 75 Imm. L.R. (3d) 215 where the Board accepted the applicants' testimony as being credible and unembellished, but rejected the claim because the IFA had not been rebutted with "clear and convincing evidence." In *A.T.V.*, the applicant had been questioned with regard to the IFA and had answered the questions put before her. Accordingly, the Court determined that the Board should have determined that the applicants had met their burden of proving that Mexico City was not a reasonable IFA. The Court determined in *A.T.V.* that the Board had failed in its consideration of the evidence before it, so the issue of whether or not the Federal District of Mexico City was an appropriate IFA was remitted.

Order Requested

[15] The Applicant requests that the Board's decision be set aside and that the Applicant be granted a new hearing before a differently constituted panel. The Applicant also requests an order of Mandamus directing the tribunal to declare that the Applicant a Convention Refugee.

The Respondent

[16] The Respondent submits that the test to show that an IFA is unreasonable bears a high threshold which requires the existence of conditions that would put the Applicant's life and safety at risk. Moreover, concrete evidence of these conditions must be presented. See *Ranganathan v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 164, [2000] F.C.J. No. 2118.

[17] The Respondent contends that the Applicant bears the onus of demonstrating that it is objectively unreasonable for him to reside in the locations suggested by the Board. This onus has not been discharged. Furthermore, the Applicant has failed to show that the Board ignored any pertinent evidence, or misapplied the IFA test in its analysis. See *Kanagaratnam v. Canada (Minister of Employment and Immigration)* (1996), 194 N.R. 46, 36 Imm. L.R. (2d) 180, *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 589 (FCA) [1993] F.C.J. No. 1172.

[18] The Applicant's concerns with regard to the how the IFA test was applied amounts to little more than disagreement with how the Board weighed the evidence before it. However, it is the duty of the Board to consider and weigh the evidence.

[19] While the Board accepted the Applicant's story as credible, there was no evidence placed before the Board that the Applicant's stepmother has any influence beyond the sphere of the local police. Rather, the evidence before the Board demonstrated that the NPF provides law enforcement

for a population of 140 million people. The Respondent contends that in light of the totality of the evidence, there is no reason to believe that Applicant would be of any interest to the police outside of his stepmother's locality. Such a finding is not inconsistent with the finding that the key facts alleged by the Applicant are to be believed.

[20] The Applicant did not discharge the burden of showing that there was no IFA available to him. In fact, the Applicant failed to provide any evidence as to why he would be of interest to police outside of his stepmother's sphere of influence.

[21] While the Applicant cites and relies on the case of *Villa*, the Respondent contends that this case is distinguishable. In *Villa*, the Applicant had clearly shown why Mexico City was not a viable IFA. Furthermore, the Board did not state the evidence upon which it relied in determining the existence of an IFA.

[22] The Respondent believes that the case at hand is distinguishable, since the Applicant's testimony with regards to the IFA was vague, and the Board referred to the specific evidence on which it relied to make the finding of an IFA.

[23] Moreover, the Board's acceptance of the Applicant's evidence that his brother had been visited by the police does not show an error in the Board's determination of an IFA. The Applicant has not demonstrated that: a) his brother resides in one of the IFA locations; b) that he resides outside of the locality inhabited by the Applicant's stepmother; or c) that it was someone other than

the local police that visited his brother. Consequently, the Applicant did not provide cogent evidence that he would be sought by the police in the IFA locations identified by the Board.

[24] The Respondent submits that this application should be denied. Furthermore, the Applicant's request for an order of a writ of mandamus is not appropriate. Four requirements must be satisfied prior to an order of mandamus. These include: a) a legal right to the performance of the duty of the statutory authority; b) proof that performance of that duty is due because the Court will not enforce a future obligation; c) there must be no discretion in the decision-maker to perform the duty; and d) there must be a prior demand for the performance of the duty and a refusal. See *Mensinger v. Canada (Minister of Employment and Immigration)*, [1987] 1 F.C. 59 and *Karavos v. Toronto (City)*, [1948] 3 D.L.R. 294 (Ont. C.A.). Because the Board has discretion to perform the duty in question, a writ of mandamus is not appropriate.

[25] Furthermore, the Respondent suggests that a writ of mandamus is inappropriate in this instance because the issues are fact-driven and involve the weighing of both personal and documentary evidence.

ANALYSIS

[26] The Board accepts the following as uncontroverted evidence:

a. "It would appear that if the NPF are indeed looking for the claimant, it follows that there is no where the claimant could be safe in Nigeria";

b. "The claimant testified that his stepmother is a very powerful individual and that she is connected to the NPF through her supplying food to them. The claimant's brother's affidavit … states at paragraph 13 that on 'the evening of July 11, 2008, two members of the Nigerian police came to my home asking Friday's whereabouts. They said that I should let him know that there is nowhere in Nigeria for him to hide and that whenever they find him he is a dead man."

[27] Notwithstanding that this evidence was accepted by the Board, the Board found that "there is no reason to think that this matter is of any interest to the police outside of the locality where the claimant's stepmother resides."

[28] The Board disregards the evidence it has accepted in favour of speculation: "It is not unreasonable to speculate that the NPF may owe the claimant's stepmother a few favours."

[29] The Board also makes highly material findings of fact for which there is no evidence: "[The stepmother] is simply a local businesswoman with some connection to the local police." This finding was made even though the Board accepts the Applicant's testimony that his stepmother is a "very powerful individual … ."

[30] There was also documentary evidence before the Board, which it does not question, that the Nigerian police can be bought and made to settle scores.

[31] It appears to me that, on the basis of the evidence accepted by the Board, the Applicant is not safe anywhere in Nigeria if the NPF are looking for him and that, as the Applicant's brother testified, the NPF are looking for him and want to kill him. There is also no evidence that the stepmother's influence is limited in the way the Board found it to be limited.

[32] In view of the foregoing, I think the Decision is unreasonable and must be returned for reconsideration. See *Villa* and *A.T.V.*. The Decision falls outside the range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application is allowed. The Decision is quashed and the matter is returned for reconsideration by a differently constituted Board.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5178-08
STYLE OF CAUSE:	**FRIDAY MICHAEL OGUNLUYA** **v.** **MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	October 27, 2009
REASONS FOR Judgment and Judgment:	RUSSELL J.
DATED:	November 24, 2009

APPEARANCES:

Mr. Richard Odeleye	FOR THE APPLICANT
Ms. Marcia Pritzker Schmitt	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Babalola, Odeleye Barristers and Solicitors Toronto, ON	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT