Federal Court  Cour fédérale

Date: 20150331

Docket: IMM-226-14

Citation: 2015 FC 410

Ottawa, Ontario, March 31, 2015

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

EFOSA MONDAY ODIGIE

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review by Efosa Monday Odigie [the Applicant] under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision by an inland enforcement officer [the Officer] at the Canada Border Services Agency [CBSA], Enforcement and Intelligence Operations Division, dated January 14, 2014, wherein the Officer rejected the Applicant's application for deferral of his removal from Canada. For the reasons that follow, the application is dismissed.

[2] The Applicant is a citizen of Nigeria who entered Canada on May 27, 2010 at the Lester B. Pearson International Airport, where he made a refugee claim. On May 10, 2012, the Immigration and Refugee Board of Canada's Refugee Protection Division [RPD] found that the Applicant was a person described in Article 1F(b) of the *United Nations Convention Relating to the Status of Refugees* [*Refugee Convention*] and, accordingly, found him to be excluded from refugee determination in Canada for serious non-political crimes pursuant to section 98 of the IRPA. The RPD determined that the Applicant had committed crimes which were equivalent to section 462.31 (laundering proceeds of crime), section 467.11 (enhancing and facilitating the ability of a criminal organization), and section 467.12 (benefiting a criminal organization) of the Canadian *Criminal Code*, RSC 1985, c C-46. The RPD also found the Applicant was not credible and stated that "[t]here were many instances of contradictory or inconsistent evidence between the various documentary evidence and oral evidence presented by the claimant. The panel does not believe that the claimant is gay or had a gay relationship with the Chief which compelled him to commit the crime of money laundering". An application for leave was dismissed on October 22, 2012.

[3] The Applicant applied for Pre-Removal Risk Assessment [PRRA] on February 11, 2013. On October 24, 2013, the PRRA officer found that most of the Applicant's evidence was not connected to the particular risk allegations and that there would be a viable Internal Flight Alternative [IFA] in Lagos, and accordingly rejected his PRRA application. An application for leave was dismissed on May 23, 2014.

[4] The Applicant had also filed an application for permanent residence based on humanitarian and compassionate [H&C] considerations which was refused on October 23, 2013 by an officer who found that the Applicant had brought forward evidence establishing nothing more than a minimal level of economic and social establishment in Canada. The H&C officer also found that the Applicant would likely not suffer social and state discrimination of prosecution in Nigeria because of his sexual orientation and that he was more likely than not to be heterosexual and not homosexual. The Applicant did not seek leave for judicial review.

[5] The Applicant also filed an application for permanent residence under the Spouse or Common-Law Partner in Canada Class which was refused on September 30, 2013. His application for leave was dismissed on February 5, 2014.

[6] The Applicant attended a Pre-Removal interview with CBSA on November 25, 2013, where he was informed about the negative PRRA decision and pending removal arrangements. He requested and was granted a deferral to remain in Canada over the holiday period and to make arrangements for his return to Nigeria, but did not follow through with this agreement.

[7] On January 3, 2014, the Applicant again attended at CBSA and was given "Direction to Report" indicating that his removal was scheduled for January 16, 2014. The Applicant submitted an application to defer his removal from Canada on January 6, 2014, alleging that he obtained two new police documents (an arrest warrant dated November 22, 2012 and a letter from the Nigerian Police Force dated December 4, 2013 confirming the existence of an arrest warrant against the Applicant) showing that he is wanted for sexual-orientation related offences

in Nigeria. The request for deferral of his removal was refused on January 14, 2014. The Applicant filed an application for leave and judicial review of that decision as well as a motion to stay the deportation on January 13, 2014. On January 15, 2014, this Court stayed removal pending the disposition of this application for leave and judicial review, and leave was subsequently granted on December 29, 2014.

[8] The Officer correctly noted that he is under a statutory obligation to enforce removal orders "as soon as possible", and that although he does have a discretion to defer removal orders, that discretion is "extremely limited" and if an enforcement officer does choose to exercise this discretion, they must do so while continuing to enforce a removal order as soon as possible. The Officer also surveyed the immigration and refugee procedural history of the Applicant (RPD determination, H&C determination, PRRA determination, applications for leave and judicial review).

[9] The Officer noted that the Applicant had filed an application for leave and judicial review of his negative PRRA decision on December 2, 2013, but leave had not been granted or dismissed yet (as noted above, leave was later dismissed May 23, 2014). The Officer noted that the mere filing of an application did not necessarily affect normal immigration processing and did not preclude the Minister's officials from enforcing the provisions of the IRPA, including the enforcement of a removal order. The Officer also noted that the Applicant could submit a stay motion if he wished to remain in Canada during the determination of his application for leave and judicial review of the negative PRRA decision.

[10] The Officer did not consider evidence that predated the negative PRRA determination and found that some of the Applicant's evidence had been considered in the PRRA and H&C applications. The Officer also found that the H&C and PRRA officer had already considered the Applicant's claim that he would be at risk as a homosexual in Nigeria.

[11] The Officer acknowledged the two new documents obtained by the Applicant after the negative PRRA decision, namely an affidavit to which was attached an arrest warrant and a letter by the police force confirming the existence of an arrest warrant. The Officer found that the Applicant had submitted insufficient new evidence to support the allegation that he will be arrested and tortured upon his return to Nigeria, due to an outstanding warrant for his arrest issued November 22, 2012. The finding of insufficient new evidence of risk led to the Officer's rejection of the request to defer. On this basis, the Officer was not convinced that the Applicant would be at risk of death, extreme sanction or inhumane treatment as a consequence of these accusations. On this point, the Officer also found that the general allegations of risk made by the Applicant had already been considered by the H&C and PRRA officer who considered whether the Applicant would face risk due to his sexuality as a result of a relationship with Chief Osagiede. The Officer noted that the Applicant had been under a deemed deportation order for approximately 1 year, 2 months and 3 weeks. The Officer held that a deferral of the execution of the removal order was not appropriate in the circumstances of this case.

[12] As to standard of review, in *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is unnecessary where "the jurisprudence has already determined in a satisfactory manner the degree of

deference to be accorded with regard to a particular category of question". The Federal Court of Appeal held in *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 at para 25 [*Baron*] that an enforcement officer's refusal to defer removal is to be reviewed on the reasonableness standard of review. In *Dunsmuir* at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[13] An enforcement officer's discretion to defer removal is very limited. The Federal Court of Appeal held in *Baron* at para 49, citing *Simoes v Canada (Minister of Citizenship and Immigration)* (2000), 187 FTR 219 (FC), that "a removal officer may consider various factors such as illness, other impediments to travelling, and pending H&C applications that were brought on a timely basis but have yet to be resolved due to backlogs in the system". The Federal Court of Appeal further held in *Baron* at para 51, and confirmed in *Canada (Minister of Public Safety and Emergency Preparedness) v Shpati*, 2011 FCA 286 [*Shpati*], that:

> In order to respect the policy of the Act which imposes a positive obligation on the Minister, while allowing for some discretion with respect to the timing of a removal, deferral should be reserved for those applications where failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment. [emphasis added].

The Federal Court of Appeal in *Shpati* at para 44 also informs us that "[w]hen […] an officer is requested to defer removal after a negative PRRA, any risk relied on must have arisen after the PRRA".

[14] The Applicant alleges that he obtained new evidence after his negative PRRA decision, which he filed with his deferral application. He said he had urged his father's friend in Nigeria to verify whether he was able to relocate safely in other parts of Nigeria. This same friend had filed an affidavit less than a year earlier in which, while he could have, he did not inquire about outstanding arrest warrants. The Applicant submits that this new evidence goes to different risk because the agent of persecution in his refugee claim and PRRA applications were Chief Osagiede and his cohorts, while the agent of persecution in his deferral application is the State of Nigeria. The Applicant further submits that Chief Osagiede and his gang were not persecuting the Applicant because of his sexual orientation but for their lost money.

[15] I disagree. The RPD had found that the Applicant was not credible. The H&C officer found that the Applicant would likely not suffer social and state discrimination or prosecution in Nigeria because of his sexual orientation. Neither the H&C officer nor the RPD believed that the Applicant was gay or had a gay relationship. Those findings were left undisturbed because his applications for leave to this Court were dismissed.

[16] This Court, in *Wang v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148 at para 50 said:

> [50] The discretion to be exercised does not consist of assessing the risk. The discretion to be exercised is whether or not to defer to

> another process which may render the removal order ineffective or unenforceable, the object of that process being to determine whether removal of that person would expose him to a risk of death or other extreme sanction. If the process has not been initiated at the time of the request for deferral, or has been initiated as a result of the removal process, the person exercising the discretion could conclude that the conduct of the applicant is inconsistent with an allegation of fear of death or inhumane treatment. This is not a question of assessing the risk but rather of assessing the bona fides of the application.

I make two points based on this finding.

[17] First, as the Respondent rightly submits, it was reasonable for the Officer to refuse to defer the Applicant's removal. I note that while the arrest warrant that was filed as new evidence is dated November 22, 2012, the Applicant had applied for PRRA on February 11, 2013, which was rejected on October 24, 2013. In other words the warrant was there to be found, but the friend did not ask for it then, and only asked for it in December 2013. The Officer had every right, and in my view was obliged to weigh the sufficiency of this allegedly new evidence in the context of the Applicant's lengthy immigration history and the reasons for his inadmissibility in the first place. The Officer did so in detail. The Officer was entitled to ask whether the new evidence was sufficient evidence of new risk to warrant a deferral. The Officer was under no obligation to accept as determinative whatever alleged new evidence the Applicant submitted, least of all when different evidence is rolled out at each successive level in the Applicant's dealings with Canada's immigration system.

[18] In my view, the Officer had every reason to be suspicious of the sufficiency of this new evidence, and to take care in considering the sufficiency of evidence supporting the request to

defer. On the record, the Applicant was not admissible because of his criminal background. In addition, he was found not credible by the RPD, a decision which was not disturbed by this Court. His PRRA was also rejected on the grounds of insufficiency of evidence (and the availability of an IFA in Lagos), another decision left undisturbed by this Court. The risk now alleged is not the first, nor even the second or third variant of risk related to sexual orientation raised by the Applicant in his dealings with Canada's immigration system. This is the fourth risk alleged by this Applicant. It is noteworthy that each new risk reformulated the previous, and that all turned on variants of his sexual orientation, his claims in respect of which were rejected by the RPD and by the PRRA and H&C officers in their turn.

[19] Sufficiency of evidence is within the Officer's purview at the removal stage. This Court generally does not re-weigh the sufficiency of evidence, which is in essence what the Applicant requests. I see no merit in the Applicant's arguments to set aside the Officer's decision based as it was on the sufficiency of evidence.

[20] I also note that while the application for leave respecting the Applicant's negative PRRA was outstanding at the time that the Officer refused to defer, even if the Applicant should have the benefit of any doubt on that account, which is a dubious proposition, that doubt evaporated when this Court dismissed his leave to seek judicial review on May 23, 2014.

[21] In my opinion, the Officer's decision is justified, transparent and intelligible. It falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. Therefore, judicial review must be dismissed.

[22] Neither party proposed a question for certification, and none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed, no question is certified, and there is no order as to costs.

"Henry S. Brown"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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