Federal Court  Cour fédérale

Date: 20171120

Docket: IMM-4876-16

Citation: 2017 FC 1055

Ottawa, Ontario, November 20, 2017

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

IKEMEFUNA AYALOGU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Ayalogu brings this application seeking review of a Minister's Delegate's [Delegate] finding that he is not likely to face personalized risk under section 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] if returned to Nigeria. The Delegate's decision renders enforceable a removal order against Mr. Ayalogu as a person described under paragraph

112(3)(a) of the IRPA due to his involvement in organized criminality. Mr. Ayalogu has not been convicted of any criminal offence.

[2] Mr. Ayalogu argues that the evidence demonstrates that if returned to Nigeria his life would be in danger and he is at risk of torture or cruel and unusual treatment or punishment. He submits that in reaching the opposite conclusion the Delegate relied on conjecture and speculation, rendering the decision unreasonable. He raises the following issues:

A. Did the Delegate engage in speculation, rather than logical inference, in finding it not likely Mr. Ayalogu would face a personalized risk? and

B. Did the Delegate err in failing to consider subsection 12(2) of the *Nigerian Criminal Code Act*?

[3] A 2007 Pre-Removal Risk Assessment [PRRA] concluded that Mr. Ayalogu would, on a balance of probabilities, be subject to a risk of torture or mistreatment in police custody if returned to Nigeria. The Delegate completed a second PRRA in September 2016 reaching a different conclusion. The 2016 PRRA decision is before this Court for review: in this second PRRA the Delegate relied on the passage of time and the standing of Mr. Ayalogu's family within Nigerian society to conclude it was unlikely that he would be detained and mistreated on return to Nigeria.

[4] Mr. Ayalogu submits, and I agree for reasons set out below, that the Delegate's conclusions were grounded in speculation and conjecture, rendering the decision unreasonable. The application is granted.

II. Background

[5] Mr. Ayalogu was born in Nigeria in 1982 and is a citizen of that country. He came to Canada with his family in 1998, when he was sixteen. His father was assuming the position of administrative attaché at the Nigerian embassy in Ottawa. Mr. Ayalogu claimed refugee status on January 15, 2002. The other family members were granted permanent residence in Canada based on humanitarian and compassionate [H&C] grounds in 2008.

[6] On May 4, 2004 an IRPA section 44 report issued against Mr. Ayalogu expressing the opinion that he was inadmissible to Canada due to participation in organized criminality [the Section 44 Report]. The Immigration Division of the Immigration and Refugee Board [ID] found him inadmissible for organized crime on October 22, 2004 and issued a deportation order against him. That order was subsequently quashed on judicial review before this Court, and the matter was sent back for redetermination by a different decision-maker.

[7] On redetermination the ID again found Mr. Ayalogu inadmissible for organized crime under paragraph 37(1)(a) of the IRPA.

[8] A PRRA was initiated in August 2007 [2007 PRRA]. The PRRA Officer found on a balance of probabilities that Mr. Ayalogu would face risk to life, danger of torture or risk of cruel

and unusual punishment or treatment if returned to Nigeria and was a person in need of protection under IRPA section 97.

[9] The 2007 PRRA found that the Canada Border Services Agency [CBSA] had provided the Section 44 Report to the Nigerian High Commission in Ottawa. The Section 44 Report discloses Mr. Ayalogu's involvement with organized crime, details the group's criminal activity, and indicates Mr. Ayalogu was involved in directing others in the group.

[10] The 2007 PRRA then addressed the claim that the Nigerian government would take harsh retribution against the son of a former Nigerian diplomat for disgracing the country and that in Nigeria, criminal responsibility applies to a Nigerian citizen even if the criminal activity occurred outside Nigeria. The PRRA Officer considered the documentary evidence and found on a balance of probabilities the Nigerian authorities had access to the contents of the Section 44 Report and would arrest and detain Mr. Ayalogu upon return to Nigeria. The Officer then considered the documentary evidence relating to the treatment of detained individuals in Nigeria, finding that it demonstrated a pattern of widespread torture of suspects in police custody which sometimes resulted in death. The PRRA Officer concluded that on a balance of probabilities Mr. Ayalogu would face a risk to life, danger of torture or risk of cruel and unusual punishment or treatment if returned to Nigeria.

[11] In December of 2013, the process to conduct a restricted risk assessment in accordance with IRPA paragraph 113(d)(ii) was commenced with disclosure being provided to Mr. Ayalogu. Submissions were made on Mr. Ayalogu's behalf in February 2014.

[12] In July 2016 Mr. Ayalogu's counsel was advised by the Delegate that a final decision would be made on the PRRA for Mr. Ayalogu. Counsel was invited to update the submissions made in 2014 with respect to both the PRRA and an outstanding H&C application.

[13] Further submissions were made. On October 31, 2016 Mr. Ayalogu was advised that his H&C application had been refused. On November 7, 2016 he received the decision that is now before the Court, the refusal of the second PRRA application.

III. Decision under Review

[14] The Delegate addressed claims of risk arising out of Mr. Ayalogu's medical condition, the disclosure of the Section 44 Report, and his claim of bisexuality. The Officer's conclusions as they relate to risk arising out of Mr. Ayalogu's medical condition and claimed bisexuality are not in issue.

[15] With respect to the risk arising out of the disclosure of the Section 44 Report, the Delegate found no more than a mere possibility that Nigerian authorities would arrest and mistreat him upon return for the following reasons:

A. Mr. Ayalogu is a member of the elite in Nigerian society and "the elite in Nigeria are provided with a degree of immunity from the normal consequences of the law due to a system riddled with ingrained nepotism";

B. even if he were to be subjected to the normal consequences of the law as reflected in Nigerian "Decree 33" permitting the additional punishment of those found

guilty of drug offences overseas, “Decree 33” only applies to those convicted of offences. As his submissions confirm, there is no indication in the Section 44 Report that Mr. Ayalogu was prosecuted or convicted for any offences; and

C. it was unlikely that Nigerian authorities would have retained the Section 44 Report from 2007.

IV. Standard of Review

[16] The parties do not dispute that the Delegate’s decision is reviewable against the standard of reasonableness (*Thamotharampillai v Canada (Citizenship and Immigration)*, 2016 FC 352 at para 18; *Kandel v Canada (Citizenship and Immigration)*, 2014 FC 659 at para 17). A reviewing Court must consider whether the decision-making process reflects the elements of justification, transparency and intelligibility, and whether the outcome falls within the range of possible acceptable outcomes based on the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

V. Analysis

[17] As a preliminary matter the respondent submits the Delegate’s jurisdiction to assess the risk in this case was not circumscribed by the assessment conducted by the PRRA officer in 2007. I agree. The jurisprudence requires that the Delegate assess the evidence and information available at the time of the decision and render a decision as to whether an applicant would be at risk if removed from Canada on the basis of that assessment (*Placide v Canada (Citizenship and Immigration)*, 2009 FC 1056 at paras 58, 63 and 70).

A. *Did the Delegate engage in speculation, rather than logical inference, in finding it not likely Mr. Ayalogu would face a personalized risk?*

[18] The respondent submits that the Delegate's conclusions were permissible inferences that could logically and reasonably be drawn from the following established facts: (1) the Nigerian High Commissioner personally contacted Mr. Ayalogu's father regarding his alleged gang related activities in 2007; (2) Mr. Ayalogu's father was a Nigerian diplomat; and (3) the Nigerian High Commission did not issue a passport in 2007 when proceedings to remove Mr. Ayagolu from Canada were underway. These established facts were, the respondent argues, sufficient to allow the Delegate to draw the following inferences:

A. the Nigerian High Commission was inclined to help Mr. Ayalogu and "attempted to frustrate legitimate deportation proceedings in 2007";

B. it was unlikely that the Nigerian authorities would have retained the Section 44 Report; and

C. Mr. Ayalogu would be shielded from mistreatment if the Section 44 Report had been shared with other Nigerian authorities as he was a member of the Nigerian elite.

[19] I am unpersuaded by the respondent's submissions. Inferences may be drawn by a decision-maker where the primary facts underpinning the inference have been established and the inference can be reasonably and logically drawn from those established primary facts. Where the primary facts have not been established or the inference cannot logically and reasonably be

drawn from the primary facts any attempt to draw an inference will be nothing more than impermissible speculation (*R v Munoz* (2006), 205 CCC (3d) 70 at paras 26 and 28, 86 OR (3d) 134(Ont Sup Ct)). That is what has occurred here.

[20] While the Delegate's conclusions may be plausible, plausibility is not sufficient to support an inference. For example, inferring that the High Commission was seeking to assist Mr. Ayalogu and frustrate a legitimate deportation is one, but only one, plausible explanation for the facts that the High Commissioner contacted a former diplomat regarding his son's pending deportation and that a passport was not issued. It is equally plausible, albeit also speculative, that the High Commissioner would contact any former member of the diplomatic staff where a child is involved simply as a matter of courtesy. One might also speculate that the passport application did not progress because neither Mr. Ayalogu nor CBSA actively pursued it.

[21] Similarly, the conclusion that the Section 44 Report was not retained is based on the passage of time and the fact that a passport was not issued. This too is plausible, but absent some information relating to past experience or Nigerian recording-keeping practices there is no factual foundation from which to logically or reasonably draw the inferences required to reach that conclusion. One might also infer the report was retained in light of the information it contained. As such the conclusion is again conjecture and speculation.

[22] Finally the Delegate concluded that Mr. Ayalogu's social status would shield him from the application of Nigerian law and in turn from mistreatment. This conclusion is linked to a single fact: the phone call his father received from the High Commissioner. As noted above there

are other plausible explanations for this call and there is no established fact that evidences why the call was made. For the Delegate to infer the motivation behind the call and to then rely on that inference to conclude Mr. Ayalogu is a member of the Nigerian elite who will be shielded from the law is pure conjecture. The Delegate also fails to address Mr. Ayalogu's estrangement from his father and the passage of time, both of which might logically impact upon his ability to benefit from any status his father may have in Nigeria.

B. *Did the Delegate err in failing to consider subsection 12(2) of the Nigerian Criminal Code Act?*

[23] The respondent submits that the Delegate did not err in failing to address the alleged risk arising from the *Nigerian Criminal Code Act* [Code] because the wording of subsection 12(2) demonstrates the provision only applies to acts or omissions that constitute an offence in Nigeria and that suspected involvement with a criminal organization would not be captured. Again I disagree.

[24] I recognize that a decision-maker need not address or refer to every argument an applicant may raise (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16). However, where a decision-maker fails to address evidence that is of direct relevance to the issues in dispute a Court may be more willing to conclude a finding has been reached without regard to that evidence (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35 at para 17, 1998 CanLII 8667 (FCTD)).

[25] In this case subsection 12(2) of the Code provides for prosecution in Nigeria where an "act and omission occurs elsewhere." The Delegate does not address what risk (if any) arose from this provision. Respondent's counsel has advanced an interpretation of the Code to explain why the Delegate did not err in failing to address any risk arising out of this provision. However, the risk, if any, arising out of the Code was an issue for the Delegate to address in reasons not for counsel to advance on judicial review.

VI. Conclusion

[26] The Delegate's decision is based on speculation and conjecture and fails to address all aspects of the risk alleged. The decision does not reflect the required elements of justification, transparency and intelligibility.

[27] The parties agreed in the course of hearing that no question of general importance arises. I agree.

JUDGMENT IN IMM-4876-16

THIS COURT'S JUDGMENT is that:

1. The application is granted and the matter returned for redetermination by a different decision-maker;

2. No question is certified.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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