Federal Court  Cour fédérale

Date: 20190719

Docket: IMM-5220-18

Citation: 2019 FC 958

Ottawa, Ontario, July 19, 2019

PRESENT: Mr. Justice Boswell

BETWEEN:

EMEKA STANLEY EDOM
CYNTHIA NKIRUKA EDOM
VALENTINA CHISOM EDOM
GOODLUCK CHUKWEMEKA EDOM
MANDELA CHINEMELUM EDOM
CLINTON CHINAZOR EDOM

Applicants

And

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] Emeka Stanley Edom, his wife, and their four minor children are citizens of Nigeria. They came to Canada in October 2015 and made refugee claims. Their claims were suspended when the Minister issued a report under subsection 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] and referred the matter to the Immigration Division [ID] of

the Immigration and Refugee Board [IRB] for an admissibility hearing. The ID found Mr. Edom and his family were not inadmissible.

[2] The Minister appealed the ID's decision to the Immigration Appeal Division [IAD] of the IRB. In a decision dated September 28, 2018, the IAD found Mr. Edom and his family inadmissible to Canada because he had engaged in or instigated the subversion by force of the Nigerian government. They have now applied under subsection 72(1) of the *IRPA* for judicial review of the IAD's decision, asking that the decision be quashed, and the matter returned for redetermination by a different member of the IAD.

I. Background

[3] The IAD found Mr. Edom inadmissible by virtue of paragraphs 34(1) (f) and 34(1) (b) of the *IRPA* and, consequently, his family were also inadmissible by virtue of paragraph 42(1) (b). The IAD conducted a *de novo* analysis based on written submissions as the parties had agreed that the IAD could proceed without the need for an oral hearing.

[4] Mr. Edom conceded for purposes of the appeal to the IAD that he is a foreign national and not a Canadian citizen or permanent resident of Canada. He also conceded that he was a member of the Movement for Actualization of the Sovereign State of Biafra [MASSOB] and that the MASSOB is an organization for the purpose of the analysis under paragraph 34(1)(f) of the *IRPA*. The central issue before the IAD was whether the MASSOB engaged in or instigated the subversion by force of the Nigerian government.

[5] The MASSOB espouses the independence of a region in Nigeria identified as Biafra through non-violent means. It is composed primarily of ethnically Igbo people.

[6] In his submissions to the IAD, the Minister argued there were reasonable grounds to believe that the MASSOB committed acts which constituted engaging in or instigating the subversion by force of the Nigerian government. Those acts included: (i) seizure of oil tankers; (ii) attacks on police stations; (iii) attacks on government staff conducting a national census; and (iv) the creation of a private army. Mr. Edom denied these allegations in his submissions to the IAD.

[7] According to Mr. Edom, the MASSOB advocates peacefully for an independent Biafra. The Minister disagreed and provided documentation to the IAD indicating that the MASSOB, despite its public statements that it is a peaceful organization, have engaged in the use of violence to achieve their political objectives.

II. The IAD Decision

[8] The heart of the IAD's decision is contained in the following paragraphs:

> [15] The panel finds that the acts that are attributed to the MASSOB, namely the hijacking of tanker trucks, the attack on police stations and the attacks on government staff conducting a national census fall within the ambit of Section 34(1) (b) of the *Act* as they are all considered acts of subversion as defined by the courts in Canada. In particular, with respect to the hijacking of fuel trucks, the Federal Court (the "Court") in *Canada v. USA* provided a detailed analysis of this activity and concluded that this was in fact an act of subversion rather than an act of civil disobedience. Regarding the attacks on police stations and the attacks on census

> workers, the panel finds that these activities also constitute acts of subversion against the government of Nigeria.
>
> [16] The only outstanding issue for the panel to decide is whether there are reasonable grounds to believe that the acts mentioned above were committed by the MASSOB. The panel finds that there are reasonable grounds to believe that they were.

[9] After making these findings, the IAD noted that the Minister had provided numerous documents indicating that the MASSOB, despite its public statements that they are a peaceful organization, have in fact engaged in the use of violence to achieve their political objectives. It also noted testimony before the ID that the government of Nigeria had attributed acts of subversion to MOSSAB in order to discredit them and to justify the crackdown against them.

[10] The IAD disagreed with the Minister's submissions that it must respect and apply the principle of *stare decisis* with respect to the Federal Court decision in *Canada (Citizenship and Immigration) v U.S.A.*, 2014 FC 416 [*U.S.A.*]. Although the IAD stated that the principle of *stare decisis* did not apply, it nonetheless found it was "bound" by the finding in *U.S.A.* that "the high jacking of oil tankers by a group seeking its independence from a country constitutes an act of subversion by force."

[11] The IAD noted the Applicants' position that *stare decisis* did not apply because the MASSOB member in *U.S.A.* conceded that the MASSOB were involved in the high-jacking of oil tankers, while there was no such concession in this case. The IAD recognized that, while Mr. Edom had not conceded that the MASSOB high-jacked oil tankers, it could not:

> … ignore that the MASSOB member in that case conceded to the high jacking of oil tankers and that the Court accepted the concession.

> … the acceptance of the concession by the Court must be taken into consideration and given significant weight. The panel finds that the Court provided a detailed analysis of the high jacking of the oil tankers and concluded that these actions constitute subversion under Section 34(1)(b) of the *Act*. The panel believes that the Court's acceptance of the concession that the MASSOB was involved in the high jacking of oil tankers is a strong indication that the court believed that there were reasonable grounds to believe that the MASSOB high jacked oil tankers in Nigeria.

[12] The IAD also considered the IAD decision in *Benneth v Canada (Public Safety and Emergency Preparedness)*, 2013 CanLII 65198 (CA IRB) [*Benneth*]. Although the IAD acknowledged it was not bound by *Benneth*, it noted that:

> The IAD in *Benneth* appears to have relied on evidence presented by the Minister that is similar to the evidence presented by the Minister in this case. The panel finds that the *Benneth* decision is persuasive with respect to its conclusion that there are reasonable grounds to believe that the MASSOB high jacked oil tankers in Nigeria and that this constituted an act of subversion that falls within the ambit of Section 34(1)(b) of the *Act*.

[13] With respect to the evidence presented by the Minister, the IAD referenced a news article quoting a national legal advisor for the MASSOB who stated that the seizure of oil tankers was approved by the senior leadership of the MASSOB. The IAD also referenced testimony before the ID about another news article describing the decision of the MASSOB leadership to seize oil tankers. It gave little weight to the testimony that the MASSOB had tried to correct this article but were unable to do so.

[14] The IAD noted the evidence submitted by the Minister where the leader of the MASSOB provided a justification several years later for taking the oil tankers. The IAD observed that the

ID member had dismissed this evidence as it was included in an academic paper without proper annotation. The IAD found:

> … this evidence is not determinative of whether there are reasonable grounds to believe that the MASSOB high jacked oil tankers. That being said, even if the panel gives this little weight, the panel finds that when its considered with the other evidence presented by the Minister as well as in consideration of the Canada and Benneth decisions, the panel finds that the Minister has established that there are reasonable grounds to believe that the MASSOB high jacked oil tankers in Nigeria and that these are acts that fall within the ambit of Section 34(1)(b) of the Act.

[15] Thus, the IAD allowed the Minister's appeal and issued a deportation against the Applicants.

III. Analysis

[16] This application for judicial review raises one central issue: was the IAD's decision reasonable?

A. *Standard of Review*

[17] The standard of reasonableness applies to the IAD's interpretation and application of paragraphs 34(1)(b) and 34(1)(f) of the *IRPA* (*B074 v Canada (Citizenship and Immigration)*, 2013 FC 1146 at para 23).

[18] The reasonableness standard tasks the Court with reviewing an administrative decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determining "whether the decision falls 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 para 47). Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16 [*Newfoundland Nurses*]).

[19] So long as "the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome"; nor is it "the function of the reviewing court to reweigh the evidence" (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61).

B. *Was the IAD's decision reasonable?*

[20] In the Respondent's view, the facts of this case are identical to those in *U.S.A.*; they involve the same organization and the same allegations are made with the same evidence used in *U.S.A.* According to the Respondent, the concession made in *U.S.A.* about the MASSOB's seizure of oil tankers should be viewed as evidence that the events in question took place as alleged.

[21] The Applicants say the IAD erred by relying on findings of fact in other decisions. According to the Applicants, it is trite law that a tribunal can rely on only the legal principles set out in the jurisprudence and not the factual findings underpinning a decision. The Applicants submit that, when it comes to factual issues, each case must be determined on the facts before the

decision-maker and in this case the IAD improperly imposed an established interpretation of the facts based on a record which may have been incomplete or outdated.

[22] In my view, the IAD unreasonably relied upon factual determinations in other decisions in finding that the MASSOB seized oil tankers. “Subject to judicial notice, the answer to a question of fact, as it rests wholly on the evidence in a particular case, cannot be presumed to be true for any situation outside the specific one before the trial court” (*R v Daley*, 2007 SCC 53 at para 86). Put another way, an individual case does not establish binding factual precedents or eliminate the necessity of proving facts in each individual case.

[23] In this case, the IAD considered itself “bound” by the fact conceded in *U.S.A.* that the MASSOB high jacked oil tankers and, because the evidence presented by the Minister was similar to that presented in *Benneth*, the IAD found *Benneth* was “persuasive” in showing there were reasonable grounds to believe the MASSOB high jacked oil tankers. Aside from these two decisions, the only other evidence referenced by the IAD in making its finding concerning the seizure of oil tankers were two news articles and the testimony before the ID concerning the seizure of oil tankers.

[24] Essentially, the IAD determined in this case that, because it was accepted as a fact in *U.S.A.* and in *Benneth* that the MASSOB high jacked oil tankers, and since the Minister presented similar evidence in *Benneth* as in this case, this supported and bolstered its finding that the MASSOB seized oil tankers in Nigeria. This finding is problematic for two reasons. First, it cannot be verified; the record in *Benneth* was not before the IAD and, although the Minister

submitted that the record in this case was similar to that in *Benneth*, this does not establish that it was. Second, not all of the evidence in this case was the same as in *Benneth* and *U.S.A.*

[25] It is true that the standard of "reasonable grounds to believe" contemplated by section 33 of the *IRPA* is a low one. As the Supreme Court stated in *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40:

> 114 … the "reasonable grounds to believe" standard requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities: [citations omitted]. In essence, reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information: [citation omitted].

[26] It is also true there is a rebuttable presumption that the IAD considered the totality of the evidence. A "decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (*Newfoundland Nurses* at para 16). Administrative agencies are not "required to refer to every piece of evidence … that is contrary to their finding, and to explain how they dealt with it" as it will often be sufficient simply to make a statement "in its reasons for decision that, in making its findings, it considered all the evidence before it" (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 at para 16 [*Cepeda-Gutierrez*]).

[27] The deference usually afforded to an administrative decision-maker dissipates and lapses, however, when key evidence or a significant and material fact is not adequately addressed. If the evidence is highly relevant or appears to contradict other findings of facts, a reviewing court may

be willing to infer that the administrative decision-maker ignored such evidence and made an "erroneous finding of fact 'without regard to the evidence'" (*Cepeda-Gutierrez* at paras 14-15).

[28] In this case, at the ID hearing the Applicants submitted eight packages of documents and called two witnesses who testified by telephone from Nigeria. This documentation overwhelmingly speaks to the non-violent nature of MASSOB; none of it discusses the alleged seizure of oil tankers. Before the IAD, the Applicants also submitted a letter from Amnesty International which states, in relevant part, that:

> While the MASSOB has sought secession from Nigeria, its leaders pledged non-violence. Amnesty International has not documented incidents where MASSOB has encouraged its members to engage in acts of violence designed to instill terror or acts of violence designed to overthrow the government of Nigeria.

[29] The IAD did not mention, let alone engage with, this letter or the other evidence attesting to the non-violent nature of the MASSOB. It is apparent from the IAD's reasons and decision that it referred to only those portions of the evidence which supported its conclusions. There was credible evidence before the IAD that the MASSOB has not engaged in violence of the type referred to by the IAD in its reasons. Such evidence stands in direct contradiction to the IAD's findings and, in my view, the IAD was obliged to analyze and consider this evidence even if only to reject it. The apparent failure by the IAD to consider the evidence which contradicted its findings is not defensible and renders its decision unreasonable.

IV. Conclusion

[30] The IAD's decision in this case was not reasonable. The matter must be returned to be reconsidered by a different member of the IAD.

[31] Neither party proposed a serious question of general importance to be certified under paragraph 74(d) of the *IRPA*; so, no such question is certified.

[32] The Applicants have named the Minister of Citizenship and Immigration as the Respondent in this matter. The correct respondent is the Minister of Public Safety and Emergency Preparedness (*Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, s 5(2) and *IRPA* subsection 4(2)). Accordingly, the Respondent in the style of cause will be amended to be the Minister of Public Safety and Emergency Preparedness.

JUDGMENT in IMM-5220-18

THIS COURT'S JUDGMENT is that: the application for judicial review is granted; the decision of the Immigration Appeal Division dated September 28, 2018, is set aside; the matter is returned for redetermination by a different member of the Immigration Appeal Division in accordance with the reasons for this judgment; no question of general importance is certified; and the style of cause is amended, with immediate effect, to name the Minister of Public Safety and Emergency Preparedness as the Respondent in lieu of the Minister of Citizenship and Immigration.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	EMEKA STANLEY EDOM, CYNTHIA NKIRUKA EDOM, VALENTINA CHISOM EDOM, GOODLUCK CHUKWEMEKA EDOM, MANDELA CHINEMELUM EDOM, CLINTON CHINAZOR EDOM v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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