Federal Court  Cour fédérale

Date: 20170328

Docket: IMM-3706-16

Citation: 2017 FC 323

Ottawa, Ontario, March 28, 2017

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

EDISON JAMES NWABUEZE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is a judicial review of a pre-removal risk assessment [PRRA] by an immigration officer [PRRA Officer] dated August 18, 2016, in which the PRRA Officer determined that the Applicant would not be at risk of persecution, be subject to risk of torture, or face a risk to life or risk of cruel and unusual punishment or treatment if removed to Nigeria, his country of nationality.

[2] As explained in greater detail below, this application is allowed, because the PRRA Officer's analysis fails to provide a sustainable explanation for reaching a different decision, than did the officer considering the Applicant's application for permanent resident on humanitarian and compassionate [H&C] grounds [H&C Officer], on the question whether the Applicant was a member of the Movement for the Actualization of the Sovereign State of Biafra [MASSOB].

II. Background

[3] The Applicant, Edison James Nwabueze, is a citizen of Nigeria. He arrived in Canada on November 2, 2006 and made a refugee claim based on fear of persecution due to membership in the political organization MASSOB. His refugee claim was refused on June 27, 2008, as the Refugee Protection Division [RPD] found him not to be credible in claiming that he was a member of MASSOB and feared returning to Nigeria because police and security agents were looking for him. The Federal Court subsequently denied Mr. Nwabueze's application for leave to apply for judicial review of this decision.

[4] Mr. Nwabueze has now been residing in Canada for almost 10 years and has submitted applications for permanent residence on H&C grounds. His most recent application was refused on May 12, 2016 based on security grounds surrounding his membership in MASSOB. The H&C Officer found Mr. Nwabueze to be inadmissible under s.34(1)(f) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. That decision was recently overturned on judicial review, based on procedural fairness concerns, because the H&C Officer relied on information, which had not been shared with Mr. Nwabueze, to conclude that MASSOB was a terrorist

organization (see *Nwabueze v Canada (Minister of Citizenship and Immigration)*, 2017 FC 26). In that judicial review application, Mr. Nwabueze did not deny being involved with MASSOB.

[5] Mr. Nwabueze also filed a PRRA application on March 26, 2014, stating that he fears harm by the Nigerian government due to his membership in MASSOB and harm from the public as well as the government because of his HIV positive status. His PRRA application was refused on July 13, 2016 in the decision which is the subject of this judicial review.

III. Issues

[6] The Applicant articulates the following issues for the Court's consideration:

A. What is the standard of review?

B. Was the PRRA Officer's finding that the Applicant was not a member of MASSOB unreasonable?

C. Did the PRRA Officer err in finding that the Applicant was not at risk in Nigeria because of his HIV status?

IV. Analysis

[7] The parties agree, and the Court concurs, that the standard of review applicable to the substantive issues in this matter, which involve the PRRA Officer's assessment of the evidence in a PRRA application, is the standard of reasonableness (see *Haq v Canada (Minister of*

Citizenship and Immigration), 2016 FC 370, at para 15; *Nguyen v Canada (Minister of Citizenship and Immigration)*, 2015 FC 59, at para 4).

[8] My decision to allow this application turns on the first substantive issue raised by Mr. Nwabueze, that the PRRA Officer made a reviewable error in finding that the Applicant was not a member of MASSOB. That error involves the PRRA Officer failing to provide a sustainable explanation for reaching a different decision, than did the H&C Officer, on the question whether Mr. Nwabueze was a member of MASSOB.

[9] Mr. Nwabueze refers to this as a matter of comity. Strictly speaking, this is a misnomer. As noted by the Respondent, Justice Harrington explained at paragraph 36 of *McNally v Canada (Minister of National Revenue)*, 2015 FC 767 that comity, in a judicial context, applies to decisions on points of law, not findings of fact. Further, as held at paragraph 15 of *Siddiqui v Canada (Minister of Citizenship and Immigration)*, 2007 FC 6 [*Siddiqui*], which addressed contradictory decisions of members of the Immigration and Refugee Board [IRB], there is no strict legal requirement that one decision-maker must follow the factual findings of another. This is particularly so where the reasonableness standard of review is applicable.

[10] However, Mr. Nwabueze acknowledges these principles. He does not argue that the PRRA Officer was obliged to follow the conclusion of the H&C Officer that he was a member of MASSOB. Rather, he argues that the PRRA Officer was obliged to provide sustainable reasons for reaching a different conclusion. Mr. Nwabueze relies on paragraph 18 of Justice Phelan's decision in *Siddiqui*:

> [18] What undermines the Board's decision is the failure to address the contradictory finding in the *Memon* decision [IRB decision A5-00256]. It may well be that the member disagreed with the findings in *Memon* and may have had good sustainable reasons for so doing. However, the Applicant is entitled, as a matter of fairness and the rendering of a full decision, to an explanation of why this particular member, reviewing the same documents on the same issue, could reach a different conclusion.

[11] The Respondent does not dispute that this principle expressed in *Siddiqui* is good law but argues that it must be considered in the particular context of the present case, where the PRRA Officer was considering new evidence that was not before the H&C Officer, and that the PRRA Officer has provided a reasonable explanation for departing from the H&C Officer's conclusion.

[12] Mr. Nwabueze acknowledges that the PRRA Officer received new evidence, in support of his position that he was a member of MASSOB, that was not before the RPD or the H&C Officer. The PRRA Officer's decision canvasses this new evidence but finds it to be of little probative value and places little weight upon it. The PRRA Officer then addresses the H&C Officer's finding that Mr. Nwabueze was excluded from H&C consideration under s. 34(1)(f) of IRPA. The Officer gives two reasons for placing less weight on that finding than on the RPD's finding that Mr. Nwabueze was not a member of MASSOB.

[13] The first reason is that the s. 34(1)(f) decision by the H&C Officer was based on a test with the lower threshold of reasonable grounds, while the RPD's decision, as well as the PRRA Officer's own decision, applies the standard of balance of probabilities. The second reason is that the s. 34(1)(f) decision was based on Mr. Nwabueze's continued assertion of membership in

MASSOB, while the RPD's finding was made after interviewing him and reviewing his supporting documentation.

[14] Mr. Nwabueze argues that the PRRA Officer erred in identifying the standard applicable to the s. 34(1)(f) decision. He submits that, while the "reasonable grounds" standard applies to the H&C Officer's determination of whether an organization has engaged in acts of terrorism, it does not apply to the factual determination as to membership in the organization, which must be proven on a balance of probabilities (see *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, at paras 58-59). The Respondent concedes that the PRRA Officer appears to have misunderstood this point, or at least that it is unclear from the PRRA Officer's reasons that this point was understood.

[15] I agree with Mr. Nwabueze that the reasons demonstrate that the PRRA Officer did not properly understand the standard of proof applicable to the H&C Officer's factual finding. Consistent with the obligations prescribed by *Siddiqui*, the paragraph of the decision in which the PRRA Officer refers to the applicable thresholds or standards is devoted to explaining why the decision differs from that of the H&C Officer. The particular determination by the H&C Officer that the PRRA Officer was required to address was the factual finding that Mr. Nwabueze was a member of MASSOB. Therefore, the reference to the lower threshold of reasonable grounds can only intelligibly be read as a reference to the standard of proof applicable to the factual finding of membership. In this respect, the PRRA Officer was clearly in error.

[16] The Respondent argues that this error was immaterial, because the PRRA Officer gave a second reason for differing from the H&C Officer's conclusion, and particularly because the evidentiary record before the two officers was itself different, with the PRRA Officer having the additional benefit of the new evidence.

[17] My conclusion is that these arguments do not represent a basis to sustain the decision notwithstanding the PRRA Officer's error. The PRRA Officer gave two reasons for reaching a different conclusion than the H&C Officer. It may be that, if the PRRA Officer had correctly understood that the same standard of proof applied to the determination of membership in MASSOB in both applications, the PRRA Officer would still have reached a different conclusion than that in the H&C application. However, the Court cannot know this. Mr. Nwabueze has not received a sustainable explanation why the PRRA Officer reached a different conclusion, to which he is entitled under *Siddiqui*.

[18] I also do not consider the effect of the new evidence to assist the Respondent on the facts of this case. I accept that a different evidentiary record may represent a sound basis for reaching a conclusion which differs from a prior conclusion on the same question. However, in the present case, Mr. Nwabueze argued the new evidence to be additional support for his position that he had been a member of MASSOB. While the PRRA Officer found that evidence to be of insufficient probative value, the PRRA Officer did not rely on the new evidence as part of the explanation for reaching a different conclusion than the H&C Officer had reached based on the previous record. Rather, in addressing the s. 34(1)(f) finding, the PRRA Officer provided the explanation which

was based in part on the error explained above, surrounding the standard of proof applicable to that finding.

[19] It is therefore my conclusion that this error by the PRRA Officer renders the decision unreasonable, such that this application for judicial review must be allowed and Mr. Nwabueze's PRRA application returned for reconsideration by another officer. It is therefore unnecessary for the Court to reach conclusions on the other issue raised by Mr. Nwabueze, surrounding the fear he alleges based on his HIV status. The reconsideration of his application will include these allegations.

[20] Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed, and the matter is remitted back to a different immigration officer for reconsideration. No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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