Date: 20070920

Docket: IMM-5079-06

Citation: 2007 FC 944

Toronto, Ontario, September 20, 2007

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

BERNARD MWAURA MUCHAI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant is an adult male person, a citizen of Kenya. The Applicant sought refugee status in Canada and was denied. The Member of the Immigration and Refugee Board of Canada, Refugee Protection Division, in a written decision dated August 29, 2006, determined that the Applicant was not a Convention refugee and not a person in need of protection, thereby denying the claim. In particular, the Member found that the Applicant knowingly took part in the Mungiki sect in Kenya an organization which was engaged in crimes against humanity including crimes against civilian populations and serious non-political crimes as proscribed by Articles 1F(a) & (b) of the Geneva Convention. Further, the Member found that the Applicant had not satisfied his burden of establishing a serious possibility of persecution on a Convention ground namely that it was more

likely than not that he would be personally subjected to danger of torture or face a risk to life or of cruel and unusual treatment or punishment on return to Kenya.

[2] For the reasons that follow, I find that the application is to be dismissed.

[3] The Applicant claims to have pursued a career as a photographer commencing with the Ministry of Information and Broadcasting in Kenya in 1989. He went to London England in 1995 where he continued that career. In 2001, the Applicant returned to Kenya where he continued that career on a freelance basis. The Applicant applied to enter Canada on a visitor's visa to visit photography studios in Canada in September 2005 and initially was rejected. He also applied for a United States visa at the same time and was rejected. The Applicant applied a second time for a visa to visit Canada and was permitted a visa. When entering Canada under the visa, the Applicant was questioned at length by immigration officials at which time the Applicant made a claim for refugee status. The Applicant asserts that at the time that the initial Canadian and the United States visas were sought, the Applicant's house was raided and ransacked by Kenyan police. The basis, for the raid according to the Applicant was that the Applicant was a member of what is known as the Mungiki sect.

[4] The Applicant joined the Mungiki sect in 2002, that is, after he returned to Kenya from England. The Applicant freely admits to joining that sect and being a member without coercion. He even produced a membership card to the Member of the Board hearing the matter. The Applicant claims that the Mungiki is a group that is comprised of many different elements and that

there are bad persons who are not members of the Mungiki but do things in the name of Mungiki. He admits that there is no doubt that some bad people do certain things in the name of Mungiki but that it is impossible to prevent them from doing so. The Applicant claims not to believe in violence but only associates with the Mungiki by reason of his interest in Kenya's cultural past, human rights, and the creation of an alternative political party in Kenya. The Applicant admits that the Mungiki sect has been attacked by the Kenyan government and members are subject to arrest. The Applicant asserts however that every political party in Kenya uses violence and intimidation and that the government itself encourages criminals to engage in violent activity in the name of Mungiki.

The Member considered the Applicant's evidence and the other evidence presented. The Member stated that tyranny in the name of any supposed noble cause is tyranny and that any argument as to different sectors in the Mungiki sect are best left for determination by the courts in Kenya. The Member determined that there was no reliable evidence from which to conclude that there were two different sectors in the Mungiki cult. I agree with this conclusion. Other than the Applicant's assertions, there is no evidence that there exists a benevolent or non-violent sector of the Mungiki cult. All other evidence is overwhelming that the Mungiki is not based on any particular religious affiliation, but it is more like an army unit using assault rifles, it is and linked with extortion, killings, illegal drug sales and for-hire vigilantism; it is a veritable secret army having the ability to practice mass violence.

[5] A review of the record leads to conclusion that the findings of the Member as to the Mungiki as set out at page 8 of his Reasons are not unreasonable namely:

> *In view of the unsurmountable documentary evidence contained in Minister's Counsel's evidence, there is little doubt that Mungiki exist for one single brutal purpose. That purpose would seem to be obtaining dominance by use of murder and intimidation. Similarly, there is very little doubt that the claimant was aware of those things and knowingly remained a part of that organization. And shared a common purpose, the overthrow of contemporary Kenyan values for the purpose of returning to traditional Kikuyu religion and culture.*

[6] The Member further in his Reasons at page 8 acknowledges that there is no evidence that the Applicant personally participated in atrocities committed by the Mungiki. He was guided, however in coming to his decision by the principles as set out in *Ramirez v. Canada (MCI)* [1992] 2 FC 306

[7] I reviewed the law in respect of a situation where a person was found to be a member of an organization which committed atrocities but there was no evidence of direct participation on those activities by the person in question *Bedoya v. Canada (MCI)* 2005 FC 1092. The decision in *Ramirez* supra is to be considered in light of later decisions including the Supreme Court of Canada in *Canada (MCI) v. Mugesera* 2005 SCC 39 and this Court in *Zazai v. Canada (MCI)* 2004 FC 1356. In *Bedoya*, I concluded in paragraphs 11 and 12:

> *[11] The test in law applied by the Board appears, therefore, to be correct, they considered whether the Applicant Sanchez "was a knowing and active participant" and an "accomplice" in crimes against humanity.*
>
> *[12] The question for the Court therefore is whether the findings of the Board in fact to support the conclusions in law were "patently*

> *unreasonable" given that the standard to be met by the Minister is "less than the balance of probabilities". In this regard the cases enumerate various considerations for "complicity" in situations such as the one now before the Court. I accept the summary of these considerations offered by the Minister's counsel at paragraph 32 of the Respondent's Further Factum:*
>
> *a. The nature of the organization*
> *b. The method of recruitment*
> *c. The position/rank in the organization*
> *d. The length of time in the organization*
> *e. The opportunity to leave; and*
> *f. The knowledge of the organization's atrocities.*

[8] In examining the criteria set out in paragraphs a) to f) above, the evidence shows that the Applicant knowingly and voluntarily joined the Mungiki in 2002 and remained as a member of that organization at least until his arrival in Canada in late 2005. He apparently knew when he joined that the Mungiki was an organization engaged in atrocities. He had many opportunities to leave the Kenyan government even offered an amnesty and protection. We do not know what position or rank he held but it does not appear to have been of significance at least not publicly.

[9] The Member found at page 9 of his Reasons:

> *The Board therefore finds that the claimant has been knowingly complicit in an organization principally directed to a limited brutal purpose and has shared a common purpose with the Mungiki sect by virture of having been enough aware of the sect's violence to have voices concerns to Mungiki leaders but, despite his own misgivings knowingly remained a member of the Mungiki sect until his departure from Kenya in October 2005. Further, the claimant has acknowledged that he shared the view with his fellow Mungikis that the ideal situation for Kikuyu tribe*

> *would be for the Mungiki to seize power and recreate native culture and religion in Kenya.*
>
> *Accordingly, the Board finds that there are serious reasons to consider that the claimant has knowingly taken part in such actions in Kenya and as a consequence of his participation with the Mungiki sect as exclude him from refugee protection because of Crimes Against Humanity including crimes against civilians population[22] and serious non-political crimes.*

[10] These findings are not unreasonable having regard to the evidence before the Board.

[11] Given that the Applicant voluntarily joined the Mungiki, knowing it to be an organization which committed atrocities, and remained, voluntarily, a member even though he could have extricated himself. Given that, throughout the Hearing, the Applicant continued to assert his desire to affiliate himself with that organization, it was reasonable for the Member to conclude that the Applicant was "complicit" in the activities of atrocity committed by the Mungiki within the meaning of article 1F(a) of the Geneva Convention.

[12] Once the Applicant has been shown to be excluded under section 98 of the *Immigration and Refugee Protection Act* S.C. 2001 c27, the Board should not consider a claim under section 97 of that Act. (*Xie v. Canada (MCI)*, 2004 FCA 250 at paras. 33-37). In this case the Member did consider section 97 and found that the Applicant could seek protection from the state. The Member should not even have considered the matter and it requires no further discussion here.

[13] In respect of the question as to whether the Board must consider section 97 of IRPA once the Applicant has been shown to be excluded under section 98, Applicant's counsel relied on a decision of this court in *Biro v. Canada (Minister of Citizenship and Immigration)*, 2005 F.C. 142 a decision made after the Court of Appeal decision in *Xie* supra where the Trial Judge conducted a section 97 analysis in such a situation. The Judge appears not to have been referred to *Xie*. Further, when Biro's circumstances were again considered in this Court in a decision cited at 2007 FC 776, the Judge, at paragraph 29, followed *Xie* as "settled law" and held that there was no need to conduct a section 97 analysis.

[14] The application is dismissed, there is no questions for certification; there is no special reason to award costs.

JUDGMENT

For the Reasons provided:

THIS COURT ORDERS AND ADJUDGES that:

1. The application is dismissed;

2. There is no question for certification;

3. There is no Order as to costs.

"Roger T. Hughes"
Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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