Federal Court  Cour fédérale

Date: 20130123

Docket: IMM-4860-12

Citation: 2013 FC 58

Ottawa, Ontario, January 23, 2013

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

CHRISTOPHER MIRAMBO ZABLON

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] of a decision of the Refugee Protection Division of the Immigration and Refugee Board [the Board], dated April 23, 2012, where the Board determined that the applicant is not a Convention refugee or person in need of protection.

I. Background

[2] The applicant is a citizen of Kenya. He alleges the following facts in support of his application. He worked as a lecturer at Kisii University College in Kenya and also had a hardware shop and micro-lending business on the side. In September 2010, he contacted police because one of his debtors had not repaid a loan. The police charged the debtor with obtaining money falsely. The debtor was released on bail, but fell ill in October 2010 and died on April 8, 2011.

[3] The debtor turned out to be a member of the Sungu Sungu vigilante group and this group accused the applicant of using witchcraft to bring death upon their associate. The applicant alleges that on April 9, 2011 his friend called him and told him he heard people were planning to harm the applicant. The applicant and his family were able to obtain protection at a police station that day after paying a bribe to the police. That night, the Sungu Sungu came to the applicant's home, set fire to it, and murdered a police officer who came to the scene. They found the applicant at the police station, where they threw stones and objects at him and his family, and his wife and children were injured. The police were able to disperse the assailants by firing shots in the air. The Sungu Sungu members returned to the applicant's home to do more destruction and then went to the applicant's shop and set fire to it.

[4] The applicant fled to his parents' home in Nairobi, where he remained for four months. He started to lose weight and suffer from ulcers and nightmares. While he was there, his mother received a call from the Sungu Sungu indicating that the group knew where the applicant was and that they were looking for him. Due to his fear of the Sungu Sungu, he came to Canada on a temporary resident visa and claimed refugee protection two days after his arrival.

II. Decision under review

[5] With respect to the applicant's credibility, the Board was satisfied that the applicant was targeted by members of the Sungu Sungu vigilante group in his native province of Nyanza.

[6] However, the Board found the applicant's fear did not have a nexus to a Convention ground, noting that the Sungu Sungu is a criminal organization and the applicant's allegations did not show a nexus to a real or perceived political opinion.

[7] The Board also found the applicant did not meet the requirements of section 97(1)(a) because, on a balance of probabilities, he did not face a danger of torture in Kenya and that he did not meet the requirements of section 97(1)(b) because the threat from the Sungu Sungu was one shared generally by other inhabitants of the Nyanza province.

[8] The Board concluded that even if the threat from the Sungu Sungu was not generalized, the applicant had an Internal Flight Alternative [IFA] in Mombasa. The Board found both prongs of the test for an IFA were met, as nothing in the evidence suggested that the Sungu Sungu operates in Mombasa and it would be reasonable for the applicant to find work in Mombasa and live there with his family.

III. Issues

[9] The applicant raises two issues in the present application:

a. Did the Board err in concluding that the risks alleged by the applicant are risks faced generally by other individuals of Nyanza province?

b. Did the Board err in concluding that the applicant has an internal flight alternative?

IV. Standard of review

[10] The two issues to be determined are reviewable under the standard of reasonableness: *Guifarro v Canada (Minister of Citizenship and Immigration)*, 2011 FC 182 at para 19 [*Guifarro*]; *Vivero v Canada (Minister of Citizenship and Immigration)*, 2012 FC 138 at para 12 [*Vivero*]; and *Pena v Canada (Minister of Citizenship and Immigration)*, 2009 FC 616 at para 13).

V. Analysis

A. *Did the Board err in concluding that the risks alleged by the applicant are risks faced generally by other individuals of Nyanza province?*

[11] Section 97 requires that a person establish on a balance of probabilities that he or she would face the risks described in paragraphs 97(1)(a) or (b) of the Act (*Li v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1 at para 14).

[12] The Board has the duty when assessing a claim for asylum under section 97 to consider both whether there is a personal risk and whether that risk is not faced generally by others in the country (*Vivero*, above, at para 29; *Guifarro*, above, at para 32).

[13] In the present case, however, the Board's section 97 analysis was limited to the following:

> [10] The claimant alleges that he is personally targeted by the Sungu Sungu. However, according to the evidence disclosed by the claimant, the Sungu Sungu targets the population generally in Gusiiland. The panel considered the jurisprudence […]
>
> [11] According to the documentary evidence, the population of Nyanza province, home to the claimant and the Sungu Sungu, numbers over 5 million in inhabitants. The panel is satisfied that the threat from the Sungu Sungu is one shared generally by other inhabitants of Nyanza province.

[14] Documentary evidence on the Sungu Sungu is limited. The only evidence on the group to which the Board referred to support its finding that Sungu Sungu targets the population generally in Gusiiland is an article by the Kenya Human Rights Commission dated October 23, 2011 entitled "Sungusungu: Merchants of Terror and Death in Kisii".

[15] In this case, the Board failed to consider the applicant's particular situation. The Board did not take into account that the applicant was not being randomly and indiscriminately targeted. Rather, the Sungu Sungu sought him out specifically in order to avenge the death of one of their members, as they attributed responsibility for their associate's death on to the applicant (see similar reasoning in *Pineda v Canada (Minister of Citizenship and Immigration)*, 2007 FC 365 at paras 13 and 15, cited in *Vivero* at para 16). I also accept the line of reasoning as articulated by Justice Mary J.L. Gleason in *Portillo v Canada (Minister of Citizenship and Immigration)*, 2012 FC 678 at paras 40-41 and Justice Luc Martineau in *Malvaez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1476 on the interpretation of section 97 of the Act.

[16] Accordingly, the Board erred by failing to consider whether this risk faced by the applicant was different from the general risk created by the criminal activity of the Sungu Sungu.

B. *Did the Board err in concluding that the applicant has an internal flight alternative?*

[17] The applicant also submits the Board erred in concluding that he had an IFA in Mombasa. Regarding the first prong of the test, the applicant asserts his experiences show there is a serious possibility of a Sungu Sungu member going to Mombasa to harm him, regardless of the fact that the group is based in Nyanza, and that the Board erred by requiring that he "present objective evidence to that effect."

[18] As for the second prong of the test, the applicant argues that the Board was obliged to assess whether it was reasonable for him to relocate to Mombasa, given he suffered from a stomach ulcer, nightmares and weight loss when he was living in Kenya and afraid of the Sungu Sungu. The applicant submits his psychological state is relevant in assessing a potential IFA and that he provided credible testimony about his mental health (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ 1425 at paras 15-17, 157 FTR 35 [*Cepeda*]).

[19] The respondent submits the Board reasonably found that Mombasa is an IFA for the applicant, as he presented no objective evidence showing that the Sungu Sungu operates in Mombasa or that this IFA would be unreasonable in his circumstances. The respondent asserts that it was reasonable for the Board to note that the applicant has various types of work experience in his country and therefore would be able to find work in Mombasa.

[20] It is agreed by counsel that notwithstanding a wrong assessment by the Board, if there is a viable IFA that is determinative of this matter. The test for a viable IFA is two-pronged. First, the Board must be satisfied that there is no serious possibility of the claimant being persecuted in the IFA found to exist. Second, it must be objectively reasonable to expect a claimant to seek safety in the part of the country considered to be an IFA (*Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 (FCA) at 710-711). The burden is on the applicant to show that an IFA is not viable (see *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589 (FCA) at paras 5-6).

[21] The applicant had stated in his narrative and also in his oral testimony that the Sungu Sungu had continued to seek him out after he went to live with his parents in Nairobi, which is not in the Nyanza province. The Board did not state that it doubted the credibility of the applicant's testimony.

[22] Given that the Board did not doubt the credibility of the applicant's testimony about the Sungu Sungu seeking him out after he left the Nyanza province and that there is very little information about the Sungu Sungu in the file, I believe it was unreasonable, on the evidence before the Board, to find that the first prong of the test had been met. I agree with the applicant's counsel that, given the evidence before the Board, it was unreasonable for the Board to conclude that the Sungu Sungu's reach did not extend beyond the Nyanza province and that there was no serious possibility the Sungu Sungu could find and target him in Mombasa.

[23] With respect to the second prong of the test, the applicant has not referred to any case law that supports his view that the Board committed a reviewable error by failing to mention his mental

and physical suffering while he lived in Kenya and feared the Sungu Sungu. However, if there was no consideration of this evidence, as provided in the medical report at pages 133 and 185, 186 of the certified tribunal record, then the Board erred in this regard as well. While it was reasonable for the Board to find that based on the applicant's work experience and the size of the city of Mombasa, it would be reasonable for the applicant, in the circumstances, to find work in Mombasa and make a life there for him and his family, failing to consider relevant medical evidence constitutes a reviewable error (*Cepeda*, above, at para 28).

[24] I need not determine whether the Board failed to consider the applicant's medical evidence because my reasoning of the first prong of the IFA test is determinative

[25] Given my reasons above regarding the first prong of the test for a viable IFA, as well as my reasons with respect to the applicant's risk in this case, I am granting the application.

JUDGMENT

THIS COURT'S JUDGMENT is that the applicant's judicial review application is granted and the matter is referred to a different Board member for redetermination.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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