Federal Court  Cour fédérale

Date: 20180320

Docket: IMM-2577-17

Citation: 2018 FC 317

Ottawa, Ontario, March 20, 2018

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

FELIX EBERECHUKWU NWOBI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada [RPD], dated May 16, 2017, whereby the RPD rejected the Applicant's claim for refugee protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] on the ground that he is a person referred to in Article 1F(b) of the *United Nations Convention Relating to the Status of Refugees* [Refugee

Convention], that is a person with respect to whom there are serious grounds for considering that he has committed a serious non-political crime outside of Canada prior to his refugee claim.

II. Background

[2] The Applicant is a citizen of Nigeria. He is a Christian. In 1991, during riots in the city of Kaduna where the Applicant resided, Christians were the targets of violence. A number of them were killed, including members of the Applicant's own family. In retaliation, he organized a group of Christians and burned down a mosque. Shortly thereafter, his photo appeared in local newspapers and on posters calling for his death. Fearing for his life, he fled to Germany.

[3] In Germany, he sought asylum, which was refused. However, he could not be deported due to the risk he faced in Nigeria. He eventually received a resident permit in Germany through marriage.

[4] On August 8, 2006, the Applicant agreed to transport 300 grams of cocaine from Hamburg to Munich. He was arrested as he arrived in Munich and convicted of drug trafficking. He was sentenced to 3 years and 9 months followed by 5 years of supervised release and served his full jail sentence.

[5] The Applicant arrived in Canada on October 15, 2010, and applied for refugee protection the following day. In a decision dated July 16, 2013, the RPD first granted him refugee status as it was not satisfied that he was excluded from refugee protection pursuant to Article 1F(b) of the Refugee Convention.

[6] That decision was overturned on judicial review and sent back to the RPD to be reassessed (*Canada (Citizenship and Immigration) v Nwobi*, 2014 FC 520 [*Nwobi*]). The Court ruled that the RPD had misstated the law as it completely misunderstood Parliament's intention and misread the amendments made to the *Controlled Drugs and Substances Act*, SC 1996, c 19, which added a minimum sentence for those convicted of drug trafficking who used or threatened to use violence or a weapon (*Nwobi* at para 11). The Court further concluded that this error was determinative and tainted the conclusion that the Applicant "did not commit a serious non-political crime in Germany" (*Nwobi* at para 12). Finally, the Court determined that the RPD had erred in not considering the arson committed by the Applicant in Nigeria as grounds for inadmissibility (*Nwobi* at para 19).

[7] On May 3, 2017, as a result of that judgment, a new hearing was held by a different RPD Member. On May 16, 2017, the Applicant's claim for refugee protection was rejected.

[8] The RPD rejected the Applicant's claim for refugee protection because he is a person referred to in Article 1F(b) of the Refugee Convention. The RPD observed that under Canadian law, the offence committed by the Applicant in Germany has a maximum sentence of life imprisonment and crimes punishable by a maximum sentence of 10 years or more are presumed to be serious. Citing *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68 [*Febles*], the RPD agreed with the Applicant that this presumption should not be applied in a mechanical, decontextualized or unjust manner (*Febles* at para 62).

[9] The RPD concluded that the mitigating factors proposed by the Applicant did not rebut the presumption that he had committed a serious crime in part because several of the factors invoked were "extraneous to the crime." The factors invoked were that (i) he was only transporting cocaine and was not involved in its distribution or sale, (ii) the crime was a one-time mistake with no prior involvement in drug trafficking, (iii) he was not carrying a weapon and there was no indication of use of violence, (iv) he told the truth about the crime when he arrived in Canada, (v) he did not reoffend, served his time and is not considered a danger to society, and (vi) he received a lesser sentence than the person who hired him to transport the cocaine.

[10] The RPD further held that the seriousness of the crime should not be considered according to German law; rather, the RPD had to consider how such an accusation would translate into a Canadian context. Despite the lack of violence associated with the crime, the RPD considered that trafficking hard drugs like cocaine is considered a very serious matter in Canada; users of cocaine present a serious danger to society. The RPD claims to have considered every aspect of the context of the Applicant's crime in concluding that the presumption of the serious nature of the crime is not rebutted. The Applicant is therefore a person referred to in Article 1F(b) of the Refugee Convention.

[11] Having determined that the Applicant is a person referred to in Article 1F(b) of the Refugee Convention due to his conviction for drug trafficking in Germany, there was no need, according to the RPD, to assess the arson committed by the Applicant in Kaduna in 1991.

[12] The Applicant essentially claims that the Article 1F exclusion clause is only intended to exclude individuals with very serious criminality, such as involvement in crimes against humanity, terrorism, other crimes of a reprehensible nature, or those whose crimes are based on violence or participation in a criminal organization. He further submits that the analysis in Canada should follow the path laid out in the May 30, 1997, UNHCR legal opinion on exclusion clauses (which is actually a *Note on the Exclusion Clauses by the UNHCR Standing Committee*) and that the exclusion clause was never intended to exclude non-violent, one-time offenders such as the Applicant. Finally, as legislation that restricts human liberties, the Article 1F(b) Refugee Convention exclusion clause should be interpreted restrictively.

[13] The Applicant further contends that the RPD should accordingly have balanced the seriousness of the Applicant's crime against the risk he faces if he is returned to Nigeria when determining if he is a person referred to in Article 1F(b) of the Refugee Convention. In particular, the RPD should have considered Article 33 of the Refugee Convention, which the Applicant mistakenly claims is internalized by section 101 of the Act. The Applicant also reminds the Court that paragraph 3(3)(f) of the Act requires that the Act be applied in compliance with Canada's international human rights commitments. According to him, this would have required the RPD to assess the situation in Nigeria.

[14] Finally, the Applicant argues that the impact of a maximum 10-year sentence for a crime in Canada has to be contextualized. It cannot be the only criteria determining whether a crime is serious or if the perpetrator is a danger to the public. Given that he was never a member of a criminal organization, was only convicted of one crime in the 25 years he lived outside of

Nigeria, is remorseful, and his crime was non-violent, the Applicant argues that his transportation of cocaine from one German city to another should not be considered a serious crime.

III. Issue and Standard of Review

[15] The only issue to be decided in this case is whether the RPD committed a reviewable error by excluding the Applicant from refugee protection on the basis of Article 1F(b) of the Refugee Convention.

[16] It is well settled that determining whether a crime is a "serious crime" for the purpose of Article 1F(b) of the Refugee Convention is a question of mixed fact and law, and is thus reviewable on a standard of reasonableness (*Feimi v Canada (Citizenship and Immigration)*, 2012 FCA 325 at para 16; see also *Febles*). This deferential standard means that the Court should only interfere with the RPD decision if the decision falls outside the "range of possible, acceptable outcomes that are defensible in fact and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12).

IV. Analysis

[17] The RPD confers refugee protection on a claimant if it is satisfied that the person is a Convention Refugee under section 96 of the Act or a person in need of protection under section 97 of the Act. However, section 98 of the Act provides that a person referred to in

section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.

[18] Section F(b) of Article 1 of the Refugee Convention is the provision at issue here. It reads as follows:

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:	F. Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser :
[…]	[…]
(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;	b) Qu'elles ont commis un crime grave de droit commun en dehors du pays d'accueil avant d'y être admises comme réfugiés;

[19] There is no dispute that the Applicant, while living in Germany, was convicted of possession of cocaine for the purpose of trafficking and served a sentence of 3 years and 9 months. Nor do the parties disagree over the qualification of this crime as “non-political.” The issue is rather whether it was reasonably open to the RPD to find that the Applicant’s crime was a “serious” crime within the meaning of Article 1F(b).

[20] As indicated previously, the Applicant argues that in determining that he is a person referred to in Article 1F(b) and thus excluded from refugee protection, the RPD should have explained why one non-violent drug trafficking offence could be the basis for exclusion, concluded that the exclusion should apply only to crimes which are violent or involve participation in criminal organizations, contextualized the impact of a maximum sentence of

10 years or more, and balanced the seriousness of the Applicant's crime against the risk he would face if returned to Nigeria.

[21] In my view, the RPD's conclusion that a conviction for drug trafficking, even if entirely non-violent, is a serious crime falls within a range of possible, acceptable outcomes. The Applicant claims that none of the leading cases in the European Database of Asylum Law on the question of what is a "serious non-political crime" resemble his own circumstances. Most of those cases, he says, deal with terrorism, violent acts and crimes of an atrocious nature.

[22] Canadian courts have assessed the definition of "serious crime" for the purposes of Article 1F(b). In *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404, the Federal Court of Appeal examined three United Nations Drug Conventions, as well as the legal framework regarding the punishment of drug trafficking offences in the United States, England, Australia, New Zealand and France, leading it to conclude that "drug trafficking is treated as a serious crime across the international spectrum" (*Jayasekara* at paras 48-52). Furthermore, when arguing that the seriousness of a crime is based on its violent nature or its connection with organized crime, the Applicant cites a case from the Austrian Constitutional Court which indicates that persons who have committed particular specified criminal offences, such as drug dealing, are excluded from protection. Though the Applicant was convicted of drug trafficking, not drug dealing, the crimes are related as it is the drug traffickers who supply the drug dealers with their merchandise.

[23] The Applicant further argues that the Article 1F(b) exclusion should apply only to crimes which are violent or involve participation in criminal organizations, implying that his crime was neither. I do not know much about cocaine, but I am at a loss as to how cocaine trafficking does not qualify as some sort of involvement in organized crime.

[24] In any event, there exists a presumption that a crime that is subject to a maximum sentence of 10 years or more in Canada is a serious crime for the purposes of Article 1F(b) of the Refugee Convention. A crime may still be a "serious crime" even if the maximum sentence is lesser (*Febles* at para 62; *Jayasekara* at paras 40-41). The Applicant correctly points out that a maximum sentence is only indicative of the seriousness of a crime (*Febles* at para 62; *Tabagua v Canada (Citizenship and Immigration)*, 2015 FC 709 at para 15 [*Tabagua*] citing *Jung v Canada (Citizenship and Immigration)*, 2015 FC 464) and that the presumption can be rebutted by referencing certain factors, including the mitigating and aggravating circumstances underlying the conviction (*Jayasekara* at para 44).

[25] The Applicant argues that the RPD should have - but failed - to conduct a *Febles*-type analysis of the mitigating factors of the Applicant's crime. This argument is bound to fail. The Applicant bases his argument on *Tabagua* and *Mohamed v Canada (Citizenship and Immigration)*, 2015 FC 1006 [*Mohamed*], but the Applicant's case is easily distinguishable from those cases.

[26] First, neither *Tabagua* nor *Mohamed* relate to crimes that are generally considered sufficiently serious to presumptively warrant exclusion from refugee protection such as

homicide, rape, child molesting, wounding, arson, drug trafficking, and armed robbery (*Febles* at para 62).

[27] Second, neither of the applicants in *Tabagua* and *Mohamed* was convicted of the crimes at issue in those cases. In contrast, the Applicant admits to having committed and was convicted of drug trafficking in Germany, a crime subject to a maximum sentence of life imprisonment in Canada.

[28] Third, the maximum sentence applicable to the Applicant's crime means that it is presumed to be a serious crime, which is not the case in *Tabagua* or *Mohamed*. In *Tabagua*, the applicant was accused of identity fraud which is subject to a maximum sentence of 6 months of imprisonment, a fine of $5,000 or both, if the Crown chooses to proceed by summary conviction. In *Mohamed*, the Court found that the presumption of a serious crime was far from clear given that the applicant was providing the same services to the terrorist organization as he did to members of the general public, he lived in a war zone and the options available to him consisted of fleeing, providing the services or putting himself and his family at risk (*Mohamed* at para 25).

[29] Finally, in both *Tabagua* and *Mohamed*, the RPD failed to consider the mitigating factors in assessing whether the applicants had committed serious non-political crimes outside of Canada (*Tabagua* at para 20; *Mohamed* at paras 25-26). In the case at hand, the RPD examined the 'mitigating factors' proposed by the Applicant, such as the fact that the Applicant was subject to a 5 year supervised release following his imprisonment, a factor the RPD considered aggravating. It correctly disregarded the factors that were extraneous to the crime such as the

lack of previous conviction, re-offense and danger to society (*Febles* at paras 17 and 60) and noted that involvement in the cocaine trade is considered a very serious matter in Canada because of the threat to society posed by cocaine users. I cannot conclude that the RPD's conclusion, that the presumption that the Applicant had committed a serious crime was not rebutted, falls outside of the range of reasonable possible outcomes.

[30] The Applicant further submits that paragraph 3(3)(f) of the Act, which requires that the application of the Act comply with the international instruments on human rights of which Canada is a signatory, requires this Court to apply Article 33 of the Refugee Convention restrictively and not expel or return the Applicant to Nigeria. Article 33 prohibits returning a refugee to a territory "where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." It requires, the argument goes, that the seriousness of the Applicant's crime be balanced against the risk he would face if returned to Nigeria.

[31] This contention cannot succeed either. First, the question before the RPD was whether the Applicant could claim refugee protection, not whether he can be expelled or returned to Nigeria. Protection from removal is dealt with in other processes available under the Act, notably in sections 112 to 115. Second, everything in the RPD decision leads me to believe that had it examined Article 33, it likely would have concluded that trafficking cocaine is a particularly serious crime which constitutes a danger for the community. And third, there is case law supporting the view that the RPD is not required to balance the seriousness of the Applicant's crime against the risk he would face if returned to Nigeria (*Jayasekara* at para 44).

[32] In paragraph 15 of his memorandum, the Applicant contends that the Court should follow the May 30, 1997, UNHCR legal opinion and apply a balancing test between the crime and the risk the offender would face if returned to his country of origin. This approach has clearly been rejected by Canadian courts (see *Jayasekara* at para 44; *Febles* at para 67).

[33] For all these reasons, I find that it was reasonably open to the RPD, both on the facts and the law, to conclude as it did. Therefore, I see no basis to interfere with the RPD decision.

[34] Both parties believe that this case does not raise a question of general importance for appeal. I agree.

JUDGMENT IN IMM-2577-17

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed;

2. No question is certified.

"René LeBlanc"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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