

Date: 20070924

Docket: IMM-3104-06

Citation: 2007 FC 951

Ottawa, Ontario, September 24, 2007

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Applicant(s)

and

**BUSHRA AHMEDIN NURU, ZEMZEM ABDULAZIZ SAID
(a.k.a. ZEMZEM ABDULAZI SAID), FAIZA BUSHRA NURU,
REHAM BUSHRA NURU, RANIA BUSHRA NURU,
REDWAN BUSHRA NURU, ABDULAZIZ BUSHRA NURU
(a.k.a. ABDULAZIZ BUSHR NURU, REEMA BUSHRA NURU)**

Respondent(s)

REASONS FOR JUDGMENT AND JUDGMENT

[1] These are my reasons for judgment rendered orally at Toronto on September 11, 2007.

[2] This is an application for judicial review by the Minister of Citizenship and Immigration (Minister) from a decision of the Refugee Protection Division of the Immigration and Refugee Board (Board) dated March 10, 2006.

[3] The Minister's challenge to the Board's decision concerns only the granting of refugee protection to the principal claimant, Bushra Ahmedin Nuru. No claim is asserted by the Minister against the remaining Respondents.

[4] Before the commencement of the hearing before the Board, counsel for the Minister advised the Board that he intended to participate in writing and in that regard, he made a detailed submission that Mr. Nuru was inadmissible to Canada by operation of Article 1F(b) of the 1951 UN *Convention Relating to the Status of Refugees*. In those submissions, it was alleged that Mr. Nuru had been a member and supporter of the Eritrean Liberation Front (ELF) which was allegedly a well-known terrorist organization responsible for numerous hijackings, kidnappings and murders throughout the 1970s and 1980s. It appears that Mr. Nuru acknowledged in his PIF an association with the Eritrean Liberation Front (ELF) during the 1970s while he lived in Saudi Arabia but the details of this were sketchy.

[5] The Minister's primary argument is that the Board's decision is patently unreasonable because it failed to consider any of the evidence bearing on Mr. Nuru's alleged support of the ELF and other evidence that at the material time, the ELF was engaged in terrorist activity.

[6] There is no question that the Board's decision fails to address any of the Minister's evidence on these issues and there is nothing to suggest that the Board even looked at that evidence. Its

finding with respect to Mr. Nuru's admissibility was as follows:

With respect to the claimant's affiliation with the ELF-RC, I am persuaded that he has been a member since on or about 1977. The letter provided from the ELF office in Saudi Arabia, dated November 8, 1977, was particularly persuasive evidence and was corroborated by the claimant's knowledge of the history of the ELF-RC. The letter from the party in Canada, dated March 1, 2006, the claimant's document showing proof of payment for party membership, and testimony from the other witnesses corroborating his membership have satisfied the Panel that the claimant has been and continues to be a member of the ELF-RC.

...

I am in agreement with the submissions provided by counsel at the commencement of the proceeding that the ELF-RC is not recognized terrorist group by either Canada or the United States. I also rely on comments by Patrick Gilkes, who is a recognized expert on Ethiopian and Eritrean politics having been a writer and journalist in Eritrea for the BBC for many years. Mr. Gilkes confirms that the ELF-RC is a peaceful political party and the strength of its organization is found generally in Germany and in Sudan.

For those reason, I am satisfied that there is no issue with respect to exclusion, based on criminal activities.

[7] The problem with this finding is that the Board had evidence before it that the Eritrean Liberation Front - Revolutionary Council (ELF-RC) was not created until the early 1980s when it split off from the ELF. The Board's finding that Mr. Nuru had been affiliated with the ELF-RC since about 1977 is inconsistent with the weight of evidence before it. If Mr. Nuru was affiliated with any group during that time, it was almost certainly the ELF. The Board failed to identify any distinction between those two groups and, in that respect, the decision is perverse and inconsistent with the evidence. Furthermore, the Board had a duty to consider the Minister's evidence and its

failure to address that evidence in its decision establishes to my satisfaction that the evidence was overlooked.

[8] On these issues, the Board relied, at least in part, upon a letter of opinion authored by Patrick Gilkes. Mr. Gilkes opined that the ELF-RC was not a terrorist organization. Mr. Gilkes was apparently not asked to comment on the practices of the ELF and did not do so. The significance of this is that the Minister was not provided with a copy of Mr. Gilkes' letter despite having asked for disclosure of the documentary evidence placed before the Board. Had the Crown seen this letter, it may well have taken fresh steps to emphasize the points it had made earlier that the ELF and the ELF-RC were distinct entities and that the ELF was a terrorist organization that Mr. Nuru was alleged to have supported.

[9] I agree with counsel for the Minister that the failure by the Board to ensure that Mr. Gilkes' opinion letter was disclosed to the Crown represents a breach of the duty of fairness.

[10] The Respondents argue that these problems are essentially academic failings because the Minister's legal argument was untenable or, as he put it, *prima facie* invalid. They assert that the Crown's argument rested on the application of criminal offences which did not exist in Canada at the time Mr. Nuru was allegedly active. This is, it is argued, an attempt to apply the law retroactively. The Respondents' argument is that this is a threshold issue which the Board resolved in Mr. Nuru's favour and which I should now confirm on judicial review.

[11] I do not accept that the Board resolved the exclusion issue on the retroactivity issue. At page 112 of the transcript, the Board was invited to confirm its position on this point and did so as follows:

I am in agreement with the submissions provided by your counsel at the commencement of the proceeding that the ELFRC is not a recognized terrorist group by either Canada or the United States, and I also noted that I read a comment by Patrick Gilkies, who is a recognized expert on Ethiopian and Eritrean politics, having been a writer and journalist in - - I believe it was Eritrea - - for the BBC - - is it Eritrea? - - for many years, and Mr. Gilkies also confirms that the ELFRC is a peaceful political party and that it has - - the strength of its organization is found generally in Germany and in Sudan.

For those reasons, I am satisfied that the issue of exclusion was withdrawn - - satisfactorily withdrawn today due to insufficient evidence.

[12] The other fundamental problem with attempting to address this legal issue on judicial review when it was never addressed by the Board is that there exists no evidentiary foundation to do so. No attempt was made by the Board to explore Mr. Nuru's alleged conduct or to determine if it was sufficient to support a finding of inadmissibility.

[13] The retroactivity issue may have some legal validity but it needs to be addressed on a meaningful factual record. That evidentiary foundation is almost entirely absent from this record because the Board effectively ignored the issue of Mr. Nuru's conduct. There were any number of questions bearing on his level of involvement with the ELF and his knowledge, if any, of its impugned conduct that needed to be addressed before the retroactivity question could be fairly

resolved. These, then, are matters that need to be fully addressed in a fresh hearing before a different panel of the Board.

[14] I will, therefore, order that this application for judicial review be allowed with the matter to be redetermined on the merits by a differently constituted panel of the Board.

[15] Neither party proposed a certified question and no issue of general importance arises on this record.

JUDGMENT

THIS COURT ADJUDGES that this application for judicial review is allowed with the matter to be redetermined on the merits by a differently constituted panel of the Board.

“ R. L. Barnes ”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3104-06

STYLE OF CAUSE: MINISTER OF CITIZENSHIP AND IMMIGRATION
v.
BUSHRA AHMEDIN NURU ET AL

PLACE OF HEARING: TORONTO

DATE OF HEARING: 11-SEPT-2007

**REASONS FOR JUDGMENT
AND JUDGMENT:** BARNES J.

DATED: September 24, 2007

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