Date: 20090630

Docket: IMM-4927-08

Citation: 2009 FC 683

Ottawa, Ontario, June 30, 2009

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

AUGUSTUS CHARLES NOHA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] As rightly noted by the Tribunal, the issue as to whether the Applicant has completely served his sentence is not determinative as to the legal validity of his exclusion under Article 1F(*b*) of the United Nations Convention Relating to the Status of Refugee (Convention), since the Federal Court of Appeal has clearly indicated in *Jayasekara v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 238, 324 F.T.R. 62 at paragraph 57, that exclusion was a possibility even when a sentence was served.

[2] This paragraph 57 of the Federal Court of Appeal's reasons reads as follows:

> The answer to the following question:
>
> > Does serving a sentence for a serious crime prior to coming to Canada allow one to avoid the application of Article 1F(b) of the Convention relating to the Status of Refugees (Convention)?
>
> is no.

II. Introduction

[3] The Applicant seeks judicial review of a decision rendered on October 8, 2008 by the Refugee Protection Division (RPD or Tribunal) of the Immigration and Refugee Board (IRB), which denied his claim for asylum.

[4] The Tribunal found that the Applicant was excluded from Convention refugee and protected person status by virtue of Article 1F(*b*) of the Convention.

[5] Furthermore, the Tribunal concluded that, in any event, the Applicant is not a Convention refugee nor a person in need of protection within the meaning of sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) respectively.

III. Facts

[6] The Applicant, Mr. Augustus Charles Noha, is a 48 year old citizen of Nigeria.

[7] He entered the United States, on April 24, 1991, settled in Miami, Florida and later became a permanent resident of the United States.

[8] On September 20, 1996, Mr. Noha was convicted of credit card frauds under the American law by the United States District Court, Southern District of Florida. He was accordingly sentenced to four months of imprisonment, a period of three years of supervised release and full restitution of the amount he had dishonestly obtained, that is $41,088.07.

[9] Mr. Noha served his prison term and his period of supervised release; however, the parties disagree as to whether or not full restitution was made.

[10] In October 2007, Mr. Noha told a Canadian immigration officer that he still owed around $5,000 in regard to his conviction.

[11] On September 9, 2008, seventeen days before Mr. Noha's hearing before the RPD, the United States Department of Justice (Office of the Unites States Attorney, Southern District of Florida) wrote in a letter to the Canadian government stating that Mr. Noha had only restituted $7,700, his last payment having been on July 24, 2004.

[12] During his testimony before the Tribunal, Mr. Noha claimed that he had made full restitution.

[13] In 1997, the United States immigration authorities issued a deportation order against Mr. Noha and, in 1999, an appeal from that decision was dismissed.

[14] In July 2005, Mr. Noha was detained for approximately two months by the United States Immigration authorities; then, on August 31, 2005, he was deported from the United States to Nigeria.

[15] Mr. Noha claims to have been detained in prison in Nigeria from September 2005 until July 2006.

[16] He allegedly arrived in Canada on September 6, 2006. Before the Tribunal, Mr. Noha said that upon his arrival in this country, he declared to the Canadian immigration authorities that he was coming to Canada only to visit, but later, during that same testimony, he said that he had told the same authorities that he was coming to Canada for business.

[17] Mr. Noha sought asylum in Canada, on September 18, 2006, that is twelve days after his arrival.

[18] Mr. Noha alleges that he fears being killed by the Nigerian authorities, because, in 2003, he sent a letter to Mr. Obasanjo, the President of Nigeria at the time, in regard to a religious riot in the north where many Christians had been killed. Mr. Noha also alleges that his grandfather, a pastor, was hacked to death and his church burnt down (Tribunal Record (TR) at pp. 650-651).

[19] On May 15, 2008, a deportation order was issued against Mr. Noha by the Immigration Division of the IRB on the basis that he **admitted** that he is a person described in paragraph

36(1)(*b*) of the IRPA, i.e. a foreign national who is inadmissible on grounds of **serious** criminality for having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least ten years.

IV. Standard of Review

[20] The RPD's purely factual conclusions that led to the challenged decision are reviewable by this Court in accordance with the unreasonableness standard (*Arizaj v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 774, 168 A.C.W.S. (3d) 830 at para. 18; *Alonso v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 683, 170 A.C.W.S. (3d) 162 at para. 5).

[21] The ultimate decision of the Tribunal that Mr. Noha is a person described in Article 1F(*b*) of the Refugee Convention involves questions of mixed fact and law, and, as such, it can only be quashed if it is unreasonable (*Jayasekara*, above, at para. 10, conf'd on other grounds: 2008 FCA 404, 384 N.R. 293; *Ryivuze v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 134 at para. 15; *Harb v. Canada (Minister of Citizenship and Immigration)*, 2003 FCA 39, 238 F.T.R. 194 at para. 14, *Murillo v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 966, 333 F.T.R. 22 at para. 22).

[22] The same standard applies regarding the Tribunal's conclusion that, in any event, Mr. Noha is not a Convention refugee as described in section 96 of the IRPA, nor a person in need of protection within the meaning of section 97 of the same statute.

[23] The purely legal questions of general importance decided by the RPD are reviewable on a correctness basis (*Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84 at para. 20; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paras. 50-60; *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, 385 N.R. 206 at para. 44).

[24] As to the issue of whether Mr. Noha's sentence has been completely served, this is essentially a factual issue where the reasonableness standard should apply. In any event, as noted by the Tribunal, even if Mr. Noha would have completely served his sentence, this did not preclude a finding of exclusion under Article 1F(*b*). Whether M. Noha's sentence has been completely served is, therefore, not a determinative issue in this case.

V. Analysis

The Applicant's exclusion, by virtue of Article 1F, is legally valid

[25] Section 98 of the IRPA states:

98. 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.	**98.** La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.

[26] According to subsection 2(1) of the IRPA, the phrase "Refugee Convention" refers to the United Nations Convention Relating to the Status of Refugees, signed at Geneva on July 28, 1951.

[27] Article 1F(*b*) of the Convention, which was applied by the Tribunal in this matter, 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;

(Emphasis added).

It was reasonable for the RPD to conclude that the crimes committed by the Applicant in the United States are serious crimes within the meaning of Article 1F(*b*)

[28] The Tribunal found that the Canadian equivalent for the crimes committed by Mr. Noha in the United States is described at "section 342.1(*c)* and/or (*d*) of the *Criminal Code of Canada.*" (Tribunal's reasons at para. 8).

[29] In the record it does appear the Tribunal intended to refer to paragraphs "342.(1)(*c)* and/or 342.(1)(*d*) of the *Criminal Code of Canada*". Footnote 4 of the RPD's reasons refers to Exhibit M-12 at page 29. At that page 29, reproduced at page 431 of the Tribunal Record, there is a copy of s. 342 of the *Criminal Code*, R.S., 1985, c. C-46. In this regard, the Minister's counsel submission before the RPD (TR at p. 758) and the decision of the Immigration Division of the IRB led to the deportation order against Mr. Noha (TR at p. 436).

[30] The reference to "section 342.1(*c)* and/or (*d*) of the *Criminal Code*" in the Tribunal's reasons can be understood in the context in which it is specified.

[31] The relevant parts of section 342 of the Criminal Code read as follows:

342. (1) Every person who	**342.** (1) Quiconque, selon le cas :
…	[...]
(*c*) possesses, uses or traffics in a credit card or a forged or falsified credit card, knowing that it was obtained, made or altered	*c*) a en sa possession ou utilise une carte de crédit — authentique, fausse ou falsifiée, — ou en fait le trafic, alors qu'il sait qu'elle a été obtenue, fabriquée ou falsifiée :
(i) by the commission in Canada of an offence, or	(i) soit par suite de la commission d'une infraction au Canada,
(ii) by an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence, or	(ii) soit par suite de la commission ou de l'omission, en n'importe quel endroit, d'un acte qui, au Canada, aurait constitué une infraction;
(*d*) uses a credit card knowing that it has been revoked or cancelled,	*d*) utilise une carte de crédit qu'il sait annulée,
is guilty of	est coupable :
(*e*) an indictable offence and is liable to imprisonment for a term not exceeding ten years, or	*e*) soit d'un acte criminel et passible d'un emprisonnement maximal de dix ans;

(*f*) an offence punishable on summary conviction.	*f*) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.
…	
Definition of "traffic" (4) In this section, "traffic" means, in relation to a credit card or credit card data, to sell, export from or import into Canada, distribute or deal with in any other way.	Définition de « trafic » (4) Pour l'application du présent article, « trafic » s'entend, relativement à une carte de crédit ou aux données afférentes, de la vente, de l'exportation du Canada, de l'importation au Canada ou de la distribution, ou de tout autre mode de disposition.
R.S., 1985, c. C-46, s. 342; R.S., 1985, c. 27 (1st Supp.), ss. 44, 185(F); 1997, c. 18, s. 16.	L.R. (1985), ch. C-46, art. 342; L.R. (1985), ch. 27 (1er suppl.), art. 44 et 185(F); 1997, ch. 18, art. 16.

[32] It is to be noted that an indictment under this offence may lead to a term of imprisonment of ten years.

[33] In the case at bar, the Tribunal considered the facts underlying Mr. Noha's conviction in the United States. In essence, Mr. Noha and a woman friend developed a scheme whereby she would be issued credit cards in her name; then, for about a month, ten such cards were used by him to purchase goods. Mr. Noha's accomplice would then contact the credit institutions to report the loss of her cards. Mr. Noha and his accomplice would then share their ill gotten profit (TR at pp. 571-574; Tribunal's reasons at para 7).

[34] For the purpose of determining whether a person is ineligible to have his or her refugee claim referred to the RPD on the basis of “serious criminality”, paragraph 101(2)(*b*) of the IRPA requires a conviction outside Canada for an offence which, if committed in Canada would be an offence in Canada punishable by a maximum term of at least ten years. As a receiving state, Canada considers crimes for which this kind of penalty is prescribed to be defined as serious crimes (*Jayasekara*, above, at para. 40).

[35] While regard should be had to international standards, the perspective of the receiving state or nation cannot be ignored in determining the seriousness of the crime. The protection conferred by Article 1F(*b*) of the Convention is given to the receiving state or nation (*Jayasekara*, above, at para. 43).

[36] Further, as previously stated, the RPD had evidence before it (TR at pp. 425, 436) that Mr. Noha **admitted**, on May 15, 2008, that he is a person described in paragraph 36(1)(*b*) of the IRPA, i.e. a foreign national who is inadmissible on grounds of **serious** criminality for having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least ten years (TR at pp. 422, 425-426, 436).

[37] The Court considers, namely:

i. The gravity of the crime (credit card frauds, which, even for a first offender, resulted in a four month jail term as well as a three year supervised release period and the requirement of full restitution of the total amount of the ten frauds, i.e. $41,088.07);

ii. The sentence imposed by the Florida Court;

iii. The facts underlying the conviction, namely, the quantity of the credit cards fraudulently used (ten of them) and the total monetary value of the goods thereby obtained;

iv. The unanimous jurisprudence of the Federal Court of Appeal stating that a crime is a serious non-political crime if a maximum sentence of ten years or more could have been imposed if the crime had been committed in Canada;

v. The objective gravity of a crime of credit card fraud in Canada, which carries a possible penalty of ten years imprisonment.

it was reasonable for the Tribunal to have serious reasons to believe that Mr. Noha had committed serious non-political crimes outside the country, and that he was, therefore, a person described in Article 1F(*b*) of the Convention (*Jayasekara*, above, at para. 55).

[38] Further, the Court notes that the RPD considered the circumstances surrounding the offences and rejected Mr. Noha's view that there were mitigating factors (Tribunal's reasons at para. 11).

The RPD was not required nor allowed to conduct a balancing of the nature and severity of the Applicant's crimes against the alleged possibility that he might face persecution if returned to Nigeria

[39] As noted at paragraphs 9 and 10 of the Tribunal's reasons, when applying Article 1F(*b*), the RPD is neither required nor allowed to balance Mr. Noha's crimes against his alleged risk of persecution upon his return to his country of origin (*Jayasekara*, above, at para. 44; *Xie v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 250, [2005] 1 F.C.R. 304 at paras. 34-40).

The alleged completion of the sentence imposed by the United States District Court

(a) The Applicant has not established having completed his sentence

[40] Before the RPD, Mr. Noha repeatedly testified that he had completed restitution of the aforesaid amount of $41,088.07, but the Tribunal did not find him credible on that allegation (Tribunal's reasons at para. 13 and *ff*).

[41] The RPD noted that a document from the United States Department of Justice, dated September 9, 2008, i.e. seventeen days before Mr. Noha's hearing before it, indicates that he still owes over $33,000 to complete restitution (TR at p. 442, Tribunal's reasons at paras. 13, 20).

[42] The Tribunal also noticed that, in November 2007, Mr. Noha himself spontaneously declared to a Canadian immigration officer that he still owed around $5,000 in this regard (TR at p. 406; Tribunal's reasons at para. 14).

[43] In the circumstances, it was not unreasonable for the Tribunal to give more weight to the aforementioned document from the United States authorities than to Mr. Noha's testimony at his RDP hearing.

[44] It was therefore reasonable for the Tribunal to conclude that Mr. Noha had not established to have made full restitution and that he had not proven that he had completed his sentence.

(b) Whether the Applicant has served his sentence or not in the United States is irrelevant for the purposes of the application of Article 1F(*b*)

[45] As rightly noted by the Tribunal (paras. 21-23 of its reasons), the issue as to whether Mr. Noha has completely served his sentence is not determinative as to the legal validity of his exclusion under Article 1F(*b*), since the Federal Court of Appeal has clearly indicated in *Jayasekara*, above, at paragraph 57, that exclusion was a possibility even when a sentence was served.

[46] This paragraph 57 of the Federal Court of Appeal's reasons reads as follows:

> [57] The answer to the following question:
>
> > Does serving a sentence for a serious crime prior to coming to Canada allow one to avoid the application of Article 1F(b) of the Convention relating to the Status of Refugees (Convention)?
>
> is no.

(c) This Court is bound to follow the Federal Court of Appeal decision in *Jayasekara*

[47] On the issue as to whether the completion of an imposed sentence for an 1F(*b*) crime allows one to avoid the application of this provision, Mr. Noha invites this Court to follow the case of *Chan v. Canada (Minister of Citizenship and Immigration)*, [2000] 4 F.C. 390, [2000] F.C.J. No. 1180 (QL), a decision rendered by the Federal Court of Appeal almost nine years ago in light of the former *Immigration Act*, R.S.C. 1985, c. I-2, as amended, and to ignore the 2008 decision of the same Court in *Jayasekara*, above, based on provisions of the current IRPA, which came into force in 2002.

[48] On that issue, this Court, under the doctrine of *star decisis*, is bound by the recent Federal Court of Appeal finding in *Jayasekara*, above (reference is also made to *Karimian v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 867, 150 A.C.W.S. (3d) 462 at para. 21).

[49] Considering the decision of the Federal Court of Appeal in *Jayasekara*, above, the RPD committed no error in finding that Mr. Noha could be excluded irrespective of the fact as to whether he had, as alleged, completed his sentence.

The Applicant's allegation that section 98 of the IRPA is void for vagueness

[50] Mr. Noha alleges that section 98 of the IRPA, which incorporates by reference, Article 1F(*b*) of the Convention, is void, since the phrase "serious non-political crime" is vague. According to Mr. Noha, section 98 is, therefore, constitutionally invalid as offending the provisions of section 7 of the *Canadian Charter of Rights and Freedoms*, Schedule B, Part I to the *Canada Act 1982* (U.K.) 1982, c.11, which reads as follows:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. (Emphasis added).	**7.** Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

[51] This argument is not adopted by this Court because it is premature.

[52] The purpose of section 98 of the IRPA is not to remove a person to his or her country of origin, but to deny the person the right to refugee protection. In addition, the exclusion has no direct effect on the removal order itself, and does not operate to make it enforceable, let alone to authorize removal.

[53] Accordingly, Mr. Noha's constitutional argument is premature, unless and until the removal order has become enforceable which as is not the case before the Court at this time.

[54] Section 98 of the IRPA does not violate section 7 of the Charter because the mere fact that a claimant is denied "Convention refugee" or "person in need of protection" status does not allow the person to be removed. How, then, can it be argued that the section in question violates the applicant's right to life, liberty or security of the person?

[55] Even if we assume that section 98 infringes the right to life and security of the person, the infringement would still be in accordance with the principles of fundamental justice, having regard

to the structure of the IRPA, which provides for an independent Pre-removal risk assessment (PRRA), thus making scrutiny under section 7 of the Charter unnecessary.

[56] Having regard to the structure of the IRPA, the arguments regarding the constitutionality of section 98 of the IRPA are premature when they are, as in the present case, made before a claimant has reached the final stage of removal (*Shephard v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 379, 326 F.T.R. 162 at para. 39; *Arica v. Canada (Minister of Employment and Immigration)* (1995), 182 N.R. 392, 55 A.C.W.S. (3d) 1017 (F.C.A.) at para. 14).

[57] By attacking section 98 of the IRPA, Mr. Noha is implicitly and erroneously assuming that being excluded from refugee protection is tantamount to being removed from Canada. That reasoning is not consistent with the structure of the IRPA, since the purpose of the exclusion is not to remove the applicant from Canada. It is to exclude him from refugee protection, but he continues to have the right to seek protection under section 112 of the IRPA (*Shephard*, above at para. 40).

[58] There is, therefore, no basis for the Court to rule as to the constitutionality of section 98, having regard to the prematurity of this argument (*Shephard*, above, at para. 41).

Conclusion as to the exclusion of the Applicant

[59] For the foregoing reasons, the Court concludes that Mr. Noha has not shown any error in the RPD's decision as to his exclusion under section 98 of the IRPA that would warrant intervention to set it aside.

The issue as to whether the Applicant is a person described in section 96 or 97 of the IRPA is irrelevant

[60] It bears repeating that section 98 of the IRPA reads as follows:

98. 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.	**98.** La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.

[61] Since the exclusion of Mr. Noha by the RPD, by virtue of Article 1F(*b*) of the Refugee Convention, is reasonable and is not vitiated by a reviewable error of fact or law, there is no actual need for this Court to consider Mr. Noha's arguments as to the validity of the RPD's conclusions that he is not a person described in section 96 or 97 of the IRPA (*Murillo*, above).

[62] Nevertheless, the Court continues its analysis.

The Board's conclusion as to the Applicant's non-inclusion should be maintained

[63] Mr. Noha alleges that he fears returning to Nigeria by reason of his political opinion. He claims having mailed a three-page letter of protest to the President of Nigeria in 2003, while he was still in the United States. In that letter, Mr. Noha would have called the President of Nigeria a murderer for having killed one of his friends and for tolerating the assassination of people in riots in Nigeria (TR at pp. 617, 655-656, 703).

[64] Mr. Noha contends that further to his alleged letter, a copy of which he did not file before the RPD, his name was put on a wanted list for treason, because in the opinion of the Nigerian authorities he was planning a revolution (TR at pp. 27, 567, 658-659, 677, 702, 704).

[65] Mr. Noha further claims that, upon his arrival in Nigeria in 2005, he was interrogated by the State Security Service, detained for about a year and tortured (TR at pp. 27, 662-664, 667-672, 674, 702, 709, 730, 732).

[66] On August 5, 2006, Mr. Noha alleged to have escaped detention with the help of a military officer and friend, Col. Abiodun. Mr. Noha claimed he lived in hiding for a few days and then headed for Canada where he allegedly arrived on September 6, 2006. Mr. Noha sought asylum in Canada on September 18, 2006 (TR at pp. 24, 28, 670-671).

[67] For the following reasons, which are not exhaustive, the Tribunal found that Mr. Noha's narrative was devoid of credibility (Tribunal reasons at para. 26).

The relevancy of the name of the Applicant's tribe and of his mother tongue

[68] At his RPD hearing, Mr. Noha testified that he hails from the Hausa tribe, that his mother tongue is Hausa and that he also speaks the Edo and Yoruba languages (TR at pp. 646-648).

[69] In his completed form wherein he sought asylum, Mr. Noha wrote that he is a "Bedel Ibo" and that his mother tongue is Edo (TR at p. 487). The Tribunal found these declarations to be

illogical. How can a native Ibo have as a mother tongue the Edo language? (Tribunal's reasons at para. 28). When confronted with these discrepancies, Mr. Noha had no explanation.

[70] The Tribunal found that Mr. Noha was not straightforward in his answers in this regard and his behaviour on this issue indicates a lack of credibility as on other aspects of his claim (Tribunal's reasons at para. 28).

[71] Mr. Noha claims that the Tribunal thereby erred in giving to much importance to the contradictions on his ethnic group. He submits that this is a peripheral aspect of his claim.

[72] Not only is it not peripheral, it is in fact central to Mr. Noha's claim, since he alleges a risk that stems in part from a letter sent to the Nigerian President to denounce the violence committed by some Muslim groups against Christians. His own grandfather, he alleged, had been killed in riots and his parents displaced.

[73] Mr. Noha submitted abundant documentary evidence on the question of "Religious conflict in Nigeria" and "Religion issues". Reference is made to pages 173 to 361 of Tribunal's Record (188 pages in total). According to Mr. Noha, these documents had led him to write letters to his government when he was living the United States (TR at p. 59).

[74] This aspect of his claim was, therefore, clearly central in his own view.

[75] Religion in Nigeria cannot simply be taken out of its ethnic and geographic context. Mr. Noha's own documentary evidence, at page 340 and 344 of the Tribunal's Record, states as follows:

> There is a strong correlation between religious differences and ethnic and regional diversity. The north, dominated by the large Hausa and Fulani ethnic groups, is predominantly Muslim; however, there are significant numbers of Christians in urban centers of the north. Both Muslims and Christians are found in large numbers in the Middle Belt. In the southwest, where the large Yoruba ethnic group is the majority, there is no dominant religion. Most Yorubas practice either Christianity or Islam, while others continue to practice the traditional Yoruba religion, which includes a belief in a supreme deity and the worship of lesser deities that serve as the supreme deity's agents in aspects of daily life. In the east, where the large Igbo ethnic group is dominant, Catholics and Methodists are the majority, although many Igbos continue to observe traditional rites and ceremonies.
>
> …
>
> Religious differences often mirror regional and ethnic differences. For example, persons in the North and in parts of the Middle Belt are overwhelmingly Muslim and from the large Hausa and Fulani ethnic groups that tend to dominate these areas. Many southern ethnic groups are predominantly Christian. In many areas of the Middle Belt, Muslim Fulani tend to be pastoralists, while the Muslim Hausa and most Christian ethnic groups tend to be farmers or work in urban areas. Consequently ethnic, regional, economic, and land use competition often coincide with religious differences between the competing groups. (Emphasis added).

(Nigeria - International Religious Freedom Report 2004).

[76] Other evidence to the same effect was also before the Tribunal; for example, the following extract in the Report on Human Rights Issues in Nigeria: Joint British-Danish Fact-Finding Mission to Abuja and Lagos, Nigeria (19 October to 2 November 2004), Denmark, January 2005, Danish Immigration Service found at tab 2.6 of the National Documentation Package on Nigeria, March 19th, 2008:

> 2.17. Nigeria's estimated population of 124 million people is divided almost equally between Muslims and Christians and about 5% to 10% animists. In general Christians dominate the south of the country while Muslims dominate the north. Nigeria comprises approximately 250 ethnic groups. More than two-thirds of all Nigerians belong to one of the three largest groups: Hausa-Fulani, Yoruba and Igbo (or Ibo). Hausa-Fulani are Muslims while a large part of Yoruba and most Igbos are Christians. (Emphasis added).

(TR at pp. 464 to 470; This Report is annexed to his memorandum, by virtue of the Federal Court of Appeal decision in *Hassan v. Canada (Minister of Employment and Immigration)* (1993), 151 N.R. 215, 38 A.C.W.S. (3d) 992 (F.C.A.)).

[77] As can be seen from the documentary evidence, Mr. Noha's confusion about his mother tongue, spoken languages and ethnic group (TR at pp. 646-650) is neither, irrelevant or peripheral. It is more than pertinent as to Mr. Noha's general credibility, and is, therefore, at the crux of his allegations.

[78] The failure to testify credibly, under oath, or the inclusion of inaccurate information in documents provided, in support of an asylum claim is always a relevant consideration as to the merits of a claim. The Tribunal committed no error in its finding in this regard.

The issuance of the Applicant's passport

[79] The Tribunal examined the question of the issuance of Mr. Noha's passport. Mr. Noha's passport was issued on October 8, 2003 at the time he was allegedly physically in the United States (TR at pp. 451, 557, 739).

[80] Initially, Mr. Noha indicated that he needed his passport to return to Nigeria, as he had just learned that his grandfather had been killed in a religious riot and the latter's church had been burnt. Many churches were burnt. Mr. Noha alleges that he wanted to return to Nigeria to see how these events had affected his family. Col. Abidun of the military intelligence, a friend of Mr. Noha, offered to secure a passport for him in Nigeria. This Colonel allegedly told Mr. Noha that all that was required of the latter was to send his photograph as requested. As alleged by Mr. Noha, this is what he did and he never had to be physically present in Nigeria to get his passport renewed (TR at pp. 558-562, 565).

[81] Later in his testimony (TR at pp. 651-653), Mr. Noha stated that he had learnt of his grandfather's death and the burning of his church towards the end of 2003, around November/December 2003 (not prior to October 8, 2003), during a telephone conversation with Mr. Pius, a church member from his grandfather's church. He later told the RPD that the riot in issue started in November 2003 (TR at p. 653). This testimony clearly contradicts his earlier claim that he needed a passport in October 2003 after he had learnt that his grandfather had died.

[82] The only explanation given for this testimony is confusion as to the sequence of events. The Tribunal found that this was unsatisfactory and it was not established that Mr. Noha needed a Nigerian passport (October 8, 2003), while he was in the United States (Tribunal's reasons at para. 31).

Contradictory evidence concerning the Applicant's possession of the original of his passport

[83] Mr. Noha did not produce an original of his passport before the RDP, as he had allegedly never received if from Col. Abiodun. He apparently never asked Col. Abiodun for his original passport and never had the original in his possession. All he had was a copy of the first two pages (TR at pp. 549, 555-559, 567). There was no reasonable explanation as to why he never obtained his original passport. The Tribunal was left in a position where it was unable to verify if Mr. Noha had, in fact, travelled with this passport.

The Applicant filed a false document before the RPD

[84] Mr. Noha produced a newspaper article in support of his claim (Applicant's Record at p. 108; TR at p. 363).

[85] This newspaper article appeared to be a fabrication designed to deceive the Tribunal.

[86] The RPD wrote the following in this regard:

> [38] The claimant produced a newspaper article of *The Nigerian Observer* (exhibit P-12) that speaks about him. Concerns with the authenticity of the document itself were raised by the Minister because of irregularities in the lining up of the article: the letters are clearer in the section mentioning the claimant than in the others, no name of journalist appears on top of the article, the picture accompanying the article is irrelevant to the subject; the written English is very poor.
>
> [39] The tribunal takes notes of these irregularities …

[87] In the same paragraph 39 of its reasons, the Tribunal also noted what it termed the "fundamental flaw" with the article. The article is dated August 14, 2006 and it states that Mr. Noha

is in Canada seeking refuge. Mr. Noha only left Nigeria on September 1, 2006. He was, therefore, still in Nigeria at the time – not in Canada where he purportedly came on September 6, 2006 (TR at pp. 24, 28: The Tribunal indicated that Mr. Noha was in prison in Nigeria on August 14, 2006, the date of publication of the newspaper. Mr. Noha had been released on August 5, 2006. Nevertheless, Mr. Noha was in Nigeria and not in Canada on August 14, 2006).

[88] In this case Mr. Noha's credibility was at the heart of his asylum claim. His credibility was seriously impaired by the fact that he tried to support his allegations with a forged newspaper article. The filing of a false document to confirm the allegations of an asylum claim reasonably allows the RPD to question the credibility of the claimant (*Gutierrez v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1192, [2007] F.C.J. No. 1537 (QL) at para. 7).

[89] Where a claimant before the RPD is found to have severely damaged his credibility in a specific instance, with a false document, this does reflect on other findings in regard to his credibility (*Rahamann v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1008, 160 A.C.W.S. (3d) 860 at para. 15).

[90] It was therefore reasonable for the Tribunal to find that Mr. Noha's credibility was seriously affected by the filing of a false document (Tribunal's reasons at para. 42).

[91] Considering the failure of Mr. Noha to provide trustworthy evidence as to the key points of his narrative, the Tribunal concluded that he had not established that he is wanted in Nigeria, that he

had been detained upon arrival in his country from the United States in 2005, nor that he had escaped or that he had left Nigeria in 2006 as alleged (Tribunal's reasons at para. 37).

[92] Taken as a whole, it was reasonable for the Tribunal to find that Mr. Noha's narrative is not credible.

[93] In and of itself, this was sufficient for the RPD to deny Mr. Noha's asylum claim on its non-inclusion aspect.

"Réfugié sur place" allegation

[94] The Tribunal noted Mr. Noha's allegation that the Nigerian authorities had been contacted by the Canadian authorities to verify his identity through the use of fingerprints (Tribunal's reasons at para. 43; Applicant's Record at p. 90).

[95] The evidence shows that the Canadian authorities contacted the Nigeria Interpol (TR at pp. 412-414, 455). There is no evidence that the Nigerian government was contacted or that it was otherwise aware of Mr. Noha's refugee claim (p. 455, *id*.)

[96] The documentary evidence indicates that the Royal Canadian Mounted Police (RCMP) was asked to verify Mr. Noha's fingerprints with Interpol to check his identity and his criminal record, if any; and the Canadian government did not reveal to the Nigerian authorities that Mr. Noha had claimed asylum in Canada (p. 455, *id*.). In addition, a letter from an Inspector of police in Nigeria

(Applicant's Record at p. 219) does not establish that there was such a disclosure (*Moin v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 473, 157 A.C.W.S. (3d) 603 at para. 37).

[97] In any event, this letter was not before the RPD, since it was sent to the Tribunal after the challenged decision in this instance was rendered (TR at pp. 4, 214-215).

[98] The conclusion of the Tribunal on this issue of Mr. Noha's "réfugié sur place" claim is reasonable, considering that it has no evidentiary foundation.

Testimony of Mr. Oladurinwah Oki

[99] During the hearing, the Tribunal heard testimony of Mr. Oladurinwah Oki. The Tribunal concluded that no probative value could be accorded to this testimony as Mr. Noha himself was not credible as to the core elements of his claim (Tribunal's reasons at para. 45).

[100] As Mr. Noha's narrative was not believed by the Tribunal, Mr. Oki's testimony cannot serve to establish the key elements of his claim.

[101] Mr. Oki's testimony was considered but could not serve to resolve the numerous discrepancies in Mr. Noha's narrative – discrepancies that he himself could not explain. This factual finding was within the purview of the Tribunal.

[102] The result of Mr. Oki's refugee claim is irrelevant to the result of Mr. Noha's asylum claim. Each claim must be examined, individually, on its own merits.

[103] A large number of cases decided by this Court have established that the IRB is not bound by the result in another claim, even if the claim involves a relative. Refugee status is determined on a case by case basis (*Cortes v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 254, 165 A.C.W.S. (3d) 509 at para. 10; *Aoutlev v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 111, [2007] F.C.J. No. 183 (QL) at para. 26).

The relevance of testimonies in another asylum claim

[104] Mr. Noha contends that the RPD erred in failing to consider the fact that another Board member in a parallel case (that of Mr. Oki) had determined that the testimonies of Mr. Noha and of Mr. Oki in that case were credible.

[105] The fact that Mr. Oki was found credible by another Board member in another case is irrelevant for two reasons: 1) at stake, in this case, is the Mr. Noha's credibility, not that of Mr. Oki; 2) based on voluminous jurisprudence of this Court, the fact that Mr. Oki obtained refugee status because his testimony was found credible in his case did not bind a Board member in Mr. Noha's asylum claim.

[106] It is important to specify that the evidence upon which a finding as to Mr. Noha's overall credibility was made, was not before the Board member in another case.

Evidence tendered after the decision was rendered by the Tribunal

[107] The Tribunal rendered its decision on October 8, 2008. On or about October 14, 2008, the Minister's representative tendered additional evidence. A response was filed by Mr. Noha, on October 17, 2008.

[108] Both documents were returned to their respective counsel by the Immigration and Refugee Board as a decision had already been rendered in this matter (Applicant's Record at pp. 224-225).

[109] Accordingly, since the Tribunal was *functus officio* when these additional documents were tendered, it is inappropriate to raise these matters in the present application for judicial review.

[110] It was open to Mr. Noha to file an application to reopen his claim pursuant to section 55 of the *Refugee Protection Division Rules*, SOR/2002-228.

[111] It is trite law that evidence that was not before an administrative tribunal when it rendered its decision is not admissible on judicial review of that same decision and none of the few exceptions to this general principle applies in this case (*Kainth v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 100, [2009] F.C.J. No. 134 (QL) at para. 26; *Simuyu v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 41, [2009] F.C.J. No. 53 (QL) at para. 16).

VI. Conclusion

[112] For all of the above-reasons, the application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS that

1. The application for judicial review be dismissed;

2. No serious question of general importance be certified.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Me Annick Legault Me Jared Will	FOR THE APPLICANT
Me Normand Lemyre Me Patricia Nobl	FOR THE RESPONDENT

SOLICITORS OF RECORD:

ANNICK LEGAULT Barrister and Solicitor Montreal (Quebec)	FOR THE APPLICANT
JOHN H. SIMS, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT