

Federal Court



Cour fédérale

Date: 20120202

Docket: IMM-5410-11

Citation: 2012 FC 132

Ottawa, Ontario, February 2, 2012

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

BUNOTI JAMES WOKWERA

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of the decision rendered by the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated July 18, 2011, which refused the applicant's refugee claim to be deemed a convention refugee or a person in need of protection under sections 96 and 97 of the Act.

[2] The applicant seeks an order setting aside the decision and remitting the matter for redetermination by a differently constituted panel of the Board.

Factual Background

[3] Mr. Bunoti James Wokwera (the applicant) is a thirty-six (36) year old citizen of Uganda. The applicant is a medical doctor who is married with two children. The applicant seeks protection in Canada on the basis of his imputed political opinion as someone who is sympathetic to homosexuals in Uganda.

[4] While studying to become a doctor, the applicant befriended a gay man and became interested in the plight of homosexuals in Uganda. In February 2001, the applicant's friend introduced him to a secret fraternity of homosexuals called the Brotherhood of Samia that existed in the area where he would be practicing. The HIV positive members of the fraternity were particularly in need of a doctor in whom they could confide without facing the stigmatization of attending a designated HIV clinic or fear of being reported to the government security agents.

[5] After completing his medical internship, the applicant took a medical officer position with the Busia Local Government in 2001. As the only doctor in the district, the applicant decided to help the members of the fraternity by providing medication, free consultation, and counselling services at his clinic. The members would display a secret signal to the applicant. He would then provide them with the confidential treatment. As a show of thanks, the fraternity made the applicant an honorary member of their group.

[6] After working in Busia for a few months, the applicant allegedly became known as a “homosexual sympathizer”. The applicant began to experience administrative challenges by being denied supplies and equipment for his clinic and was threatened with harm by his supervisor if he did not stop helping gay patients. The applicant was also harassed by anonymous telephone death threats, surveillance by persons he suspected were security personnel. In mid-2001, the applicant was threatened by a man at gunpoint and was told to leave Busia (which he reported the threat to the police). After the threat, the applicant’s motorcycle was stolen, which he also reported to the police, but a few days later the applicant was notified that the police suspected that he had been involved with orchestrating the theft. A goat’s carcass was placed by his clinic and home compound as a message that he was not wanted in the local village. In July 2001, the applicant was placed on forced leave for one year. In July 2002 the applicant’s employment was terminated. The applicant appealed the forced leave and termination and he was reinstated with full pay, but the harassment continued.

[7] The applicant resigned his public service job in Busia and began working on contract in Kampala in January 2005 until he was appointed full time at a hospital in Kampala in May 2007. The applicant maintained his contacts with the fraternity while working at the hospital, but realized that he was being discriminated against and he was forced out of the hospital by his superiors. The applicant then rejoined the public service on July 1, 2008, but remained at the hospital so that he answered to the Ministry of Health instead of the hospital administrators. However, his contract was terminated on September 24, 2008, and the applicant gave notice of intent to launch a lawsuit for wrongful dismissal. The applicant withdrew this suit because he feared it would further expose his

assistance to homosexuals in Busia and interfere with his ability to leave Uganda. At his request, the applicant was posted to another location in the western part of Uganda where he served for approximately one month before coming to Canada.

[8] During his time in Kampala, the applicant allegedly continued to be harassed with threatening phone calls which referenced his work in Busia, in spite of changing his phone number several times. The applicant attempted to report the calls to police but would not disclose the motivation for the calls, and so the police did not investigate. In October 2009, the applicant was attacked and stabbed by a man who alleged that the applicant was a homosexual sympathizer. The applicant required medical attention for the laceration which he administered himself with the help of a medical assistant. The applicant then reported the attack to police as an attempted robbery but nothing came of the investigation.

[9] The applicant sat for the Medical Counsel of Canada Evaluating Exam and learned that he had passed in March 2009. The applicant applied for and was granted a Visa. He arrived in Canada on October 28, 2009. He filed his claim for refugee status on March 15, 2010.

[10] The applicant's claim was heard by the Refugee Protection Division of the Immigration and Refugee Board on June 20, 2011. The Board rendered its decision on July 18, 2011.

Decision under Review

[11] The Board found that there was insufficient credible or trustworthy evidence to determine that the applicant would be persecuted for a Convention reason if he were returned to Uganda. The

Board accepted the applicant's identity. The Board found that the determinative issues of the claim were credibility and a lack of an objective basis for his fear.

[12] The Board found that the applicant had been straightforward with his answers at the hearing and that there were no major omissions, contradictions or inconsistencies between the applicant's testimony and documentary evidence. However, the Board found that the applicant had failed to provide sufficient reliable and trustworthy evidence to show that he had been persecuted in Uganda, or to show that an objective basis for his fear exists.

[13] The Board observed that the applicant supplied many documents to establish his credentials as a doctor and his employment record. However, the applicant supplied no document that links him to a fraternity supporting homosexuals or any document that corroborates his claim to have treated and counselled homosexuals beyond what would be normal for any physician who was treating any other member of the general public.

[14] The applicant responded to questions about the lack of corroborative documentation by stating that it would have been too dangerous for him to have any documents that linked him to a secret fraternity or the gay community in Uganda. The Board accepted this explanation as reasonable while the applicant was in Uganda, but noted that the applicant has been in Canada since 2009, allowing him time to seek documentation from those he treated or know his work in Uganda.

[15] The Board noted that the documentation supplied between the applicant and the medical health authorities contain no mention of work with gay or HIV infected patients. The Board rejected the applicant's explanations for the lack of such references.

[16] The applicant was unable to obtain a copy of the police report he made after being stabbed in October 2009, or any verification for the medical treatment he received. He claimed that such records are not often kept in Uganda. The Board rejected this explanation and found that a physician of the applicant's stature could have obtained at least affidavits to attest to the events.

[17] The Board acknowledged that as a developing country Uganda may have less rigorous administrative practices than other countries. However, the Board found that a highly educated and experienced doctor, with the benefit of legal counsel and a father who is a retired senior public official, could have provided corroboration of his allegations.

[18] The Board found that the applicant's delay in leaving Uganda and delay in filing his refugee claim in Canada, while not fatal to his claim, undermined the applicant's subjective fear in Uganda. The Board noted that while the applicant claimed to have been harassed in Busia beginning in 2001, he did not resign from his employment until December 2004, and shortly after relocated to Kampala. The applicant remained in Uganda for five years without major incident until he was stabbed in October 2009. The Board noted that, at the time of the stabbing, the applicant had already planned his departure for Canada. The Board also noted that the applicant waited nearly five (5) months after arriving in Canada before he claimed refugee status.

[19] The Board was of the view that there was insufficient evidence to show an objective basis for the applicant's fear as a medical officer who provided counselling to homosexuals and treatment to gay and HIV infected persons. The Board accepted that homosexuals in Uganda face discrimination and legal restrictions and that people with HIV/AIDS are discriminated against and prevented from obtaining treatment and support. The Board also took note of the draft "Anti-homosexuality" bill that was introduced in the Ugandan parliament in September 2009 which contained draconian measures and penalties for homosexuals and those "aiding and abetting" homosexuality. However, the Board found no evidence that the bill was adopted, or contained a prohibition on physicians from counselling or treating HIV patients. The Board accepted that the introduction of the bill in 2009 may expose gay rights activists to increased risk, however the Board found that the applicant does not fit the profile of a gay rights activist as his advocacy was not in the public domain.

[20] The Board also found that there was no objective documentation to establish that anyone providing counselling and treatment would automatically be considered to be a "homosexual sympathizer" in Uganda. The Board found that notwithstanding discrimination against homosexuals in Ugandan society, medical authorities continue to offer assistance to patients.

Issues

[21] The only issue to be determined on this review is as follows:

1. Was the Board's assessment of the evidence and its conclusion on the applicant's credibility reasonable?

Statutory Provisions

[22] The following provisions of the *Immigration and Refugee Protection Act* are applicable in this proceeding:

REFUGEE PROTECTION,
CONVENTION REFUGEES AND
PERSONS IN NEED OF
PROTECTION

NOTIONS D'ASILE, DE REFUGIE
ET DE PERSONNE A PROTEGER

Convention refugee

Définition de « réfugié »

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

96. A qualité de réfugié au sens de la Convention - le réfugié - la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Person in need of protection

Personne à protéger

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality,

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a

their country of former habitual residence, would subject them personally (a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or (b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

- (i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,
- (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,
- (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and
- (iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

Person in need of protection

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
 a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
 b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

- (i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
- (ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
- (iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
- (iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Personne à protéger

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

Standard of Review

[23] With respect to the Board's findings of fact, including its conclusions on the applicant's credibility, the appropriate standard of review is reasonableness (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*]; and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 [*Khosa*]).

Arguments

Position of the Applicant

[24] The applicant argues that the Board selectively chose to rely on information provided in the documents that were suitable to the Board's position, while ignoring elements of corroborating documents that demonstrate the applicant's credibility. Essentially, the applicant argues that his story is entirely consistent with the documentary evidence, the documentation supports and establishes the applicant's story, and the Board failed to assess numerous exhibits supporting the applicant's claim. The applicant argues that the Board erred with regard to its assessment of several pieces of evidence:

- The Board failed to give any weight to the fact that a dead goat was placed before the applicant's compound to signify a threat to his safety, or the fact that the applicant submitted a letter which highlights the fear he had for his safety after this incident.
- The Board ignored evidence demonstrating that Ugandan government authorities ignored the applicant's requests for help to obtain security, fences and lights for his compound.
- The Board failed to properly analyze the documents that demonstrate that the applicant was undermined by his superiors in Kampala without any legitimate basis and dismissed for an improper reason. These documents also show that while living in Kampala, the applicant argues that he faced a threat to his job safety and corresponding financial situation which was overlooked by the Board.

[25] The applicant argues that based on the documentation and his affidavit evidence, there was a basis for the harassment he endured in Uganda, that basis is the applicant's assistance to homosexuals and the Board erred by failing to give the applicant's story sufficient credibility.

[26] The applicant further argues that the Board erred by not finding an objective basis for the applicant's subjective fear. Although no documentation was submitted to show that anyone who provides medical treatment to homosexual individuals would be considered a "homosexual sympathizer", the applicant suggests that it is obvious that a doctor such as himself would be considered as such. The applicant also argues that, although the Board took note of the draft "Anti-homosexuality" bill, the Board failed to consider it as indicative of the widespread negative attitude towards homosexuals in Uganda.

[27] The applicant argues that he could not provide particular documentation to corroborate his assistance of HIV positive homosexuals as such documentation would require the identification of homosexual individuals, putting them in danger of physical and legal consequences. Also, the applicant argues that identifying any of his former patients would be a flagrant disregard for the medical profession's ethical code of doctor and patient confidentiality.

[28] The applicant also argues in reply that procuring corroborating documents from individuals he had assisted in Uganda to support his claim, as suggested by the Board and the respondent, would be too dangerous to individuals still residing in Uganda. The applicant contends that providing an affidavit in support for the applicant could involve revealing an individual's identity and exposing this individual to legal consequences as it is illegal to be a homosexual in Uganda.

Position of the Respondent

[29] The respondent argues that the applicant disagrees with the interpretation of and the weight afforded to the evidence by the Board. The respondent argues that these are highly fact specific findings that attract a deferential standard of review, and in this case the Board's decision falls within the range of possible, acceptable outcomes that are defensible in respect of the facts and law (*Khosa*, above, at para 59).

[30] The respondent disagrees with the applicant's argument that he could not reveal the identities of former patients as it would put those individuals in danger and constitute a breach of the medical profession's ethical code. The respondent argues that the applicant does not explain why he could not ask former patients for their consent to release their identities, or ask them to voluntarily write letters corroborating his evidence as surely some members of the fraternity would. The respondent argues that the applicant does not indicate how authorities in Uganda would discover that a letter or affidavit had been written. Further, the respondent suggests that the applicant does not explain why he could not have asked someone other than a former patient to swear an affidavit corroborating his involvement in the gay community in Uganda.

[31] The respondent contends that given the applicant's position, education and familial ties, it was reasonable for the Board to expect the applicant to provide corroborating documentation for his association with the gay community, the reason behind his lawsuit for unjust dismissal and the robbery report. The respondent argues that the onus is on the applicant to prove each aspect of his claim. In this case, the applicant failed to discharge this burden so it was open to the Board to draw an adverse inference from the lack of corroborating evidence.

[32] The respondent alleges that the Board carefully considered the documentary evidence in determining that it did not support an objective basis for the applicant's claim. The respondent argues that the Board reasonably determined that the applicant did not fit the profile of a gay activist as his services were provided in secret. Also, the respondent argues that the Board reasonably concluded that there was no evidence to suggest that the applicant would be considered a "homosexual sympathizer" and in danger of persecution in Uganda for his medical treatment of homosexual individuals.

Analysis

[33] It is trite law that the Board has the discretion to make findings of fact, determinations on credibility and to weigh evidence. In the case at hand, the Court finds that the Board conducted a thorough analysis of the evidence before it, and reasonably found that there was insufficient evidence to substantiate the applicant's claim.

[34] The Court is not persuaded by the applicant's argument that the Board ignored or erred in its assessment of any individual facts or pieces of evidence; the examples referred to by the applicant are all mentioned in the decision and were properly considered by the Board. It is not the role of the Court on a judicial review to re-weigh the evidence that was before a decision maker whom is owed deference, but it is instead "...concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." (*Dunsmuir*, above, at para 47).

[35] More particularly, the Board noted at paragraph 13 of the decision:

... [The applicant] has provided a plethora of documents that establish his credentials as a medical doctor and his employment record in Uganda. However he has provided no document that in any way links him to gay support “fraternity” nor has he provided documentation to corroborate that he has been active in treating and counselling homosexuals in Uganda beyond what would be normal for any physician or medical officer who are treating members of the general public.

[36] The Board also noted at paragraph 15 of the decision:

In examining the various letters between the claimant and the medical authority that employed him in Busali and Kampala I find no mention of the claimant’s work with the gay or HIV community in Uganda.

[37] The applicant argues that the Board erred in its assessment because the body of documentation demonstrates a history of persecution against the applicant that could only have been brought on by his medical assistance of homosexual individuals. After a careful review of the evidence before the Board, the Court does not agree with the applicant’s contention; none of the documentation specifically mentions or links the adverse events that the applicant lived through with his assistance of homosexuals. The Board specifically considered whether the evidence submitted regarding the applicant’s interaction with his employers demonstrated adverse treatment due to the applicant’s activities of treating homosexuals at his clinic. The Board rejected this conclusion at paragraph 15 of the decision and found that the evidence could support a contrary conclusion:

... The employment issues raised do refer to the claimant’s “attitude” and “wanting display of professionalism” and there is clearly a dispute between the claimant, police and the health authority over the incident of a stolen motorcycle. However, there is no reference in any of these documents to the claimant’s work with gay or HIV infected patients. When I raised this with the claimant he pointed to his letter that appealed his “interdiction” which mentions that a friend of the claimant has the opinion that his “interdiction was a conspiracy by some people to punish (him) for obvious reasons of (his) inflexibility on several principles of administration in Busia district. I do not find that this reference addresses the issue of the claimant’s work with gay or

HIV infected patients or explains the lack of such references in other documents. Indeed a plain reading of the passage indicates that his problems result from his inflexibility around administrative failures within the health authority as the claimant has noted in his PIF narrative and that include the failure of the authority to provide him with a vehicle and medical equipment he determined was necessary in his role.

[Emphasis added]

[38] Also, the newspaper articles submitted by the applicant do not correspond to the profile of the applicant who is not a public gay activist. To the contrary, the evidence shows that the applicant secretly provided treatment. While it is true that the Board failed to make specific reference to the ‘goat incident’, the Court finds that, based on the overall objective evidence and the decision, the Board was alive to the situation and, it and of itself, this omission is not material in the present case. Finally, the Court observes that counsel for the applicant confirmed at the hearing that the draft “Anti-homosexuality” bill introduced in 2009 has not been adopted and is therefore not law.

[39] The Court further notes that the central issue in this case is whether it was reasonable for the Board to expect that the applicant could and should have provided corroborating evidence, and whether it was open to the Board to draw a negative inference from the failure to produce any. In this analysis, the Court refers to *Lopera v Canada (Minister of Citizenship and Immigration)*, 2011 FC 653, [2011] FCJ No 828 [*Lopera*], which relied on *Ortiz Juarez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 288, 146 ACWS (3d) 705. In *Lopera*, above, the Court states at para 31 that: “Whether corroborative evidence can reasonably be demanded depends upon the facts of each case”. Both cases stand for the proposition that it is reasonable for the Board to demand corroborating evidence where the applicant can be reasonably expected to have such evidence available to them.

[40] The Board asked the applicant specifically for some sort of corroborating evidence during the hearing, beginning at page 15 of the hearing transcript:

Q: Do you have any documentation that -- at all that links you with working in the gay community? Leaving the fraternity aside for a moment, but just working with HIV patients and working with the gay community in Uganda?

A: Not specifically gay community. I would say that I worked with the HIV-positive people throughout my Ugandan career and I made sure that any documentation linking me with -- would cause me trouble. I had to make sure there wasn't such a documentation.

[41] The Board explained at paragraph 14 of the decision that it considered this explanation, but rejected it, finding that the applicant could have supplied corroborating evidence:

While it may have been reasonable for the claimant to be cautious about incriminating documentation while he was in Uganda, I note he has been in Canada since the fall of 2009 and I find it has been open to him during this time to seek affidavits or letters of support from those he treated or who knew of his work in Uganda on behalf of gays yet he has not done so.

[42] The Board also found at paragraph 18 of the decision that as a highly educated individual with legal representation and family connections in Uganda, such as the applicant, could be expected to provide corroboration for his allegations.

[43] The applicant insists that it is unreasonable to expect him to provide evidence of his treatment of homosexuals as that would necessitate the identification of individuals who could face legal consequences and physical danger in Uganda. However, the Court notes that the applicant in fact named two individuals in his Personal Information Form narrative: one individual is referred to as a homosexual whom the applicant met during his studies, and the other individual is identified as a member of the Brotherhood of Samia and employee of the administration in the Busia District.

[44] It was also reasonable for the Board to assume that there are other sources from which the highly educated applicant could acquire corroborating evidence in the form of affidavits or letters other than from individuals who would be put in danger. This is equally applicable for corroborating evidence that would support the applicant's subjective fear of persecution on a Convention ground and objective fear as a physician who has provided treatment to homosexuals in Uganda.

[45] For all of these reasons, the Court finds that the decision of the Board was reasonable and that the Court's intervention is not warranted. As neither party proposed a question for certification, none will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.
2. No question of general importance is certified.

“Richard Boivin”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5410-11

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PLACE OF HEARING: Edmonton, Alberta

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DATED: February 2, 2012

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