

Federal Court



Cour fédérale

Date: 20130110

Docket: IMM-9760-11

Citation: 2013 FC 22

Montréal, Quebec, January 10, 2013

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

EKINE EDMUND NDOKWU

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] In this matter before the Court since the Refugee Protection Division's adverse credibility finding, in and of itself, is dispositive, it is not necessary to consider its objective fear analysis. The Court analyzed the reasoning behind the Refugee Protection Division's preference for country condition evidence prepared by the Canadian High Commission over that of a particular advocacy group.

[2] The notion that evidence from a particular advocacy group or, for that matter, any advocacy group is consistently or uniformly less objective than country condition evidence prepared by diplomats, must be examined carefully in light of information from those closest to the situation, including diplomats, themselves, when and where they are privy to first-hand knowledge. This is to ensure that findings be considered as objectively as possible in light of tests of corroboration.

[3] By this means of analysis, evidence which would otherwise not be brought forward would see the light of day for the purpose of analysis, and, not be dismissed out of hand, otherwise, the voice of the ordinarily voiceless, would remain voiceless; however, plausibility and consistency of evidence must not be overlooked in such an exercise; it requires the delicate, intricate and vigilant scrutiny of complete evidence analysis by decision-makers in each and every case.

II. Introduction

[4] The Applicant seeks judicial review of a decision by the Refugee Protection Division [RPD] of the Immigration and Refugee Board, wherein it was determined that he is not a Convention Refugee or a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. In particular, the Applicant argues that the RPD unreasonably assessed his identity documents, credibility, and objective fear of persecution as a bisexual man in Nigeria. The Applicant also claims that a reasonable apprehension of bias arises from the decision and that the inadequate translation services at his hearing raise issues of procedural fairness.

III. Judicial Procedure

[5] This is an application under subsection 72(1) of the *IRPA* for judicial review of the decision of the RPD, dated October 27, 2011.

IV. Background

[6] The Applicant, Mr. Ekine Edmund Ndokwu, is a citizen of Nigeria, born in 1973.

[7] In 1998, the Applicant claims that he danced with and kissed a man at a club and that he was consequently persecuted by his university peers, threatened with death by co-workers, forced to withdraw from university, and disowned by his father.

[8] In January 2000, the Applicant went to Lagos, where he continued to be persecuted.

[9] In May 2010, the Applicant claims that homophobic youths attacked him and his boyfriend, Kenneth, at a club in Lagos after a friend from university identified him. The youths allegedly came to his apartment the next day while the Applicant and Kenneth were away and left a note threatening to immolate him.

[10] The Applicant allegedly arrived in Montreal on July 7, 2010 using a counterfeit passport, which he claims he surrendered to the person who smuggled him into Canada. The Applicant claims that he had no opportunity to examine the fraudulent passport, which his smuggler only gave to him when passing through various checkpoints.

[11] When the Applicant claimed refugee protection on July 8, 2010, he allegedly could not remember the name in which his counterfeit passport was issued. Pressed by an officer, he randomly gave Kunle as the name in which the passport was issued.

[12] The Applicant presented his birth certificate and a Nigerian driver's license, both of which were authenticated by the Nigeria High Commission as identity documents.

V. Decision under Review

[13] The RPD dismissed the Applicant's claim because he did not present sufficient evidence of his identity, was not credible, and lacked an objective fear of persecution.

[14] According to the RPD, the Applicant's birth certificate and driver's license were not sufficient to establish his identity. The RPD reasoned that the birth certificate did not provide biometric data and was not reliable evidence for forensic investigation. The Applicant's driver's license was also insufficient because the RPD found that it was easy to obtain fraudulent driver's licenses in Nigeria. The RPD also drew a negative inference from the Applicant's failure to obtain a Nigerian passport from the Nigeria High Commission, which he had contacted to verify his driver's license.

[15] The RPD made a general adverse credibility finding. The RPD did not believe that the Applicant had kissed a man at a night club since it was unlikely that anyone, knowing he could be imprisoned or executed for same-sex acts, would kiss a man in a heterosexual club; nor did the RPD

believe that the Applicant had a boyfriend named Kenneth. Asked how he learned of his father's death, the Applicant testified that his girlfriend told him. The RPD did not accept his explanation that he referred to Kenneth as his girlfriend because he had otherwise referred to Kenneth as his boyfriend. The RPD concluded it was unlikely that the Applicant was disowned by his father in 1998, since it was his birth certificate that his father had applied for in July 2010. Moreover, the Applicant's claim that he was spotted by a former classmate in Lagos was implausible because it was unlikely he would be recognized after twelve (12) years in a dark night club in a city of several million people. The RPD also drew an adverse inference from his inability to establish that he arrived in Montreal under a fraudulent passport issued in the name of Kunle, acknowledging the Applicant's claim that he surrendered this passport to his smuggler. There was no record of a person entering Canada under this name and arriving in Montreal on July 7, 2010. The Applicant's failure to obtain a copy of an alleged warrant for his arrest further diminished his credibility.

[16] The RPD found that the Applicant did not have an objective fear of persecution. The RPD cited country condition evidence that, despite sanctions of imprisonment, same-sex acts are seldom prosecuted in Nigeria and referred to country condition evidence that: (i) the government did not hamper the work of Lesbian, Gay, Bisexual and Transgender [LGBT] activists; (ii) there was an active LGBT scene in Lagos and Abuja; (iii) convictions under the legislative sodomy prohibition are not possible without a confession; (iv) same-sex activity was tolerated in cases of discreet conduct; otherwise, persons public indecency charges could ensue; (v) violent attacks in such cases were not common; and, (vi) federal courts overturned every death sentence for same-sex acts under Shari'a law.

[17] The RPD made this finding notwithstanding country condition evidence in respect of (i) the low visibility of homosexuals; (ii) reports of frequent homophobic violence by gangs and family; (iii) police harassment and detention of LGBT persons; (iv) socio-religious intolerance; and, (v) contradictory evidence in regard to police protection. The RPD reasoned that the sources for these reports were LGBT groups whose findings could not be considered objective “given their subjective perspective” (at para 24). The RPD preferred an assessment by the Canadian High Commission in Nigeria because “it is written by an objective professional Canadian diplomat resident in Nigeria” (at para 31).

VI. Issues

- [18] (1) Did the RPD assess identity documents unreasonably?
- (2) Did the RPD assess credibility unreasonably?
- (3) Did the RPD assess objective fear of persecution unreasonably?
- (4) Did a reasonable apprehension of bias arise?
- (5) Did the translation provided at the hearing breach procedural fairness?

VII. Relevant Legislative Provisions

[19] The following legislative provisions of the *IRPA* are relevant:

Convention refugee

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,

Définition de « réfugié »

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

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, 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,

Personne à protéger

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 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) 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.

(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.

(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.

(2) A également qualifié 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.

VIII. Analysis

Standard of Review

[20] The standard of reasonableness applies to the RPD's assessment of the Applicant's identity documents, as it does for credibility and a well-founded objective fear of persecution (*Lin v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1235; *Wei v Canada (Minister of Citizenship and Immigration)*, 2012 FC 854).

[21] Correctness applies in assessing the reasonable apprehension of bias (*Cao v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1398). Issues with the adequacy of translation relate to procedural fairness and are assessed on the standard of correctness (*Owochei v Canada (Minister of Citizenship and Immigration)*, 2012 FC 140).

[22] Where the standard of reasonableness applies, the Court may only intervene if the Board's reasons are not "justified, transparent or intelligible". To satisfy this standard, the decision must also fall in the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

(1) Did the RPD assess identity documents unreasonably?

[23] To assert that his birth certificate and authenticated driver's license were sufficient identity documents, the Applicant argues that they contain biometric data and other security features. The Applicant contends that the RPD has insufficient expertise to assess the genuineness of his driver's license and stresses that his driver's license was accepted as authentic by the Canada Border Services Agency [CBSA] (which has document verification expertise) and Citizenship and Immigration Canada.

[24] The Respondent counters that the RPD may consider if driver's licenses could be obtained fraudulently in Nigeria in assessing identity documents and that a negative inference can be drawn from the Applicant's failure to obtain a Nigerian passport from the Nigeria High Commission, which had authenticated his driver's license.

[25] Rule 7 of the *Refugee Protection Division Rules*, SOR/2002-228 requires claimants for refugee protection to provide acceptable documents establishing identity. In *Su v Canada (Minister of Citizenship and Immigration)*, 2012 FC 743, Justice Judith Snider held that proof of identity is a “pre-requisite for a person claiming refugee protection” (at para 3). Justice Snider reasoned that, in the absence of such proof, there is no sound basis for testing and verifying an applicant's claim of persecution or even his or her true nationality.

[26] This Court finds that the RPD unreasonably determined that the Applicant had not proven his identity. The Respondent is correct that the RPD may draw an adverse credibility inference from an absence of corroborating evidence, “especially when an applicant makes no effort to obtain [it]” (*Alonso v Canada (Minister of Citizenship and Immigration)*, 2008 FC 683 at para 10). The Respondent is also correct that the RPD may consider the validity or authenticity, especially, if fraudulent documents can be easily obtained in a country of origin of an applicant (*Zhang v Canada (Minister of Citizenship and Immigration)*, 2009 FC 787 at para 7). In the present case, the driver's license was authenticated by the Nigeria High Commission (Certified Tribunal Record [CTR] at p 196). While the Applicant's birth certificate did not contain sufficient identifying data and security features to be subject to forensic investigation, it gives the birth date and bears a recent photograph of the Applicant (CTR at p 273). Consequently, the Applicant's birth certificate could be compared with his authenticated driver's license to further establish his identity.

[27] In these circumstances, it was not reasonable for the RPD to refuse to accept the Applicant's identity documents simply because the birth certificate did not contain biometric data or sufficient security features to be subject to forensic investigation; the RPD found that driver's licenses in

Nigeria could be easily obtained, and that the Applicant could well have obtained a passport from the Nigeria High Commission. In the absence of contradicting forensic evidence, it was not reasonable, in and of itself, to conclude that a driver's license authenticated by the Nigeria High Commission was fraudulent merely because the RPD had knowledge that Nigerian driver's licenses could be fraudulently obtained.

(2) Did the RPD assess credibility unreasonably?

[28] The Applicant argues that the RPD's adverse credibility finding was unreasonable. He argues that the RPD should not have drawn negative credibility inferences from: (i) his inability to establish that he arrived in Montreal under a fraudulent passport issued in the name of Kunle; (ii) his father's application for his birth certificate despite having disowned him; (iii) his allegation that he drunkenly kissed his boyfriend at a club; (iv) his former schoolmate's recognition of him in a club in Lagos; and, (v) his failure to obtain a copy of the Nigerian warrant, thereby exposing himself to his persecutors.

[29] By contrast, the Respondent submits that the Applicant gave contradictory and implausible evidence. Moreover, according to the Respondent, the Applicant had the onus of corroborating his claim by obtaining a copy of the warrant issued against him and providing evidence about his arrival in Canada.

[30] This Court finds that the RPD's adverse credibility finding was reasonable on the basis of the following, although the above discussed factors, in and of themselves, may have been inconclusive.

[31] First, it was reasonable to draw an adverse credibility inference from the Applicant's failure to corroborate his account of his arrival in Canada. In *Akhtar v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1319, Justice Yvon Pinard held that the RPD may reasonably draw an adverse credibility inference from an applicant's failure to corroborate his account of his arrival in Canada through documentary evidence. Pursuant to *Akhtar*, the RPD may reasonably reject an applicant's "explanation that smuggling agents typically request that travel documents be returned to them upon arrival to the destination" (at para 5).

[32] It was reasonable to find that the Applicant's account of his arrival in Canada was not credible, given the absence of any supporting documentation (including a boarding pass or luggage tag). The RPD sought to verify his account by requesting a CBSA records search (CTR at p 228), which did not reveal that a person using the name of Kunle arrived in Montreal on July 7, 2010. This CBSA records search impugns the Applicant's credibility even when one considers his allegation that he was uncertain of the name in which his fraudulent passport was issued. It was reasonable for the RPD to require the Applicant to give, at the very least, the name by which he was crossing border checkpoints.

[33] Second, it would be reasonable to find that the Applicant's claim that he was disowned by his father, in 1998, because of his sexuality, was inconsistent with his father's request for his birth certificate in 2010. It falls within the range of possible, acceptable outcomes to find that a person who has actually disowned his son would not assist him by applying for his birth certificate. This

conclusion is reasonable notwithstanding the Applicant's claim that his aunt intervened to persuade his father to apply for the birth certificate (CTR at p 295).

[34] Third, it would be reasonable to find it implausible that the Applicant had kissed a man in a heterosexual club, knowing that he could be imprisoned or executed. The RPD's credibility findings ought to have considered the context of the country condition evidence (*Renteria v Canada (Minister of Citizenship and Immigration)*, 2006 FC 160 at para 1). The RPD, moreover, was entitled to apply its own understanding of human behaviour in determining the plausibility of the Applicant's account (*Utrera v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1212 at para 61). Given the stigma and punitive measures confronting homosexuality in Nigeria, it would be reasonable to find that it would be unlikely that the Applicant, even if drunk, would kiss a man in a non-LGBT public space.

[35] Fourth, it was reasonable to disbelieve the Applicant's claim that he had a boyfriend named Kenneth or was recognized by a former schoolmate in a club in Lagos. The Applicant testified that his girlfriend informed him of his father's death. Asked by his counsel to clarify whether he was referring to his "gay friend or girlfriend", he repeated that it was his girlfriend who informed him (CTR at p 292). The Applicant subsequently testified that, by girlfriend, he was referring to his boyfriend Kenneth and that, in Nigeria, men referred to their same-sex partners as girlfriends (CTR at p 293). This explanation is inconsistent with his earlier testimony that he was referring to his girlfriend and not his gay friend. Consequently, it was not unreasonable to conclude that the Applicant did not have a boyfriend named Kenneth and that the Affidavit of Kenneth Oputa (CTR at p 203) was a fraudulent document (CTR at p 295). Moreover, it was also reasonable to conclude

that the Applicant was not identified by a former classmate in a club in a large city by a person who he had not seen in twelve (12) years. This conclusion would fall within the range of acceptable and possible outcomes, regardless of whether (as the Applicant contends) that club was dark or well-lit.

[36] Finally, it was reasonable to require the Applicant to obtain a copy of the alleged warrant for his arrest in Nigeria. In *Morka v Canada (Minister of Citizenship and Immigration)*, 2007 FC 315, Justice Luc Martineau held that the RPD may, in certain circumstances, ground an adverse credibility finding on an absence of corroborating documentation (at para 18). Although it would be unreasonable for the RPD to require corroborating evidence that could not have been obtained or was not reasonably available, the Applicant has not established that the warrant could not have been obtained or was not reasonably available (*Touraji v Canada (Minister of Citizenship and Immigration)*, 2011 FC 780 at para 26). Even if requesting a copy would reveal to the Nigerian authorities that the Applicant was living in Canada, it would be reasonable to conclude that the authorities would not pursue him from abroad on a law that the country condition evidence suggests is rarely used for the purposes of prosecution.

(3) Did the RPD assess objective fear of persecution unreasonably?

[37] In this matter before the Court since the RPD's adverse credibility finding, in and of itself, is dispositive, it is not necessary to consider its objective fear analysis. The Court analyzed the reasoning behind the RPD's preference for country condition evidence prepared by the Canadian High Commission over that of the LGBT advocacy group.

[38] The notion that evidence from a particular advocacy group or, for that matter, any advocacy group is consistently or uniformly less objective than country condition evidence prepared by diplomats, must be examined carefully in light of information from those closest to the situation, including diplomats, themselves, when and where they are privy to first-hand knowledge. This is to ensure that findings be considered as objectively as possible in light of tests of corroboration.

[39] By this means of analysis, evidence which would otherwise not be brought forward would see the light of day for the purpose of analysis, and, not be dismissed out of hand, otherwise, the voice of the ordinarily voiceless, would remain voiceless; however, plausibility and consistency of evidence must not be overlooked in such an exercise; it requires the delicate, intricate and vigilant scrutiny of complete evidence analysis by decision-makers in each and every case.

(4) Did a reasonable apprehension of bias arise?

[40] This Court finds that a reasonable apprehension of bias does not arise from the RPD's decision. The Applicant alleges that bias arises as: (i) the panel member had previously granted refugee protection to a Nigerian homosexual on the basis of the legislative prohibition on homosexuality; and, (ii) country condition evidence suggested that there was no protection for LGBT individuals in Nigeria. In rejecting this argument, this Court follows the Federal Court of Appeal's decision in *Arthur v Canada (Attorney General)*, 2001 FCA 223, which held that an allegation of bias "cannot rest on mere suspicion, pure conjecture, insinuations or mere impressions of an applicant or his counsel. It must be supported by material evidence demonstrating conduct that derogates from the standard" (at para 8).

(5) Did the translation provided at the hearing breach procedural fairness?

[41] Finally, this Court rejects the Applicant's argument that the inadequacy of translation establishes a denial of procedural fairness. Although translation issues arose at the hearing, this Court has held that these do not breach procedural fairness if they are immaterial to the outcome (*Mowloughi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 662 at para 32). In the present case, the decision was premised on several credibility findings that were not affected by the adequacy of the translation.

[42] The only credibility finding that would have been affected by the translation, the Applicant's use of "girlfriend", does not disclose a breach of procedural fairness. The RPD gave the Applicant several opportunities to clarify what he meant by "girlfriend". Moreover, his counsel did not object to the translation: "I'm not saying he said gay, he said girl, that was clear" (CTR at p 293). In *Dhaliwal v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1097, Justice Yves de Montigny held that there was no breach of procedural fairness where the RPD "took every step to ensure that the interpretation was accurate, and counsel appeared to be satisfied that her concerns had been addressed" (at para 16). Justice de Montigny reasoned that this amounted to a waiver to object to the adequacy of the translation (at para 15). Likewise, this Court finds that the Applicant's failure to address his concerns with the translation at the hearing amounts to a waiver of his right to object to the translation at judicial review.

IX. Conclusion

[43] For all the above reasons, this Applicant's application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS that the Applicant's application for judicial review be dismissed.

No question of general importance for certification.

“Michel M.J. Shore”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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STYLE OF CAUSE: EKINE EDMUND NDOKWU v
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PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: January 9, 2013

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

DATED: January 10, 2013

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