

Date: 20070802

Docket: IMM-2017-06

Citation: 2007 FC 811

Ottawa, Ontario, August 2, 2007

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

**MARY OKENY OLAL, JUSTINE OKENY OWERE,
BRIAN OKOT OKENY, JEREMIAH OPIO OKOT and
KATHERINE ACIRO OKOT**

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The principal applicant, Mary Okeny Olal, and her four children bring this application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated March 16, 2006, which concluded that the applicants are not Convention refugees or persons in need of protection under section 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act).

BACKGROUND

[2] The applicants are citizens of Uganda. The principal applicant is 49 years old. She first came to Canada in 1999 to work at the Ugandan High Commission in Ottawa. When the applicant's posting at the High Commission ended in January 2005, she and her children made a claim for protection under the Act. The claims were heard on January 9, 2006 and rejected in the decision under review on March 16, 2006.

[3] The principal applicant argues that her life would be in danger if she returns to Uganda because she is a member of the Acholi ethnic group, which is persecuted both by the Ugandan government and by the rebel Lord's Resistance Army (the LRA). The applicant alleges that the LRA has committed many atrocities against the Acholi people including recruiting children as soldiers, abducting women and girls, raping them and forcing them into slavery. She also fears returning to Uganda because she is HIV positive and would suffer discrimination in Uganda accordingly. The applicant states that the Acholi people are also targeted by the army because they are suspected of being supporters of the LRA.

[4] The Board concluded that the applicant did not establish a nexus to a Convention ground and that she was not a person in need of protection within the meaning of the Act. The Board made an adverse credibility finding. The Board further considered the difficulties expressed by the applicant with respect to her employer, the Ugandan High Commission, but concluded that these problems did not constitute persecution and did not fall within the scope of the Convention.

[5] With respect to the applicant's fear of persecution, the Board noted that the applicant's family members currently lived in Uganda and were not being persecuted. The Board also noted that the applicant owns a home in the capital of Kampala, which is in southern Ugandan, and that she was able to live outside of the dangerous conflict zones in northern Uganda. The Board held that the applicant presented no credible evidence that she would be a person of interest to the LRA or the government of Uganda.

[6] With respect to the applicant's HIV status, the Board noted that the Ugandan government has taken measures to fight AIDS and that the availability of health care, while imperfect and expensive, undermined the applicant's claim of persecution on this ground.

[7] The applicant argues that the Board erred in:

1. concluding that her fear was not based on a Convention ground;
2. ignoring relevant evidence including the expert opinion of Dr. Ogenga Otunnu;
3. misconstruing the principal applicant's testimony; and
4. basing its decision on irrelevant factors.

ISSUE

[8] The issue raised in this application is whether the Board erred in concluding that the applicants are not refugees or persons in need of protection.

STANDARD OF REVIEW

[9] With respect to the Board's factual findings, including its determinations of credibility, the appropriate standard of review is patent unreasonableness. Only if the Board's findings are unsupported by the evidence before it will the decision under review be patently unreasonable. Otherwise, the Court will not revisit the facts or weigh the evidence before the Board: *Jessani v. Canada (Minister of Citizenship and Immigration)*, 2001 FCA 127 at paragraph 16. With respect to a failure by the Board to refer to important, relevant evidence contradictory to the Board's decision, this is an alleged error of law subject to review on a standard of correctness.

RELEVANT LEGISLATION

[10] The legislation relevant to this application is the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act). The relevant provisions governing protection and refugee status are as follows:

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,

(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.

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) 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

[...]

(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, [...]

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 :

[...]

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, [...]

ANALYSIS

Issue: Did the Board err in concluding that the applicant is not a refugee or person in need of protection?

[11] The applicant described in her Personal Information Form (PIF) the circumstances that led to her application for protection:

In October 1999, I assumed the position of senior personal secretary for the Ugandan High Commissioner to Canada. My job ended at the beginning of 2005 in unusual and somewhat troubling circumstances. Usually when an Embassy employee's time is up, there is a warm send-off given to him or her – a party or some other type of farewell. Moreover, before one leaves a diplomatic posting, all travel arrangements are made for the employee by the government. Neither

of these things happened in my case. Instead, one day in January 2005 I received a message from the High Commissioner (who was out of the country at the time) that I was to return to Uganda immediately.

Because no travel arrangements had been made for me (and the cost for a family of five was prohibitive) and out of growing concern for my (and my family's) well-being in Uganda, I did not return to my country. I remained in my post until the end of January 2005, but have remained in Canada since then.

My sister, who lives in the United Kingdom, has told me that a rumour has been circulating that I have been communicating with the Acholi community in Ottawa. A friend of hers told her this, and this information was then related to me.

I was not totally surprised to hear this. Several years ago I had a disagreement at work with the acting High Commissioner. I did not believe that he was treating me fairly, and I told him so. Later I communicated my problems at work to one of the leaders of the Ugandan community in Ottawa. This man then spoke to the acting High Commissioner on my behalf. Later the acting High Commissioner scolded me for passing office information to the outside community.

Being accused of passing on government information to which I was privy could have serious consequences for me should I return to Uganda, where suspected support of the rebels can lead to one's imprisonment and torture or cruel, unusual or degrading treatment in custody. At the same time, having worked for the Ugandan government puts makes [*sic*] me especially vulnerable to attacks by the rebel forces in my country.

Should I return to Uganda, even if I am not targeted for suspected support of the rebels, I will be unemployed. Finding employment anywhere in Uganda, but especially outside of the northern regions, will be very difficult for a single, Acholi woman. As mentioned above, given the current situation in Uganda, Acholis outside the north are mistrusted. Aggravating this situation is my HIV status. My youngest son and I are both HIV positive, and require anti-retroviral medication in order to survive. People in Uganda are extremely aware of HIV/AIDS, and it is not easy to hide one's HIV status. [...]

[12] The Board rejected the applicants' claim on several grounds. On the issue of credibility, the Board stated:

The panel questioned the principle [*sic*] claimant on all the aspects of her story but did not find her testimony to be neither [*sic*] clear nor convincing. The claimant has been a civil servant working for her government for some 20 years. She and the members of her family were all issued diplomatic passports which they used to travel to their country and on holidays to visit family and friends in the United Kingdom. The panel does not believe that they were victims of discrimination by the authorities of their country in this regard.

With respect to the applicant's testimony that she heard rumours through her sister in the United Kingdom concerning her lack of loyalty to her government based on her alleged contact with the Acholi community in Canada, the Board noted that the applicant was unconvincing:

Her testimony was not clear on this issue. Questioned about her family in Uganda, she did not reveal that they were being persecuted there. On the contrary, she indicated that she sent her son Justine Brian to live with his father in Uganda in 2003. He worked as a policeman in Kampala and now ran a small business. She declared that her sister went to Uganda from the United Kingdom in 2005 and stayed in the house the claimant has in Kampala. The house is cared for by her father and her cousins in her absence. The claimant could not explain with any satisfactory details why her government would think she was a supporter of the LRA rebels and that should be would be arrested and tortured when she returned. [...] The claimant declared she worked for her government for 20 years. She did not submit any credible evidence to support her allegations that she would be considered either a spy or a supporter of the rebel army LRA, and that she would be sought by the Ugandan authorities in her country. She did not submit any evidence either to show that the Acholi are systematically persecuted by the government in Uganda. The panel does not find her credible on this issue and does not believe her security or that of her children would be in danger should she return to Uganda.

(Emphasis added.)

[13] The Board has complete jurisdiction to determine the plausibility of testimony, gauge the credibility of a claimant's account and draw the necessary inferences: *Aguebor v. Canada (Minister of Employment and Immigration)* (1993), 160 N.R. 315 (F.C.A.). In my view, it was open to the Board to conclude that the applicant's claim was not credible on most issues.

[14] The Court agrees with the respondent that the principal applicant's claim before the Refugee Board was vague and incoherent. She testified at the hearing in response to the Board's question (Transcript, Certified Tribunal Record, page 965):

Presiding Member: Who is it that you fear exactly?

Claimant (to Presiding Member): At the moment, my major fear is the government of Uganda and then the Rebels and our people in general. The reason being that I was working with the government.

Under further questioning by the Presiding Member the principal applicant stated that the government of Uganda thinks that she is a supporter of the Rebels.

[15] At the hearing before the Court, it was clear that the applicants were no longer basing this case on any perceived fear other than a fear from the government. In the decision of the Board the Presiding Member states (and I repeat):

... She did not submit any credible evidence to support her allegations that she would be considered either a spy or a supporter of the Rebel Army LRA, and that she would be sought by the Ugandan authorities in her country. ...

However, the applicant submitted written evidence from:

1. her sister that during her sister's visit to Uganda in January 2005 government agents on a number of occasions came to her home looking for the principal applicant and asking why she had not returned to Uganda since her duties at the Ugandan High Commission in Canada were over; and
2. Dr. Otunnu (a purported expert in violations of human rights in Uganda), that the principal applicant would be perceived by the Government of Uganda as a political opponent and that she will be persecuted. He states in paragraph 6 of his statement:

I also conclude that Ms. Millisent Okeny Olal should not return to Uganda because, given the culture of impunity with which the government of Uganda deals with perceived political opponents and perceived supporters of anti-regime groups, it is quite likely that she will be raped and tortured and/or detained indefinitely under the politically defined anti-terrorism law, or she will be murdered by either the regime or the Lord's Resistance Army (LRA) in northern Uganda. This is especially true because the regime regards her as an enemy of the "state" due to her perceived and extensive contracts with groups opposed to atrocities committed by both the regime and the Lord's Resistance Army in northern Uganda.

[16] The Board made no reference to this evidence. This was direct, relevant evidence contradicting the Board's finding, and which should have been mentioned specifically and analyzed in the Board's decision. As Mr. Justice John Evans held in *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425 at paragraph 17:

¶17. However, the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": *Bains v. Canada (Minister of Employment and Immigration)* (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent

on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact.

[17] The blanket statement from the Board at page 4 in its reasons:

She did not submit any credible evidence to support her allegations that she would be considered either a spy or a supporter of the Rebel Army LRA, and that she would be sought by the Ugandan authorities in her country.

required explanation.

[18] The Board could have dismissed the credibility of this evidence with an explanation. The nature of this evidence required that it be mentioned specifically and assessed.

[19] The Board has a duty to identify relevant evidence that is directly contradictory to the Board's conclusion, and explain why the Board has decided that such evidence is not credible. The Court is satisfied that the Board made an error of law in this regard.

[20] For the reasons above, this application for judicial review is allowed.

[21] Neither party proposes a question for certification. No question will be certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

This application for judicial review is allowed, the Board Decision dated March 16, 2006 is set aside, and the matter is referred to a differently constituted panel for redetermination.

“Michael A. Kelen”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2017-06

STYLE OF CAUSE: MARY OKENY OLAL AND OTHERS

and

THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: Ottawa, Ontario

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

DATED: August 2, 2007

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