

Date: 20080328

Docket: IMM-3059-07

Citation: 2008 FC 400

Ottawa, Ontario, March 28, 2008

PRESENT: The Honourable Madam Justice Dawson

BETWEEN:

MACAULEY ONYEKACHI KALU

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Macauley Onyekachi Kalu is a seven-year-old child who claims to be a citizen of Eritrea and seeks refugee protection. His parents are said to be Pentecostal Christians who fled religious persecution in Eritrea. Macauley's mother, his designated representative, provided evidence to the Refugee Protection Division of the Immigration and Refugee Board (Board) that the family fled from Eritrea to Sudan in 2005. Macauley's mother then came to Canada with her two youngest children and they made refugee claims. Macauley remained in Sudan with his father until 2006, when his father was able to send him to Canada with a smuggler. A few days after arriving in

Canada, Macauley made his refugee claim. Macauley's father remains in Sudan, attempting to come to Canada.

[2] The refugee claims of Macauley's mother and his siblings were refused because they were unable to establish their identity to the Board's satisfaction.

[3] Macauley's claim for protection was also refused by the Board because he was unable to establish his identity and Eritrean nationality.

[4] This application for judicial review of the decision dismissing Macauley's claim to protection is allowed because the Board's reasons for rejecting his claim do not withstand scrutiny on any standard of review.

[5] Before turning to address the Board's decision, it is useful to set out some relevant principles:

1. The determination of a claimant's identity, and particularly the determination of whether a claimant is a citizen of a particular country, is a question of fact.
2. Subsection 162(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act), confers sole and exclusive jurisdiction upon the Board to determine all questions of fact and law in refugee claims.
3. The mission of the Board, as a division of the Immigration and Refugee Board, is "to make well-reasoned decisions on [...] refugee matters efficiently, fairly and in accordance with the law."

4. Hearings before the Board are not adversarial in nature. Thus, Board members participate to some extent in the hearing procedure. (This occurred in this case, where no refugee protection officer was present.)
5. The Board is an expert and specialized tribunal. Thus, pursuant to paragraph 170(i) of the Act, the Board may take notice of any information or opinion that is within its specialized knowledge.
6. Board members are assigned to adjudicate claims that arise from specific geographic regions. This is so members are better able to develop institutional memory and specialized knowledge of localized country conditions.
7. The development of institutional memory and specialized knowledge is supported by the Board's "Policy on Country-of-Origin Information Packages in Refugee Protection Claims." This policy states that, in support of the mission statement of the Immigration and Refugee Board, the Board "uses the best available current information about human rights and country conditions in countries from which claimants originate."
8. This Court is obliged to give great deference to the Board's findings of fact. This reflects both the Board's specialized knowledge and expertise, and the fact that it has the benefit of seeing and hearing a claimant's testimony.

[6] Turning now to the Board's reasons, they are very brief. In material part, they are as follows:

According to Ms. Kalu, the smuggler would not allow her to carry identity documents to Canada because she was traveling under an alias and it would have been dangerous to be in possession of two sets of identity documents. It is noted from her PIF, that Ms. Kalu presumably has both parents and five siblings still living in Eritrea. As to why Ms. Kalu did not ask any of them to help her obtain

identity documents, Ms. Kalu responded that she did not want to communicate with any family members because they would get into trouble if they knew where she was and be put in jail. This, in my view, is highly speculative. Moreover, it does not address the risk of the claimant being returned to Eritrea if his identity was not established. When asked why she did not ask her putative husband allegedly in Sudan and with whom she was in contact to help secure documentation, Ms. Kalu indicated that she did not think of it. I am not satisfied that reasonable attempts were made to provide identity documents for the claimant; nor has Ms. Kalu provided reasonable or credible explanations as to why these documents were not provided. [footnote omitted]

[7] A review of the transcript reveals that the Board was particularly concerned with the absence of Macauley's birth certificate. Macauley's mother testified that, while he was born at home, she had registered his birth and that she tried to find Eritreans returning to Eritrea whom she could trust to speak with her mother in order to obtain Macauley's birth certificate. Macauley's mother testified on two occasions that she had not contacted her family directly since arriving in Canada because the authorities would mistreat her family if her family admitted that they knew she was in Canada.

[8] In finding that reasonable efforts had not been made to obtain identity documents, the Board rejected this explanation as being "highly speculative." The Board gave no reason for that conclusion.

[9] The 2005 United States Department of State Country Report for Eritrea reported that:

Beginning in June, security forces began detaining and arresting parents of individuals who had evaded national service duties or fled the country. They required the parents to pay a fine and bring their children back before they would release them. These arrests and detainments continued through year's end. [emphasis added]

[10] In view of that evidence, there was no basis for the Board's conclusion that Ms. Kalu's explanation for not contacting her parents was "highly speculative." That finding is, therefore, a reviewable error, even on the most deferential standard of review.

[11] The Board's second and final reason for its finding was that it was unreasonable for Ms. Kalu not to have asked her husband in Sudan to help secure the identity documents. The Board did not specify what help he could have provided. Presumably, the Board, with its specialized knowledge of local conditions in Eritrea, was aware from a then existing Response to Information Request (ERI102025.E, "Information on official identity documents and the names of organizations that issue them (2005-2006)") that, according to the United States Bureau of Consular Affairs, Eritrean birth certificates and marriage certificates can only be issued to persons inside Eritrea.

[12] In my view, the Board, as a specialized tribunal, failed to have proper regard to the evidence available to it to explain the difficulties inherent in obtaining identity documents for persons in the situation of Macauley and his designated representative. By failing to have that regard, the Board's conclusions that no reasonable efforts had been made to obtain identity documents and that no reasonable explanation had been provided for that failure were made in reviewable error.

[13] Before parting with this matter, I understand that Macauley's mother and brothers remain in Canada as failed refugee claimants. Their counsel did not believe that they had yet been served with applications for pre-removal risk assessments. Hopefully, if applications are served and filed, the pre-removal risk assessment officer will be directed to the documentary evidence that touches

upon the difficulty of obtaining identity documents and to the Court's concern in this case. If, in future, Eritrean travel documents are made available for Macauley's family, it is obvious that a thorough and rigorous risk analysis would be required prior to their removal from Canada to Eritrea.

[14] For the above reasons, this application for judicial review will be allowed. Counsel posed no question for certification, and I am satisfied that no question arises on this record.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed and the decision of the Refugee Protection Division dated July 11, 2007, is hereby set aside.
2. The matter is remitted to the Refugee Protection Division for redetermination by a differently constituted panel in accordance with these reasons.

“Eleanor R. Dawson”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3059-07

STYLE OF CAUSE: MACAULEY ONYEKACHI KALU, Applicant
and
MINISTER OF CITIZENSHIP AND IMMIGRATION,
Respondent

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: MARCH 19, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT:** DAWSON, J.

DATED: MARCH 28, 2008

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