

**Date: 20090320**

**Docket: IMM-3555-08**

**Citation: 2009 FC 286**

**Ottawa, Ontario, March 20, 2009**

**PRESENT: The Honourable Mr. Justice Orville Frenette**

**BETWEEN:**

**Mark Osazee OSAKPOLO**

**Applicant**

**and**

**MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review of a decision of the Refugee Protection Division (the RPD) of the Immigration and Refugee Board (the IRB) dated June 26, 2008, allowing the application to set aside the decision dated November 4, 1997, granting refugee status to the applicant.

I. The facts

[2] The applicant was born on May 23, 1965, in Bénin, Nigéria. He was named Osakpolo Omorogbe.

[3] He arrived in Canada on November 22, 1996, at Pearson Airport in Toronto, having travelled through Johannesburg (South Africa) and Amsterdam (Holland). For this trip, the applicant used a passport from the United States of America identifying him by the name of Jacob Conrad Koella.

[4] In his Notice of Claim to be a Convention Refugee, he stated that his place of birth was “Lagos, Nigeria.” He stated that he had continuously lived in Nigeria from 1986 until his departure in November 1996.

[5] The applicant applied for refugee status in Canada on November 22, 1996, and submitted his Personal Information Form (PIF) on January 25, 1997. He referred to one or more incidents that occurred in Nigeria in December 1995, leading to his arrest.

[6] On November 4, 1997, the RPD determined that he was a Convention refugee.

[7] On August 17, 1998, a Nigerian national, Johnbull Notiemwen, arrived at Dorval Airport with a Canadian passport in the name of Olatunde Okywobi.

[8] This individual claimed refugee status on the basis of a fear of persecution by the Nigerian government because he had written an article in the *Nigerian Newswatch*.

[9] A Royal Canadian Mounted Police investigation revealed that Johnbull Notiemwen and Mark Osazee Osakpolo were the same person, namely the applicant.

[10] On May 21, 2004, Kingsley Ighodaro, carrying a Nigerian passport and a Canadian visa, attempted to enter Canada; it was then discovered that Kingsley Ighodaro was in fact the applicant, Mark Osazee Osakpolo. It was also discovered that he had lived in the United States between 1987 and 1994 under the name of Make O Morow. The investigation also revealed that he had a criminal record in the United States, after committing criminal offences for which he was imprisoned and deported to Nigeria on March 21, 2004. These facts were not declared to the Canadian authorities.

[11] Following these revelations, the respondent Minister commenced proceedings to have set aside the decision dated November 4, 1997, granting the applicant refugee status.

[12] The first notice to appear for the hearing of this application on February 12, 2007, was sent to the applicant at his last reported address. After learning that the applicant had a new address, a new notice for the hearing on February 12, 2007, was sent to the applicant, but it did not reach him.

[13] On February 12, 2007, when the hearing opened, neither the applicant nor his counsel were present. However, the applicant's counsel, Mr. Handfield, showed up by chance, he said, and learned that the hearing was to begin that day; he demanded a [TRANSLATION] "a new hearing." By

facsimile dated March 7, 2007, the RPD allowed his application [TRANSLATION] “to reopen the hearing” and agreed to continue the hearing on a new date. The RPD also undertook to send him a copy of the recording of the hearing on February 12, 2007, which was done.

[14] On March 11, 2008, the hearing resumed in the presence of the applicant, who testified, and his counsel. The evidence and the pleadings were in a 130-page transcript. When he testified, the applicant admitted that he had used a false name as proof of identity in the United States and in Canada. He admitted that he had submitted false information in the eligibility form regarding his residences, his university attendance and his employment (pages 408 to 410 and 425 to 428 of the Tribunal record).

## II. The decision at issue

[15] On June 26, 2008, the RPD made its decision, 15 full pages, explaining its reasons for allowing the application to set aside the 1997 decision granting the refugee claim. The RPD referred to a number of false statements made by the applicant and the lack of credibility giving rise to the remedy provided at subsection 109(2) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act).

## III. The relevant legislation

[16] Subsections 109(1) and (2) and sections 159 and 163 of the Act read as follows:

**109.** (1) The Refugee Protection Division may, on application by the Minister, vacate a decision to allow a claim for refugee protection, if it finds that the decision was obtained as a result of

**109.** (1) La Section de la protection des réfugiés peut, sur demande du ministre, annuler la décision ayant accueilli la demande d’asile résultant, directement ou indirectement, de

directly or indirectly misrepresenting or withholding material facts relating to a relevant matter.

(2) The Refugee Protection Division may reject the application if it is satisfied that other sufficient evidence was considered at the time of the first determination to justify refugee protection.

**159.** (1) The Chairperson is, by virtue of holding that office, a member of each Division of the Board and is the chief executive officer of the Board. In that capacity, the Chairperson

(a) has supervision over and direction of the work and staff of the Board;

(b) may at any time assign a member appointed under paragraph 153(1)(a) to the Refugee Protection Division, the Refugee Appeal Division and the Immigration Appeal Division;

(c) may at any time, notwithstanding paragraph 153(1)(a), assign a member, other than a member of the Immigration Division, to work in another regional or district office in order to satisfy operational requirements, but an assignment may not exceed 90 days without the approval of the Governor in Council;

(d) designates from among the full-time members of the Board coordinating members for a Division, other than the Immigration Division;

(e) assigns administrative functions to the members of the Board;

présentations erronées sur un fait important quant à un objet pertinent, ou de réticence sur ce fait.

(2) Elle peut rejeter la demande si elle estime qu'il reste suffisamment d'éléments de preuve, parmi ceux pris en compte lors de la décision initiale pour justifier l'asile.

**159.** (1) Les président est le premier dirigeant de la Commission ainsi que membre d'office des quatre sections; à ce titre :

a) il assure la direction et contrôle la gestion des activités et du personnel de la Commission;

b) il peut assigner les commissaires nommés au titre de l'alinéa 153(1)a) à la Section de la protection des réfugiés, à la Section d'appel des réfugiés et à la Section d'appel de l'immigration;

c) il peut, malgré l'alinéa 153(1)a) et s'il l'estime nécessaire pour le fonctionnement de la Commission, affecter les commissaires, autres que ceux de la Section de l'immigration, à tout bureau régional ou de district pour une période maximale, sauf autorisation du gouverneur en conseil, de quatre-vingt-dix jours;

d) il choisit parmi les commissaires à temps plein des commissaires coordonnateurs qu'il affecte à telle des sections autres que la Section de l'immigration;

e) il confie des fonctions administratives aux commissaires;

(f) apportions work among the members of the Board and fixes the place, date and time of proceedings;

(g) takes any action that may be necessary to ensure that the members of the Board carry out their duties efficiently and without undue delay;

(h) may issue guidelines in writing to members of the Board and identify decisions of the Board as jurisprudential guides, after consulting with the Deputy Chairpersons and the Director General of the Immigration Division, to assist members in carrying out their duties; and

(i) may appoint and, subject to the approval of the Treasury Board, fix the remuneration of experts or persons having special knowledge to assist the Divisions in any matter.

(2) The Chairperson may delegate any of his or her powers under this Act to a member of the Board, other than a member of the Immigration Division, except that

(a) powers conferred under subsection 161(1) may not be delegated;

(b) powers referred to in paragraphs (1)(a) and (i) may be delegated to the Executive Director of the Board; and

(c) powers in relation to the Immigration Division may only be delegated to the Director General, directors or members of that Division.

**163.** Matters before a Division shall be conducted before a single member unless, except for matters before the Immigration Division, the

f) il répartit les affaires entre les commissaires et fixe les lieux, dates et heures des séances;

g) il prend les mesures nécessaires pour que les commissaires remplissent leurs fonctions avec diligence et efficacité;

h) après consultation des vice-présidents et du directeur général de la Section de l'immigration et en vue d'aider les commissaires dans l'exécution de leurs fonctions, il donne des directives écrites aux commissaires et précise les décisions de la Commission qui serviront de guide jurisprudentiel;

i) il engage des experts compétents dans les domaines relevant du champ d'activité des sections et, avec l'agrément du Conseil du Trésor, fixe leur rémunération.

(2) Le président peut déléguer ses pouvoirs aux commissaires, autres que ceux de la Section de l'immigration, ceux prévus aux alinéas (1)a) et i) au secrétaire général de la Commission et ceux en matière d'immigration au directeur général et aux directeurs et aux commissaires de la Section de l'immigration, ceux prévus au paragraphe 161(1) ne pouvant être délégués.

**163.** Les affaires sont tenues devant un seul commissaire sauf si, exception faite de la Section de l'immigration, le président estime

Chairperson is of the opinion that a panel of three members should be constituted.

nécessaire de constituer un tribunal de trois commissaires.

#### IV. Standard of review

[17] According to the case law, the appropriate standard of review in this case is that of reasonableness for questions of fact and mixed questions of fact and law (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190; *Mugesera v. Canada (M.C.I.)*, [2005] 2 S.C.R. 100). Deference must be given to administrative tribunal decisions (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12).

[18] For questions of law, breaches of procedural fairness or rules of natural justice, the standard is that of correctness.

[19] The applicant argues that the RPD made an unreasonable decision.

#### V. Analysis

[20] The applicant raised various reasons to support his application: (1) the breach of the principles of natural justice; (2) the decision contained errors in law and was unreasonable in regard to the facts.

##### A. *Breach of the rules of natural justice*

###### (1) The hearing

[21] The applicant argued that the RPD breached the rules of natural justice, in that it began a hearing on February 12, 2007, in the absence of the applicant and his counsel, and in that it allowed

his application for a “new hearing” *i.e.* “*de novo*,” and continued by a [TRANSLATION] “continued hearing.” He also argued that the RPD should have withdrawn itself and called a new panel because the application to set aside had been taken under deliberation.

[22] The respondent submits that there was no decision made on February 12, 2007, and that the RPD allowed the applicant’s motion to [TRANSLATION] “continue the hearing,” after giving the applicant’s counsel the cassette recordings of the first hearing that was only 39 minutes long.

[23] When the hearing was continued, the applicant was heard and his counsel examined him and argued his case before the RPD. The applicant had ample opportunity to argue all of the elements of the defence after examining the Minister’s representative to show that there were no grounds to set aside the decision, but he declined the offer.

[24] In my opinion, the applicant’s complaint on this point is not founded. Whether we qualify it as a continued hearing or a hearing *de novo* is not determinative. What is determinative is the right and ability to argue the defence and be able to dispute the application to set aside. This objective was attained here, therefore no rule of natural justice was breached on this point.

(2) The composition of the Board

[25] The applicant raised the fact that the Board, which usually sits with a single member, was composed of three members and that he was not advised of this beforehand.



[26] The record indicates that the IRB chairperson has the right to delegate his powers to constitute a panel of three members, and that is what he did on January 17, 2007. The stated reason was training members. This composition is allowed under section 163 of the Act. The applicant had known since June 13, 2007, that the RPD was composed of three members. Further, he did not establish that exercising this discretionary process caused him prejudice. It is recognized that it is lawful for panels to be composed of three persons (*Ramirez v. Minister of Citizenship and Immigration*, 2008 FC 602; *Lewis v. Minister of Citizenship and Immigration*, 2006 FC 1538). Accordingly, this grievance cannot be accepted.

(3) The RPD should have withdrawn

[27] The applicant submitted that there was an appearance of bias because the RPD had already learned of certain factual elements when he was not present.

[28] The respondent alleged that there was no evidence filed of the RPD's bias or apprehension of bias according to the informed reasonable person requirement (*Elmahi v. Minister of Citizenship and Immigration*, 2004 FC 1472; *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 S.C.R. 369, at pages 394 and 395).

[29] The apprehension of bias cannot rest on mere suspicion, pure conjecture or mere impressions; there must be concrete evidence (*Arthur v. Canada (Attorney General)* (2001), 283 N.R. 346 (F.C.A.), at pages 349 and 350).

(4) The objections to the documentary evidence

[30] The applicant raised the fact that his objections to the evidence were not the subject of decisions by the panel.

[31] The answer to this grievance is that the Board is the master of its procedure and can dispose of the objections according to various methods and that is what it did during the hearing.

(5) Michel Byczak and the conflict of interest

[32] The applicant alleged that there was a conflict of interest and an apprehension of bias because Mr. Byczak, who was a member of the panel, was an official employed by the IRB. The respondent contested this allegation; he established that there was no evidence that Mr. Byczak was employed by the IRB. This observation disposes of this grievance.

(6) The order of the examinations

[33] The applicant raised the fact that the panel failed to respect the order of the examination of the parties.

[34] This argument does not hold since the applicant was heard, he presented his defence and overall, the panel is not bound by the same strict procedural rules as the common law courts.

*B. The decision was not contested on the merits*

[35] The applicant argued that the respondent had the burden of establishing that the decision that was the subject of this proceeding was founded, which he failed to do.

[36] An analysis of the RPD's decision dated November 4, 1997, granting the status claimed was based on evidence that, according to the hearing before the RPD, proved to be false.

[37] An analysis of this claim clearly established that the above-mentioned evidence of wrongdoing could not at that time have been before the decision-maker, otherwise the refugee status would not have been allowed. Mr. Justice John M. Evans of the Federal Court of Appeal in *Coomaraswamy v. Canada (M.C.I.)*, [2002] 4 F.C. 501, stated the following on this point:

[17] Of course, when attempting to establish for the purpose of subsection 69.2(2) that a claimant made misrepresentations at the determination hearing, the Minister may adduce evidence at the vacation hearing that was not before the Board when it decided the refugee claim. Similarly, a claimant may adduce new evidence at the vacation hearing in an attempt to persuade the Board that she did not make the misrepresentations alleged by the Minister.

[38] Although these principles were set out in the former Act, they have been upheld by the Court under the new legislation (see *Chahil v. Minister of Citizenship and Immigration*, 2007 FC 1214, at paragraph 25; *Minister of Citizenship and Immigration v. Wahab*, 2006 FC 1554, at paragraph 27).

[39] The tribunal properly summarized the evidence, including the applicant's version, and determined that he was not credible. This decision is well founded based *inter alia* on the use of the false names and passport, the false and misleading statements which made his story implausible, full of inconsistencies, not rational and defying common sense (*Shahamati v. Canada (M.C.I.)*, [1994] F.C.J. n° 415 (F.C.A.) (QL); *Cheema v. Minister of Citizenship and Immigration*, 2008 FC 1002, at paragraphs 15 and 16; *Ikhuwuu v. Minister of Citizenship and Immigration*, 2008 FC 35, at paragraph 30).

[40] Further, the false statements and use of false names and false passport are offences under sections 122 and 123 of the Act as well as under section 57 of the *Criminal Code*, punishable by between five and fourteen years in prison (*R. v. Berryman* (1990), 78 C.R. (3d) 376 (B.C.C.A.)). In *R. v. Lin*, 2007 NLCA 13, 62 Imm. L.R. (3d) 199, the Court of Appeal of Newfoundland confirmed the sentence of a Chinese national for using a Korean passport to enter Canada.

## VI. Conclusion

[41] In light of the foregoing, the application is unfounded in fact or in law. For all of these reasons, the application for judicial review is dismissed.

**JUDGMENT**

The Court orders:

The application for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board, dated June 26, 2008, is dismissed.

No question will be certified.

“Orville Frenette”  
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Deputy Judge

Certified true translation

Kelley A. Harvey, BCL, LLB

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-3555-08

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**DATE OF REASONS:** March 20, 2009

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