

Federal Court



Cour fédérale

Date: 20090514

Docket: IMM-4856-08

Citation: 2009 FC 501

Montréal, Quebec, May 14, 2009

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

ADEDAYO ODETOYINBO

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, a citizen of Nigeria, challenges the legality of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated October 7, 2008, wherein the Board held he was not a Convention refugee or a person in need of protection. The applicant's claim is based on his alleged bisexuality. Since homosexuality is illegal in Nigeria, the applicant fears persecution because of his sexual orientation.

[2] The only question before the Court is whether the Board's dismissal of the applicant's claim on the basis of a lack of credibility is reasonable in the circumstances.

[3] How the Board weighed and assessed the evidence at the hearing is a question of fact. Accordingly, it should be reviewed on a standard of reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (*Dunsmuir*)). Provided the decision “falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”, this Court will not intervene (*Dunsmuir* at para. 47; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para. 59, [2009] S.C.J. No. 12 (*Khosa*)). Moreover, unless the credibility findings were made capriciously or without supporting evidence, or the Board did not provide sufficient reasons in clear and unmistakable terms to conclude as it did, this Court would owe these findings the highest degree of deference (paragraph 18.1(4)(d) of the *Federal Courts Act*, R.S.C., 1985, c. F-7, as further confirmed in *Dunsmuir (Khosa* at para. 46)).

[4] At the opening of the hearing before the Board, the presiding member clearly sets out the issues of the present case as follows:

... the hearing today should particularly focus on the following issues: The identity of the claimant as bi-sexual, as a bi-sexual person, and [the claimant’s] credibility in general. ...

[5] At the hearing, the applicant was questioned at length both about his bisexuality and the facts which led him to flee Nigeria. With respect to the first matter, the applicant was asked about the moment at which he initially realized that he was bisexual, the number of partners he had, if and when he had revealed his bisexuality to the members of his family, if his partners disclosed their sexual orientation to their families, the existence in Nigeria of organizations devoted to homosexual rights advocacy, his personal knowledge of the law condemning homosexuality in Nigeria and of

people having been tried or arrested pursuant to this law, his current partner since his arrival in Canada and his knowledge of the gay community in Canada.

[6] Unfortunately, despite extensive questioning at the hearing on the identity of the applicant as a bisexual person, the Board's reasons are totally silent on this key issue of the applicant's claim. Having closely reviewed the tribunal's record, including the transcripts and documentary evidence, overall, I find the Board's conclusion unreasonable. Notwithstanding the Board's negative credibility findings with regards to the events causing the applicant to flee Nigeria, an assessment of the applicant's sexual orientation both in Nigeria and in Canada was nevertheless necessary considering the documentary evidence on record pertaining to the persecution of homosexuals in Nigeria, and the elaborate testimony of the applicant on this very central issue of his claim (which incidentally was corroborated by the letters produced by the applicant). Accordingly, the Board's failure to make an explicit determination as to the applicant's bisexuality constitutes a reviewable error and justifies a redetermination of the applicant's claim (*Burgos-Rojas v. Canada (Minister of Citizenship and Immigration)*, 162 F.T.R. 157, [1999] F.C.J. No. 88); *Alemu v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 997 at paras. 45 and 46, [2004] F.C.J. No. 1210).

[7] It is well settled that an adverse credibility finding, though it may be conclusive of a refugee claim under section 96 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), is not necessarily conclusive of a claim under subsection 97(1). The reason for this is that the evidence necessary to establish a claim under section 97 differs from that required under section 96 (*Jarada v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 409, [2005] F.C. J. No. 506). When considering section 97, the Board must decide whether the claimant's removal would subject him

personally to the dangers and risks stipulated in paragraphs 97(1)(a) and (b) of the Act (*Bouaouni v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1211, [2003] F.C.J. No. 1540).

Further, there are objective and subjective components to section 96, which is not the case for paragraph 97(1)(a): a person relying on this paragraph must show on a balance of probabilities that he or she is more likely than not to be persecuted (*Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593, [1995] S.C.J. No. 78; *Li v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1, [2005] F.C.J. No. 1).

[8] It must be stressed that the claimant's fear of persecution or individualised risk must be evaluated in light of or take into account what is generally known about conditions and the laws in the claimant's country of origin, as well as the experiences of similarly situated persons in that country. In the case at bar the Board did not explicitly state in its reasons that it did not believe that the applicant was bisexual. Accordingly, it could not ignore compelling objective evidence on record demonstrating the abuses which gay men are subjected to in Nigeria. Therefore, even if the Board rejected the applicant's account of what happened to him in Nigeria, it still had a duty to consider whether the applicant's sexual orientation would put him personally at risk in his country.

[9] Therefore, the application will be allowed and returned to the Board for redetermination by a different member. There is no question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review be allowed. The decision rendered by the Board on October 7, 2008 is set aside and the matter is referred back for redetermination by another member of the Board. No question is certified.

“Luc Martineau”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4856-08

STYLE OF CAUSE: ADEDAYO ODETOYINBO v. THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: May 12, 2009

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

DATED: May 14, 2009

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