

Federal Court



Cour fédérale

**Date: 20120620**

**Docket: IMM-8219-11**

**Citation: 2012 FC 792**

**Toronto, Ontario, June 20, 2012**

**PRESENT: The Honourable Mr. Justice Zinn**

**BETWEEN:**

**AVWEROSUOGHENE OKWAGBE**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, of a decision of the Refugee Protection Division of the Immigration and Refugee Board is allowed. The Board, in response to a specific question, stated that counsel need not make submissions on areas other than the delay in claiming protection as that was the only issue of concern. The Board could not, as it did, then render a decision on the basis of there being an internal flight alternative (IFA) without providing counsel with an opportunity to respond to its concerns.

[2] The Certified Tribunal Record (CTR) shows that at the commencement of the hearing the Board identified the issues as identity, affiliation, state protection, credibility, and IFA: CTR 308.

[3] These issues were dealt with in turn by the Member who questioned the applicant. When questioning him about IFA possibilities in Nigeria, the Member asked if he would not be safe in Lagos or Ibadan. The applicant stated that he would not because the police falsely believed that he was a member of the MASSOB and he would be at risk for that reason in those locations and elsewhere in Nigeria. The Member and applicant's counsel then engaged in a discussion of the documentary evidence that the applicant was relying on in this regard.

[4] The Member then returned to question the applicant on the delay in claiming protection and commented: "That's the only thing I have to get past [emphasis added]." Immediately following this line of questioning, counsel commenced his submissions. His submissions were restricted to the issue of delay. When he commenced those submissions he advised the Member that he would deal with the delay issue and the Member responded at CTR 350: "Okay. That's what I need."

[5] Counsel concluded his submissions on delay with the following query at CTR 352: "If there's any other issue you want me to address --." The response, in my opinion, can only be reasonably interpreted as an indication from the Member that the delay was the only issue for determination. This led counsel to the view that he need not make submissions on any other issue.

The relevant exchange is as follows:

COUNSEL: ... If there's any other issue you want me to address –

MEMBER: No. I'm satisfied with regards to identity, I'm satisfied with that. We dealt really with state protection. In turn you can't

have one without the other so. No, that was my only, shall I say, concern [emphasis added].

[6] I agree with the respondent that the Member never said that counsel for the applicant need not make submissions of IFA because that was no longer at issue; however, the Member did the same when in response to a specific question as to whether there was any other areas he wished him to address, said “No, that was my only ... concern [emphasis added].”

[7] When the applicant has not made submissions on an issue because the tribunal directly indicates that no such submissions are required, or where the tribunal indirectly indicates that no such submissions are required, then the applicant is denied natural justice if the tribunal makes its ruling based on that issue: *Velauthar v Canada (Minister of Employment and Immigration)*, [1992] FCJ No 425; *Rodriguez v Canada (Minister of Citizenship and Immigration)*, [1995] FCJ No 77; *Butt v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 325.

[8] For these reasons this decision must be set aside. Neither party proposed a question for certification.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application is allowed, the decision is set aside and the applicant's claim for protection is remitted to a differently constituted Board, and no question is certified.

"Russel W. Zinn"

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Judge

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

**DOCKET:** IMM-8219-11

**STYLE OF CAUSE:** AVWEROSUOGHENE OKWAGBE v. THE MINISTER  
OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** June 19, 2012

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

**DATED:** June 20, 2012

**APPEARANCES:**

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