

Federal Court



Cour fédérale

**Date: 20130801**

**Docket: IMM-3588-12**

**Citation: 2013 FC 842**

**Ottawa, Ontario, August 1, 2013**

**PRESENT: The Honourable Mr. Justice O'Keefe**

**BETWEEN:**

**POPYILLA DAYEBGA**

**Applicant**

**and**

**MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision of the Immigration and Refugee Board, Refugee Protection Division (the Board), dated April 10, 2012, wherein the applicant was determined to be neither a Convention refugee within the meaning of section 96 of the Act nor a person in need of protection as defined in subsection 97(1) of the Act.

[2] The applicant requests that the Board's decision be set aside and the application be referred back to the Board for redetermination by a different panel.

### **Background**

[3] The applicant is a citizen of Cameroon born in 1984. He claims refugee protection on the basis of persecution due to being gay.

[4] His first gay relationship was in 2004 and he told his mother he was gay in the same year. His was a member of the gay awareness group at his high school and joined the local gay pride movement.

[5] In January 2005, the applicant was attacked and beaten by police for participating in the meeting of a gay pride group. He spent two weeks in hospital.

[6] In May 2008, he was participating in a gay rights march when he and others were arrested. He never appeared before a judge. He stayed in prison for four months before he was released due to his uncle's bribing the warden.

[7] The applicant fled Cameroon on October 28, 2011 and arrived in Canada on October 30, 2011. He claimed protection on November 3, 2011.

### **Board's Decision**

[8] The Board gave an oral decision at the hearing on April 10, 2012 with written reasons provided on April 30, 2012. The Board summarized the applicant's allegations and held that the applicant was neither a Convention refugee nor a person in need of protection.

[9] The Board accepted the applicant's identity but held that he had not established other central elements of his claim, including his sexual orientation.

[10] The applicant had testified that he was involved in the gay, lesbian and transgender movement in various groups from 2004 to 2011, but could not provide any acceptable documents to establish this fact. The Board rejected the applicant's explanation; that he could not get in touch with any members of these groups due to their being in hiding, on the basis that there was some continuity in the groups given that the applicant had been a member for seven years.

[11] The Board noted the applicant had testified he was no longer in touch with any of his past partners, so could not provide corroborative evidence from them. The Board assigned no weight to a letter from the applicant's mother, as the applicant did not provide any documents establishing his presence in Cameroon from 2003 to 2011.

[12] The Board also noted the applicant provided no documents confirming either his nursing training or his employment at a hospital. The applicant testified he could not obtain documents from either source. The Board held that the applicant had been unable to satisfactorily establish his

whereabouts from 2003 and 2011 and his testimony about how he got to Canada was not supported by documentary evidence.

[13] The Board therefore concluded the applicant was not credible and indicated neither his knowledge of the persecution of gays and lesbians in Cameroon nor his activities in Canada with groups that cater to gay, lesbian and transgender refugee claimants established that he was gay.

### **Issues**

[14] The applicant submits the following points at issue:

1. Did the panel err by basing a negative identity and credibility finding on a faulty premise and thereby make a finding without regard for the material actually before it?
2. Did the panel err by making perverse findings of fact regarding apparent inconsistencies and implausibility?

[15] I would rephrase the issues as follows:

1. What is the appropriate standard of review?
2. Did the Board err in rejecting the applicant's claim?

**Applicant's Written Submissions**

[16] The applicant notes that the Board accepted his identity and nationality and that he provided documents to the Board including his birth certificate and educational transcripts. The Board did not doubt the authenticity of this evidence.

[17] The applicant argues the standard of review is reasonableness. The applicant emphasizes section 106 of the Act, which allows a claimant to provide a reasonable explanation for a lack of documentation. The applicant argues he gave such satisfactory explanation. The Board must make a reasonable finding based on the evidence.

[18] The applicant argues the Board had no basis on which to impugn his credibility. His sworn testimony is presumed to be truthful unless there is a reason not to believe it. A lack of corroborative evidence is an insufficient reason to discredit his testimony regarding his treatment in Cameroon.

[19] The applicant further argues the Board performed a microscopic analysis of the evidence and placed undue reliance on the absence of documentary evidence. This Court has held that the Board cannot disbelieve the applicant simply because there is no documentary evidence. The Board failed to grasp the reality facing homosexual people in Cameroon. The applicant argues there is a perception the decision maker lost impartiality by ignoring the totality of the evidence. The Board should give clear and convincing reasons in rejecting evidence. The Board gave no reasons for rejecting the claim under section 97 of the Act.

## **Respondent's Written Submissions**

[20] The respondent argues reasonableness is the appropriate standard of review. There was no requirement for a separate section 97 analysis given that the applicant had not established his sexual orientation or his allegations of mistreatment.

[21] The respondent argues the applicant's affidavit evidence that was not before the decision maker cannot be considered. The respondent argues the Board considered the applicant's reasons for failing to provide documents and did not find them credible. The transcript shows that the Board discussed with the applicant the steps he took to obtain corroborating documents. It was reasonable to expect the applicant to provide corroborating evidence. The Board also questioned why the applicant left Cameroon so quickly that he was not able to bring corroborating documents with him.

## **Analysis and Decision**

### [22] **Issue 1**

#### What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[23] It is established jurisprudence that credibility findings, described as the "heartland of the Board's jurisdiction", are essentially pure findings of fact that are reviewable on a reasonableness

standard (see *Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at paragraph 7, [2003] FCJ No 162; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 46, [2009] 1 SCR 339; *Demirtas v Canada (Minister of Citizenship and Immigration)*, 2011 FC 584 at paragraph 23, [2011] FCJ No 786). Similarly, the weighing of evidence and the interpretation and assessment of evidence are reviewable on a standard of reasonableness (see *Oluwafemi v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1045 at paragraph 38, [2009] FCJ No 1286).

[24] In reviewing the Board's decision on the standard of reasonableness, the Court should not intervene unless the Board came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47; *Khosa* above, at paragraph 59). As the Supreme Court held in *Khosa* above, it is not up to a reviewing court to substitute its own view of a preferable outcome, nor is it the function of the reviewing court to reweigh the evidence (at paragraph 59).

[25] **Issue 2**

Did the Board err in rejecting the applicant's claim?

The applicant filed an affidavit which was not before the Board that made the decision in this matter. I am not prepared to consider this evidence. The jurisprudence of this Court is to the effect that the review of a tribunal's decision should proceed on the basis of the evidence before the decision maker (see *Fabiano v Canada (Minister of Citizenship and Immigration)* 2005 FC 1260 at paragraphs 22 to 25, [2005] FCJ No 1510). Accordingly, the affidavit with its exhibit sworn to on December 17, 2012 is struck.

[26] The applicant relies on the principle from *Ahortor v Canada (Minister of Employment and Immigration)*, (1993), 65 FTR 137 (Fed TD), that the Board cannot reject a claim on the basis of a lack of corroborative evidence if the applicant's credibility is not in question (at paragraph 45). The respondent points out that the Board had clearly elaborated credibility concerns relating to the applicant's explanation for his failure to produce documents.

[27] The respondent's approach would reverse engineer the principle from *Ahortor* above. The applicant's failure to produce documents would create a credibility concern allowing the Board to consider his failure to produce documents as a reason to doubt credibility. If the Board engages in such reasoning, it circumvents the presumption that sworn testimony is truthful (see *Maldonado v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 72) by analyzing the applicant's reasons for a lack of documents without addressing the credibility or plausibility of the applicant's allegations as described in oral testimony.

[28] The reasons do not disclose any credibility concern other than those concerns relating to the failure to produce evidence. In the absence of such a credibility concern or any doubts about the applicant's story other than those pertaining to documentary evidence, it was an error for the Board to reject the claim solely on the basis of a lack of corroborative evidence.

[29] I would also note that the applicant's nursing training and hospital employment, two elements of the claim the Board doubted due to the lack of documents, are not central elements of the applicant's claim. While the applicant may have been reasonably expected to produce



corroborative evidence on these points, that is certainly not the case in the actual central elements of the claim: his sexual orientation and his participation in persecuted political groups.

[30] Whether corroborative evidence can be reasonably demanded depends on the facts of each case (see *Lopera v Canada (Minister of Citizenship and Immigration)*, 2011 FC 653 at paragraph 31, [2011] FCJ No 828). The fact that the applicant was a member of such groups for seven years while he was physically present in Cameroon does not mean that such groups are easy to contact from Canada. The Board did not take into account the undisputed persecution of such groups in Cameroon when considering the ease with which the applicant could contact group members or procure corroborative evidence from them. As for sexual orientation itself, it is not clear to me what evidence could be reasonably expected from an applicant who described the extensive persecution he suffered in Cameroon on that basis.

[31] Given the flaws I have described in the Board's reasoning, its decision was not properly justified and it falls outside the range of acceptable outcomes.

[32] The application for judicial review is therefore granted and the matter returned to the Board for redetermination.

[33] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

**JUDGMENT**

**THIS COURT’S JUDGMENT is that** the application for judicial review is allowed and the matter is remitted to a different panel of the Board for redetermination.

“John A. O’Keefe”

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Judge

## ANNEX

**Relevant Statutory Provisions*****Immigration and Refugee Protection Act, SC 2001, c 27***

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.

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.

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

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.

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.

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 :

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(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,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

106. The Refugee Protection Division must take into account, with respect to the credibility of a claimant, whether the claimant possesses acceptable documentation establishing identity, and if not, whether they have provided a reasonable explanation for the lack of documentation or have taken reasonable steps to obtain the documentation.

(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,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

106. La Section de la protection des réfugiés prend en compte, s'agissant de crédibilité, le fait que, n'étant pas muni de papiers d'identité acceptables, le demandeur ne peut raisonnablement en justifier la raison et n'a pas pris les mesures voulues pour s'en procurer.

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

**DOCKET:** IMM-3588-12

**STYLE OF CAUSE:** POPYILLA DAYEBGA  
- and -  
MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** February 14, 2013

**REASONS FOR JUDGMENT  
AND JUDGMENT:** O'KEEFE J.

**DATED:** August 1, 2013

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