

**Date: 20090331**

**Docket: IMM-2787-08**

**Citation: 2009 FC 332**

**Toronto, Ontario, March 31, 2009**

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

**BETWEEN:**

**NORBERT OKOLI**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] Norbert Okoli applied for judicial review of the June 2, 2008 decision of the Refugee Protection Division denying his claim for Convention Refugee Status under sections 96 and 97(1) of the *Immigration and Refugee Protection Act (IRPA)* on the basis of being persecuted as a homosexual person in Nigeria.

[2] The Applicant is a citizen of Nigeria from Enugu. He says he is homosexual and fears persecution from members of the Ogbete Traders Association and from the general public in

Nigeria. Mr. Okoli had worked in a market in Nigeria as a member of the Ogbete Traders Association. He first became involved in a homosexual relationship with a trader in 1997. In 1998, he met Emeka and the two began a homosexual relationship in 1999 that continued until 2005.

[3] Mr. Okoli says that because of his homosexual relationship he was persecuted by members of the Ogbete Traders Association including two severe beatings, ongoing harassment, forced intercourse with a prostitute, death threats and expulsion from the Ogbete Traders Association. Around April 2005 his lover, Emeka, approached a priest to ask if the two could be married. The proposed marriage was disclosed to the local media and members of the Ogbete Traders Association came searching for him and Emeka. The two went into hiding and fled from Nigeria separately. Mr. Okoli made his way to Canada travelling on a false French passport. He filed a claim for refugee status on June 18, 2005.

[4] The Refugee Protection Division board member denied his refugee claim on the basis that the Applicant was not credible. The member concluded that Mr. Okoli does not have a well-founded fear of persecution in Nigeria nor would he be subject to personalised risk upon return. The member also found that an internal flight alternative was available within Nigeria in Lagos City if the Applicant kept his sexual orientation discreet.

[5] In the application for judicial review, the Applicant poses a question for certification as follows:

“Is there a requirement under the 1951 convention *Related to the Status of Refugees* or under s. 97 of the *Immigration and Refugee Protection Act* that an individual hide his/her sexual orientation to avoid persecution?”

### Background

[6] The Applicant says that an agent helped the Applicant to get to Canada and recommended that he apply once inside the country rather than at the airport. He was also advised that if there were any problems entering the country he should say that he had made a refugee claim in the Netherlands so he would be returned there rather than Nigeria. When the Applicant claimed refugee status on arrival he told officials that he had made a claim in the Netherlands. He was kept in detention until November 2, 2005 for reasons of identity.

[7] While in detention, the Applicant was provided with the name of a lawyer who met with him only briefly a couple of times. The Applicant alleges that this lawyer told him that his story was “too sweet”, meaning that it would not be believed. The Applicant says that he relied on the lawyer’s advice since he was in detention. From July to September, the Applicant says that the lawyer did very little on his case or in attempting to have him released. In September, he requested a different lawyer.

[8] After release, with the assistance of his new lawyer, the Applicant submitted a revised PIF which he states by affidavit is the true narrative. The Applicant states that people in his community of Enugu, including the Ogbete Traders Association, first found out about his sexual orientation in

1999 and that since then he has experienced serious beatings and threats, was forced out of his home and was arrested by the police.

[9] The Applicant alleges that he became afraid that he would be killed in April 2005 after people found out that his partner, Emeka, had asked a local priest about the two getting married. Emeka apparently provided the priest with a photo of the couple and a letter. The media were informed and a gang from the Ogbete Traders Association went hunting for both of them. They fled and went into hiding in a village before leaving the country separately. The Applicant does not know Emeka's whereabouts.

[10] The Applicant submitted a doctor's medical report about numerous scars on his body and a physiological report about the effects of the treatment he received.

#### The Decision Under Review

[11] The board member found that the Applicant was a trader in Enugu and that he was homosexual. The board member did not dispute the findings of Dr. Ng with respect to the Applicant's numerous scars but concluded that there was insufficient evidence that they were due to a beating because of his homosexuality. He found that the Applicant was not credible due to inconsistencies and contradictions between his testimony, the two versions of his PIF, his Port of Entry (POE) Declaration and associated notes despite his explanations about fear upon arrival, incompetent counsel and memory problems for the inconsistencies.

[12] The board member rejected the Applicant's explanation that he was stressed and fearful at the Port of Entry. Instead, the member found that the Applicant came to Canada with the intent to mislead Canadian officials because he came as a visitor and only applied for refugee status after his false French passport was challenged. As such, the board member found any inconsistencies in the POE documents were caused by his deception and getting caught, not stress or fear.

[13] The board member concluded that the Applicant did not provide credible or trustworthy evidence to support his allegations about his first lawyer since he did not make any complaint to the Law Society of Upper Canada or inform the lawyer of the allegations to provide him with the opportunity to defend himself.

[14] The board member found the Applicant's explanation of memory problems to be unreasonable because although the Applicant was able to provide details about his treatment at the psychological evaluation, at the doctor's office, and when asked by his counsel at the hearing, he claimed memory problems when asked to clarify inconsistencies by the board member.

[15] The board member found inconsistencies in the POE documentation and the two PIFs as to the frequency and details of beatings. The board member also found that the Applicant's story about fleeing with his boyfriend varied in the different accounts. The Applicant's explanations were rejected. The board member found it to be implausible, in the homophobic context of Nigeria, that Emeka would ask a priest to marry them and also provide a photograph and letter which could be used as evidence against them. No evidence of the alleged media reports was provided. The board

member concluded on a balance of probabilities that the Applicant was not abused by the Ogbete Traders Association and did not have his life threatened because of the plans to marry his homosexual partner.

[16] The board member questioned whether the Applicant was even in Nigeria after April/May 2004, as he had no documents proving he was there. This was found to be critical as the final events were after that period and there was some concern that the Applicant might have been in the Netherlands at that time. The documentation and explanations of the Applicant were rejected as unreasonable.

[17] The board member gave little weight to the psychological report because the Applicant's story was found not to be credible.

[18] Finally, after considering the documentary evidence and explaining why he gave the weight he did to the various documents, the board member concluded that the Applicant had a reasonable IFA in Lagos, "if he were discreet about his sexuality".

#### The Standard of Review

[19] The decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, has established that there are now only two standards of review: correctness and reasonableness, at para. 34. Where questions of

fact and credibility are reviewed, the standard of review is reasonableness (*Sukhu v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 427 at para. 15).

[20] A claimant's testimony is presumed to be true (*Valtchev v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 at para. 6). The presumption may be refuted by the presence of inconsistencies and contradictions in testimony, implausibility and where facts as presented are not what could reasonably be expected (*Jiang v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 775 at para. 15). Lastly, the Board is entitled to deference in regard to its credibility determinations (*R.K.L. v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at para. 8).

[21] The parties agree that the reasonableness standard applies to all of the questions. I agree that credibility findings are to be assessed on the reasonableness standard (*Aguirre v. Canada (M.C.I.)*, 2008 FC 571, at para. 14). The same is true for IFA findings (*Khokhar v. Canada (M.C.I.)*, 2008 FC 449, at paras. 21-22).

### Issues

[22] The issues in this proceeding are:

1. *Did the Board member ignore or misapprehend the evidence such that the credibility findings were unreasonable?*
2. *Was the Board member's IFA finding reasonable?*

Analysis

*Did the board member ignore or misapprehend the evidence such that the credibility findings were unreasonable?*

[23] The Respondent submits that the board member is entitled to consider discrepancies between the POE and the PIF and draw negative inferences from the omission of significant events in the PIF (*Oyebade v. Canada (M.C.I.)*, 2001 FCT 773).

[24] The details of the beatings, frequency and dates were not consistent in the various sources. The Respondent submits that the board member did consider the explanations for the inconsistencies, that is: the Applicant's fear at the POE, the incompetence and misrepresentation by former counsel, and the Applicant's memory problems. The Respondent submits that the board member gave cogent reasons for his credibility findings.

[25] The Respondent submits that, given the generalised discrimination faced by homosexuals in the country and the previous treatment received by the Applicant and Emeka, it was reasonable for the board member to conclude that Emeka approaching a priest to ask him about marriage was implausible.

[26] The Respondent submits that both the medical and psychological reports were considered but properly given little weight because the Applicant's allegations were not found to be credible.



In result the Respondent submits the Applicant has not demonstrated that any error was made by the board member.

[27] I find the board member accepted several crucial elements of the Applicant's story: his sexual orientation, his scars, mistreatment of homosexuals in Nigeria and lack of police protection for homosexuals. The board member's overall credibility findings about the Applicant are based almost entirely on inconsistencies between the port of entry notes and the two versions of the PIF. The Applicant was detained and asked for the details of his claim at the Port of Entry. There were discrepancies over several interviews but the core of the Applicant's claim remained the same. The Applicant provided a PIF while in detention and an amended PIF after release from detention.

[28] The Applicant provided an explanation for the amended PIF. The amendment was made almost immediately after the Applicant found a new lawyer and was released from detention (*Giminez v. Canada (M.C.I)*, 2005 FC 1114). The board member may not draw negative inferences from the fact of an amendment which was done in a timely manner well before the hearing (*Ameir v. Canada (M.C.I)*, 2005 FC 876). The amended PIF merely expands on the original, rather than contradicting it. In similar cases, this Court has concluded that such a change provides no reason to question the credibility of the claimant (*Puentes v. Canada (M.C.I)*, 2007 FC 1335, para. 17-19). The amended PIF addresses the omissions directly, explaining why they occurred. The board member's role was to assess these explanations, rather than point out the inconsistencies (*Osman v. Canada (M.C.I)*, [1993] F.C.J. No 1414, para. 12-13). The board member failed to assess the Applicant's explanation.

[29] The board member disregarded the Applicant's explanation about the change from the initial PIF to the amended PIF because the Applicant had not made a complaint to the Law Society or notified the previous counsel. However, at the hearing the board member, after adjourning to consult legal counsel, indicated that he would not be applying the policy requiring a complaint and notice. Nevertheless he applied the policy in his decision.

[30] As an example of microscopic examination, the board member notes that the Applicant did not mention that he had been tied to a pole when being beaten with canes and electrical wires, as he did mention this to his doctor. The Applicant was consistent in saying that he'd been attacked throughout the proceedings and to conclude that the attacks did not happen because he did not mention being tied to a pole is unreasonable. Where the evidence supports the plausibility of the story, namely the medical report of numerous scars and the reliable documentary evidence of homophobic attitudes in Nigeria, relatively minor inconsistencies should not lead to a negative credibility finding (*Mohacsi v. Canada (M.C.I.)*, 2003 FCT 429, para. 20).

[31] The board member's finding of implausibility with respect to Emeka's approaching the priest ignored the explanation provided. The Applicant's companion did not approach just any priest but rather a priest he thought was gay and would be receptive to the idea. This may have been naïve, but is an explanation that negates an implausibility conclusion.

[32] The board member did not dispute the medical report which confirmed numerous scars on the Applicant's body on the shoulder, biceps, abdomen, thigh and back. The board member decided

since the Applicant's claim of beatings because of his homosexual relationship was not credible, little weight should be assigned to the medical report. The board member treated the psychological findings in support of the Applicant's claim in a similar fashion. In effect, the board member discounted the medical and physiological reports submitted in support of the Applicant's credibility about the beatings as of little weight because the member already decided the Applicant was not credible.

[33] I find the board member's assessment of the Applicant's credibility to be unreasonable.

*Did the board member err in finding an internal flight arrangement in Lagos City?*

[34] The Respondent submits that the onus is on the Applicant to demonstrate that he does not have an IFA in Lagos City. The board member did not say that the Applicant would have to give up his homosexual identity or lifestyle, just that he would need to be discreet. According to the Respondent, an IFA is only unreasonable when there is evidence that the life or safety of the Applicant would be jeopardized (*Ranganathan v. Canada (M.C.I.)*, [2000] F.C.J. 2118 (FCA)).

[35] As I have found the board member's assessment of credibility to be flawed, it follows that the assessment of an IFA on faulty fact finding is itself flawed.

[36] The board member found that the Applicant did not present sufficient credible evidence that he would be personally targeted by the police or the public in Nigeria based on his sexuality.

Although he noted that the British-Danish Fact Finding Mission Report stated that homosexuals in large cities in Nigeria have a well-founded fear from the person's local community and society at large, he preferred the statement in the Report that homosexuals in larger cities may not have reason to fear persecution as long as they do not present themselves as homosexuals in public. The board member stated: "There was no evidence to suggest that he [the Applicant] would have to remain in hiding, should he live there, although, as with respect to certain elements of his life in Canada, he would possibly have to practice discretion with respect to his sexual orientation in Nigeria." The Federal Court has repeatedly found such findings perverse as they require an individual to repress an immutable characteristic (*Sadeghi-Pari v. Canada (M.C.I.)*, 2004 FC 282, para. 29).

[37] I find the board member's conclusion that a viable IFA exists in Lagos City to be unreasonable given the flawed credibility finding of facts and requirement that the Applicant repress an immutable characteristic to live there.

#### Question for Certification

[38] The Applicant proposes a question for certification as a serious question of general importance under s. 74(d) of *IRPA*. Since I have found the board member erred on assessment of credibility, the facts of this application have to be re-determined before any question could be considered for certification.

## Conclusion

[39] I have found the board member erred in the assessment of the Applicant's credibility because he failed to consider the Applicant's explanation for the amended PIF; he acted contrary to his statement that he would not apply policy on non-reporting the first lawyer's misconduct; he failed to consider medical and psychological evidence; and he conducted an overly microscopic examination of the Applicant's claim. Further, the board member erred in assessing an IFA based on a faulty assessment of credibility and on an impermissible requirement for concealment of a personal characteristic, the Applicant's homosexuality. Accordingly, the decision is unreasonable. The application for judicial review is granted.

[40] Given my conclusion on the credibility findings in this matter, I do not consider it appropriate to propose a question for certification.

**JUDGMENT**

**THIS COURT ORDERS that:**

1. The application for judicial review is granted. The matter is remitted back for re-determination by a differently constituted board.
2. No question of general importance is certified.

“Leonard S. Mandamin”

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Judge

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

**DOCKET:** IMM-2787-08

**STYLE OF CAUSE:** Norbert Okoli v. MCI

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** March 12, 2009

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

**DATED:** March 31, 2009

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