

Federal Court



Cour fédérale

Date: 20100423

Docket: IMM-4166-09

Citation: 2010 FC 446

Ottawa, Ontario, April 23, 2010

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

KATE IGBINOBA

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to Section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) of a decision of the Immigration and Refugee Board, Refugee Protection Division (RPD) dated July 22, 2009, wherein it was determined that the applicant is not a Convention refugee or a person in need of protection under sections 96 and 97 of IRPA.

[2] These are my reasons for finding that while no reviewable error was made on the merits of the claim, the applicant was denied procedural fairness and the matter must, therefore, be returned to the RPD for reconsideration.

BACKGROUND

[3] The applicant is a 40-year-old citizen of Nigeria with a history of domestic abuse by her former husband. Her father forced her to marry the husband in 1982, at age 13, because of the husband's wealth.

[4] It is undisputed that the husband physically abused the applicant throughout the 1990s and that she had to be rushed to hospital on at least one occasion. It is also undisputed that the husband brought the applicant to Italy and forced her to work as a prostitute there from 1990 to 1992, and again from 1993 until either 1997 or 1999. However, the RPD did not believe the applicant's testimony concerning events that took place after 1999.

[5] The applicant says that she and the husband returned to Nigeria in 1999. She says she ran away from the husband and travelled between various friends' homes to hide from him. Finally, in 2002, she settled in Oloko, Nigeria, which had been her mother's village. At the first sitting of the refugee hearing, the applicant testified that she stayed in Oloko until she left Nigeria, but at the second sitting she said that she was forced to return to the husband's house from 2003 to early 2005, and again from late 2005 to 2006.

[6] At both sittings, the applicant indicated that her husband found her in Oloko in 2006 and threatened to kill her if she did not return to his house. The applicant fled Nigeria in 2007.

[7] The applicant says that she travelled to Milan, Italy on February 12, 2007 using her genuine passport, but that her agent took her passport away. She says that she then travelled two hours by taxi to Verona, where a friend helped her sell a wristwatch she had stolen from the husband. She then stole the friend's passport, returned to Milan the same day, and used the proceeds from the watch to purchase a plane ticket to Canada. However, the travel itinerary for the applicant's flight bears an earlier purchase date. The applicant arrived in Canada the next day, February 13, 2007.

THE PHOTOS AND THE REFUGEE HEARING

[8] The applicant made a claim for refugee protection at the port of entry, where she was interviewed by an immigration officer (the POE Officer). She says in her affidavit that she provided the POE Officer with several photographs taken in Nigeria, which show "incidents" of her husband's abuse. She says that the POE Officer seized the photos. However, Citizenship and Immigration Canada (CIC) did not initially forward any photographs to the RPD for use in the applicant's refugee hearing.

[9] The POE Officer's notes (POE Notes) indeed refer to photographs, but only to photographs of a man. The notes indicate that the officer questioned the applicant as to why she would continue to have photographs of her husband in light of his abuse of her. The applicant testified at the refugee

hearing that she never had photographs of a man with her, only photographs of herself. This discrepancy could not be resolved at the refugee hearing since CIC had not produced the photos.

[10] At the conclusion of the second sitting of the refugee hearing, the RPD member adjourned the hearing for CIC to produce the photos. The member indicated that a copy of the photos would also be sent to the applicant. On receiving them, the applicant could decide either to attend a third sitting of the hearing to testify about the photos and make oral submissions, or not to attend and instead to make written submissions. On the other hand, if CIC failed to produce the photos, the member would contact the applicant to discuss next steps.

[11] In his instructions to the applicant, the member was clear that he did not wish her to attend the third sitting unless the photos were produced. The member stated as follows:

I do not want to have to bring you back here again for no reason. I am not sure how to handle this. I think I have to give you an opportunity to lead evidence about those [photos] if you have something that you think your client should explain about them and likewise I might have questions about them; I do not know.

[. . .] So I am going to request today, I will send something to the Case Manager Officer to ask them to contact Citizenship and Immigration Canada and see if they have anything in the record regarding this claimant including these photographs and to send them to us right away, and also to send you a copy of them. And then I think we will just have to see what comes up. And if nothing comes up I can get the Case Manager to call you and then get an idea of what you want to do.

[. . .] What I will try to do, is try to avoid having you come back again unless there is a good reason for it.

[. . .] But on the other hand we have the date now if we need to come back either to address the photographs or if you want to make submissions orally.

[12] CIC forwarded a single photograph to the RPD on April 20, 2009. It depicted the applicant in a hospital bed. The applicant and her counsel were unaware of this, and never received a copy. The photographs of a male referred to in the POE Notes have not been produced.

[13] Before the third sitting, the applicant herself provided the RPD with several photographs of her scars. These photographs had been taken in Canada in 2009.

[14] On the day of the third sitting, the applicant's counsel advised the RPD by fax that she had not received the photos. She presumed CIC had not produced them. She explained that in accordance with the RPD's instructions at the second sitting, she would not be attending the third sitting.

[15] Counsel provided written submissions to the RPD on May 28, 2009 which also referred to the applicant's belief that CIC had not produced the photos.

DECISION UNDER REVIEW

[16] The member discussed the photos and the applicant's failure to attend the third sitting in the following terms:

[The applicant] provided photographs that appear to depict scarring on her back, shoulders, upper left arm, right breast and buttock. As well, a photocopy of a photograph that would appear to depict the claimant in a hospital bed was provided by CIC after the second sitting. The claimant did not attend the third sitting to provide detail regarding the photographs, nor did her counsel. No independent medical evidence was provided as to the cause of these scars. However, the claimant has consistently claimed, as the port of entry, in her PIF and in her testimony, that she was physically abused by her husband.

[17] It is not clear what significance the member attached to the applicant's failure to attend the third sitting. It appears that he did not require the applicant's attendance because he accepted that she had been physically abused by the husband.

[18] In any event, the member accepted that the applicant had been physically abused and forced to work as a prostitute during the 1990s. However, he did not believe that she was in Nigeria or that she was abused by the husband after 1999. Rather, the member found that the applicant had spent much more time in Italy than she had acknowledged.

[19] The member's adverse credibility finding was based in part on the following inconsistencies in the applicant's evidence:

- a. The POE Notes state that the applicant first said she had no children, but later said that she had one son;
- b. The POE Notes report the applicant saying she had lived in Italy for 16 years. Her Personal Information Form (PIF) said she had been in Italy for six or seven years;
- c. The POE Notes report the applicant saying that she had been arrested for prostitution in Italy in 1994, but her PIF and testimony indicated she had never been detained or imprisoned;
- d. The applicant's PIF said that she returned to Nigeria from Italy in 1997, but she testified that she only returned in 1999;
- e. At the first sitting, the applicant implied that she had lived in Oloko continuously after 2002, but at the second sitting she testified that she lived at her husband's home for two years beginning in 2003. None of this information was in her PIF;

- f. The applicant testified that her agent took her passport from her in Italy. However, the POE Notes stated that she threw away or destroyed her passport.

[20] The applicant responds to most of these inconsistencies by stating that the POE Notes are inaccurate. In particular, she told the POE Officer that she lived in Italy for 6 years, not 16. However, the applicant has not provided an explanation for inconsistencies (d) and (e) which do not involve the POE Notes.

[21] In addition to these inconsistencies, the member did not believe the applicant's account of living in Nigeria and being abused by the husband after 1999 for the following reasons:

- a. The applicant's diary contains more than 30 telephone numbers from Italy and only 2 from Nigeria;
- b. The applicant's story about her journey to Canada via Italy is implausible. A travel itinerary for the applicant's flight to Canada, under the name on her stolen Italian passport, is dated January 25, 2007. This contradicts the applicant's testimony that she did not acquire the passport or purchase the ticket until February 12, 2007;
- c. The applicant's testimony about her movements within Nigeria and abuse by the husband after 1999 have an "improvised quality," were not detailed in her PIF, and are unsupported by documentary evidence;
- d. The applicant's statement at the port of entry that she had lived in Italy for 16 years was consistent with her fluency in Italian and her knowledge of Italy.

[22] The member concluded that the applicant had “not provided a sufficiently credible and coherent narrative of events on which to base a claim for refugee protection.” Therefore, the member found that the applicant is neither a Convention refugee nor a person in need of protection.

ISSUES

[23] The following issues arise on this application:

- a. Did the RPD materially breach its duty of procedural fairness?
- b. Did the RPD err in finding that the applicant is neither a Convention refugee nor a person in need of protection?

ANALYSIS

Standard of Review

[24] It is well settled that issues of procedural fairness are reviewable on a standard of correctness: *Juste v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 670 at paragraph 23; *Olson v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 458 at paragraph 27. The RPD’s findings of fact and credibility should be reviewed on a standard of reasonableness: *Dunsmuir v. New Brunswick*, 2008 SCC 9; *Malveda v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 447 at paragraphs 18-20.

Procedural Fairness

[25] I am satisfied that the applicant's right to procedural fairness has been breached. As noted above, the member had made it clear to the applicant and her counsel that he preferred that they not attend the third sitting of the refugee hearing, unless it was necessary to address the photos. Absent that development, written submissions would be sufficient. Unaware that CIC had produced a photo, the applicant and her counsel did not consider it necessary to attend the third sitting where the photos would have been addressed. The result, in essence, was to deny the applicant the opportunity to speak to the photos. I expect that this was, initially at least, entirely inadvertent because of the passage of time and the volume of other business before the RPD.

[26] On the day of the third sitting, counsel for the applicant sent a fax to the RPD explaining that she would not be attending because she believed the photos had not been produced. Counsel provided the same explanation in her written submissions dated May 28, 2009. Accordingly, by the time the member rendered his decision on July 22, 2009, he must have known that the applicant, through no fault of her own, had not received an opportunity to speak to the photo produced by CIC.

[27] In these circumstances, it was incumbent on the RPD to disclose the photo to the applicant, and offer her an opportunity to make submissions. The applicant had the right to be heard: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. Moreover, during the second sitting, the RPD created a legitimate expectation that the applicant would be able to speak to the photos if they were produced. This expectation should have been upheld.

[28] Normally, a breach of procedural fairness will invalidate a decision automatically. However, in *Yassine v. Canada (Minister of Employment and Immigration)* (1994), 27 Imm. L.R. (2d) 135, the Federal Court of Appeal created a narrow exception where “the demerits of the claim are such that it would in any case be hopeless” and “the claim could only be rejected” (paragraphs 9-10). In such circumstances, returning the matter to the RPD would serve no purpose.

[29] Assuming that the RPD’s credibility and plausibility findings were properly made, I am satisfied that the *Yassine* exception applies in the case at bar. Given those findings, the applicant’s refugee claim could only be rejected. An opportunity to speak to the photos would not change that.

[30] According to the applicant’s affidavit, the photos provide evidence of abuse by the husband. However, the RPD accepted that this abuse took place. What it did not accept is that the abuse took place after 1999 in Nigeria. The one photo that CIC produced, showing the applicant in a hospital bed, does not provide evidence that any abuse occurred after 1999 in Nigeria. Thus, the photo could not have changed the RPD’s findings.

[31] The applicant’s main argument is that her testimony and submissions about the photo would have cast doubt on the accuracy of the POE Notes. The POE Notes refer to photographs of a man, but the applicant had testified that she did not have any photographs of men with her. CIC’s failure to produce any photographs of men, the applicant submits, demonstrates that her testimony is more credible than the POE Notes. Since the RPD’s adverse credibility findings relied on discrepancies between her testimony and the POE Notes, discrediting the POE Notes would have a material impact on the decision.

[32] The difficulty with the applicant's submission is that the RPD had more than adequate grounds to reject her claim even without relying on the POE Notes. The member noted that there was no detail in the applicant's PIF regarding her movements in Nigeria or abuse by her husband after 1999. He held that her testimony in that regard had an improvised quality and changed significantly between the first and second sittings of the refugee hearing. The member cited the applicant's diary, travel itinerary, fluency in Italian, and knowledge of Italian culture as evidence that she had lived in Italy more recently and for a longer period of time than she alleged. He found that her explanation for how she travelled to Canada was implausible. All of these findings were reasonable, in my view, and did not rely on discrepancies between the applicant's testimony and the POE Notes.

[33] Given these findings, the applicant's claim could only have been rejected. Returning it to the RPD for reconsideration would, absent other concerns about the decision, serve no purpose.

[34] However, more troubling to the Court is the RPD's apparent failure to consider the submissions that counsel for the applicant provided on May 28, 2009. The opening paragraphs of the submissions clearly state that, to the applicant's knowledge, CIC had not produced the photos. Later in the submissions, counsel again referred to the fact that CIC had apparently misplaced the photos. Yet, in the decision, the member did not appear to recognize that the applicant never received any photos; he faulted the applicant for failing to attend the third sitting. This casts doubt on how carefully the member considered the applicant's submissions, or whether he did so at all.

[35] Unlike the failure to produce the photos, this breach of procedural fairness cannot be saved by *Yassine*. It cannot be said in these circumstances that due to adverse credibility findings, the refugee claim could only be rejected. The submissions directly address the issue of the applicant's credibility, and may have affected the RPD's credibility findings. I would stress that the *Yassine* exception is quite narrow, and should only apply where a claim is hopeless. If credibility findings had been properly made, as in *Yassine*, this might have been the case, but here they were apparently made without regard to the applicant's submissions. Accordingly, the matter must be returned to the RPD for a redetermination.

RPD's Decision on the Merits

[36] Having found a breach of procedural fairness, it is not strictly necessary for me to address the applicant's arguments about the merits of the decision. Nonetheless, I will do so briefly for the benefit of the next member to consider the applicant's claim.

[37] The applicant alleges several errors in the decision. With respect, I do not find that any of them constitute reviewable errors.

[38] First, the applicant submits that the RPD misinterpreted the POE Notes as saying that she had "destroyed" her Nigerian passport. In fact, the applicant had told the POE Officer that she had "thrown away" her passport. I cannot find a material difference between "destroying" and "throwing away" a passport. Regardless of which statement the applicant made, she clearly told the

POE Officer that she had rid herself of the passport deliberately. As the RPD reasonably pointed out, that is inconsistent with her testimony that her agent took the passport from her.

[39] Second, the applicant submits that it was unreasonable for the RPD to rely on the POE Notes in making its credibility and factual findings. I disagree. While the POE Notes refer to a photograph of a man that could not later be produced, there were also inconsistencies and implausibilities in the applicant's testimony that had nothing to do with the POE Notes. Clearly neither source of evidence was perfect; it was open to the RPD to prefer the POE Notes over the applicant's testimony where the two were inconsistent.

[40] Third, the RPD said in the decision that "No independent medical evidence was provided as to the cause of [the applicant's] scars." The applicant submits that a medical report was provided by Dr. D. V. Kanhai of YorkWoods Clinic in Toronto, and that the RPD ignored it.

[41] In my opinion, the report was not necessarily ignored. Dr. Kanhai wrote it in Canada in 2009, long after the scars were inflicted, and he had no way of knowing their cause. Thus, the report did not contain independent evidence on the cause of the scars. In any event, the RPD accepted that the husband caused the scars. What the RPD did not accept was that this abuse continued in Nigeria after 1999. As Dr. Kanhai's report says nothing about where and when the scars were inflicted, any failure to consider it was not material.

CONCLUSION

[42] I have concluded that the main breaches of procedural fairness alleged by the applicant, the failure to inform her that CIC had produced the photos and the failure to give her a chance to speak to them, would not require the decision to be quashed. However, I find that the RPD's apparent failure to consider the applicant's written submissions is a serious breach of procedural fairness. Therefore, the application for judicial review must be granted, the decision quashed and the matter returned to a newly constituted panel of the RPD for reconsideration.

[43] If I had not found a breach of procedural fairness, I would not have found any error in the RPD's decision on the merits. Nonetheless, due to the breach of procedural fairness, the matter must be sent back.

[44] No questions have been proposed for certification and none, in my view, arise from the facts of this case.

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that

1. the application is granted and the matter is remitted to the Refugee and Protection Division for reconsideration; and
2. no questions are certified.

“Richard G. Mosley”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-4166-09

STYLE OF CAUSE: KATE IGBINOBA

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: April 1, 2010

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

DATED: April 23, 2010

APPEARANCES:

Stella Iriah Anaele

FOR THE APPLICANT

Melissa Mathieu

FOR THE RESPONDENT

SOLICITORS OF RECORD:

STELLA IRIAH ANAELE
Barrister & Solicitor
Toronto, Ontario

FOR THE APPLICANT

JOHN H. SIMS, Q.C.
Deputy Attorney General of Canada
Toronto, Ontario

FOR THE RESPONDENT