

Federal Court



Cour fédérale

**Date: 20131127**

**Docket: IMM-8110-12**

**Citation: 2013 FC 1195**

**Ottawa, Ontario, November 27, 2013**

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

**BETWEEN:**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Applicant**

**and**

**MICHAEL OLUFEMI OLADAPO**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application by the Minister of Citizenship and Immigration (the Minister or the applicant) 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 July 30, 2012, wherein the respondent was determined to be a person in need of protection as defined in subsection 97(1) of the Act.

[2] The applicant asks the Court to set aside the Board's decision and refer the matter back to the Board for redetermination by a different panel.

### **Background**

[3] The respondent is a citizen of Nigeria. He claimed protection on the basis of fearing persecution by his uncle and other community members in Nigeria due to an inheritance dispute. He also alleged persecution based on political opinion.

[4] The respondent's father was the king of the respondent's community and the respondent was first in line for the title as the first-born son. Many family members died and the respondent's pastor advised him to leave the country to avoid becoming the next victim. The respondent left his father's house in 1995. At one point, the respondent's shop was burned due to political motivations. The respondent's father told the respondent that the root of the conflict was that the respondent's uncle wanted land that had been left to the respondent's father.

[5] The respondent fled to Benin in 1997 and to Spain in 1999.

[6] The respondent's father died in 1999 but the respondent did not learn of this for two years due to his father's wish that he not return to Nigeria for the funeral. In 2006, the respondent returned to Nigeria and was asked to assume the chieftaincy, but refused. He also assisted the Action Congress Party and was threatened. He reported the threats to the police but they said they could not protect him so he returned to Spain.

[7] The respondent arrived in Canada on April 21, 2011 and was detained upon arrival. He claimed protection at that time.

[8] The Board heard his claim on May 17, 2012.

### **Board's Decision**

[9] The Board issued an oral decision in the hearing on May 17, 2012, with written reasons released on July 27, 2012. The Board summarized the respondent's allegations and accepted his identity. The Board noted that it was unclear from his Spanish residency card what his status was in that country, but concluded it was clear that his Spanish documents were fraudulently obtained because they indicated Beninese citizenship. The Board indicated exclusion was therefore a moot point.

[10] The Board indicated it did not accept all his testimony but would make a decision based on the core of the matter. The Board rejected his claim under section 96 of the Act due to a lack of objective evidence of nexus.

[11] The Board accepted the respondent's claim under section 97 of the Act on the basis of risk due to past activities, profession, family lineage and political parties. The Board concluded there was no internal flight alternative or state protection available.

## **Issues**

[12] The applicant submits that the following points are in issue:

1. What is the standard of review?
2. Did the Board breach the principles of procedural fairness by failing to notify the Minister that there was a possibility that Article 1E of the Refugee Convention applied to the claim?

[13] The respondent originally argued that the application was out of time, but abandoned that position at the hearing.

## **Applicant's Written Submissions**

[14] The applicant argues that whether the Board erred by failing to give notice to the Minister is a question of procedural fairness reviewable on a correctness standard.

[15] The applicant says that the Board did not notify the Minister upon becoming aware that section 1E of the *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 (the Convention) possibly applied to the claim. This was a breach of what was then Rule 23 of the *Refugee Protection Division Rules*, SOR/2002-228, which makes such notification mandatory. This Court has previously held that a failure to notify as required by this Rule constitutes a violation of procedural fairness warranting redetermination.

[16] The applicant argues that the Board's duty is triggered when there is a mere possibility that Articles 1E or 1F could apply. The Minister is the beneficiary of this Rule.

[17] The applicant argues that in this case, while the Board cited "Article 1(a)", it clearly meant 1E since it was referring to the respondent's status in Spain. The Board was clearly aware there was a possibility this Article applied since it took the time to review the evidence and make a finding. The transcript indicates the Board thought that exclusion might be an issue. Therefore, there was a duty to notify the Minister.

[18] Even if the reference to 1(a) was not a typo, the Board was aware that Article 1E might apply based on the evidence, as the respondent's boarding card indicated he had boarded with a Spanish passport. The respondent has three children born in Spain, lived there for 11 years and possessed a number of Spanish documents.

[19] The applicant argues that had the Minister had the chance to participate in the proceedings, the Minister could have provided evidence on the respondent's status in Spain and other questions relevant to whether or not the respondent had status substantially similar to that of Spain's nationals.

### **Respondent's Written Submissions**

[20] The respondent agrees that the standard of review is correctness. The respondent argues that the Board did not believe there was a possibility that either Article 1E or 1F applied to the

respondent, as he had lived in Spain under a fake identity. There was therefore no obligation to notify the Minister.

[21] In the alternative, the respondent argues that the applicant has not proven there was no notification. The applicant has only relied upon staff within its own evidence as opposed to providing evidence from the Board itself. The presumption of due process has therefore not been rebutted.

### **Applicant's Reply Submissions**

[22] The applicant argues that the respondent did not live under a false identity in Spain, as the Spanish documents are in his name; rather, they only fraudulently list his citizenship as Benin.

[23] The applicant argues that an email sent from the Board to the Canada Border Services Agency did not notify the applicant there was a possibility that Article 1E would be raised and is not the proper method for doing so. The transcript reveals that the Board was not of the view that the applicant had been notified. It did not provide the necessary relevant information.

## **Analysis and Decision**

### **[24] 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).

[25] It is trite law that the appropriate standard of review for issues of procedural fairness is correctness (see *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 43, [2009] 1 SCR 339). No deference is owed to decision makers on these issues (see *Dunsmuir* above, at paragraph 50). The question of whether the Board has complied with Rule 23 or its successor is a matter of procedural fairness and therefore attracts this standard of review (see *Canada (Minister of Citizenship and Immigration) v Louis*, 2009 FC 674 at paragraph 14, [2009] FCJ No 826).

### **[26] Issue 2**

Did the Board breach the principles of procedural fairness by failing to notify the Minister that there was a possibility that Article 1E of the Refugee Convention applied to the claim?

The Board clearly considered the possibility of exclusion in its reasons at paragraph 4:

While it's unclear from the copy of your Spanish residency card exactly what your status in Spain is, having determined that you are a Nigerian, it is clear that your Spanish documents are fraudulently obtained because Spain is under the belief that you are a citizen of Benin based on the passport you showed them. Therefore, the issue of exclusion under article 1(a) of the Convention is, I think, a moot point.

[27] This passage makes clear that the Board considered and then rejected exclusion. The Board made a factual finding relating to the respondent's status in Spain. This reaches the threshold of "possibility" as used in Rule 23 and therefore requires notice to the Minister.

[28] I agree with the applicant that the transcript shows that the Board had not given notice:

You have given me some additional [sic] today that changes some of the things that I had questions about so we will see where the hearing goes, but I will let you know that I may decide to suspend the hearing and invite the minister to participate.

[29] Failure to give such notice requires redetermination (see *Louis* above, at paragraph 14).

[30] As a result, the application for judicial review must be allowed and the matter referred to a different panel of the Board for redetermination.

[31] The respondent has proposed the following serious questions of general importance for my consideration for certification:

1. Whether former Section 23 of Refugee Protection Division (RPD) Rules (Section 26 under the current RPD Rules) involves a two stage process, namely:
  - (a) A first stage process of exclusive deliberation in the board's mind as to whether it "believes" that there is a possibility that the issue of exclusion might arise in a claim; and
  - (b) A second stage process of Ministerial notification once the board forms the belief that there is a possibility that the issue of exclusion might arise in a claim.
2. If the proposition in Question one is affirmed, is the board required to notify the Minister about its first stage deliberation it



[sic] forms the belief that there is no possibility that the issue of exclusion will arise in the claim?

3. Does the deliberation referred to in Question 1(a) above permit the board to canvass whether the claimant is potentially an excluded person? Are there limits to the nature of the board's deliberations?

4. What is the applicable standard to be applied by a reviewing court with respect to the board's deliberative process in the context of Question 1(a)?

[32] The Federal Court of Appeal in *Lin Zhang v Canada (Minister of Citizenship and Immigration)*, 2013 FCA 168, 446 NR 382 stated at paragraph 9:

It is trite law that to be certified, a question must (i) be dispositive of the appeal and (ii) transcend the interests of the immediate parties to the litigation, as well as contemplate issues of broad significance or general importance. As a corollary, the question must also have been raised and dealt with by the court below and it must arise from the case, not from the Judge's reasons.

[33] I have considered the parties' submissions on certification and I am not prepared to certify any of the proposed questions as I do not believe any of the questions transcend the interests of the immediate parties to the litigation and contemplates issues of broad significance or general application.

[34] The issue which underlies the proposed questions is whether the Board carries out a two-stage process relating to giving notice to the Minister under what was then current section 23 of the Refugee Protection Rules. Section 23 reads:

23.(1) If the Division believes, before a hearing begins, that there is a possibility that sections E or F of Article 1 of the

23. (1) Si elle croit, avant l'audience, qu'il y a une possibilité que les sections E ou F de l'article premier de la Convention sur

Refugee Convention applies to the claim, the Division must notify the Minister in writing and provide any relevant information to the Minister.

(2) If the Division believes, at any time during a hearing, that there is a possibility that section E or F of Article 1 of the Refugee Convention applies to the claim, and the Division is of the opinion that the Minister's participation may help in the full and proper hearing of the claim, the Division must notify the Minister in writing and provide the Minister with any relevant information.

les réfugiés s'appliquent à la demande d'asile, la Section en avise par écrit le ministre et lui transmet les renseignements pertinents.

(2) Si elle croit, au cours de l'audience, qu'il y a une possibilité que les sections E ou F de l'article premier de la Convention sur les réfugiés s'appliquent à la demande d'asile et qu'elle estime que la participation du ministre peut contribuer à assurer une instruction approfondie de la demande, la Section en avise par écrit le ministre et lui transmet les renseignements pertinents.

[35] A reading of subsection 23(1) shows that if the Board believes there is a "possibility" that sections E or F of Article 1 of the Refugee Convention applies, the Board must give notice to the Minister. From the transcript, it appears that this was the situation in this case (certified tribunal record page 350). There is simply no serious question of broad significance or general application raised here.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is allowed and the matter is referred to a different panel of the Board for redetermination.
2. No question is certified.

“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,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(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,

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

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

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

169. In the case of a decision of a Division, other than an interlocutory decision:

169. Les dispositions qui suivent s'appliquent aux décisions, autres qu'interlocutoires, des sections :

(a) the decision takes effect in accordance with the rules;

a) elles prennent effet conformément aux règles;

(b) reasons for the decision must be given;

b) elles sont motivées;

(c) the decision may be rendered orally or in writing, except a decision of the Refugee Appeal Division, which must be rendered in writing;

c) elles sont rendues oralement ou par écrit, celles de la Section d'appel des réfugiés devant toutefois être rendues par écrit;

(d) if the Refugee Protection Division rejects a claim, written reasons must be provided to the claimant and the Minister;

d) le rejet de la demande d'asile par la Section de la protection des réfugiés est motivé par écrit et les motifs sont transmis au demandeur et au ministre;

(e) if the person who is the subject of proceedings before the Board or the Minister requests reasons for a decision within 10 days of notification of the decision, or in circumstances set out in the rules of the Board, the Division must provide written reasons; and

e) les motifs écrits sont transmis à la personne en cause et au ministre sur demande faite dans les dix jours suivant la notification ou dans les cas prévus par les règles de la Commission;

(f) the period in which to apply for judicial review with respect to a decision of the Board is calculated from the giving of notice of the decision or from the sending of written reasons, whichever is later.

f) les délais de contrôle judiciaire courent à compter du dernier en date des faits suivants : notification de la décision et transmission des motifs écrits.

***Refugee Protection Division Rules, SOR/2002-228***

23.(1) If the Division believes, before a hearing begins, that there is a possibility that sections E or F of Article 1 of the Refugee Convention applies to the claim, the Division must notify the Minister in writing and provide any relevant information to the Minister.

23. (1) Si elle croit, avant l'audience, qu'il y a une possibilité que les sections E ou F de l'article premier de la Convention sur les réfugiés s'appliquent à la demande d'asile, la Section en avise par écrit le ministre et lui transmet les renseignements pertinents.

(2) If the Division believes, at any time during a hearing, that there is a possibility that section E or F of Article 1 of the Refugee Convention applies to the claim, and the Division is of the opinion that the Minister's participation may help in the full and proper hearing of the claim, the Division must notify the Minister in writing and provide the Minister with any relevant information.

(2) Si elle croit, au cours de l'audience, qu'il y a une possibilité que les sections E ou F de l'article premier de la Convention sur les réfugiés s'appliquent à la demande d'asile et qu'elle estime que la participation du ministre peut contribuer à assurer une instruction approfondie de la demande, la Section en avise par écrit le ministre et lui transmet les renseignements pertinents.

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** IMM-8110-12

**STYLE OF CAUSE:** THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

- and -

MICHAEL OLUFEMI OLADAPO

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** May 28, 2013

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

**DATED:** November 27, 2013

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