



IMM-3689-96

BETWEEN:

AUSTEN MICHAEL

Applicant

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

CULLEN J.:

This is an application for judicial review of the decision of the Convention Refugee Determination Division of the Immigration and Refugee Board [hereinafter, the "Tribunal"], dated September 23, 1996, in which the applicant was determined not to be a Convention refugee.

The applicant seeks an Order that the Tribunal's decision be set aside. The applicant also seeks an Order that the applicant be declared a Convention Refugee, or, in the alternative, that this matter be referred to a differently constituted Tribunal for a new hearing.

THE FACTS

The applicant is a Nigerian citizen who arrived in Canada in 1991. Within days of arriving, the applicant made a refugee claim.

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At his refugee hearing, the applicant testified that because of his involvement in the Baptist Church in Nigeria, both he and his father, his father being a Priest of that Church, were persecuted by the Muslims in the North, while the authorities turned a blind eye or participated in the persecution. The applicant testified that his father had died in 1991 as a result of injuries sustained from this persecution.

The Tribunal disbelieved several key incidents in the applicant's claim. First, the Tribunal disbelieved that the applicant was ever involved in a religious riot in Kaduna, because the applicant could not answer even basic questions about the city in which the riot allegedly occurred. The respondent concedes that the Tribunal erred in its finding that the applicant contradicted himself when giving evidence as to the site of the riot. The applicant points out numerous instances in the transcript of the refugee hearing where the applicant did, indeed, answer numerous questions about Kaduna.

Second, the Tribunal disbelieved the applicant's testimony that he had heard radio announcements in 1990 that gave his name and that of his father. The disbelief was primarily grounded in evidence that radio licenses had been issued only in 1994, and the lack of persuasiveness of the applicant's explanation for this. However, the documentary evidence cited by the Tribunal to support this conclusion does not have anything to do with the topic of radio licenses.

Third, the Tribunal did not accept the applicant's explanation for the omission of his arrest and detention from his PIF. However, a reading of the applicant's PIF reveals that he did mention, albeit in poor English, that the government had searched for and arrested him.

Finally, the Tribunal did not believe that the applicant's scars, that could be consistent with beatings with Koboko, came as the result of mistreatment while in detention. The Tribunal did not believe the applicant because he had initially testified that he was never beaten or tortured, and then later testified that he had been beaten with

Koboko. The respondent now concedes that the applicant did not contradict himself concerning his evidence that he was mistreated when he was detained.

On the basis of the above findings, the Tribunal concluded that the applicant lacked credibility, and his story was a fabrication.

DISCUSSION

1. **The broadcasting incident**

With respect to the first negative credibility finding, I have difficulty in accepting the Tribunal's conclusion that, because radio licenses were not issued in the applicant's region until 1994, it was impossible for the applicant to have heard broadcasts mentioning his and his father's names. The documentary evidence as to radio licenses is only relevant to the issue of licensed broadcasting. There is no analysis of the possibility of unlicensed broadcasting.

In addition, the documentary evidence cited by the Tribunal does not even speak to the topic of radios or their licenses. The test for judicial review of the decision of an expert tribunal such the one at Bar is whether its conclusion can be supported by the evidence before it. The evidence cited by the Tribunal does not support its conclusion. The difficulty here is that this may be due to an editorial oversight, in which case the Court ought not to intervene in this part of the decision. However, if it is not due to an oversight, then this part of the decision is patently unreasonable.

2. **The alleged arrest and detention**

It would be reasonably open to the Tribunal to draw negative inferences about the applicant having omitted to mention his arrest and detention in his PIF. Normally, this Court owes curial deference to the Tribunal in this regard.

However, I have difficulty in coming to the conclusion that the applicant omitted these important points, when it is clearly set out in the applicant's PIF:

The government then went in search and arrest of me ...

Due to the search and arrest for me by the government over statement I never made

...

This indicates, to me, that the applicant did not concoct a story about arrest and detention during his refugee hearing. The Tribunal's finding, therefore, has no factual basis. A credibility finding with no facts to support it cannot stand.

3. The applicant's demeanour and contradictory answers

Because it has the opportunity to observe the witnesses, the Tribunal is in the best position to determine the credibility of the people that come before it. Assessments of demeanour can be crucial to a Tribunal's credibility finding.

In the case at Bar, the Tribunal came to a negative credibility finding because of various contradictions in the applicant's testimony, and because it thought that he was making up answers as he went along. It also described the applicant as "cagey" and unknowledgeable when answering basic geography questions about his home city. Therefore, it is on the basis of various findings of fact that the Tribunal found that the claimant lacked credibility.

The respondent concedes that, at least in two instances, the Tribunal erred in finding that the applicant had contradicted himself. The Tribunal erred, first, concerning the applicant's evidence describing the location of a crusade, and second, concerning the applicant's evidence that he was mistreated when he was detained.

These are two central incidents in the applicant's claim to Convention refugee status, which the Tribunal somehow misunderstood. It is, therefore, quite likely that the Tribunal's conclusions, based on such findings, cannot stand.

CONCLUSION

The Tribunal rejected the applicant's claim to Convention refugee status primarily because of its negative findings of credibility. Questions of credibility and weight of evidence are within the jurisdiction of the Tribunal as the trier of fact in respect of Convention refugee claims within the scheme of the *Immigration Act*.

The negative credibility findings were based on the following:

1) The applicant testified that his name and his father's name had been mentioned in a radio broadcast in 1990 [hereinafter, the "broadcasting incident"]. The Tribunal rejected this evidence because it had documentary evidence that licenses for radios were not issued until 1994. In addition, the applicant could not remember the frequency of the radio station he was listening to in 1990.

2) The applicant failed to mention his alleged arrest and detention in his Personal Information Form [hereinafter, "PIF"]. The applicant had several lawyers, who could have brought such relevant information to the Tribunal's attention before the hearing.

3) The applicant often hesitated or paused when answering questions. His answers were not spontaneous. The Tribunal describes the applicant's demeanour as "cagey," and his answers to key questions as improvised or contradictory.

This case hinges on credibility, and this Court is normally loathe to intervene in a Tribunal's determination within its expertise. The applicant has revealed several erroneous findings of fact that underlie the Tribunal's negative conclusion on credibility. The respondent replies that these erroneous findings of fact are irrelevant, because the Tribunal disbelieved the central incident in the applicant's claim.

I reject the respondent's submissions on the weight to be given to the Tribunal's erroneous findings of fact. I reject these submissions because the Tribunal used these facts to conclude that the applicant had contradicted himself or was vague. These findings undoubtedly influenced the Tribunal when it came to a negative conclusion regarding the applicant's demeanour. This is an indication that the Tribunal's conclusion about the applicant's demeanour may be unfounded. This means that the Tribunal's conclusion regarding the applicant's credibility may be equally unfounded.

This is a difficult case to evaluate on the written submissions alone. It could go either way. A preliminary conclusion is that, based on the Tribunal's errors, it is difficult to wholly trust its conclusion. Although I am very uncomfortable in interfering in a Tribunal's findings on credibility, I believe that this matter ought to be referred back to a differently constituted Tribunal for re-determination.

OTTAWA, ONTARIO

July 2, 1997.

B. Cullen

J.F.C.C.

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE NO.:

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REASONS FOR ORDER BY:

The Honourable Mr. Justice Cullen

DATED:

July 2, 1997

APPEARANCES:

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