Date: 20060802

Docket: IMM-4990-05

Citation: 2006 FC 945

Ottawa, Ontario, August 2, 2006

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

KENILE AWOH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Immigration and Refugee Board (IRB) dated July 20, 2005, in which it rejected the applicant's claim for refugee status under s. 96 and 97 of the *Immigration and Refugee Protection Act*.

FACTS

[2] The applicant, Ms. Awoh, claims to be a citizen of Nigeria and is 22 years old. She claims refugee status based on her membership in a specific social group, namely lesbians. She states that

she has been subject to humiliation and punishment for her sexual orientation and her participation in lesbian relationships.

[3] She states that her father threw her out of the house upon learning of one such relationship in February 2003, and she sought the assistance of the police shortly thereafter, but they detained her without charges for two days before releasing her. She states that she then went to stay with an uncle in another city, who arranged for her transportation to Canada through the use of an agent.

DECISION UNDER REVIEW

[4] The Panel's decision was based on the claimant's failure to establish her identity as well as credibility concerns. With respect to her identity, the panel found it implausible that the claimant could have received her birth certificate simply by requesting a friend to obtain the said document without any further documentation. The Panel also found that the legitimacy of the proffered document was undermined by the fact that the birth registration was the same as the issue date, when given other evidence (namely that she had previously had a birth certificate), the date of birth registration should have been different. The applicant came to Canada with a different birth certificate, which the Panel found was not a formal, government-issued document and as such was insufficient to establish identity. The Panel also rejected the student library card as evidence of identity because it was issued in 2002 and had an expiry date of 2006, despite the fact that the card itself states it expires at the end of the academic session. Given these factors, plus the documentary evidence of the availability of fraudulent documents in Nigeria, the Panel held that the applicant did not establish her identity.

[5] As for the applicant's credibility, the panel found a number of inconsistencies within her *viva voce* evidence and between that evidence and the information given on her Personal Information Form (PIF) and Record of Examination (ROE), namely:

- In testimony, she stated that her father had threatened to kill her, but there was no indication of this on the PIF
- The applicant stated that she went to university in her testimony, but there was no mention of this in the ROE
- In testimony, the applicant changed her university start date from October to December 2002, then stated this was because of a strike, and the Panel found her explanation unbelievable given that her PIF did not explain this
- The end date of her university studies was not given as the same date on the PIF and in her testimony
- In testimony, he applicant did not indicate that she had decided to leave the country, as it was her uncle's decision and she did not know when he had decided, but in her PIF she indicated that she knew when she was leaving on a specific date while staying with her uncle
- The claimant was not credible as she had no documents to indicate arrival in Canada (passport, air tickets, etc.) and stated that she was not even aware of the name on the false passport used to facilitate her entry into Canada
- During testimony, the applicant changed the name of her first partner in high school from Kate to Ephayan
- During testimony, she stated that she had not written to her parents to ask for documents because she did not want them to know what she was doing, and later said she had sent a letter to her parents and received no reply
- The applicant testified that she knew the police might treat lesbians badly, but also that she chose to complain to the police when her father kicked her out of the house for being a lesbian; furthermore, there was no reference to fear of police in her PIF
- The applicant's fear of police mistreatment was speculative, and not supported by the documentary evidence

ISSUES

[6] There are essentially two issues to be determined in this application for judicial review:

a) Did the panel err in its assessment of the applicant's claimed identity?

b) Did the panel err in finding that the applicant lacked credibility?

APPLICANT'S SUBMISSIONS

[7] On the issue of her identity, the applicant argues that the Panel erred by referring to examples of other Nigerian cases and drawing a negative conclusion based on the absence of similar evidence (i.e. affidavits) in the applicant's case. Citing the case of *Valtchev v. Canada (M.C.I.)* 2001 FCT 776, the applicant argues that implausibility findings should only be made by the Panel in the clearest of cases, and in this situation there was no justifiable reason for them to reject her version of events with regard to how she obtained her birth certificates. The applicant also submits that the Panel had a duty to alert the applicant of its concerns about the identity documents in order to afford her the chance to respond to them, and erred in law by not doing so. The applicant submits that the Panel erred when it assumed that the expiry date for the student card should be one year after its issuance, as this was merely speculation.

[8] With respect to her credibility, the applicant submits that the panel erred by drawing a negative inference based on the fact that she failed to mention her fear that her father would kill her in the PIF. She relied for that proposition on *Singh v. Canada (M.E.I.)*, [1993] F.C.J. No. 1034. She further contends that the difference in the end dates of her university studies, and the apparent inconsistencies about her knowledge of when she would be coming to Canada were only minor inconsistencies, insufficient to support an adverse credibility finding. The applicant submits that the Panel was not entitled to require the applicant to state events in her PIF the same way she did in her testimony.

[9] The applicant argues that with regard to credibility as well as identity, the Panel had an obligation to alert the applicant as to its concerns and provide her with a chance to respond. The

applicant argues that her lack of awareness of the name used on her false passport has no bearing on her potential status as a refugee, and as such the Panel erred by basing its findings on an irrelevant consideration, and also failed to consider the ROE, in which the applicant stated that she never saw the documents used to gain admission to Canada.

[10] The applicant submits that the Panel did not have good grounds for making an adverse credibility finding based on her lack of spontaneity in answering questions about her relationships, and that it unreasonably made such a finding on the basis that she had only had two relationships. With regard to her contact with the police, the applicant states the Panel failed to establish that she knew the police might mistreat lesbians before she asked for their help, and as such cannot make an adverse credibility finding on this ground.

[11] The applicant states that the Panel failed to assess the applicant's evidence in light of what it knew about other similarly-situated persons in that country, and failed to sufficiently consider the documentary evidence of the mistreatment of lesbian police cadets.

RESPONDENT'S SUBMISSIONS

[12] The respondent argues, as a preliminary issue, that the applicant did not file her own affidavit, but instead filed the affidavit of Mr. Fines, a research analyst for the applicant's lawyer. The respondent states that this is hearsay, as Mr. Fines does not have any connection with the hearing other than his employment with the applicant's lawyer, does not attribute an adequate source for his knowledge, and as such does not comply with Rule 10(2)(d) do the *Federal Court*

Immigration and Refugee Protection Rules, 2003, which does not permit hearsay evidence in an application such as the present one.

[13] The respondent also contends that the appropriate standard of review for the panel's findings concerning identity documents is patent unreasonableness. The respondent further submits that the Panel had legitimate reasons for rejecting the identity documents offered by the applicant. Specifically with regard to the birth certificate, the respondent argues that it was reasonable for the Panel to conclude that there was no reason for the claimant to request a second birth certificate if she already possessed one, and to reject the other birth certificate which was undated and did not indicate issuance by any government authority. With respect to the library card, the respondent states that it was reasonable for the Panel to disbelieve its authenticity, as it states an expiry date of 2006, yet also states that it must be renewed at the end of the session.

[14] Finally, the respondent submits that the Panel was entitled to make adverse credibility findings based on the applicant's failure to identify fear of her father on her PIF if it was part of the reason for her to flee persecution. The respondent contends that the other findings of inconsistencies were reasonable and sufficient to undermine the applicant's credibility. With regard to the questions about her relationships, the respondent states that it was reasonable for the Panel to expect a person who had only had two partners to properly remember the names of those partners.

ANALYSIS

[15] It is soundly established in the case law of the Court of Appeal and of this Court that the standard of review for credibility determinations by the IRB is patent unreasonableness (see, e.g. *Thavarathinam v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1866 (F.C.A.), at para. 10; *Aguebor v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 732 (F.C.A.), at para. 4, recently applied in *Ogiriki v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 420 , *Mohammad v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 493). The same standard of review applies to the assessment of the legitimacy of identity documents (see, e.g. *Egbokheo v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 285 and *Kosta v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1233.

[16] As explained by the Supreme Court of Canada, the standard of patent unreasonableness implies that this Court will not interfere with a decision unless “there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived" (*Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20).

[17] Turning next to the preliminary issue raised by the respondent, it is true that the applicant did not submit her own sworn affidavit but rather included the affidavit of a research analyst employed by her counsel. But the failure of an application to be supported by affidavits based on personal knowledge has been held not to result automatically in dismissal of an application for judicial review (*Moldeveanu v. Canada (Minister of Citizenship and Immigration)* (1999), 235 N.R.

192 (F.C.A.); *Turcinovica* v. *Canada (Minister of Citizenship and Immigration)*, 2002 FCT 164; and *Ling* v. *Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1525 (QL)).

[18] In the present case, the affiant Mr. Fines can be said to have personal knowledge of the applicant's documents, but not of the events described therein. The relevant documents appended to that affidavit formed part of the Tribunal record, and as such are before this Court in any case. With regard to the alleged breach of Rule 10(2)(d), in my opinion the affidavit submitted counts as a "supporting affidavit" within the meaning given by the Rules; this is consonant with the above jurisprudence, wherein it was held that submission of an affidavit other than the applicant's is not in itself sufficient to justify dismissal of the case. To my mind the application cannot be dismissed on this basis.

[19] In its decision, the Panel considered the identity documents offered by the applicant, namely a birth certificate and a library card, and provided specific reasons to support its rejection. The applicant claims that the Panel erred by relying on its general experience with Nigerian refugee in drawing a negative inference. In the *Valtchev* case, cited by the applicant, Justice Muldoon granted judicial review of a negative refugee determination where he found, amongst a plethora of other errors, that the Panel erred as follows:

> 33. Once again, the tribunal engages in speculation: it admits that it has no precise information surrounding birth registration requirements in Bulgaria during the period in which the claimant was born, yet it nonetheless impugns the applicant's version of events.

[20] To my mind, the present case is distinguishable; the panel did state, at p 2. of its reasons, that it "does not find it plausible that the claimant could obtain her birth certificate merely by

writing to a friend from Canada. It has seen an affidavit from a parent or a nearest blood relative in the past hearings of a birth to be registered and a birth certificate to be issued." The Panel went on to give several other reasons for rejecting the birth certificate. In my opinion this cannot be said to amount to reliance on generalizations based on a lack of precise information as described in *Valtchev*. The Panel was entitled to rely on its expertise and experience in assessing the evidence of refugee claimants. Accordingly, its decision to reject the identity documents of the applicant cannot be said to be patently unreasonable.

[21] Additionally, the applicant raises the argument several times in her memorandum that the panel failed to meet its obligation to alert her to its concerns about the reliability of both her documents and her testimony. This issue was considered by Justice Phelan in *Farooq v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 867, in which he stated:

> 5. The applicant argues that the Board did not give him a chance to respond to the allegations that the FIR and the warrant of arrest were fraudulent since it was first brought up to him in the decision and was not mentioned at all during the hearing. I do not agree. It appears from the Tribunal Record, at pages 403 and 404, that the applicant was confronted with his answers in his PIF about the existence of charges against him and the explanations provided were not found satisfactory. With regard to the implausibilities drawn by the Board, in many decisions this Court has decided that the Board was under no obligation to alert an applicant of its concerns about weaknesses in his evidence that could give rise to implausibilities (see, for example, *Sarker v. Canada (M.C.I.)* (1998), 45 Imm.L.R. (2d) 209, *Khorasani v. Minister of Citizenship and Immigration*, IMM-3198-01, 2002 FCT 936, *Danquah v. The Secretary of State of Canada*, [1994] F.C.J. No. 1704, IMM-105-94, November 17, 1994, and *Appau v. Minister of Employment and Immigration*, [1995] F.C.J. No. 300, A-623-92, February 24, 1995).

[22] In the present case, the panel confronted the applicant specifically with regard to the problems related to her identity documents (see, for example, pp. 44-48 of the hearing transcript), as well as to its other credibility concerns (see, for example, pp. 33-34, 41-42, 49-50). Furthermore, based on the jurisprudence of this Court, it cannot be said that the Panel erred either by failing to alert the applicant of weaknesses in her testimony or by drawing conclusions of implausibility therefrom.

[23] With regard to the documentary evidence of the mistreatment of lesbian police cadets, the Panel clearly considered this evidence, addressed it with the applicant at the hearing (p. 38 of the hearing transcript), and concluded that it was insufficient to support the applicant's refugee claim. To my mind, this was not unreasonable by any measure.

[24] For all the above reasons, I am of the view that this application for judicial review must be rejected.

JUDGMENT

THIS COURT ADJUDGES that this application for judicial review is dismissed.

"Yves de Montigny"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-4990-05
STYLE OF CAUSE:	KENILE AWOH v. MCI
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	May 16, 2006
REASONS FOR ORDER:	de Montigny J.
DATED:	August 2nd, 2006

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