Date: 20070822

Docket: IMM-4191-06

Citation: 2007 FC 848

Montréal, Quebec, August 22, 2007

PRESENT: The Honourable Maurice E. Lagacé

BETWEEN:

TUNJI DIRAN LEKE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Tunji Diran Leke applies for the judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated July 18, 2006, which determined that he was not a Convention refugee or a person in need of protection in that his removal to Nigeria would not subject him personally to a risk to his life or to a risk of cruel and unusual treatment or punishment.

Issue

[2] Did the Board err in fact or in law in concluding that the applicant did not establish his sexual orientation and would therefore not be at risk of cruel and unusual treatment or punishment should he return to Nigeria?

Facts

[3] The applicant, Mr. Tunji Diran Leke, was born on August 13, 1977 in Osa Oke, Nigeria. Raised in a devoutly Christian home, he was expected to succeed his father, Reverend John Leke. Although he would eventually become a Minister like his father and marry a preacher's daughter who bore him two sons, the applicant led a double life all along, for he was truly not a heterosexual.

[4] The applicant realized he was a homosexual during his final year in high school and had his first homosexual experience in 1993 with a classmate at the Polytechnic school in Ibadon. Between 1996 and 2000, he was involved in three homosexual relationships.

[5] On September 24, 2005, the applicant and his male partner, Kunle Oba were caught having sex in Mr. Oba's apartment. The landlord, who caught them in the act, and onlookers beat and humiliated the applicant and his partner. The applicant escaped and Kunle Oba was handed over to the police who later visited the applicant's home and church looking for him. The next day, the applicant fled to Lagos, where a friend gave him refuge. It was in Lagos that the applicant was introduced to an agent who provided him with passage to Canada. He arrived in Toronto on October 6, 2005 and immediately claimed refugee protection based on his sexual orientation.

[6] The applicant took up residence at 321 Jarvis Street, in Toronto and became a member of the 591 Church Street Community Centre, which serves members in the heart of the gay, lesbian, as well as the transsexual and transgendered communities in that city. The applicant's refugee claim was heard on May 19, 2006 and a negative decision rendered on July 18, 2006. This negative decision is the object of the present application for judicial review.

[7] In support of his application for judicial review, the applicant provided an affidavit from Debo Abdul Dean Salam sworn on January 28, 2007. The affiant swears that he is gay and was in a same-sex relationship with the applicant when his refugee claim came up for hearing on May 19, 2006. Mr. Salam further swears that he attended the hearing, and when asked by the Board member the purpose of his presence at the hearing, he indicated that he was the applicant's partner and he was there to give him moral support.

Decision under review

[8] The Board found that the applicant was not a Convention refugee or person in need of protection because there was no substantial basis to believe that his sexual orientation would be readily identifiable by people in Nigeria, such that he would be at personal risk of detection or exposed to the risk of torture. First, while the applicant alleged that others in Nigeria including the police, a landlord, his family and in-laws now know that he is a homosexual, it was not possible for the Board to conclude that others in Nigeria would perceive the applicant to be either homosexual or bisexual. He did not look like a gay person. The Board noted as follows:

> Having observed the claimant throughout the hearing, I do not find that there is anything to be gleaned from the claimant's facial expressions, tone of voice or his physical that would, in and of themselves create an impression that this claimant was either homosexual or bisexual.

[9] Moreover, the Board acknowledged that since it did not have a test result to ascertain the claimant's sexual orientation, it had to rely on an assessment of credibility in order to determine whether the applicant's allegations of his sexual orientation were probable. In this regard, the Board found that there were several factors that, in its view, undermined the applicant's fears that public perceptions would lead others to conclude that he was indeed a homosexual or bisexual and thus expose him to a risk of persecution upon his return to Nigeria.

[10] First, the applicant is an ordained pastor and it is not probable that a perceived homosexual would be allowed to become a church pastor in Nigeria where "disapproval of homosexuality remains strong" and the ordination of gays is a controversial issue. Second, the applicant had a common-law spouse. Third**,** this common-law union bore him two sons born in 2000 and 2004 respectively. The Board held that it was highly improbable that a homosexual would father two sons. As a result of this conclusion, the Board was of the view that it was extremely difficult to identify the claimant's sexual identity as an innate characteristic. In arriving at this conclusion, the Board considered the following factors:

- the applicant's situation in Canada, a country more accepting of different sexual orientations than Nigeria;

- during testimony, the applicant was reticent to describe explicitly the intimate sexual act he and Kunle Oba were performing when the landlord forced himself into the apartment and caught them in the act;
- the applicant acknowledged that he was not currently involved in a homosexual relationship in Canada;
- in support of his claim, the applicant provided a letter from Pastor (Dr.) Amos Dada of the Christ Apostolic Church in North York, which makes no mention of the applicant's problems in Nigeria or his sexual orientation;
- the applicant submitted a membership card from the 519 Church Street Community Centre, which is characterized as a community centre in the Toronto region and asked the Board to consider this as evidence of sexual orientation. The Board was unable to lend any credence to the applicant's membership card from the 519 Church Street Community Centre as proof of his sexual orientation and this for two reasons. First, the 519 Church Street Community Centre serves a diverse community even though it does serve gays and lesbians. Second, the Board drew an analogy and stated that the simple possession of a library card does not provide evidence that the cardholder is literate since libraries offer a variety of services, including video and audio recordings and do not set out literacy tests for patrons.

[11] Finally, the Board concluded that innate characteristics are unchangeable and immutable and establish membership in a particular social group as set out in *Canada (Attorney General of Canada) v. Ward,* [1993] 2 S.C.R. 689. Consequently, since the applicant has failed to establish that

others in Nigeria would probably identify him as a homosexual, he was not a Convention refugee as described in section 96 of the Act.

Relevant legislation

[12] The Board found that the applicant did not establish that others in Nigeria would probably identify him as a homosexual, the result being that he was not a Convention refugee as described in section 96 of the Act. The relevant passages of this section provide as follows:

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, [. . .]	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 : [. . .]

[13] The Board also considered refugee protection as set out in section 97 of the Act, which states:

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	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) 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	*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 himself of the protection of that country, (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, (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and (iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays, (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) 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) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

Analysis

Standard of Review

[14] At the outset, the Court must determine the standard of review applicable in this wholly fact based matter anchored in the applicant's credibility. Where a finding of fact and credibility is at issue, judicial review is only warranted when the reviewing Court is satisfied that the decision is patently unreasonable. See: *Aguebor v. Canada (Minister of Citizenship and Immigration)* (1993), 160 N.R. 315 (F.C.A.), where Mr. Justice Décary stated as follows:

> [3] It is correct, as the Court said in Giron, that it may be easier to have a finding of implausibility reviewed where it results from inferences than to have a finding of non-credibility reviewed where it results from the conduct of the witness and from inconsistencies in the testimony. The Court did not, in saying this, exclude the issue of the plausibility of an account from the Board's field of expertise, nor

> did it lay down a different test for intervention depending on whether the issue is "plausibility" or "credibility".
>
> [4] There is no longer any doubt that the Refugee Division, which is a specialized tribunal, has complete jurisdiction to determine the plausibility of testimony: who is in a better position than the Refugee Division to gauge the credibility of an account and to draw the necessary inferences? As long as the inferences drawn by the tribunal are not so unreasonable as to warrant our intervention, its findings are not open to judicial review. In Giron, the Court merely observed that in the area of plausibility, the unreasonableness of a decision may be more palpable, and so more easily identifiable, since the account appears on the face of the record. In our opinion, Giron in no way reduces the burden that rests on an appellant, of showing that the inferences drawn by the Refugee Division could not reasonably have been drawn. In this case, the appellant has not discharged this burden.

[15] To succeed, the applicant must demonstrate therefore that the inferences drawn by the Board could not reasonably have been drawn.

Did the Board err in fact or in law?

[16] There are several shortcomings in this decision which stem from erroneous findings of fact that appear to have been made in a perverse and capricious manner without regard to the evidence before the Board.

[17] First, as counsel for the applicant correctly points out, the Board misinterpreted, misunderstood or misapplied the documentary evidence pertaining to the treatment of homosexuals in Nigeria.

[18] The evidence before the Board established that the applicant led a double life. He lived an openly normal life in the image of his father as an ordained pastor, with a wife and two young sons on the one hand. All the while however, he was carrying on in secret a series of homosexual relationships in Nigeria until caught in the act. And the applicant testified that he led this double life because of his fears of homophobia in Nigeria and that he fled his country only after he was caught and beaten for having sexual relations with a man.

[19] The Board acknowledged that unlike Canada, Nigeria has zero tolerance towards homosexuals; indeed it is a criminal offence to engage in same-sex relationships. The Board stated as follows:

> While the claimant has reminded the Board that homosexuality is illegal in Nigeria, the Board finds that the claimant is not a person in need of protection as described in this section of the Act. The Board does not accept that the claimant has been perceived as a homosexual male in Nigeria nor would he be so perceived in the future for reasons set out above. Although homosexuality remains an anathema in Nigerian culture, has been described as an "assault to basic values of humans and human society" and is admittedly illegal, the Board is also aware that Amnesty International has stated that Nigerian courts rarely impose sentences for homosexuality. Nonetheless, since others in Nigeria probably would not identify this claimant as a homosexual consideration of cruel and unusual treatment, punishment or tortures are theoretical and abstract.

[20] It was patently unreasonable for the Board to find that the applicant was not a homosexual because it was highly improbable that a homosexual would father two sons. The Board provided no explanation and no basis for this inference in spite of the evidence before it that homosexuals in Nigeria are forced to live double lives for fear of the consequences of living openly in same-sex relationships. Since the Board did not reach an adverse conclusion regarding the applicant's

credibility, it was patently unreasonable to disregard this evidence before it and conclude that it was highly improbable that a homosexual would father two sons.

[21] In addition to this blanket statement, the Board misapprehended the evidence before it by stating that it is not probable that a perceived homosexual would be allowed to become a church pastor in Nigeria where "*disapproval of homosexuality remains strong*." While it was reasonably open to the Board to conclude that it did not observe any outward indications in the applicant's appearance, or manner of conducting himself, all the while acknowledging that it did not have a litmus test to determine homosexuality, it was perverse to disregard the facts before it that the applicant is now wanted by the police for homosexuality and is considered a disgrace to his children, wife, family, church and community.

[22] Moreover, the Board made significant errors of fact about the evidence provided to support the applicant's homosexuality in Canada. First, the Board clearly erred by stating that during his testimony the applicant acknowledged that he was not currently involved in a homosexual relationship in Canada. At no point in the transcripts of the hearing does the applicant make any such acknowledgment. In fact, there is no indication in the transcripts that the Board or counsel put that question to the applicant, such that he would affirm or deny that he was in a same-sex relationship in Canada at the time of the hearing.

[23] In this regard, the transcripts do show the presence of an observer in the room during the hearing. This individual identified himself to the Board as Mr. Debo Abdul Dean Salam. Mr. Salam

provided an affidavit sworn on January 28, 2007, in which he states among other things, that he was gay and the same-sex partner of the applicant.

[24] The transcripts indicate no evidence that the applicant was in a homosexual relationship in Canada at the time of the hearing, except for the affidavit provided by the applicant's same-sex partner. In fact the affiant Salam corroborates this when he states that he spoke to the Board member and indicated that he was the same-sex partner of the applicant and that he was not there to testify but rather to provide moral support.

[25] While Mr. Salam's presence was noted for the record, no testimony was given regarding his relationship to the applicant. Even if a discussion (inaudible for transcription purposes) took place between Mr. Salam and the Board member regarding his relationship to the applicant, this discussion would not constitute sworn evidence that the Board could consider to assess the applicant's claim. Mr. Salam was obviously present and could have testified on the applicant's behalf but did not.

[26] Nevertheless the Board mistakenly noted that the applicant acknowledged that he was not involved in a homosexual relationship in Canada at the time of the hearing, and this error on this issue is material since the Board clearly indicated that the applicant's lack of identification as a homosexual in Canada was a determinative factor in its decision.

[27] The Court has no reason to doubt the affiant’s account of what transpired, since the explanation provided in the affidavit is corroborated by the transcription, in that there is clearly an intervention by an unidentified speaker off microphone, which is inaudible. Also, it is clear from the Board member’s acknowledgment of this unidentified person that she had foreknowledge of this observer including his four names.

[28] Furthermore, the Court finds it incongruent that the Board would invite the applicant to accord permission to this observer and not ascertain beforehand the identity of this person. However, the exchange is indeed inaudible. Notwithstanding, and in light of the circumstances and the important error of fact on the part of the Board with respect to the unsubstantiated statement attributed to the applicant, the Court finds that this error is significant especially since the affidavit is duly sworn and signed before a Commissioner of the Bar of Ontario.

[29] In addition to this affidavit, the applicant provided a copy of his membership card at the 519 Church Street Community Centre as evidence of his association with an organization in Toronto that serves the gay, lesbian, transsexual and transgendered communities among other minorities in the City and thus supports his alleged sexual orientation. The Board rejects this evidence for two reasons.

[30] First, while the 519 Church Street Community Centre does indeed serve members of the City’s gay and lesbian communities, the Board took judicial notice of the fact that this community centre serves a diverse community, including Latinos, the arts, and theatre and film festivals.

Second, by analogy, the Board claims that the mere possession of a library card does not provide evidence that the cardholder is literate because the library provides a variety of services to meet the needs of different people. Similarly, the mere possession of a membership card at the 519 Church Street Community Centre does not provide evidence that a member of this particular community centre is gay or lesbian.

[31] There are problems with the Board’s misapplication of the facts that steer it in error such as to invite the intervention of the Court. First, it is clear from the documentary evidence before the Board, and in particular from the Personal Information Form (PIF) that the applicant resides at 321 Jarvis Street which falls within the dominantly gay community in the heart of which the 519 Church Street Community Centre is located. Second, the Board states that it took judicial notice by reviewing the 519 website at “ http//www:the519.org/programs/groups/arts/index.shtml”

[32] A careful review of this complex and detailed website reveals that over and beyond the programs, groups and arts listed on the website, their predominant clientele and users are members of the gay and lesbian communities. In fact, even a cursive review of this website highlights the fact that the 519 Church Street Community Centre is devoted to the needs and concerns of this specific community in all its diversity whether Latino, or of any other immigrant and minority group. In the history of the community centre on the same website, the Court notes the following on the 519 Church Street Community Centre Web Site at: http//www.the519.org/about/history.shtml:

> Gays and lesbians living in The 519's catchment area have been among the most active and visible members and users of the community centre. Most groups are run by volunteers, and the group

> members appreciate the safe environment, the accessibility, and The 519's role within the community."

[33] The Court is satisfied that it was patently unreasonable for the Board to dismiss the applicant's membership in the 519 Church Street Community Centre as proof of his membership in an organization that serves minorities like him in and near the City's Gay Village. As such, the Board erred by its disregard or misapprehension of the evidence before it.

[34] For all these reasons, the Court finds that the Board erred in fact or in law in concluding that the applicant did not establish his sexual orientation and would therefore not be at risk of cruel and unusual treatment or punishment should he return to Nigeria. Therefore the application for judicial review shall be allowed.

[35] The parties were invited to present questions of importance for certification but declined.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application for judicial review is allowed, with costs;

2. The matter be returned to a differently constituted Board for re-determination; and

3. No question is certified**.**

"Maurice E. Lagacé"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4191-06
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APPEARANCES:

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