Federal Court  Cour fédérale

Date: 20100526

Docket: IMM-5439-08

Citation: 2010 FC 576

Ottawa, Ontario, May 26, 2010

PRESENT: The Honourable Mr. Justice Mainville

BETWEEN:

OGHOMWEN UWADIA

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
and
THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This concerns an application brought pursuant to sections 72 and following of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, ("the Act") by Oghomwen Uwadia (the "Applicant"). The Applicant is seeking the judicial review of the alleged failure of the Minister of Public Safety and Emergency Preparedness and the Minister of Citizenship and Immigration (the "Respondents") to allow the Applicant to commence a claim for protection pursuant to section 99 of the Act and to consider the referral of such a claim to the Refugee Protection Division pursuant to section 100 of the Act.

[2] This application is dismissed for the reasons set out below. In a nutshell, though the Applicant's counsel has made able arguments in support of her client, the Applicant has failed to establish the factual basis which supports these arguments.

Background

[3] The Applicant is a female citizen of Nigeria born on November 26, 1978. She arrived in Canada at the Toronto International Airport on November 8, 2008 without any travel documents such as a passport or visa. She was consequently examined by officers of the Canada Border Services Agency, and an exclusion order was issued against her that day.

[4] The events which unfolded at the Toronto International Airport that day are described quite differently by the Applicant and by the Canada Border Services Agency officers.

[5] The Applicant asserts in the affidavit she submitted to support her application for leave and for judicial review that she left Nigeria to escape an abusive uncle. She claims to have secured the services of an Italian smuggler known as "Steve" in order to travel from Nigeria to Canada. The services of "Steve" were paid by the Applicant through a transfer of the deed to the house she had inherited from her father in Nigeria. She thus claims to have left Nigeria for Canada via Italy on November 7, 2008 accompanied by "Steve". She discovered "that somewhere along the journey Steve had disappeared and had taken [her] passport with him" (para. 4 of Applicant's affidavit).

[6] The Applicant's description of the events following her arrival in Canada are set out in paragraphs 5 and 6 of her affidavit which read as follows:

> 5. When I came off the plane I was immediately confronted by Canadian officials who were very angry that I did not have a passport with me. I was taken aside and placed in a room and periodically questioned by as many as 5 different officials. I could not understand everything that was being said but I gathered that they did not believe that I did not have a passport. I was strip searched and aggressively interrogated for what seemed like hours. I was accused of being a liar and threatened with jail time. I was very scared and was crying uncontrollably and moreover I was feeling very ill, something I explained to the officials.
>
> 6. Finally one of the Canadian officials that was previously interrogating me came out with a pen and a notebook and asked me if I had ever been charged with a crime in Nigeria. When I answered that I had not he proclaimed that this meant that I was not afraid to return to Nigeria and he asked me to write on the paper while he dictated, "I came to Canada to work." At one point I was asked if I needed and [sic] interpreter and I responded that I did not even though I did not know what an interpreter was at the time. Generally I did not understand exactly what was going on, I was not feeling well, and I was very scared. If I would have known what a refugee claim was or been given an opportunity to tell my story I would most certainly have explained that I came to Canada to seek refuge and protection.

[7] The Canada Border Services Agency officers have a very different recollection of events.

[8] Officer Allen Milcic conducted the examination of the Applicant at the Toronto International Airport shortly after her arrival in Canada without any travel documentation. He attaches to his affidavit his interview notes which contain the following questions he asked the Applicant and her answers:

[…]

Q. Do you intend to remain in Canada temporarily or permanently?
A. Yes, permanently

Q. Have you ever applied for a permanent resident visa for Canada?
A. No

[…]

Q. Do you have a fear of returning to your country?
A. No

Q. Would you be in any danger if you returned to Nigeria?
A. No

Q. If you return to Nigeria tonight or tomorrow, would anything happen to you?
A. No

Q. Have you ever been refused admission to or requested to leave another country?
A. No

Q. Have you ever been convicted of a crime or an offence in any country?
A. No

Q. Do you fear persecution in any country?
A. No, no, no.

[…]

Q. Why are you coming to Canada?
A. To work, to help my mom

[…]

Q. Why are you here in Canada, you have not applied for a work visa so you are not authorized to work?
A. I told you I want to help my family.

Q. The only reason you are here is to work?
A. Yes

Q. Do you have any education?
A. Yeah I finished my primary school I was in class 2 and my father died and then I stopped

Q. Are you comfortable speaking English?
A. Yes

Q. Is that the primary language that you use?
A. Yes

Q. Can you read and write?
A. Not much

Q. I want you to write down in your own words why you are in Canada.
A. I cannot write. I told you I did primary school. I cannot write if the spelling is wrong.

Q. Write in your own words why you are here in Canada. It does not matter if the spelling isn't perfect.
A. You have to help me with the spelling

[…]

Q. I want to confirm one more time that your intention is to live and work in Canada.
A. Yes

Q. I want to confirm that you did not fear or have no fear of returning to Nigeria.
A. No fear

[…]

Q. I ask you one more time if you understand that you are being refused entry to Canada and returned to Nigeria?
A. I understand

Q. And is that OK?
A. Well no because I want to live and work in Canada because I want to support my family.

Q. And that is the reason you are in Canada, to find work and live?

A. Yes

Q. Anything else to add?
A. No

[9] During this examination, the Applicant filled out and signed three written declarations. In the first declaration, she stated “I want to be examined in the English language”. In the second declaration she stated that “I came to Canada to work and to help my family, [incomprehensible words], I am not afraid to go to Nigeria. PS if the country can help me I will be happy to myself and my family. Care you all.” The third and final declaration provides for the following:

> I am her (sic) in Canada becuse (sic) are want to help my mother and my sister. In the year 1993 my father die by assassinate (sic) left my mother with eight children, my uncle drove my mother and the children from the house, bisuce (sic) she have femle (sic) children if this [incomprehensible] to do to help my mother I will.

[10] After the examination, the Applicant was placed before Maria Martins-Miller, the Minister’s Delegate Review Officer who then issued an exclusion order against her. Ms. Maria Martins-Miller’s notes attached to her affidavit, and that affidavit itself, confirm that the Applicant was again asked if she wished to continue her examination in English and that she answered yes. They also indicate she understood the allegations against her. Moreover, at no time during the interview with Maria Martins-Miller did the Applicant indicate that she feared returning to Nigeria, or that she wished to make a refugee claim in Canada.

[11] After the exclusion order was made against her, the Applicant was held in detention. She eventually received the services of a legal counsel. She thereafter sought to make a claim for

refugee protection. However, this claim was deemed barred by subsection 99(3) of the Act as she was then the subject of an exclusion order.

[12] Finally, Mr. Javier Cerda, the Superintendent of Disembarkation and Roving Team (DART) in the Passenger Operations and Enforcement Division of the Canada Border Services Agency at Terminal 1 of the Toronto International Airport confirms by affidavit evidence that it is standard procedure to keep a written record of strip searches. No strip search was recorded or authorized with respect to the Applicant. Moreover, strip searches rarely occur on the immigration side of operations and such searches are considered a very unusual practice.

Position of the Applicant

[13] The Applicant's counsel asserts that the Respondents breached natural justice and procedural fairness, as well as Canada's international obligations, by failing to allow the Applicant an opportunity to initiate a claim for protection. The Applicant's counsel also initially asserted that the Respondents had breached the Applicant's rights under the *Canadian Charter of Rights and Freedoms* (the "*Charter*") and challenged subsection 99(3) of the Act on that basis. No formal notice of constitutional question was submitted, and counsel for the Applicant explained in oral argument that the *Charter* argument was not a direct challenge to any specific provision of the Act, including subsection 99(3), but was rather used as an underlying supporting basis for her natural justice and procedural fairness arguments.

[14] The Applicant's counsel freely acknowledges that there is no jurisprudence on the matter, but argues that the comportment of the port of entry officers raises a reasonable apprehension of bias, since such officers act in a dual role. They must both guard the borders of Canada and ensure that persons in need of protection are given a reasonable opportunity to put forward their protection claims. In this case, border protection considerations resulted in a course of action which effectively precluded the Applicant, by fear or otherwise, from making her protection claim known prior to the exclusion order being issued against her. This comportment amounted to a breach of natural justice and to procedural fairness in the circumstances at hand. In oral argument, the Applicant's counsel noted that this was not a case in which institutional bias was being alleged, the allegations of bias being limited to the particular facts of this case.

[15] Moreover, sections 96, 97 and 99 of the Act and related sections were incorporated into the Act in order to comply with Canada's international obligations. Paragraph 3(2)(b) of the Act specifically sets out as an objective of the Act the fulfillment of Canada's international legal obligations with respect to refugees.

[16] In this case, Officer Milcic recognized in his cross-examination on his affidavit that he was "building a case" against the Applicant. This enforcement attitude is incompatible with Canada's international obligations and the Applicant's *Charter* rights, including her section 7 *Charter* rights to security of the person and not to be deprived thereof except in accordance with the principles of fundamental justice. The Applicant should have been treated with greater respect and with sensitivity to her needs as a potential refugee claimant.

[17] In this specific case, the officers should have been concerned about potential protection issues as soon as the Applicant indicated that her father had been assassinated. Instead, the officers treated the Applicant as an economic migrant with no concern as to her requirements as a person in need of protection.

[18] In addition, though an interpreter service was readily available to the officer who conducted the examination, the Applicant was only questioned in English, a language in which she was not entirely comfortable and which she did not fully understand. Obviously the Applicant understood some English, but the officers should have been more sensitive to her needs and to her linguistic difficulties before carrying out their questioning. In this case, the Applicant later testified that she did not understand the meaning of the word "persecution" and, consequently, her answers to the officers at the airport interview on the subject of persecution were erroneous. This was compounded by the frightful experience the Applicant was being put through by the border security services.

Position of the Respondents

[19] For the Respondents, the only substantive issue in this case is whether the allegations of unprofessional behavior against the officers have been established by the Applicant. The Respondents note that the Applicant's testimony has been contradictory throughout these proceedings, makes little sense, and is unsupported by the record. In short, the Applicant is not a particularly trustworthy witness and her version of the events leading up to the removal order should not be given any weight. The Respondents submit that the Applicant presents the classic scenario of a person who, having failed to make a refugee claim at a port of entry interview, later returns with

an “improved” version of her story, including new allegations of persecution. The Respondents thus seek the dismissal of the judicial review with costs in light of the egregious comportment of the Applicant.

[20] The Respondents note that though the Applicant claims in her affidavit that she was strip-searched, she subsequently changed her story in cross-examination. In light of the abundant evidence demonstrating that a strip search never took place, the Applicant now asserts simply being searched by a scanner and patted down while wearing a t-shirt and pants.

[21] The Applicant provides a story about transferring the deed to a house to her smuggler “Steve” but insists she does not know the name of “Steve”, an incredible assertion for someone who had signed a title document with “Steve” which must surely contain his full name.

[22] The Applicant clearly indicated she could answer questions in the English language at the airport interviews, and the officers who interviewed her all testified to her understanding of English. Yet now the Applicant claims to have insufficient knowledge of the English language so as to explain away the answers she gave at those interviews which no longer serve the purposes of her new allegations as a person in need of protection.

[23] The unmistakable conclusion from all these inconsistencies and contradictions is that the Applicant is simply not credible.

[24] Moreover, as recognized by this Court in *Mitchell v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 918, [2008] F.C.J. No. 1147 (QL), section 7 of the *Charter* is not engaged at the eligibility determination stage. This is consistent with the case law which has found that section 7 of the *Charter* is not engaged where alternative remedies exist in which the allegations of risk may be considered prior to removal. In this case, the Applicant is eligible for a pre-removal risk assessment under the Act in which all of her risk allegations can be dealt with prior to her removal. Consequently, no *Charter* argument is engaged by this case.

Pertinent legislative provisions

[25] The provisions of paragraphs 3(2)(a), (b), (c) and (e), subsections 11(1) and 18(1), paragraph 41(a), and subsections 44(1) and (2), 99(3) and 112(1) of the Act read as follows:

3. (2) The objectives of this Act with respect to refugees are	**3.** (2) S'agissant des réfugiés, la présente loi a pour objet :
(*a*) to recognize that the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted;	*a*) de reconnaître que le programme pour les réfugiés vise avant tout à sauver des vies et à protéger les personnes de la persécution;
(*b*) to fulfil Canada's international legal obligations with respect to refugees and affirm Canada's commitment to international efforts to provide assistance to those in need of resettlement;	*b*) de remplir les obligations en droit international du Canada relatives aux réfugiés et aux personnes déplacées et d'affirmer la volonté du Canada de participer aux efforts de la communauté internationale pour venir en aide aux personnes qui doivent se réinstaller;
(*c*) to grant, as a fundamental	*c*) de faire bénéficier ceux qui

expression of Canada's humanitarian ideals, fair consideration to those who come to Canada claiming persecution;

[…]

(*e*) to establish fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system, while upholding Canada's respect for the human rights and fundamental freedoms of all human beings;

11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.

18. (1) Every person seeking to enter Canada must appear for an examination to determine whether that person has a right to enter Canada or is or may become authorized to enter and remain in Canada.

41. A person is inadmissible for failing to comply with this Act

(*a*) in the case of a foreign national, through an act or

fuient la persécution d'une procédure équitable reflétant les idéaux humanitaires du Canada;

[…]

e) de mettre en place une procédure équitable et efficace qui soit respectueuse, d'une part, de l'intégrité du processus canadien d'asile et, d'autre part, des droits et des libertés fondamentales reconnus à tout être humain;

11. (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.

18. (1) Quiconque cherche à entrer au Canada est tenu de se soumettre au contrôle visant à déterminer s'il a le droit d'y entrer ou s'il est autorisé, ou peut l'être, à y entrer et à y séjourner.

41. S'agissant de l'étranger, emportent interdiction de territoire pour manquement à la présente loi tout fait — acte ou omission — commis directement ou indirectement

omission which contravenes, directly or indirectly, a provision of this Act; […]

en contravention avec la présente loi […]

44. (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.

44. (1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.

(2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.

(2) S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi.

99. (3) A claim for refugee protection made by a person inside Canada must be made to an officer, may not be made by a person who is subject to a removal order, and is governed by this Part.

99. (3) Celle de la personne se trouvant au Canada se fait à l'agent et est régie par la présente partie; toutefois la personne visée par une mesure de renvoi n'est pas admise à la faire.

112. (1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the

112. (1) La personne se trouvant au Canada et qui n'est pas visée au paragraphe 115(1) peut, conformément aux règlements, demander la

Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).	protection au ministre si elle est visée par une mesure de renvoi ayant pris effet ou nommée au certificat visé au paragraphe 77(1).

Analysis

[26] Though the Applicant's counsel raises interesting and well articulated arguments concerning principles of natural justice and procedural fairness, as well as concerning the interrelation between the *Charter* and the preliminary steps under the Act leading to the determination of a refugee protection claim, it will not be necessary to address these arguments.

[27] In this case, the Applicant has failed to establish a proper factual basis which sustains the legal issues raised by her counsel.

[28] Simply put, the Applicant's assertion that she did not understand English sufficiently to correctly answer the questions she was asked at the Toronto International Airport is simply not tenable. In addition, there is no evidence in the record before me demonstrating that the Applicant was somehow placed in a "frightful situation" which impeded her ability to assert a claim for protection at the interviews conducted by Canada Border Services Agency officers.

[29] Based on the record before me, the Applicant clearly acknowledged to the concerned officers that she was an economic migrant who had no fear of returning to Nigeria. In such circumstances, the officers acted properly and reasonably in preparing and issuing an exclusion

order against her. Any claims the Applicant may now have regarding the risk she alleges if returned to Nigeria will be dealt with through the mechanisms provided under the Act, notably the pre-removal risk assessment procedure.

[30] In this case, the Applicant paid a substantial price to a smuggler in order to enter Canada, and arrived at the Toronto International Airport without any documentation. Her flight arrived at approximately 3:00 pm on November 8, 2008 and her interview with Officer Milcic, which eventually resulted in the exclusion order taken against her, was completed at 5:10 pm. During this relatively short period of time, the Applicant had to disembark from the aircraft and had to go through a primary examination line with all other passengers. Since the Applicant had no papers, she was referred to a secondary examination. Officers had to search the plane for her documents and thereafter proceeded to conduct a scan to search for the missing travel documents. The Applicant was then interviewed by Officer Milcic.

[31] It is simply inconceivable that the Applicant expected to pass the Canadian border controls without being questioned. The allegation that she encountered a “frightful” experience has simply not been established. She arrived at the airport without any papers and clearly as an illegal migrant. It was the duty of the officers of the Canada Border Services Agency to question her and to ascertain the purposes for which she was attempting to gain entry into Canada. I find, on the record before me, that the officers carried out their duties in an appropriate and fair manner.

[32] Turning first to the allegation of a strip search, the record conclusively demonstrates that no strip search of the Applicant was ever carried out. The Applicant herself admitted as much in her cross-examination. The Applicant had to remove some over clothing for a scan in what appears to have been no more intrusive an operation than what all international travelers are accustomed to for airport travel. Such a search is reasonable and engages no constitutional issues: *Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] 1 S.C.R. 1053 at pages 1071 to 1074 and 1077.

[33] The Applicant's assertion that she did not sufficiently understand English in the interview with Officer Milcic is contradictory to the record before me. The evidence in the record shows that the Applicant was offered the services of an interpreter and declined this offer, preferring to carry out the interview in English. Both Officer Milcic and the Minister's delegate Maria Martins-Miller attest under oath that they had no difficulties communicating verbally with the Applicant in English, who further confirmed to them that she understood what was being said to her in English. I note that the affidavit of Maria Martins-Miller has not been challenged by the Applicant.

[34] I therefore do not accept that the Applicant did not understand the questions put to her at the airport. However, even if I were to accept, as the Applicant asserts, that she did not understand the meaning of the word "persecution", this would still not explain why the Applicant answered "no" to numerous simple questions put to her about any fear of returning to Nigeria.

[35] The Applicant asserts that Officer Milcic was not sensitive enough to her situation as a potential refugee. Yet Officer Milcic asked the Applicant <u>at least five times</u> if she had any fear of

returning to Nigeria, and she answered “no” each time. Moreover, the Applicant herself confirmed in writing that she was not afraid to return to Nigeria. In this context, I fail to understand what more “sensitivity” Officer Milcic could have shown the Applicant in ascertaining if she had such a fear.

[36] The Applicant’s counsel takes issue with Officer Milcic’s testimony that he was “building a case” against the Applicant, but this statement is used by counsel out of its context. The Applicant clearly indicated to Officer Milcic that she was an economic migrant without any travel documents who was attempting to gain access to Canada for work purposes and not out of any fear. Officer Milcic’s answer to the question put to him was as follows (cross-examination of Allen Milcic at page 44 question 138):

> Q. So you were building a file on Ms. Uwadia when you were questioning her?
>
> A. Absolutely I was building a file, ma’am. She came to Canada undocumented. I needed to examine why. I needed to understand why, and based on her answers, I felt that there was a possibility that there may be an enforcement action coming. I needed to build a file as properly as possible with as much information as possible, so that when a Minister’s delegate made a decision, they could make a fully educated decision.

The officer’s actions were proper in the circumstances of this case, and based on the foregoing, I can find no breach of natural justice or of procedural fairness, nor do I find any bias in the manner in which the officer handled the Applicant’s case. The officer was simply doing his duty.

[37] The Applicant further argues that since she indicated that her father had been assassinated, this should have raised concerns with the officer as to a potential need for protection. I find no merit in this argument. The Applicant indicated that her father had been assassinated in 1993; this was

fifteen years before her arrival in Canada. In addition, the Applicants written declaration, in which she disclosed her father's assassination, was written after the Applicant had repeatedly stated that she had no fear of returning to Nigeria. The conclusion drawn by Officer Milcic was entirely reasonable and proper as noted in his cross-examination (cross-examination of Allen Milcic at page 45 question 140):

> Q. So despite seeing on page 22 of the CTR that she noted that "My father died by assassination", that possibility didn't strike you that she would be afraid of going back to Nigeria?
>
> A. No, ma'am. I gave her every opportunity to explain to me if there was any fear of her returning to Nigeria. So between the fact that it happened 15 years ago and the fact she told me on numerous occasions that she had absolutely no fear of returning to Nigeria, that she had nothing to fear, that she was not persecuted and that nothing would happen to her if she returned to Nigeria, I came to the only possible conclusion, and that was she had no fear of returning to Nigeria.

[38] The Supreme Court of Canada has stated in a number of decisions that the obligations imposed by the duty of fairness vary with the circumstances: *Knight v. Indian Head School Division No. 19,* [1990] 1 S.C.R. 653, at p. 682; *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817 at para. 21.

[39] Here, the Canada Border Services Agency was dealing with a foreign national who was clearly attempting to enter Canada without documentation and with admitted assistance from a smuggler. There is no evidence before me indicating that the officers of the Canada Border Services Agency acted improperly in either searching or questioning the Applicant. The Applicant was offered interpretation services, and she declined such services, preferring to proceed in English. The

Applicant expressed herself in English to the officers in a manner which raised no concern with them as to her ability to communicate in English. The Applicant was repeatedly asked if she had any fear of returning to Nigeria and she repeatedly answered negatively. The Applicant was repeatedly asked why she was coming to Canada and she repeatedly answered it was for the purpose of working to help her family.

[40] In these circumstances, the facts of this case cannot support the argument that a breach to the rules of natural justice or to procedural fairness occurred or that any constitutionally protected right was otherwise violated or infringed. Therefore, I need not discuss further the questions of law raised by the Applicant's counsel, and I therefore take no position on these questions which are left to be decided, if need be, in another case presenting a proper factual foundation.

The claim for costs

[41] The Respondents seek costs against the Applicant. The Respondents' position is that the Applicant created an unnecessary delay in her cross-examination by demanding an Edo interpreter at the last minute, although her affidavit was drafted in English without the assistance of an interpreter. Consequently, the Applicant should bear the unnecessary expenses of one day of cross-examination and associated transcript costs which was created by insisting on an interpreter where the circumstances were clear that she understood English for the purposes of subsections 80(2.1) and 93(1) of the *Federal Courts Rules*, SOR/98-106.

[42] The Applicant asserts that pursuant to Rule 22 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22 no costs are to be awarded to or payable by any party in respect of an application for judicial review made pursuant to sections 72 and following of the Act unless the Court, for special reasons, so orders. No such special reasons exist here.

[43] This dispute is essentially about which party should bear the financial responsibility for the costs of an interpreter when an affiant is cross-examined. It is useful to note that the Applicant submitted an affidavit drafted in the English language in support of her application for leave and for judicial review. The Respondents consequently wished to cross-examine her, but a few days before the day set for the cross-examination, the Applicant insisted that an Edo interpreter be made available. The Respondents considered this request abusive, while the Applicant believed she was entitled to an interpreter. The Respondents finally secured the services of an Edo interpreter, but under protest as to an eventual claim for costs.

[44] Both parties agree that there is no case law on this issue.

[45] Subsection 4(1) of the *Federal Courts Immigration and Refugee Protection Rules* provides that subsections 80(2.1) and 93(1) of the *Federal Courts Rules* apply to these proceedings. These subsections of the *Federal Courts Rules* set out the following:

80. (2.1) Where an affidavit is written in an official language for a deponent who does not understand that official language, the affidavit shall	**80.** (2.1) Lorsqu'un affidavit est rédigé dans une des langues officielles pour un déclarant qui ne comprend pas cette langue, l'affidavit doit :

(*a*) be translated orally for the deponent in the language of the deponent by a competent and independent interpreter who has taken an oath, in Form 80B, as to the performance of his or her duties; and	*a*) être traduit oralement pour le déclarant dans sa langue par un interprète indépendant et compétent qui a prêté le serment, selon la formule 80B, de bien exercer ses fonctions;
(*b*) contain a jurat in Form 80C.	*b*) comporter la formule d'assermentation prévue à la formule 80C.
93. (1) Where a person to be examined on an oral examination understands neither French nor English or is deaf or mute, the examining party shall arrange for the attendance and pay the fees and disbursements of an independent and competent person to accurately interpret everything said during the examination, other than statements that the attending parties agree to exclude from the record.	**93.** (1) Si la personne soumise à un interrogatoire oral ne comprend ni le français ni l'anglais ou si elle est sourde ou muette, la partie qui interroge s'assure de la présence et paie les honoraires et débours d'un interprète indépendant et compétent chargé d'interpréter fidèlement les parties de l'interrogatoire oral qui sont enregistrées selon le paragraphe 89(4).

[46] The Applicant submitted an affidavit in the English language without any jurat by an interpreter. When the Applicant indicated her need for an interpreter for cross-examination on her affidavit (a need first raised just a few days before the date originally set for her cross-examination), the issue of the validity of her affidavit was then raised by the Respondents. Indeed, if the Applicant did not understand English, her affidavit, which was not accompanied by a jurat from a translator, would carry little or no weight: *Momcilovic v. Canada (Minister of Citizenship and Immigration*, 2001 FCT 998, [2001] F.C.J. No. 1375 (QL) at para. 6; *Liu v. Canada (Minister of Citizenship and*

Immigration), 2003 FCT 375, 231 F.T.R. 148, [2003] F.C.J. No. 525 (QL) at para. 13; *Singh v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 315, [2006] F.C.J. No. 387 (QL) at para. 44; *Tkachenko v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1652, [2005] F.C.J. No. 2105 (QL) at para. 8.

[47] Faced with this situation, the Applicant subsequently asserted that she did understand English, but not sufficiently for a cross-examination. She also added that her affidavit had been translated to her by an unnamed "somebody" in the Edo language who was not qualified to sign a jurat. The fact that this unqualified interpreter was never identified and never testified is somewhat disconcerting. Moreover, the Applicant could have submitted a new corrected affidavit containing the interpretation jurat as was allowed in *Fibremann Inc. v. Rocky Mountain Spring (Icewater 02) Inc.*, 2005 FC 977, [2005] F.C.J. No. 1238 (QL), but she never did so.

[48] The inescapable conclusion is that the Applicant did sign her affidavit in English because she understood that language sufficiently to do so. This is, moreover, entirely consistent with all the other evidence in the record demonstrating that the Applicant understood English and could adequately communicate in that language with the Canada Border Services Agency officers upon her arrival in Canada.

[49] The issue, therefore, is whether the Respondents had to assume the costs of an interpreter in cross-examining the Applicant on her affidavit if that interpreter was requested by the Applicant out of preference rather than out of necessity. In my opinion, if the Applicant's preference was to be

assisted by an interpreter for her cross examination, in the particular circumstances of this case, it was her responsibility to secure these services.

[50] The Respondents have estimated the costs of the interpreter at $250, and this estimate was not challenged by counsel for the Applicant. Consequently, the issue here is if an order for costs in this amount should be made against the Applicant. Rule 22 of the *Federal Courts Immigration and Refugee Protection Rules* specifically restricts costs orders:

22. No costs shall be awarded to or payable by any party in respect of an application for leave, an application for judicial review or an appeal under these Rules unless the Court, for special reasons, so orders.	**22.** Sauf ordonnance contraire rendue par un juge pour des raisons spéciales, la demande d'autorisation, la demande de contrôle judiciaire ou l'appel introduit en application des présentes règles ne donnent pas lieu à des dépens.

[51] Costs are therefore exceptional in judicial review applications under the Act, and may only be awarded for special reasons. I do not find that special reasons have been established here justifying such an award.

[52] In this case, the Respondents could have submitted a motion to this Court to decide the matter of interpretation prior to proceeding with the cross-examination of the Applicant. The Respondents decided instead to proceed with the cross-examination of the Applicant with an interpreter retained at their own expense. In such circumstances, I am not inclined to now grant them costs for expenses which could have been avoided had a motion to adjudicate the issue been submitted prior to the expense being incurred.

Question for certification

[53] Both the Applicant and the Respondents agreed that there was no serious question of general importance involved in this judicial review. Nevertheless, some of the legal issues raised by the Applicant may have warranted certification under paragraph 74(d) of the Act. However, the lack of a proper factual foundation to argue these issues leads me to conclude that no question should be so certified.

JUDGMENT

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

"Robert M. Mainville"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5439-08
STYLE OF CAUSE:	OGHOMWEN UWADIA v. THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS and THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	May 13, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	MAINVILLE J.
DATED:	May 26, 2010

APPEARANCES:

Wennie Lee	FOR THE APPLICANT
Jamie Todd Manuel Mendelzon	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

LEE & COMPANY Immigration Advocacy , Counsel & Litigation North York, Ontario	FOR THE APPLICANT
MYLES J. KIRVAN Deputy Attorney General of Canada	FOR THE RESPONDENTS