

Federal Court



Cour fédérale

Date: 20130604

Docket: IMM-6405-12

Citation: 2013 FC 596

Ottawa, Ontario, June 4, 2013

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

MOHAMMED MURITALA SHUAIB

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant is a citizen of the Federal Republic of Nigeria who came to Canada in October 2011. He applied for refugee protection in Canada, claiming fear of persecution at the hands of his family, the police and the community because of his sexual orientation. In a decision dated June 11, 2012, a panel of the Immigration and Refugee Board, Refugee Protection Division (the Board) concluded that the Applicant was not a Convention refugee pursuant to s. 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*) or a person in need

of protection under s. 97 of *IRPA*. Simply stated, the Board did not believe that the Applicant was gay.

[2] The Applicant seeks to overturn the decision. For the reasons that follow and on the unusual facts before me, I agree that this decision should be quashed.

[3] The Applicant raises two issues:

1. Is the Board's credibility finding reasonable?
2. Did the Board breach the rules of procedural fairness by failing to consider the Applicant's post-hearing documents?

[4] If I were to assess the Board's decision based on everything that was before the Board as of the date of the hearing, I would conclude that the decision was reasonable. However, the determinative issue in this case is whether the Board erred by failing to consider certain evidence submitted after the hearing.

[5] The oral hearing took place on May 8, 2012. Under cover letter dated June 6, 2012, counsel for the Applicant forwarded further documents (Post-hearing Documents) to the Board. These documents included a copy of the Applicant's Driver's Licence, an Affidavit from the Applicant's brother attesting to certain facts that appear to corroborate the Applicant's testimony

before the Board and a Police document allegedly inviting the Applicant to a police interview in respect of an “ongoing investigation concerning a suspicious homosexual act”.

[6] Given that there is absolutely no mention of the Post-hearing Documents in the decision, I assume that they were not considered by the Board. Two questions remain:

1. Was it open to the Board to reject the Post-hearing Documents on the basis that no application for their admission was made as required by s. 43 of the *Refugee Protection Division Rules, SOR/2012-256* (the *RPD Rules*)?
2. Would consideration of the Post-hearing Documents have had a material impact on the outcome of the Applicant’s case?

[7] Rule 43 of the *RPD Rules* (previously, Rule 37), states that a party wishing to adduce post-hearing evidence must make an application, accompanied by the desired evidence, under Rule 50 (formerly, Rule 44). This application should be made in writing and without delay, explain the decision the party wishes the Board to make and provide the reasons why this decision should be made. If there is another party, which is not the case here, the application should state whether this party agrees to the application, if this information is known.

[8] In my view, the letter and attached documents provided on June 6, 2012 meet these requirements for three reasons:

1. The letter in the Applicant's Record is stamped as received by the Board on June 6, 2012. There is no question concerning when and whether these documents arrived at the Board. The Respondent does not dispute this point.
2. Counsel for the Applicant clearly states in the letter that post-hearing documents are attached. Although it is not explicit, this letter is clearly a request to consider the admittance of these post-hearing documents and could not be interpreted in any other way.
3. An affidavit from the Applicant's brother is attached explaining the circumstances under which the most important document – the letter from the Nigerian Police – was obtained. Specifically, the brother explains why this document was not available earlier, that it was provided as soon as it was found and why the Board should consider it.

[9] These circumstances are very similar to those in *Nagulesan v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1382, 44 Imm LR (3d) 99 [*Nagulesan*]. In that case, the applicant filed additional evidence, explaining that the Board member had requested this corroborating evidence during the hearing (*Nagulesan*, above at paras 3, 16-17). In that situation,

as in this one, forwarding the documents and explaining why they should be considered was sufficient to satisfy the requirements of the *RPD Rules*.

[10] The second question is whether this additional evidence could have a material effect on the decision or whether the result is inevitable. The Court must consider whether a breach of procedural fairness is “purely technical and occasions no substantial wrong or miscarriage of justice” (*Khosa v Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12 at para 43, [2009] 1 SCR 339; *Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202 at 228-229, 111 DLR (4th) 1). In my view, this evidence is significant enough that it could have affected the outcome. The Post-hearing Documents directly address the issue of the Applicant’s homosexuality, the core element of his claim.

[11] In sum, on the particular facts of this case, it was open to the Board to either explain: (a) why the late submission would not be accepted; or (b) why the Post-hearing Documents would not change its conclusion. What was not open to the Board was to ignore the Post-hearing Documents as it did.

[12] Neither party proposes a question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. the application for judicial review is allowed, the decision quashed and the matter remitted to a different panel of the Board for redetermination; and
2. no question of general importance is certified.

“Judith A. Snider”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6405-12

STYLE OF CAUSE: MOHAMMED MURITALA SHUAIB v.
THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: MAY 29, 2013

REASONS FOR JUDGMENT: SNIDER J.

DATED: JUNE 4, 2013

APPEARANCES:

Sina Ogunleye FOR THE APPLICANT

Ndija Anderson FOR THE RESPONDENT

SOLICITORS OF RECORD:

Sina Ogunleye FOR THE APPLICANT
Barrister and Solicitor
Toronto, Ontario

William F. Pentney FOR THE RESPONDENT
Deputy Attorney General of Canada
Toronto, Ontario