

**Date: 20060705**

**Docket: IMM-6058-05**

**Citation: 2006 FC 847**

**Ottawa, Ontario, July 5, 2006**

**PRESENT: The Honourable Mr. Justice Mosley**

**BETWEEN:**

**JOSHUA KAMAU NDEGWA**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review of the decision of the Immigration and Refugee Board that the applicant was not a Convention refugee or person in need of protection.

[2] The applicant is a Kenyan citizen who alleged a fear of persecution in Kenya due to his refusal to have his daughter circumcised. The Board found that he was a victim of indirect persecution and was not personally targeted.

[3] The applicant's daughter was born in Kenya in 1996. In 2001 the applicant and his wife refused to have her circumcised. As a result, the applicant's family threatened to force the applicant and his family out of their house and they were accused of bringing calamity on the family. His wife was attacked by members of his family and hospitalised, and their village disassociated from them. As a result, the applicant and his family decided to come to Canada.

[4] The applicant, his wife, and their daughter arrived in Canada in September 2003 and claimed refugee status. The applicant had his claim heard along with that of his wife and daughter. While the panel accepted their evidence as credible and his wife and daughter were granted refugee status, the claim of the applicant was rejected as the Board found he was only a victim of indirect persecution and, as such, was not entitled to refugee protection.

[5] The three claims were based on the same facts. The applicant submits that it was erroneous for the panel to disassociate the applicant's claim from that of his daughter and wife. The applicant also submits that the Board erred in not conducting a separate analysis as to whether he was a person in need of protection under section 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

## Issue

[6] The issue is whether the Board erred in its finding that the applicant was not a Convention refugee or person in need of protection.

## Standard of Review

[7] The identification of persecution behind incidents of discrimination or harassment is not purely a question of fact but a mixed question of law and fact. The intervention of the Court on that finding will not be warranted unless the conclusion reached by the Board appears to be unreasonable: *Tolu v. (Canada) Minister of Citizenship and Immigration*, (2002) 218 F.T.R. 205, 2002 FCT 334; *Bela v. (Canada) Minister of Citizenship and Immigration*, 2001 FCT 581, [2001] F.C.J. No. 92 (T.D.) (QL).

## Analysis

[8] The law requires that a refugee claimant show that there is a personal nexus between him and the alleged persecution based on one of the Convention refugee grounds. Thus, indirect persecution is not a solid foundation for a Convention refugee claim: *Pour-Shariati v. Canada (Minister of Employment and Immigration)* (1997), 215 N.R. 174, 39 Imm. L.R. (2d) 103 (C.A.) [*Pour-Shariati*]; *Granada v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1766, [2004] F.C.J. No. 2164 (QL).

[9] That the family is a valid social group for the purposes of seeking refugee protection is well established. Where membership in a family group is the basis for the claim, a personal nexus must be established between the claimant and the alleged persecution on Convention grounds: *Pour-Shariati*. It is not enough to point to the persecution suffered by family members if it is unlikely to affect the claimant directly. In this case, there was a sufficient nexus between the applicant's claim and his wife and daughter's persecution. The applicant is the husband and father of the women and therefore he would directly be at risk resulting from the decision not to allow his daughter's circumcision.

[10] In this case the Board member erred by not considering whether the applicant would be persecuted as a member of his family. While indirect persecution is not sufficient to ground a claim for refugee protection, in this case the member should have considered the applicant's membership in the family as something giving rise to a risk of persecution.

[11] It was unreasonable for the Board member to conclude that the applicant's wife and daughter were Convention refugees without considering the applicant's relationship to them as husband and father respectively. This is not a case of indirect persecution. The applicant is not just an "unwilling spectator of violence" against other members of his family, as described by Justice Luc Martineau in *Granada v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1766, [2004] F.C.J. No. 2164 (QL). He himself may be at risk due to the relationship with his wife. The Board should have considered this in its analysis.

[12] The applicant contends that the Board was also required to conduct a separate analysis under section 97. In light of my conclusion that the section 96 decision was unreasonable, I do not need to address this question. However, absent evidence beyond that considered in the section 96 analysis that could establish that the claimant is in need of protection a separate s. 97 analysis will not be required. See *Soleimanian v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1660 paragraph 22, [2004] F.C.J. No. 2013 (QL); *Brovina v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 635, [2004] F.C.J. No. 771 (QL); *Islam v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1391, [2004] F.C.J. No. 1711 (QL); *Nyathi v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1119, [2003] F.C.J. No. 1409 (QL); *Ozdemir v. Canada (Minister of Citizenship and Immigration)* (2004), 256 F.T.R. 154, 2004 FC 1008.

[13] The parties proposed no serious questions of general importance and none will be certified.

### **JUDGMENT**

**THIS COURT ORDERS** that the application is granted and the matter is remitted for reconsideration by a differently constituted panel. No questions are certified.

"Richard G. Mosley"

Judge

**FEDERAL COURT**

**NAME OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** IMM-6058-05

**STYLE OF CAUSE:** JOSHUA KAMAU NDEGWA  
and  
THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** June 29, 2006

**REASONS FOR JUDGMENT:** MOSLEY J.

**DATED:** July 5, 2006

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