

Ikeni v. Mukasey

United States Court of Appeals for the Ninth Circuit

January 18, 2008; May 30, 2008, Filed

No. 04-71848

Reporter

281 Fed. Appx. 647; 2008 U.S. App. LEXIS 12090

PATRICIA TONYE IKENI, aka Donna Lou Marwih, Petitioner v. MICHAEL B. MUKASEY, * Attorney General, Respondent

Notice: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: **[**1]** On Petition for Review of an Order of the Board of Immigration Appeals. Agency No. A77-169-405.

Disposition: PETITION GRANTED; REMANDED with instructions.

Core Terms

documents, authentication, credibility, new hearing, telephonic, asylum, instructions, Immigration, petition for review, appropriate weight, reasonable way, cogent reason, identification, certification, corroborating, erroneously, reliability, ethnicity, consular, objected, passport, letters

Case Summary

Procedural Posture

Petitioner alien sought review of an order from the Board of Immigration Appeals, which affirmed an immigration judge's (IJ) decision denying the alien's claims for asylum, withholding of removal, and relief under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, 23 I.L.M. 1027.

Overview

The IJ determined that the alien was not credible, based primarily on the alien's failure credibly to establish her personal identity. On review, the court found that the IJ erroneously excluded evidence submitted by the alien to establish her identity. For example, the IJ noted the alien's lack of documentation corroborating her identity during a preliminary hearing. The IJ approved of the government's suggestion that the alien could get documents related to her employment to establish her identity. At her subsequent hearing, the alien offered several employment documents. The IJ stated that the documents could not be considered until the alien explained what happened to her passport. The court held that the IJ did not present a legitimate basis for distrusting the employment documents, as the alien's failure to produce a passport did not undermine the reliability of the employment documents. Those documents, absent a specific reason to doubt their reliability, provided a very reasonable way to identify the alien. The IJ also erred by refusing to allow the Secretary General of the Ijaw National Congress, U.S.A., to testify by telephone.

Outcome

The court granted the alien's petition for review and remanded the matter with instructions that the alien be given a new hearing in front of a different IJ to ensure that the alien had an opportunity to establish her identity. After assessing the evidence, the IJ at the new hearing would be free to make whatever decision was warranted by the record, including an adverse credibility determination.

LexisNexis® Headnotes

Immigration Law > Asylum, Refugees & Related Relief > Asylum > Eligibility for Asylum

* Michael B. Mukasey is substituted for his predecessor, Peter D. Keisler, as Attorney General of the United States, pursuant to Fed. R. App. P. 43(c)(2).

Immigration Law > ... > Administrative Proceedings > Evidence > General Overview

HN1 Although an immigration judge (IJ) may deny an asylum application based on a finding that the petitioner's documentary evidence is not credible, the IJ must offer a legitimate, articulable basis for the finding and a specific, cogent reason for any stated disbelief. More specifically, an adverse credibility finding cannot rest on mere speculation or conjecture, such as the IJ's bare subjective opinion about the authenticity or probity of documents. Rather, the record must include some evidence undermining their reliability, such that a reviewing court can objectively verify whether the IJ has a legitimate basis to distrust the documents.

Evidence > Authentication > General Overview

Immigration Law > ... > Administrative Proceedings > Evidence > Admissibility of Evidence

HN2 The United States Court of Appeals for the Ninth Circuit has held that it is error to exclude official records from another country based solely on the lack of consular certification. A petitioner may authenticate a foreign document through any recognized procedure for authentication of documents in general, including the petitioner's own testimony.

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For MICHAEL B. MUKASEY, Attorney General, Respondent: Charles E. Canter, Esq., Attorney, OIL, DOJ - U.S. DEPARTMENT OF JUSTICE, Civil Division/Office of Immigration Litigation, Washington, DC; Alisa Kaufman, Esq., Attorney, San Francisco, CA; Ronald E. LeFevre, OFFICE OF THE DISTRICT COUNSEL, Department of Homeland Security, San Francisco, CA; Steven K. Sharpe, Esq., Attorney, Cheyenne, WY.

Judges: Before: NOONAN, W. FLETCHER, BEA, Circuit Judges.

Opinion

[*648] MEMORANDUM **

Before: NOONAN, W. FLETCHER, BEA, Circuit Judges

Patricia Ikeni, a native and citizen of Nigeria, petitions for review of the Board of Immigration Appeals' ("BIA") order affirming the Immigration Judge's ("IJ") decision denying Ikeni's claims for asylum, withholding of removal, and relief under the Convention Against Torture ("CAT"). We have jurisdiction under 8 U.S.C. § 1252, and **[**2]** we grant the petition and remand with instructions that Ikeni be given a new hearing.

The IJ found Ikeni was not credible, based primarily on Ikeni's failure credibly to establish her personal identity. During the hearing, however, the IJ erroneously excluded evidence submitted by Ikeni to establish her identity.

During the July 20, 1999 preliminary hearing, the IJ noted Ikeni's lack of documentation corroborating her identity. The government attorney suggested Ikeni could "get documents related to her employment . . . establishing her identification because she worked at United Plastic Industries for seven years. . . ." The IJ approved of this suggestion, stating: "That certainly is a very reasonable way to identify who she is and where she had been."

Accordingly, during her May 17, 2002 hearing before the IJ, Ikeni offered an employment letter from United Plastic Industries, a letter from the company's personnel manager, and an employee badge as proof of her identity. The government (now represented by a different attorney) objected to these documents for lack of authentication. The IJ responded she would give the documents "appropriate weight," later stating they "could not be considered **[**3]** personal identification documents unless and until [Ikeni] can explain what happened to [her] passport."

HN1 Although an IJ may deny an asylum application based on a finding that the petitioner's documentary evidence is not credible, the IJ must offer a "legitimate, articulable basis for the finding and a specific, cogent reason for any stated disbelief." Lin v. Gonzales, 434 F.3d 1158, 1162 (9th Cir. 2006) (internal quotation marks and alterations omitted).

More specifically, an adverse credibility finding cannot rest on mere speculation **[*649]** or conjecture, such as the IJ's bare subjective opinion about the authenticity or probity of documents. Rather, the record must include some "evidence

** This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

undermining their reliability," such that a reviewing court can objectively verify whether the IJ has a legitimate basis to distrust the documents.

Id (internal citations omitted).

Here, the IJ's "bait-and-switch" with respect to Ikeni's employment documents does not meet this standard. That Ikeni failed to produce a passport at the immigration hearing did nothing to undermine the reliability of the employment documents she submitted. As the IJ herself initially observed, these documents--absent a specific, **[**4]** cogent reason to doubt their reliability--provided a "very reasonable way to identify who she is[.]"

The IJ also refused to allow Mondy Gold, the Secretary General of the Ijaw National Congress, U.S.A., to testify either telephonically or via videoconference in support of Ikeni's asylum application, and further refused to admit two letters from Mr. Gold into evidence because he failed to appear in person at the hearing. ¹ Ikeni's asylum claim is based on her Ijaw ethnicity and, more specifically, her claimed leadership role in the Ijaw Youth Movement. The IJ's refusal to allow Mr. Gold to testify limited Ikeni's ability both to prove her identity and to establish the reasonableness of her fear of future persecution as a member of the Ijaw Youth Movement. We have addressed similar refusals by Us to allow telephonic testimony in two previous decisions. In both cases, we held the IJ erred in refusing to allow the telephonic testimony. See [Zolotukhin v. Gonzales, 417 F.3d 1073, 1076 \(9th Cir. 2005\)](#); [Biggs v. INS, 55 F.3d 1398, 1401-02 \(9th Cir. 1995\)](#).

Ikeni also submitted a Nigerian "Statutory Declaration of Age" as corroborating evidence of her identity. The

government objected to the admission of this document based on lack of authentication, contending the document must be authenticated by a stamp of a foreign service officer of the United States located in Nigeria. The IJ agreed, stating "the Government have properly stated their objection, and the reasoning is correct," and concluding she would give the document its "appropriate weight," which "would be none[.]"

HN2 We have held, however, it is error to exclude official records from another country based solely on the lack of consular certification. [Vatyan v. Mukasey, 508 F.3d 1179, 1181 \(9th Cir. 2007\)](#). A petitioner may authenticate a foreign document through "any recognized procedure for authentication of documents in general," including the petitioner's own testimony. [Id. at 1183](#). Thus, to the **[**6]** extent the IJ relied on lack of consular certification alone in refusing to consider the Statutory Declaration of Age, this was error.

In sum, we hold the IJ erroneously prevented Ikeni from presenting evidence to establish her identity. The IJ's error was not harmless. See [Vatyan, 508 F.3d at 1185](#). Accordingly, we grant Ikeni's petition for review with instructions that she be given a new hearing in front of a different IJ to ensure she has an opportunity to establish her identity. After assessing the evidence, the IJ at this new hearing is free to make whatever decision (including an adverse credibility determination) he or **[*650]** she determines is warranted by the record. ²

PETITION GRANTED; REMANDED with instructions.

¹ Mr. Gold's letters described conditions in Nigeria, and stated that Ikeni was of Ijaw ethnicity, was a member of the Ijaw Youth Movement, **[**5]** and would be in grave danger if she returned to Nigeria. At the time of the hearing, Mr. Gold lived in New York. The hearing was in San Francisco, California. Mr. Gold submitted a signed statement asserting "[b]ecause of the distance, I am available to testify . . . by telephone only[.]"

² Because we remand for a new hearing on the ground discussed, we need not and do not reach the other grounds of error raised by Ikeni on appeal.