

Federal Court



Cour fédérale

Date: 20160531

Docket: IMM-4590-15

Citation: 2016 FC 601

Ottawa, Ontario, May 31, 2016

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

**BUNMI AGNES EZE
RICHARD CHUKWUEMEKE EZE
OLUCHI MERCY EZE (MINOR)
KELECHI EMMANUEL EZE (MINOR)
AMARACHI CHRISTABEL EZE (MINOR)**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of the Refugee Protection Division (“RPD”) of the Immigration and Refugee Board of Canada (“IRB”), dated September 23, 2015, finding that the Applicants are neither Convention refugees nor persons in need of protection

pursuant to s 96 or s 97, respectively, of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (“IRPA”) and also finding that the Applicants’ claim had no credible basis.

Background

[2] The Applicants are husband (“Male Applicant”) and wife (“Female Applicant”) and their three minor children who are all citizens of Nigeria. In his Personal Information Form (“PIF”) narrative, the Male Applicant claimed that after the birth of his first daughter his mother and kinsman told him that female children are to be circumcised before the age of seven. He informed his mother that, as a Christian, he was opposed to this practice but his mother insisted as it was part of their culture.

[3] In January 2009, after the birth of their second daughter, the Male Applicant’s mother reminded him that the girls were to be circumcised. In February 2009, the Male Applicant’s uncle, who had previously expressed jealousy of the Applicants’ comfortable lifestyle, and his mother tried to forcibly remove the children, but neighbours intervened. The Male Applicant reported the incident to the police but they refused to become involved. In July 2009, a group of the Male Applicant’s family members again came to the Applicants’ home and said they would take his daughters whether he allowed it or not. He again reported this to the police to no avail.

[4] In 2010, the family moved to another location within Lagos and did not contact his family. Two years later, in July 2012, the Male Applicant’s brother informed him that there had been a meeting of the extended family and that they were considering hiring professional kidnappers to abduct his daughters and to kill anyone who stood in their way. The Male

Applicant reported the threat of kidnapping to the police and was again told to follow his family's traditions. The family fled to Canada on September 25, 2012.

[5] On July 10, 2015 and August 5, 2015, the Applicants submitted updated PIF narratives and further evidence, to support their claim that it remains unsafe for them to return to Nigeria.

Decision Under Review

[6] The RPD denied the Applicants' claim, finding that the determinative issue was credibility and that the Applicants' claim had no credible basis.

[7] The RPD found that despite indications in the country documents that female circumcision continues to be prevalent in Nigeria, most Nigerian women are not circumcised and most Nigerian men and women are now opposed to the practice. The RPD noted evidence stating that parents can refuse to have their daughters circumcised, especially if both parents agree, which was the circumstance in the subject claim. Further, female genital mutilation ("FMG"), which includes circumcision, has now been banned in 12 states throughout the country.

[8] The RPD found it improbable that the Male Applicant's mother would regularly travel over 500 kilometers from where she lived to the Applicants' home to harass them. The RPD also noted discrepancies between statements made by the Applicants at the port of entry ("POE") and their PIF narrative and testimony. Further, the RPD noted that the Male Applicant's allegedly jealous uncle was not mentioned at the POE, nor was there evidence that he exists; it found that

the uncle was likely introduced to bolster the claim with threats from male family members in Nigeria's paternalistic society. The RPD found that no mention was made of the three attempts to make police reports at the POE and that it was improbable that the police would not have produced a report during one of the Applicants' three visits. The RPD noted a Response to Information Request ("RIR") dated November 2012, entitled "Nigeria: Whether parents can refuse female genital mutilation for their daughters; protection available to the child" ("2012 RIR") which stated "most likely, police will also consider it a family affair and refuse to interfere". However, the RPD noted that this document was three years old and that recent trends in Nigeria suggest less support for FGM. For these reasons, the RPD found there was insufficient trustworthy evidence to support the claim that the Applicants' family in Nigeria is adamant about circumcising the adult Applicants' daughters or that they hired professional kidnapppers.

[9] The RPD also found inconsistencies regarding the Applicants' subjective fear. It noted that the adult Applicants left their children in Nigeria with the Female Applicant's sister while they left the country for vacations in 2009 and 2011. This was in contrast to the Female Applicant's testimony that between 2010 and 2012, the Male Applicant's family would visit two to three times a week to try and take their daughters. The RPD found this suggested that the adult Applicants were not concerned that the children were in any danger and further undermined the Applicants' credibility. Further, at the POE interview, the Male Applicant also stated that he travelled to Europe with his daughters in April 2012 but did not mention this in his PIF or at the hearing, nor did he claim protection in any of the European countries through which they travelled.

[10] The RPD also determined that the psychological reports concerning both adult Applicants were not persuasive as the doctor was not in a position to determine that their mental and emotional states resulted from their alleged problems in Nigeria. The RPD noted that psychological reports cannot serve as a cure-all and that opinion evidence is only as valid as the truth of the facts on which it is based (*Rokni v Canada (Minister of Citizenship and Immigration)*, [1995] FCJ No 182; *Danailov v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 1019) and gave them no weight. On the basis of its concerns with the Applicants' credibility and the availability of fraudulent documents in Nigeria, the RPD also gave no weight to the documents from Nigeria produced by the Applicants to corroborate their allegations.

Issues

[11] Although the Applicants raise a number of issues, in my view this matter can be determined on the reasonableness of the RPD's assessment of the Applicants' credibility and its no credible basis finding.

Standard of Review

[12] The RPD's credibility findings, described as the "the heartland of the Board's jurisdiction", are essentially pure findings of fact that are entitled to deference and have previously been determined to be reviewable on a reasonableness standard (*Behary v Canada (Citizenship and Immigration)*, 2015 FC 794 at para 19 [*Behary*]; *Pournaminivas v Canada (Citizenship and Immigration)*, 2015 FC 1099 at para 5 [*Pournaminivas*]; *Zhou v Canada*

(*Citizenship and Immigration*), 2013 FC 619 at para 26; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 62 [*Dunsmuir*]). Reasonableness is concerned with the existence of justification, transparency and intelligibility, and whether the decision falls within a range of possible, acceptable outcomes (*Dunsmuir* at para 47; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59).

Analysis

[13] I have carefully considered the parties' written and oral submissions.

[14] In this case, the RPD based its decision primarily on four negative credibility or plausibility findings. The RPD found it improbable that the Male Applicant's 70 year old mother who lives over 500 kilometers away would continue to pose a threat to the family over the years since the birth of his first daughter. I agree with the Applicants that there was no evidence that his mother was making this journey on a regular basis or that this was a necessary aspect of their claim given the alleged involvement of other family members.

[15] The RPD also found that the Applicants had not gone to the police with their concerns because it is "improbable that the police would not have produced some sort of report".

However, the RPD referred to no evidence to support this as is required for plausibility findings (*Valtchev v Canada (Citizenship and Immigration)*, 2001 FCT 776 at para 7; *Ye v Canada (Citizenship and Immigration)*, 2014 FC 1221 at para 29; *Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at para 9). Further, the documentary evidence quoted in the RPD's decision states that the police would likely treat FGM issues as familial and

refuse to intervene. This is excerpted from the 2012 RIR prepared by the Research Directorate of the Immigration and Refugee Board of Canada, the RPD's own research document.

[16] Although the RPD notes that this source is three years old and that recent trends indicate less support for FGM, the evidentiary basis for this finding is unclear as is the relevance of trends to the police making reports. Perhaps the RPD intended to suggest that, with changing attitudes, police might take FGM cases more seriously. However, the Respondent rejects this interpretation, submitting instead that the RPD was simply noting attitudinal trends. Regardless, decreasing public support for FGM does not necessarily correlate with improved police response. Such an inference would require an evidentiary foundation which is not present in the RPD's decision. Further, the Male Applicant's testimony was that the police told him that they don't involve themselves in such matters and that they did not make any written reports, which is consistent with the documentary evidence. Accordingly, the RPD's negative plausibility finding in this regard is also unreasonable.

[17] However, in my view, the RPD's finding of a lack of subjective fear was reasonable. The evidence was undisputed that the adult Applicants travelled abroad without their children following an alleged attempted abduction in 2009. Further, based on their PIFs, it is also apparent that members of the family traveled to Europe on several other occasions while the Male Applicant's family members were allegedly visiting their home two to three times a week in an effort to take the female children and subject them to FGM. At no point did the Applicants claim asylum in any of the countries they visited. It is of note, however, that the RPD referred to the Applicants' lack of subjective fear in the context of its broader credibility findings,

determining that it further undermined their credibility, but did not make a determinative finding based on subjective fear. A lack of subjective fear would alone suffice to defeat the Applicants' claim under s 96 of the IRPA (*Zaied v Canada (Citizenship and Immigration)*, 2012 FC 771 at para 17; *Farfan v Canada (Citizenship and Immigration)*, 2011 FC 123 at para 16; *Perez v Canada (Citizenship and Immigration)*, 2010 FC 345 at para 33; *Ghasemian v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1266 at para 14).

[18] The RPD also found that the jealous uncle was invented to bolster the Applicants' claim as he was not mentioned in the POE interview and there was no evidence that he exists.

[19] As stated by Justice Russell in *Cetinkaya v Canada (Citizenship and Immigration)*, 2012 FC 8 [*Cetinkaya*], the RPD should be careful not to place undue reliance on POE statements when considering differences between it and testimony at a hearing, given the circumstances surrounding the taking of the notes and their purpose:

It is an error of the RPD to impugn the credibility of the Applicant on the sole ground that the information provided by the Applicant at the POE interview lacks details. The purpose of the POE interview is to assess whether an individual is eligible and/or admissible to initiate a refugee claim. It is not a part of the claim itself and, consequently, it should not be expected to contain all of the details of the claim (see also *Hamdar v Canada (Minister of Citizenship and Immigration)*, 2011 FC 382 at paragraphs 43 through 48, and *Jamil v Canada (Minister of Citizenship and Immigration)*, 2006 FC 792 at paragraph 25) (at para 51).

[20] And, as stated by Justice Fothergill in *Kusmez v Canada (Citizenship and Immigration)*, 2015 FC 948 [*Kusmez*] at para 22, POE statements are to be treated with caution by the RPD (citing *Cetinkaya* at paras 50-51). Nevertheless, inconsistencies between an applicant's

statements at the POE and those given before the RPD may support an adverse finding of credibility (*Arokkiyanathan v Canada (Citizenship and Immigration)*, 2014 FC 289 at para 35) if the omission concerns an element that is central to the claim (*Jamil v Canada (Minister of Citizenship and Immigration)*, 2006 FC 792 at para 25; *Sava v Canada (Minister of Citizenship and Immigration)*, 2005 FC 356; *Kusmez* at para 22). In this matter, although both the Male and Female Applicants noted their fear of the Male Applicant's mother at the POE, neither mentioned the uncle or any other family members who became part of the narrative in their PIF.

[21] In my view, while the nub of the Applicants' claim was captured in the POE interview, that the daughters are at risk of FGM if returned to Nigeria, the omission of the uncle and other family members as agents of persecution was not an insignificant omission nor was this a mere detail that could later be provided to flesh out the claim.

[22] However, and significantly, the Applicants also submitted in their supporting documentation threatening emails from the uncle and affidavits from the Male Applicant's brother swearing to the uncle's role in harassing the family. The RPD made no reference to these emails and mentioned the affidavits only in passing. While the RPD is not required to refer to every piece of evidence before it, where the evidence contradicts the RPD's findings, more than a blanket statement will be required to demonstrate that the RPD considered the evidence, otherwise it may be open to the Court to infer that the decision was made without regard to the evidence (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, (1998) 157 FTR 35 at paras 16 and 17). In this case, the RPD found that there was no evidence of the

existence of the uncle and that he had been fabricated to bolster the Applicants' claim. However, the emails and affidavit evidence contradict this finding.

[23] The RPD also made a blanket finding giving no weight to any of the Applicants' supporting documents because of its serious concerns with the Applicants' credibility and because fraudulent documents are prevalent in Nigeria. It referred to much of that evidence, including corroborating affidavits from family members, by listing it in a footnote to its blanket finding.

[24] A general finding of a lack of credibility may conceivably extend to all evidence emanating from the applicant's testimony (*Li v Canada (Citizenship and Immigration)*, 2008 FC 266 at para 19). However, in this matter, given my finding above that some of the RPD's credibility findings are unreasonable, it follows that so too is its assessment of the Applicants' documents as it assigned them no weight based on its flawed credibility findings. Further, although the RPD noted that fraudulent documents are prevalent in Nigeria, presumably as a further basis for affording the documents no weight, this is not a relevant consideration unless the RPD intended to impugn the authenticity of the documents, which is not apparent from its decision. If that was the intent, a more thorough assessment of this issue was required. As is well-established in this Court's jurisprudence, the prevalence of fraudulent documents in a country is not, by itself, sufficient reason to reject foreign documents as forgeries (see *Chen v Canada (Citizenship and Immigration)*, 2015 FC 1133 at paras 12-13; *Cheema v Canada (Minister of Citizenship and Immigration)*, 2004 FC 224 at para 7; *Lin v Canada (Citizenship and Immigration)*, 2012 FC 157 at paras 52-55).

[25] While the RPD did make errors in its credibility findings, viewed in whole, and in particular considering the failure to identify the Male Applicant's uncle as an agent of persecution in the POE and the RPD's credibility finding regarding subjective fear, its finding that the Applicants were not credible may be reasonable.

[26] However, to find that the Applicants lacked credibility is different from saying that their claim had no credible basis. The threshold for a no credible basis finding is high because it removes important procedural rights provided to claimants under the IRPA (*Wu v Canada (Citizenship and Immigration)*, 2016 FC 516 at para 12 [*Wu*]; *Pournaminivas* at para 9; *Behary* at para 58; *Rahaman v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 89 at para 51). The RPD must, before reaching a conclusion of no credible basis, look to the objective documentary evidence for *any* credible or trustworthy support for an applicant's claim (*Behary* at para 58; *Wu* at para 12).

[27] As a result of an error in the RPD's credibility assessment as set out above, the RPD rejected, without assessment, the Applicants' supporting evidence that potentially could have supported their claim. Additionally, there was also at least some objective documentary evidence in the record that may have provided some support for the Applicants' claim which was not assessed. Accordingly, in these circumstances, the no credible basis finding was unreasonable.

[28] For these reasons, and although upon reconsideration the Applicants may face a challenge with regard to subjective fear and other elements of their claim, I must allow the application for judicial review and remit it for reconsideration by another member of the RPD.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted. The decision of the RPD is set aside and the matter is remitted for redetermination by a different officer;
2. No question of general importance is proposed by the parties and none arises; and
3. There will be no order as to costs.

“Cecily Y. Strickland”

Judge

FEDERAL COURT
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