Federal Court  Cour fédérale

Date: 20180710

Docket: IMM-4604-17

Citation: 2018 FC 712

Ottawa, Ontario, July 10, 2018

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

MARGRET OKONJI,
MAYA-JAYDEN IFECHUKWUDE OKONJI,
KAYLAH-ROSE C V OKONJI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicants, Ms. Margret Okonji and her two daughters, Maya-Jayden Ifechukwude Okonji and Kaylah-Rose C V Okonji, bring this application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] Ms. Okonji and her daughter Maya-Jayden are Nigerian citizens. Kaylah-Rose is a dual citizen of the United States (by virtue of her birth there) and of Nigeria (as a child of a Nigerian national). They ask that the Court set aside a decision of the Refugee Appeal Division [RAD] confirming a Refugee Protection Division [RPD] determination that they are neither Convention refugees nor persons in need of protection under sections 96 and 97 of the IRPA. They submit that the RAD erred by: (1) refusing to admit new evidence; (2) failing to convene an oral hearing; and (3) unreasonably assessing the evidence.

[3] Having reviewed and considered the parties' submissions, I am unable to conclude the RAD committed any reviewable error. The application is dismissed for the reasons that follow.

II. Background

[4] The applicants' refugee claim was based on allegations that a neighbour, whose brother was a high-ranking Nigerian police officer, attempted to sexually assault Ms. Okonji. Ms. Okonji claimed that in December 2015, after reporting the attempted sexual assault to the Nigerian police, her husband was arrested. Ms. Okonji reported that her husband remained incarcerated at the time of the RPD hearings that were conducted in March 2016 and February 2017.

[5] In rejecting the claim the RPD first noted that Kaylah-Rose had not asserted any risk or fear of persecution on a Convention ground if returned to the United States. The RPD found that her claim failed on that basis alone. In addressing the claims of Ms. Okonji and Maya-Jayden the RPD found that on a balance of probabilities the applicants' allegations that the police had

retaliated against them or held Ms. Okonji's husband in custody were not credible. The RPD further concluded Ms. Okonji was generally not credible.

III. Decision under Review

[6] The RAD set out the background of the claim, noting that the alleged attempted sexual assault and subsequent police retaliation had resulted in Ms. Okonji's husband being held without trial for more than a year. The RAD also noted the RPD findings that: (1) the allegations concerning her husband's detention were not credible; (2) Ms. Okonji was not credible generally; and (3) apart from credibility concerns, Kaylah-Rose's claim failed as there was no alleged fear of persecution or harm in the United States.

[7] The RAD then reviewed its role in light of the Federal Court of Appeal's decision in *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 [*Huruglica*], noting that it was to conduct its own analysis of the record to determine whether the RPD erred. The RAD recognized that it was to review questions of mixed fact and law on a correctness standard but could adopt a reasonableness standard in those circumstances where the RPD enjoyed a meaningful advantage in making a particular finding relating to the assessment of the credibility of oral testimony.

[8] The RAD then addressed the request to admit new evidence on the appeal. The RAD broke this evidence into two groupings: (1) documents relating to a claim of incompetent representation by former counsel, and (2) documents supporting the refugee claims that were not put before the RPD. In considering the new evidence relating to the claim against former counsel

(the group 1 documents) the RAD concluded that the appellants had not demonstrated incompetent representation. That finding is not challenged.

[9] The RAD also rejected the group 2 documents. The RAD concluded that although many of the documents were created after the RPD's 2017 decision, the information they contained related to events that occurred in 2015. The RAD also concluded that the applicants could reasonably have been expected to have presented this evidence to the RPD, noting in particular "a strong indication from the RPD, from the first sitting of her hearing that it was expecting to see supporting documents". Having refused to admit the applicants' new evidence the RAD, relying on section 110 of the IRPA, concluded it was bound to proceed without an oral hearing.

[10] The RAD then concluded the RPD was not wrong to find that Kaylah-Rose's claim failed on the basis that she does not allege a fear of persecution or harm in the United States. In considering the RPD's credibility findings, the RAD noted inconsistencies between Ms. Okonji's Basis of Claim form and a psychological report. The RAD concluded these inconsistencies seriously damaged her credibility and the credibility of the allegations made.

[11] In considering a warrant for the arrest of Ms. Okonji's husband which incorrectly stated the police rank of Joseph Offor (the brother of the man who allegedly attacked Ms. Okonji) the RAD found no error in the RPD's decision that the arrest warrant be given little weight. The RAD pointed to an error in the document and also noted the prior negative credibility determinations and the documentary evidence reporting the widespread availability of false documents in and from Nigeria.

[12] The RAD also drew negative credibility inferences due to: (1) the absence of evidence from Margaret's father who had reportedly visited her husband in jail; (2) concerns with the credibility of an affidavit reportedly attested to by Ms. Okonji's brother; (3) the absence of documentary evidence to support the assertion that the family had consulted a lawyer in Nigeria despite having been advised that such evidence would be helpful; and (4) the fact that the Nigerian lawyer Ms. Okonji identified as having been consulted was not registered with the Nigerian Bar Association.

[13] The RAD concluded:

> [75] On the basis of the findings noted above and after its own assessment of all the evidence in the record, including the recording of the hearing, the RAD finds that the Appellants have not established, on a balance of probabilities, that they face retaliation from a neighbour, his brother, or police in Nigeria. Therefore, the RAD finds that there is not a serious possibility of persecution should the Appellants return to Nigeria.
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> [76] The RAD therefore concludes that the Appellants have failed to establish a well-founded fear of persecution under section 96 of the IRPA, and, for these same reasons – the lack of credibility – the RAD finds that the Appellants are not persons in need of protection or at a risk to life, or a risk or cruel and unusual treatment or punishment, or in danger of torture as set out in section 97 of the IRPA.

IV. Standard of Review

[14] Decisions of the RAD involving questions of fact or mixed fact and law are to be reviewed against a standard of reasonableness: *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at para 29 [*Singh*]; *Huruglica* at para 35; *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47, 51.The three issues raised by the applicants engage questions of fact and mixed fact

and law. On a reasonableness review a reviewing court should show deference to the decision-maker.

V. Analysis

A. *Did the RAD err in refusing to admit new evidence?*

[15] The applicants argue that the RAD misapplied subsection 110(4) of the IRPA by rejecting the applicants' evidence concerning the family's efforts to release Ms. Okonji's husband from detention. They submit that on an appeal before the RAD new evidence may be presented where that evidence "arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection."

[16] The applicants submit that the new evidence, which included: (1) correspondence between former counsel in Nigeria and current counsel in Nigeria; (2) a statutory declaration with exhibits and court documents from a law firm in Nigeria that were prepared on behalf of Ms. Okonji's husband; and (3) results from a Google search for "Joseph Offor Nigeria Police" arose after the rejection of the claim, was not reasonably available, and could not have been presented to the RPD. In advancing this position the applicants rely on Justice Elizabeth Heneghan's decision in *Ogundipe v Canada (Citizenship and Immigration)*, 2016 FC 771 [*Ogundipe*].

[17] The jurisprudence has repeatedly recognized that the date of creation of a document is not determinative of the question of whether the evidence is new (*Jadallah v Canada (Minister of Citizenship and Immigration)* 2016 FC 1240 at para 34). In considering the correspondence between former counsel in Nigeria and current counsel in Nigeria and the statutory declaration attaching court documents, the RAD identified that the "new evidence" sought to establish that: (1) a police report was made in November 2015; (2) Ms. Okonji's husband was arrested in 2015 and had been detained since that time; and (3) a lawyer was involved in attempting to secure her husband's release. The RAD noted that all of these events and circumstances occurred "well before the Appellants' claims were rejected."

[18] Having reviewed the evidence and having identified the purpose for which the correspondence between counsel and the statutory declaration were being presented, the RAD concluded the information was not new. This conclusion was reasonably available to the RAD.

[19] The arrest, the ongoing detention of Ms. Okonji's husband and the involvement of counsel in effecting his release would all have been circumstances that existed at the time of the RPD hearing. The circumstances evidenced by the correspondence between counsel and the statutory declaration would have been instrumental in advancing the applicants' narrative and the RPD had placed the applicants on notice in the first hearing that corroborating documents were expected in respect of these key aspects of the narrative. No corroborating documentation was produced for the second hearing despite a more than ten month pause in the RPD's consideration of the claim. In these circumstances I am unable to conclude that the RAD erred in determining that the evidence was not new.

[20] Having rejected the "newness" of the evidence, the RAD then considered whether the evidence "was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection." Again the RAD noted that Ms. Okonji had been put on notice at the first RPD hearing that the lack of documentation to show legal efforts made in Nigeria to release her husband was an issue.

[21] The decision in *Ogundipe* is, in my opinion, of little assistance to the applicants. In *Ogundipe* the applicants sought to admit Nigerian news articles published on February 1, 2015 describing events that took place in Nigeria on January 31, 2015. The RPD hearing was held on January 26, 2015 and the decision was issued on February 3, 2015. On the basis of these facts Justice Heneghan concluded that the applicants, who were in Canada, could not have been reasonably expected to present the articles to the RPD in the three days between the event in Nigeria and the date of the RPD decision. Justice Heneghan also concluded that the RAD unreasonably found an article published after the decision was not new evidence. In *Ogundipe* the documentary evidence reported new circumstances that arose just prior to the issuance of the RPD decision. In this case the circumstances the applicants sought to establish through the "new evidence" were not new or even recent.

[22] It was reasonably open to the RAD to conclude that while the documents themselves post-dated the RPD decision, the underlying facts that the evidence was being placed before the RAD to establish were not new.

[23] The RAD also concluded that a third document containing the results of a Google search that evidenced the rank of a member of the Nigerian police was inadmissible. The RAD concluded that particular document identified the individual's rank on April 4, 2017 - the date of the printout - but did not establish his rank on the date in issue, December 8, 2015. Having found the evidence was not relevant the RAD reasonably concluded the evidence was inadmissible. As the Court of Appeal noted in *Singh* at para 45, relevance is an implied criterion for admissibility under subsection 110(4) of the IRPA: relevance "is a basic condition for the admissibility of any piece of evidence, and it would be difficult to imagine the introduction of new evidence being somehow exempt from this criterion."

[24] Applicants' counsel acknowledged in the course of oral submissions that if the RAD did not err in refusing to admit the proposed new evidence then there was no basis upon which the RAD could reasonably grant the applicants' request for an oral hearing (IRPA subsections 110(3), (4) and (6)). Having concluded that the RAD did not commit any reviewable error in refusing to admit the applicants' new evidence, I need not address the argument that the RAD erred in failing to convene an oral hearing.

B. *Did the RAD unreasonably assess the evidence?*

[25] The applicants submitted before the RAD that the RPD erred in giving little weight to an arrest warrant for Ms. Okonji's husband. The RPD noted the warrant stated that Joseph Offor, the issuing officer, held the rank of Assistant Superintendent of Police whereas the RPD found he in fact held the higher rank of Deputy Superintendent of Police. The RPD noted that individuals are generally attentive to titles or ranks in official documents and that it was unlikely

the police officer would have misstated his rank. It was to challenge this conclusion that the applicants sought to place the Google search before the RAD.

[26] The applicants argue that the RAD's treatment of the arrest warrant in evidence was unreasonable because the Google search evidence demonstrated that Mr. Offor's rank was correctly reflected on the arrest warrant. The applicants submit the RAD's reasoning in this regard was "not only an unreasonable finding but a ridiculous one." I disagree.

[27] The applicants' argument is premised on a document that was not admitted into evidence and was therefore not part of the RAD's assessment. I have concluded above that that the RAD's refusal to accept the Google search document as new evidence was reasonable.

[28] The RAD's analysis of the arrest warrant does not consider the rejected new evidence but is based upon the record that was before the RPD. The RAD cannot be found to have committed a reviewable error on this basis. The applicants advance no additional argument in support of the claim that the RAD's treatment of the arrest warrant was unreasonable.

VI. Conclusion

[29] The RAD did not commit a reviewable error in considering the applicants' new evidence. The decision reflects the required elements of transparency, intelligibility and justification in the decision-making process and the outcome is within the range of reasonable, possible outcomes based on the facts and the law. The application is dismissed.

[30] The parties have not identified a question of general importance for certification and none arises.

JUDGMENT IN IMM-4604-17

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.

2. No question is certified.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4604-17
STYLE OF CAUSE:	MARGRET OKONJI, MAYA-JAYDEN IFECHUKWUDE OKONJI, KAYLAH-ROSE C V OKONJI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
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