Federal Court  Cour fédérale

Date: 20190418

Docket: IMM-872-18

Citation: 2019 FC 495

Ottawa, Ontario, April 18, 2019

PRESENT: The Honourable Mr. Justice Norris

BETWEEN:

OLUWASEYI KAYODE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] Oluwaseyi Kayode, the applicant, is a citizen of Nigeria. In March 2015 she obtained a visa for travel to the United States that was valid for two years. When she left Nigeria for the United States at the end of November 2015, the applicant was just over one month pregnant. After staying in the United States for a little over four months, the applicant entered Canada on April 4, 2016. She submitted a claim for refugee protection a short time later. The applicant

said she was at risk if she returned to Nigeria because her ex-boyfriend (the father of her child) and his family would force her and the child to undergo certain rituals to which she objected on religious grounds and which could harm her child. As well, her ex-boyfriend and his family had threatened to harm her because of her refusal to return from the United States to undergo these rituals.

[2] The applicant's claim was heard by the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada [IRB] over two days in February and March, 2017. For reasons dated May 17, 2017, the RPD rejected the claim on the basis of negative credibility findings and because the applicant had an internal flight alternative in Nigeria.

[3] The applicant appealed this decision to the Refugee Appeal Division [RAD] of the IRB. The applicant did not file any new evidence or request a hearing before the RAD. The RAD dismissed the appeal in a decision dated January 17, 2018. The RAD confirmed the finding of the RPD that the applicant is neither a Convention refugee nor a person in need of protection. While the RAD found that the applicant did not have an internal flight alternative, it dismissed the applicant's other grounds of appeal and upheld the RPD's negative credibility findings.

[4] The applicant now seeks judicial review of the RAD's decision under section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The applicant contends that the RAD's credibility determinations are unreasonable and that the RAD erred in ignoring relevant evidence.

[5] For the following reasons, I have concluded that the RAD did not err in either of these respects. Accordingly, this application will be dismissed.

[6] The applicant also submitted that the RAD erred in failing to conduct a separate analysis under section 97 of the *IRPA*. This issue was not raised before the RAD and the member cannot be faulted for not addressing it (*Caleb v Canada (Citizenship and Immigration)*, 2018 FC 384 at para 37). I need not consider it further.

II. BACKGROUND

[7] The applicant was born in Lagos, Nigeria in June 1991. She obtained a diploma in business administration in March 2013 from the Moshood Abiola Polytechnic in Abeokuta, Nigeria. In April 2013, she was admitted into a part-time program to obtain a higher national diploma in business administration at the same school.

[8] The applicant met Olatunde Gbadamosi through a friend in September 2013. The two began dating. In October 2015, the applicant discovered she was pregnant. After she told him the news, Olatunde said they needed to meet with his family. According to the applicant, Olatunde's father is a wealthy businessman and a "secret cultist."

[9] In her narrative, the applicant describes this meeting with Olatunde's family as follows:

> Olatunde's father told me he heard that I am pregnant for his son and before we get married I have to undergo some rituals because he wanted to be very sure if the pregnancy is for his son. I was shocked and surprised when I heard this, because I had never cheated before. He told me that according to their tradition that

> every woman and child born into their family must have rituals. I asked him what type of rituals and was told that, firstly, I will have my hair cut, use sharp objects to give me tribal mark on my body. After that, I will now bath with concoction (herbs) and swear an oath that Olatunde is the father. Also, after I give birth, if it is a girl they will cut or clip the clitoris and use animal blood to bath her, if it is a boy they will use tribal mark on his face and use animal blood to bathe him and then circumcise him in a deep forest [*sic* throughout].

[10] The applicant states that she told Olatunde and his father that she could not go through with this because it was against her religion as a Christian. Olatunde and his father insisted that she had to undergo the rituals "at all cost" because this is their tradition.

[11] At the end of October 2015, Olatunde's family started calling the applicant and pressuring her to undergo the rituals quickly. On November 5, 2015, the applicant left her parents' home in Lagos and went to the home of a friend from school in Abeokuta "to get away from Olatunde and his harassment." Olatunde kept trying to call her but she did not answer. After she was there for two weeks, Olatunde showed up in the company of some police officers. He said it was not acceptable that she was trying to avoid him. According to the applicant, Olatunde "threatened that no matter where I was in Nigeria he would find me and that I should answer his calls or else he would deal with me." The applicant states in her narrative that Olatunde "dragged" her back to her parents' home. After he left, the applicant told her father that she needed to get away from the stress and rest for a while.

[12] The applicant had already obtained a visa for travel to the United States in March 2015. She decided to go there for a vacation. She left Nigeria on November 25, 2015, and arrived in New York the next day. According to the applicant, she originally planned to visit with her

uncle in Maryland for two weeks (although her airline ticket had her booked to return on November 30, 2015). She ended up staying with her uncle for the next four months.

[13] The applicant states that she decided to extend her stay in the United States because of the situation with Olatunde. However, she also states that Olatunde did not begin looking for her until a month after she left Nigeria. Olatunde and his father had gone to the applicant's father's house looking for her. They threatened to have the applicant's father arrested if he did not tell them where the applicant was. Her father went to the police to complain about this threat but the police told him it was a "family issue" that they had to settle for themselves. As a result, the applicant's father gave Olatunde the applicant's telephone number.

[14] In an affidavit filed in support of the refugee claim, the applicant's father describes his encounters with Olatunde somewhat differently. According to the applicant's father, Olatunde came to his house on December 20, 2015. The latter was "not happy" that the applicant had not been answering his calls. (There is no evidence about whether the applicant brought her Nigerian cell phone with her to the United States or not.) When he realized that she was not there, Olatunde ransacked the house and threatened to have the applicant's father "arrested or beaten" if he did not tell him where the applicant was. According to the applicant's father, he "refused to tell him but when the threats and harassment became worse and the police even refused to help" he "had no choice" but to give him the applicant's phone number in the United States.

[15] At the RPD hearing, the applicant testified simply that Olatunde threatened to do something to her father that he would regret if he did not give him her phone number. She did not mention the specific threats of arrest or assault.

[16] According to the applicant, she had not heard from Olatunde while she was in the United States until her father gave him her number. Olatunde then began calling her there and threatening her. Olatunde told her she had to return to Nigeria to undergo the rituals. He said if she refused, he and his father would use their contacts to bring her back.

[17] The applicant claims that she was so fearful of Olatunde and his family's contacts that the first time she left her uncle's home in Maryland was at the end of March. On that occasion, she went to a local bar where a woman struck up a conversation with her because she looked so sad. The applicant told the woman her story. The applicant explained that she was fearful that she would be forced to return to Nigeria and undergo the rituals. The woman told her she should go to Canada and make a claim for protection there. The woman offered to introduce her to an agent who could help her travel to Canada.

[18] The applicant met this agent the next day. He agreed to help her for a $2000 fee. On April 4, 2016, the agent, the applicant, and two other people drove together from Maryland to Toronto. They crossed into Canada at Niagara Falls. The agent had taken the applicant's Nigerian passport although eventually it was returned to her. The applicant did not know what documents the agent showed at the Canada/U.S. border. The agent dropped the applicant off at a

church in Toronto. People at the church put her in touch with a lawyer to help her with her refugee claim. This claim was submitted on April 26, 2016.

[19] According to the applicant's father, Olatunde continued to threaten the applicant and insist that she return to Nigeria. Olatunde said that "his child must complete the family rituals" and that if the applicant did not return he would "kill her whenever he finds her." The applicant's father states that Olatunde came to his house as recently as May 5, 2016, and made threats against his daughter. The applicant's father's affidavit was sworn on May 20, 2016.

[20] The applicant did not offer any evidence of more recent or ongoing threats after that date at either the RPD hearing in February and March 2017 or in support of her appeal to the RAD.

[21] The applicant's daughter was born in Toronto in July 2016.

III. DECISION UNDER REVIEW

[22] As noted above, the applicant's claim for protection was rejected by the RPD. The applicant appealed this decision to the RAD on essentially four grounds:

a) the RPD erred in its credibility assessment;

b) the RPD's decision rested on factual errors;

c) the RPD erred in finding that the applicant had an internal flight alternative; and

d) the applicant was not represented adequately by counsel before the RPD.

[23] The RAD member instructed himself in light of the decision of the Federal Court of Appeal in *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 [*Huruglica*]. That is to say, the RAD is to conduct its own analysis of the record to determine whether the RPD erred. Where the credibility of the oral evidence before the RPD is not a determinative issue, the RAD is to apply a correctness standard when assessing the RPD's findings of fact or mixed fact and law. Where the credibility of the oral evidence before the RPD is a determinative issue, the RAD is to defer to the RPD when it enjoyed a meaningful advantage over the RAD in assessing the evidence presented.

[24] The only ground of appeal giving rise to a ground of judicial review is the RAD's assessment of the credibility of the claim. The RAD agreed with the RPD that the applicant was not credible. Drawing on its own review of the evidence, the RAD based this determination on two key considerations: first, the applicant's failure to seek refugee protection in the United States was inconsistent with her claim to fear persecution in Nigeria; and second, the applicant had failed to give a consistent account of how Olatunde was able to contact her in the United States.

[25] The applicant also contends that the RAD ignored relevant evidence in rejecting the claim. I address this argument below.

IV. STANDARD OF REVIEW

[26] The RAD's determinations of factual issues and issues of mixed fact and law are reviewed by this Court on a reasonableness standard (*Huruglica* at para 35). Reasonableness

review "is concerned with the reasonableness of the substantive outcome of the decision, and with the process of articulating that outcome" (*Canada (Attorney General) v Igloo Vikski Inc*, 2016 SCC 38 at para 18). That is to say, the reviewing court must look at both the outcome and the reasons that are given for that outcome (*Delta Air Lines Inc v Lukács*, 2018 SCC 2 at para 27). The reviewing court examines the decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determines "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). These criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16). The reviewing court should intervene only if these criteria are not met. It is not the role of the reviewing court to reweigh the evidence or to substitute its own view of a preferable outcome (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61).

V. ISSUES

[27] As noted above, the applicant challenges the decision of the RAD on two main grounds:

a) the RAD's credibility determinations are unreasonable; and
b) the RAD erred by ignoring relevant evidence.

VI. ANALYSIS

A. *Are the RAD's credibility determinations unreasonable?*

[28] The applicant contends that the RAD unreasonably drew adverse findings with respect to her credibility from her failure to seek refugee protection in the United States and from her account of how Olatunde was able to contact her in the United States. I do not agree.

[29] Looking first at the failure to seek refugee protection in the United States, recently I summarized the governing principles concerning delay in seeking protection in *Chen v Canada (Citizenship and Immigration)*, 2019 FC 334 at para 24. To reiterate:

a) Delay in seeking refugee protection is not determinative of the claim; rather, it is a factor the decision-maker may take into account in assessing the claim's credibility (*Calderon Garcia v Canada (Citizenship and Immigration)*, 2012 FC 412 at paras 19-20).

b) In particular, delay can indicate a lack of fear of persecution in the country of reference on the part of the claimant (*Huerta v Canada (Minister of Employment & Immigration)*, [1993] FCJ No 271 (FCA), 157 NR 225). Put another way, delay can be probative of the credibility of the claimant's assertion that he or she fears persecution in the country of reference (*Kostrzewa v Canada (Citizenship and Immigration)*, 2012 FC 1449 at para 27).

c) Whether there has been delay and, if so, its length must be determined with regard to the time of inception of the claimant's fear as determined from the claimant's personal narrative.

d) The governing question is: Did the claimant act in a way that is consistent with the fear of persecution he or she claims to have?

e) Delay in seeking protection can be inconsistent with subjective fear because generally one expects a genuinely fearful claimant to seek protection at the first opportunity (*Osorio Mejia v Canada (Citizenship and Immigration)*, 2011 FC 851 at paras 14-15).

f) When a claimant has not sought protection at the first opportunity, the decision-maker must consider why not when assessing the significance of this fact. A satisfactory alternative explanation for why the claimant waited to seek refugee protection can support the conclusion that the delay is not inconsistent with the fear of persecution alleged by the claimant. Absent a satisfactory alternative explanation, it may be open to a decision-maker to conclude that, despite what the claimant now says, he or she does not actually fear persecution and that this is why protection was not sought sooner (*Espinosa v Canada (Citizenship and Immigration)*, 2003 FC 1324 at para 17; *Dion John v Canada (Citizenship and Immigration)*, 2010 FC 1283 at para 23 [*Dion John*]; *Velez v Canada (Citizenship and Immigration)*, 2010 FC 923 at para 28).

g) Whether an alternative explanation is satisfactory or not depends on the facts of the specific case, including the claimant's personal attributes and circumstances and his or her understanding of the immigration and refugee process (*Gurung v Canada (Citizenship and Immigration)*, 2010 FC 1097 at paras 21-23; *Licao v Canada (Citizenship and Immigration)*, 2014 FC 89 at paras 57-60; *Dion John* at paras 21-29).

[30] The precise point at which the applicant claims her fear of persecution crystalized is not entire clear. The applicant stated that the pressure for her to undergo rituals began as early as the end of October 2015. This pressure was such that she found it necessary to hide from Olatunde at a friend's, only to have him find her there and return her forcibly to her family's home two weeks later. The applicant decided to leave Nigeria for the United States but at that point it was only for a vacation, to get away from the stress of the situation and to rest for a while. At some point while she was in the United States, Olatunde managed to contact her. His threats made her fear for herself and her child. It is unclear when this contact occurred but, in any event, the applicant also claimed that she was always so fearful of Olatunde and his family that the first time she left her uncle's home in Maryland was shortly before leaving for Canada.

[31] Against this backdrop, it was reasonable for the RAD (like the RPD before it) to consider why the applicant did not seek protection in the United States. The applicant offered two reasons for this. One was that she did not realize she could claim asylum in the United States. The other was that she did not want to stay in the United States because she feared that Olatunde and his family could find her there and force her to return to Nigeria.

[32] The RAD rejected both of these explanations. In my view, it was not unreasonable for it to do so.

[33] Contrary to the applicant's contention on this application for judicial review, the RAD did not impose inapplicable standards of reasonable behaviour on the applicant. There was nothing in the applicant's background that could explain her failure to seek out even basic

information about how to seek asylum in the United States. The applicant is a literate and reasonably well-educated woman. She had experience with international travel and already had at least rudimentary knowledge of immigration procedures (she had travelled not only to the United States on a visa but also to the United Kingdom previously). When asked directly at the RPD hearing why she did not do some research to find out how she could stay in the United States legally since she was already there, the applicant responded that it "did not cross her mind" and she was "terrified" and "afraid." The RAD did not accept the applicant's claim that she was paralyzed by her fear that Olatunde or his family's contacts would find her. This is a reasonable determination in light of the applicant's at best vague fears about how Olatunde and his family could use their unspecified contacts to find her in the United States and return her to Nigeria. It is also a reasonable determination in light of the fact that the applicant had decided to extend her stay in the United States well before Olatunde even began looking for her in Nigeria or contacting her in the United States.

[34] In short, the RAD concluded that there was no good reason for the applicant not to have sought out information about how she could protect herself in the United States if she truly feared what would happen if she returned to Nigeria. The fact that she did nothing was a reason to doubt the genuineness of the fear the applicant was now alleging. There is no basis to interfere with this conclusion.

[35] The RAD also did not accept the applicant's improbable story of first learning about the asylum process from a stranger in a bar, who just happened to be able to introduce her to an agent who could facilitate her travel into Canada where she could seek protection. Further, the

RAD found it unlikely that the applicant would risk entering Canada illegally and potentially face deportation to Nigeria when her status in the United States was secure for as long as her visa was valid (the visa did not expire until March 24, 2017). As for the relative safety of the United States and Canada, the applicant claims that she did not want to stay in the United States because Olatunde could use his father's contacts to find her there and bring her back to Nigeria. The applicant never explains why she believed this would not happen if she went to Canada instead.

[36] Having rejected her explanation for why she delayed seeking protection until after she arrived in Canada, it was open to the RAD to draw an adverse inference concerning the credibility of the applicant's claim to subjectively fear persecution in Nigeria. In the absence of such a fear, there was no need to go on to consider whether the fear was objectively well-founded.

[37] Finally in this connection, the applicant argued before the RAD that the United States is not a safe third country for asylum seekers like her. The relevance of this issue is unclear to me in the absence of evidence from the applicant that this was a reason she did not seek protection there. Far from offering such an explanation, the applicant claimed to know nothing whatsoever about the asylum process in the United States. In any event, this issue was canvassed by the RAD member in his reasons and the applicant has not demonstrated any reviewable error in the member's assessment of it.

[38] I turn now to the issue of how Olatunde was able to contact the applicant in the United States. The RAD member found that the applicant's account of this was not credible. While I find that the member misapprehended some of the evidence bearing on this issue, his determination is nevertheless reasonable.

[39] According to the applicant, she had a Nigerian cell phone when she was in Nigeria. Olatunde had that number and he would call her on it. While the applicant never says so explicitly, it appears that she obtained another cell phone in the United States. The applicant's father allegedly gave Olatunde this phone number under duress. Olatunde then started calling her on it and threatening that she would be in serious trouble if she did not return to Nigeria and undergo the rituals. When asked by the RPD member if she ever thought about changing her number, the applicant replied that she had not. When asked why not, the applicant answered: "Because I didn't find it necessary at that point in time." The applicant does not say whether she changed numbers after coming to Canada.

[40] The RAD member found it "curious" that the applicant testified at one point that Olatunde had her personal cell phone number but later stated that he did not have her number until her father gave it to him. I agree with the applicant that the RAD member appears to have misunderstood her evidence about how Olatunde was able to call her in the United States. In fairness to the member, the applicant's evidence on this point is less than clear. However, what I understand the applicant to have said was that Olatunde had had her cell phone number in Nigeria, she obtained a different cell phone in the United States and Olatunde did not have that

number until her father gave it to him. I do not find there to be any inconsistency in the applicant's evidence on this point (although there is certainly a lack of clarity).

[41] While the member misapprehended the evidence in this respect, I find that this error was not material. The member disbelieved the applicant's account of how Olatunde obtained her number from her father for other reasons besides this one. The member found it to be "illogical and unreasonable" that the applicant's father would disclose her number to someone she feared. The member also found there were inconsistencies between the applicant's account of this incident in her narrative and in her testimony before the RPD. The fact that it did not occur to the applicant to change cell phones after Olatunde allegedly started calling her in the United States and threatening her also belies her claim to be in fear of him and his family. This other evidence is not affected by the member's error with respect to which cell phone number Olatunde had when and it reasonably supports the member's negative finding concerning the credibility of the claim.

B. *Did the RAD ignore relevant evidence?*

[42] The applicant submits that the RAD erred by ignoring relevant evidence. Specifically, she contends that the RAD failed to take into account evidence relating to her mental health found in a psychological report from Dr. Gerald Devins dated June 11, 2016, and in a psychiatric assessment by Dr. Rahaf Alasiri dated March 9, 2017. I do not agree.

[43] Dr. Devins holds a Ph.D. in Clinical Psychology and is a Registered Psychologist in Ontario. On the basis of a psychological assessment he conducted of the applicant on

June 8, 2016, Dr. Devins concluded that the applicant satisfied the diagnostic criteria for "stressor-related disorder with prolonged duration." Dr. Devins found that she presented "stress-response and dissociative symptoms." He recommended mental-health treatment. He also recommended, in light the applicant's "distress, cognitive problems, and vulnerability," that the RPD allow her "ample opportunities to take breaks during testimony so that she can restore herself and participate effectively at her Refugee Hearing."

[44] Dr. Alasiri was a resident in psychiatry at Women's College Hospital. Dr. Alasiri conducted an assessment of the applicant under the supervision of the staff psychiatrist on March 2, 2017. Dr. Alasiri's clinical impression was that the applicant was presenting symptoms of post-traumatic stress disorder with dissociation, depressed mood and a high level of anxiety. In the March 9, 2017, letter stating these findings, Dr. Alasiri also set out a detailed plan for the applicant's care. (This assessment was conducted between the first and second days of the hearing before the RPD.)

[45] In her appeal to the RAD, the applicant did not raise any grounds relating to either of these reports or her psychological condition generally. In fact, she does not appear to have relied on the information in the reports in any way in her written submissions in support of the appeal. Once again, the member cannot be faulted for not addressing an issue that was not raised in the appeal before him.

[46] Apparently on his own initiative, the RAD member drew on the information in the report of Dr. Alasiri in particular to support his finding that it would be unreasonable for the applicant

to relocate to Port Harcourt, the internal flight alternative that had been identified by the RPD. Thus, contrary to the applicant's submission, the member did not ignore this evidence. In fact, he accepted it and relied on it in the applicant's favour. The applicant has not demonstrated that there was any other way the member should have considered this evidence when deciding the appeal. As a result, this ground for review must fail.

VII. CONCLUSION

[47] For these reasons, the application for judicial review is dismissed.

[48] The parties did not suggest any serious questions of general importance for certification under section 74(d) of the *IRPA*. I agree that none arise.

JUDGMENT IN IMM-872-18

THIS COURT'S JUDGMENT is that

1. The application for judicial review of the decision of the Refugee Appeal Division dated January 17, 2018, is dismissed.

2. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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