

Federal Court



Cour fédérale

**Date: 20190813**

**Docket: IMM-4211-17**

**Citation: 2019 FC 1070**

**Ottawa, Ontario, August 13, 2019**

**PRESENT: The Honourable Madam Justice Elliott**

**BETWEEN:**

**OBIDI CAROLINE EJEIHI  
OBIDI ANDRELA NGOZICH  
OBIDI ANDRE IKECHUKWU  
OBIDI RICHARD OLISE-E**

**Applicants**

**and**

**THE MINISTER OF IMMIGRATION,  
REFUGEES AND CITIZENSHIP CANADA**

**Respondent**

**JUDGMENT AND REASONS**

**I. Introduction**

[1] This is an application for judicial review, under section 72(1) of the *Immigration and Refugee Protection Act [IRPA]*, of a decision of the Refugee Appeal Division (“RAD”), dated September 19, 2017, in which the RAD upheld the decision of the Refugee Protection Division

(“RPD”), dated February 24, 2017, that the Applicants are neither Convention refugees nor persons in need of protection under sections 96 and 97(1) of the *IRPA* (the “Decision”).

[2] For the reasons that follow, this application is granted. The RAD made a determinative credibility finding without regard to the material before it. The other findings, none of which were said to be determinative, are not sufficient to overcome that error.

## II. **Background**

[3] The Applicants are a mother and her three minor children, two of whom are fraternal twins. They claim refugee protection from Nigeria as a result of superstition surrounding twins being bad luck and the fear that the daughter will be forced to undergo female genital mutilation [FGM] while her twin brother will be required to watch the ceremony and drink the resulting blood.

[4] While the family of the father of the children supports the ritual being performed, the father himself has supported it not being done. The mother and father of the children are from different tribes in Nigeria with which it is said the father’s parents had an issue.

[5] The twins were born in 2008. At that time the mother was told by the family of the father that twins are evil and would be bring bad luck to the family. They would need to undergo a cleansing ritual in which the male twin would have incisions made on his face and chest while the twin daughter would be circumcised before she reached puberty. The children would drink the blood from the circumcision after it is mixed with herbs. The mother refused to subject her daughter to circumcision and the subject was not brought up again.

[6] In April 2014, the mother was told by her mother-in-law that a date had been set for the circumcision of her daughter. When the mother refused, she was told that it would be done one way or another.

[7] On May 15, 2016, a date was set in September for birth rituals for the twins and the circumcision. The mother moved to a different location but, within two weeks, she received a visit from the elder who said she could not hide without being found and they would have the police assist them in having the rituals performed.

[8] On September 3, 2016, the father's uncle said that the daughter would be circumcised on September 15, 2016. With the consent of the father, the mother and her three children obtained tickets to leave Nigeria. They came to Canada on September 9, 2016 using Canadian visas and made refugee claims.

### III. **The RPD Decision**

[9] The decision under review is that of the RAD. As the RAD sits in appeal from the decision of the RPD it is necessary to very briefly mention the reasons that the RPD rejected the refugee claims.

[10] The RPD found the determinative issue was the credibility of the allegations made by the Applicants. Specifically, the RPD found that the mother was not a credible witness. Her testimony was inconsistent with other evidence, she omitted highly relevant evidence from her Basis of Claim form [BOC], she failed to reasonably explain her failure to make an asylum claim during a trip to the United States in 2016, she re-availed to and, delayed departing from, Nigeria.

IV. **The RAD Decision**

[11] The RAD confirmed the determination of the RPD and dismissed the appeal.

[12] The RAD acknowledged and correctly stated the panel's role as set out in (*Citizenship and Immigration*) v *Huruglica*, 2016 FCA 93 [*Huruglica*]. The RAD noted that it is to conduct its own analysis of the record to determine whether the RPD erred.

[13] After setting out the background facts, the RAD began by addressing the admissibility of new evidence submitted by the Applicants in the form of a sworn affidavit from the father of the children dated April 7, 2017.

[14] The RAD considered at some length the provisions of subsection 110(4) of the *IRPA*, noting the disjunctive nature of the test established in the jurisprudence of this court. Ultimately, the RAD rejected the affidavit. The panel found, on a balance of probabilities, that it had no relevance to the determination of the claim. As a consequence, the RAD also denied the request of the Applicants for an oral hearing.

[15] The RAD conducted an extensive analysis of the evidence. It reviewed each of the issues considered by the RPD. As previously stated and as set out in some detail in the analysis section, the RAD made an erroneous and determinative credibility finding without regard for the material before it.

V. **Issues**

[16] Three issues are raised by the Applicants:

- i. Whether the RAD erred in assessing the credibility of the Applicants.
- ii. Whether the RAD erred in assessing the documentary evidence.
- iii. Whether the RAD erred by failing to consider the Chairperson's Guidelines.

[17] The Court has found that the RAD did err in assessing the credibility of the Applicants. It is not necessary to consider the other two issues as that error renders the Decision unreasonable.

VI. **Standard of Review**

[18] The standard of review when examining a RAD decision is reasonableness: *Huruglica* at para 35.

[19] A decision is reasonable if the decision-making process is justified, transparent, and intelligible, resulting in a determination that falls within the range of possible, acceptable outcomes which are defensible on the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*].

[20] If the reasons, when read as a whole, “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, the Dunsmuir criteria are met”: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16 [*Nfld Nurses*].

[21] The RAD is not required to consider and comment upon every issue raised by the parties. The issue for the reviewing court is whether the decision when viewed as a whole in the context of the record, is reasonable: *Nfld Nurses* at para 3.

## VII. Analysis

### A. *Overview of the positions of the parties*

[22] In general terms, the Applicants take issue with a great many findings made by the RAD and dissects each of them.

[23] The Respondent points out that a review of each individual finding is not the way to determine whether the outcome is reasonable. The totality of the evidence is to be considered.

[24] The Court agrees and acknowledges that judicial review is to be approached as an organic whole and not a line-by-line treasure hunt for errors. In the absence of finding that the decision, based on the record, is outside the range of reasonable outcomes, the decision should not be disturbed: *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at para 54.

[25] The Applicants say that the sworn testimony of the mother was disregarded and the RAD failed to employ the principle enunciated in *Maldonado v Canada (Minister of Citizenship and Immigration)* [1980] 2 FC 302 (CA) that when an applicant swears to the truth of an allegation it is presumed to be true unless there is reason to believe otherwise.

[26] The Respondent says there are several reasons on the face of the record to believe otherwise and not accept the sworn testimony as true.

B. *The RAD's erroneous credibility finding*

[27] The Applicants submit that the RAD deferred to the RPD findings and did not conduct an independent assessment of the evidence. They say that although it may appear that an independent assessment was conducted by the RAD, it simply reviewed the RPD findings on a reasonableness standard.

[28] The Respondent submits that the fact that the RAD arrived at the same credibility conclusions as the RPD does not mean that it deferred to the RPD. It simply means that the same evidence raised credibility issues. The RAD arrived at its credibility determinations after considering the evidence, reviewing the transcript of the hearing and taking into account the submissions of the Applicants.

[29] In determining that it would confirm the decision of the RPD, the RAD independently considered and discussed the testimony of the mother and the documentary evidence.

[30] Three main areas were considered by the RAD in dealing with credibility: (1) omissions in the BOC about the risks to the twins; (2) failure to claim in the United States of America and re-availment to Nigeria; and (3) delay in leaving Nigeria.

(1) There was no BOC omission of risk to twins

[31] The risks identified by the Applicants in Nigeria, were that the twins would be forced to undergo a cleansing ritual. The daughter would be subjected to FGM. Her twin brother would be subjected to having incisions made on his face and chest. The twins would then be forced to drink a concoction of blood from the FGM mixed with herbs. The incisions and drinking of the blood are the cleansing ritual.

[32] The RPD noted that there was a discrepancy in the evidence regarding the date on which the mother was first told that there would be a cleansing ritual. In her testimony at the RPD the mother said when the twins were born in 2008 she was told some things needed to be done to cleanse them. The RPD noted that this explanation was “completely missing from” the BOC. Rather, the BOC narrative first mentions the ritual to the twin brother when discussing the visit from the elder in May 2016, after the Applicants returned to Nigeria.

[33] In submissions to the RAD, the Applicants tried to overcome the date discrepancy by referring to portions of the transcript and the BOC narrative showing that the mother had made multiple references to birth rituals involving the twins. She submitted to the RAD that the statements indicated prior knowledge that birth rituals were to occur.

[34] In considering the cleansing rituals, the RAD noted that in the BOC narrative the mother had made reference to the meeting with the chief. He told her that because the rituals were not carried out calamities would befall the family. The RAD noted the mother’s submission that in her testimony she did not alter her story but simply provided more detail.

[35] The RAD then set out critical findings, which it described as determinative, in paragraphs 39 and 40 of the Decision:

[39] The RAD has read the pertinent portions of the transcript that relate to the rituals proposed for the twins. The Appellant was quite explicit in the processes that were involved in this cleansing. In reviewing the Appellant's BOC narrative, there is no mention of the process of the rituals. The Appellant talks about the circumcision of her daughter before she reaches puberty, but there is no mention of any cleansing ritual as described in the Appellant's testimony. The RAD draws a negative inference regarding her credibility on this issue. A determinative issue in this claim is the alleged threat of cleansing rituals and circumcision to her twins; the reason that she allegedly left Nigeria. To not include this information in her BOC narrative is not credible.

[40] With regards to her submissions regarding just adding additional details at the hearing, the RAD disagrees. The descriptions of these rituals that she allegedly learned about in May of 2016 are critical issues in the determination of this claim. These facts were part of the basis of the claim, not just additional information, and should have been included in the BOC narrative.

[emphasis added]

[36] The RAD erred when it found that descriptions of the rituals were not in the BOC narrative.

[37] On the second page of the BOC narrative, in the second paragraph, the Applicants discuss the visit from the elder, who is the Chief. The RAD refers to the meeting with the Chief at paragraph 38 of the Decision when it says that "[i]n her BOC narrative, she makes reference to the meeting with the Chief, who tells her that because the rituals were not carried out, calamities would befall the family."

[38] After referring to the “calamities”, the BOC narrative continues in the next sentence with the following explicit description of the rituals:

Chief said that my mother-in-law had always assured the family that the rituals had been done but based on his dream he now knew that this was a lie. The rituals included having some incisions made on Andre’s face and chest and Andrela would be circumcised; the blood from her private would be mixed with other herbal mixtures and given in a drink to the children. Because we had not done the rituals at birth; myself and my son Richard would have to witness the process and chant a some prayers for forgiveness for disobeying the Gods.

[39] Contrary to the RAD’s finding, the BOC narrative contains, as did the mother’s testimony, explicit details of the process of the rituals.

[40] The RAD made an erroneous negative credibility finding on what it described as a determinative issue. That finding was made without regard for the material before it for which the Court may grant relief in accordance with paragraph 18.1(4)(d) of the *Federal Courts Act* . RSC 1985, c F-7.

(2) The other findings by the RAD do not cumulatively support the outcome

[41] Keeping in mind that it is the totality of the evidence that is considered in a reasonableness review, the Court has considered whether the other findings made by the RAD are cumulatively sufficient to support the outcome notwithstanding the RAD’s erroneous assessment of the information in the BOC narrative.

[42] The other findings made by the RAD are not sufficient to overcome the RAD’s BOC analysis error, which it is to be remembered, was described as a determinative issue.

[43] For example, at paragraph 59, when examining the Applicants' departure from Nigeria and finding that it was delayed, the RAD drew a negative credibility inference concerning the allegations of FGM and cleansing rituals "given the details of the Appellant's testimony and the documentation submitted". The panel stated that although it was "not necessarily a determinative issue", the delay in leaving was probative in undermining the allegations of the Applicants.

[44] The analysis in paragraph 59 relies to some extent on the erroneous credibility finding made by the RAD. It is not possible to determine whether that finding would have been the same had the RAD been aware of the mistake in its analysis of the ritual cleansing evidence and the BOC narrative.

[45] At paragraph 44, the RAD found it was not a determinative issue that the BOC narrative and the mother's testimony about the date for her daughter's circumcision was inconsistent with the date in her husband's sworn affidavit. The panel found that discrepancy undermined the basis of the mother's story and credibility, although it was not determinative.

[46] In paragraph 54, the RAD drew a negative credibility inference regarding the mother's inconsistent testimony about her experiences in Nigeria after returning from her vacation in the United States and before coming to Canada. It did not say whether or not it considered the inconsistency to be determinative.

[47] The only reference made by the RAD to a determinative issue is found at paragraph 39 discussing the cleansing rituals. At paragraph 40, the RAD says the description of those rituals was a critical issue that should have been included in the BOC narrative. Those are strong statements which stand alone in the reasons for the Decision.

## VIII. Conclusion

[48] For the reasons set out above, the Court finds that the cumulative weight of other findings made by the RAD does not begin to overcome the determinative analytical error made by the RAD without regard to the evidence before it.

[49] It is undisputed that credibility findings are entitled to considerable deference. There is however a limit to the amount of deference owed to a decision maker. The Court of Appeal in *Siad v Canada (Secretary of State)*, [1997] 1 FC 608 at paragraph 24 (FCA) established the starting point for review of decisions based on credibility and the requirements that must be met by the decision-maker when rejecting a claimant on grounds of credibility:

The Tribunal is uniquely situated to assess the credibility of a refugee claimant; credibility determinations, which lie within "the heartland of the discretion of triers of fact", are entitled to considerable deference upon judicial review and cannot be overturned unless they are perverse, capricious or made without regard to the evidence.

An important indicator of credibility is the consistency with which a witness has told a particular story. (*Dan-Ash v Canada (Minister of Employment and Immigration)* (1988), 93 NR 33 (FCA))

When a tribunal rejects a claim on the ground that the claimant is not credible, it must state that ground clearly (*Ababio v Canada (Minister of Employment and Immigration)* (1988), FCJ No 250 (FCA)) and it must give reasons for the credibility finding. (*Armson v Canada (Minister of Employment and Immigration)*, [1989] FCJ No 800 (FCA)).

(spacing added to separate discrete principles)

[Emphasis added]

[50] In the Decision, the RAD clearly stated the ground for making its negative credibility finding. It was that the basis of claim made by the Applicants was not credible. The reason given

by the RAD was that the BOC narrative omitted details of the cleansing ritual process. That finding was wrong. It was made without regard to the evidence.

[51] The result is that the application is granted and the Decision is overturned. The matter will be sent back for redetermination by a differently constituted panel of the RAD.

[52] No question for certification was suggested by the parties, nor does one exist on these facts.

**JUDGMENT IN IMM-4211-17**

**THIS COURT'S JUDGMENT is that:**

1. The application is granted and the Decision is set aside.
2. The matter is returned for redetermination by differently constituted panel of the  
RAD.
3. There is no question for certification.

“E. Susan Elliott”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

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