Federal Court Cour fédérale

Date: 20191003

Docket: IMM-1526-19

Citation: 2019 FC 1202

Ottawa, Ontario, October 3, 2019

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

EHIMIAGHE PRESLEY AYENI
VICTORIA ISIMEME AYENI
EMMANUEL AYENI
ESTHER AIRAOA AYENI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AMENDED JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision dated January 3, 2019, which dismissed the Applicants' Pre-Removal Risk Assessment [PRRA] pursuant to section 112 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

II. Background

[2] The Applicants are Ehimiaghe Presley Ayeni [Principal Applicant], his wife Victoria, and their two children, Esther and Emmanuel. They are citizens of Nigeria. The Applicants arrived in Canada in June 2016 and have been in Canada ever since.

[3] The Applicants claimed refugee protection because of Mr. Ayeni's sexual orientation. Mr. Ayeni says he is bisexual. He claims that he fled Nigeria with his family after he was caught having sexual intercourse with a man named Buwa Chukwu. Buwa Chukwu has since died. The Applicants submitted an article stating that, because of his sexual orientation, Buwa was beaten to death by community members.

[4] Mr. Ayeni claims that because he is bisexual, both he and his family will be persecuted in Nigeria should they return. ~~In 2017, the Principal Applicant alleges that he was forcibly taken by the army on two separate occasions, and that he was beaten and suffered degrading treatments while detained. He was only released in exchange of a promise to pay a specific amount of money, and with the understanding that more beatings would otherwise take place.~~

A. *Procedural History*

[5] The Refugee Protection Division [RPD] heard the Applicants' claims and concluded they were not Convention refugees in a decision published August 29, 2016. Credibility was a serious issue at the RPD and featured heavily in the Officer's decisions as well. The RPD stated that, because of contradictions and inconsistencies, the credibility issues were "so detrimental to [Mr.

Ayeni's] overall credibility that they undermine his allegation that he is bisexual" (RPD's decision, at para 33). The Officer relied heavily on this finding of credibility in her decision.

[6] The Applicants appealed to the Refugee Appeal Division [RAD], but their appeal was denied because of lack of jurisdiction. Their application for leave and judicial review of the RAD's decision was also denied.

[7] Subsequently, the Canada Border Services Agency [CBSA] issued a Direction to Report for Removal, but the Applicants did not show up. The CBSA issued a warrant for their arrest. In July 2018, the Applicants presented themselves and the CBSA executed the warrant but released the Applicants on the same day. The CBSA scheduled the Applicants' deportation for March 2019, but in March, Justice Martine St-Louis granted a stay of deportation.

[8] The Applicants applied for a PRRA in August 2018. The Officer dismissed their PRRA on January 3, 2019, and the Applicants received the Reasons on March 6, 2019. The Applicants filed an application for leave and for judicial review of the Officer's decision on March 13, 2019. Justice St-Louis granted leave on June 18, 2019.

III. Decision under Review

[9] In the PRRA decision, the Officer considered the new evidence and access to psychological and support services. The Officer dealt briefly with the socioeconomic conditions in Nigeria only to note that it was more relevant to H&C than to a PRRA. The Officer concluded

that the Applicants were not at risk of persecution, torture, or cruel/unusual punishment in Nigeria. Consequently, the Officer denied the PRRA.

A. *Evidence*

[10] The Officer listed eleven new pieces of evidence that she would consider as part of the PRRA. The evidence included: letters from Mr. and Mrs. Ayeni; the two articles mentioned above; the "crime diary" excerpt; Buwa Chukwu's death certificate; an invitation letter from the Ogute Community to attend a spiritual cleansing because of Mr. Ayeni's sexual conduct; and, four affidavits from various family members and from Buwa Chukwu's sister. The Officer refused to consider all other submitted evidence because it was either not relevant or not new.

[11] The Officer concluded that neither article was significant. The Officer acknowledged that the online blog article contained Mr. Ayeni's name and picture; but, the Officer countered that the Applicants did not show that the blog was widely accessed. Likewise, the Officer wrote that she was unable to find the "South-South News" article online, and that there was no evidence how prevalent it was. The Officer concluded that neither the articles nor the letters from family members outweighed the negative credibility finding of the RPD. As a result, although the Officer accepted Buwa Chukwu's death certificate, the Officer concluded that it was not relevant since there was no established link between Mr. Ayeni and Buwa Chukwu.

[12] The Officer acknowledged that Mr. Ayeni was nervous during his testimony at the RPD, but countered that the panel's decision shows that "care and attention were taken to repeat or rephrase questions" for Mr. Ayeni as needed (PRRA, Notes to file, at p 7). Mr. Ayeni gave

answers during his testimony that are inconsistent with the crime diary. He said that he was caught with Buwa Chukwu in July 2016 but the crime diary says that it was April 2016. The Officer noted that the crime diary excerpt also has syntax errors. Because of the inconsistencies and errors, the Officer concluded that the documents were not probative and did not outweigh the credibility finding of the RPD. It is not apparent from the decision whether the Officer included the Ogute Community Invitation letter in that conclusion. The Officer did not consider it separately.

B. *Psychological/Support Services*

[13] The Officer concluded that Mr. Ayeni did not need protection for his mental state. Although Mr. Ayeni had a psychological assessment which yielded evidence of post-traumatic stress disorder, anxiety, and depression, the Officer commented that the assessment was over two years old. Further, Mr. Ayeni did not demonstrate he could not obtain psychological services in Nigeria.

IV. Positions of the Parties

A. *The Applicants' Position*

[14] The Applicants argue that the errors are minor typographical and grammatical errors which do not render the documents less probative (Applicants' Reply, at para 11). They argue that it was unreasonable for the Officer to disregard the probative value of the documents because of those errors, and inconsistent with Federal Court jurisprudence (citing *Adebayo v. Canada (Immigration, Refugees and Citizenship)*, 2019 FC 330 at para 34). They argue "an

officer must have valid grounds to doubt official documents" and, in the case of the crime diary at least, minor typographical errors do not rise to the level of a "valid ground" for rejection (Applicants' Reply, at para 11 citing *Animodi v Canada (Citizenship and Immigration)*, 2015 FC 929 at para 33).

[15] The Applicants argue that it was entirely unreasonable for the Officer to require specific knowledge about how many people read either the blog post or the newspaper article (Applicants' Reply, at paras 22–26).

[16] In their Reply, the Applicants clarify that they are attacking the Officer's process for evaluating the evidence put before him. They argue that the Officer's process was unreasonable (Applicants' Reply, at para 3).

B. *The Respondent's Position*

[17] The Respondent states that the RPD's finding of non-credibility was in the record before the Officer and it was reasonable for the Officer to consider that finding as part of her decision (Respondent's Memorandum and Affidavit, at para 28). They note that the Officer considered the new evidence as part of the PRRA decision and gave reasons for why she did not consider it probative (Respondent's Memorandum and Affidavit, at para 32).

[18] The Respondent argues it was reasonable for the Officer to disregard the blog and newspaper article because it was not clear that they were widely accessed. For that argument, the Respondent relies on a case from the English Court of Appeal: *SS (Iran) v Secretary of State for*

the Home Department, [2008] EWCA Civ 310 at para 24. There, the applicant argued that because a photo was taken of him at a political rally, his activities in the UK had been publicized and he was in danger in his home country. The Court of Appeal said that the applicant's argument could be extended to encompass too many people and there were practical limits to the use of publicity in proving one's claim.

[19] The Respondent cites *Mikhno v Canada (Citizenship and Immigration)*, 2010 FC 385 at para 27, for the proposition that Immigration Officers have the authority to determine the weight to give to new evidence and their decisions should be afforded "significant deference". As such, the Respondent claims that the decisions of the Officer were reasonable and open to him to make.

V. Relevant Dispositions

[20] The following dispositions are relevant in this case:

Convention refugee	**Définition de réfugié**
96 A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	**96** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

b) soit, si elle n’a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Person in need of protection

Personne à protéger

97 (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

97 (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n’a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s’il y a des motifs sérieux de le croire, d’être soumise à la torture au sens de l’article premier de la Convention contre la torture;

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d’autres personnes originaires de ce pays ou qui s’y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by

(iv) la menace ou le risque ne

the inability of that country to provide adequate health or medical care.	résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
Application for protection	**Demande de protection**
112 (1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).	112 (1) La personne se trouvant au Canada et qui n'est pas visée au paragraphe 115(1) peut, conformément aux règlements, demander la protection au ministre si elle est visée par une mesure de renvoi ayant pris effet ou nommée au certificat visé au paragraphe 77(1).

VI. Analysis

[21] As per *Dunsmuir v New Brunswick*, 2008 SCC 9, the standard of review to be applied by this Court is reasonableness. Accordingly, if the Officer's decision is defensible in respect of fact and law, and it is justified, transparent and intelligible, it should stand.

[22] The Court, in considering the Officer's reasoning, determined the following in respect of the assessment of evidence: in her reasoning, the Officer relies heavily on the findings of credibility of the RPD, which she is entitled to do. Nevertheless, due to the findings on credibility of the RPD, the Officer gave little probative value to potentially relevant documents submitted by the Principal Applicant that required more consideration.

[23] More specifically, the Officer highlights syntax errors in the crime diary that are well within the range of typographical or inadvertent clerical errors and do not ordinarily undermine the credibility of the document.

[24] Moreover, the Officer dismissed the relevance and probative value of a blog post, which names the Principal Applicant as the lover of Mr. Chukwu and identifies him by photo. The Officer independently confirmed that the blog post is accessible online; however, an unreasonable burden was placed on the Principal Applicant to demonstrate that the blog post is "widely viewed and accessed by the public". The Officer was, in fact, able to have access to the blog. As the blog post publicly identifies the Principal Applicant as bisexual and thereby potentially endangers his life in Nigeria, recognizing the country condition evidence thereon, more demonstrative consideration is required for a reasonable assessment.

[25] Similarly, the Officer dismissed the relevance and probative value of a photocopy of a newspaper called "South-South News" which reports the death of Mr. Chukwu and the escape of Mr. Ayeni without adequately providing an explanation thereon.

[26] Finally, the Officer has not given proper consideration to a letter by the Ogute Community which invites the Principal Applicant to a spiritual cleansing because of the fact that he was caught having sex with another man. The Officer simply rejected the letter on the basis that the RPD's credibility findings outweighed its value, which the Officer may have been in position to do, had she adequately considered key evidence, discussed above, for its probative value with explanation.

[27] The Court, in a review such as the present application, must examine whether the evidence was, in fact, insufficient. In *Magonza v Canada (Citizenship and Immigration)*, 2019

FC 14, Justice Sébastien Grammond highlighted the importance of the "sufficiency" of the evidence in refugee law:

> [32] The last concept I wish to discuss is that of "sufficiency" of the evidence. The use of this concept, especially if it is meant to require several pieces of evidence to prove a fact, may be surprising. After all, the law does not require that facts be proved by more than one witness. When a contract is filed in evidence, or a witness testified that he saw the accused discharge a firearm on the victim, those facts are proven. But these are cases of direct evidence. Where the evidence is indirect or circumstantial, however, the fact-finder must rely on inferences, weigh each piece of evidence and decide whether the cumulative weight of all the evidence is sufficient to warrant a finding that the disputed fact exists.
>
> [33] Another manner of conveying the concept of sufficiency is to require corroboration: evidence that stands alone may not be sufficient. Of course, there is no accepted manner of quantifying credibility, probative value and weight. Thus, it is impossible to describe in advance what "amount" of evidence is "sufficient." "Sufficiency" is simply a word used by decision-makers to say that they are not convinced.
>
> [34] In refugee law, the central fact that must be proven is that there is "more than a mere possibility of persecution" (*Chan v Canada (Minister of Employment and Immigration)*, [1995] 3 SCR 593 at para 120, citing *Adjei v Canada (Minister of Employment and Immigration)*, [1989] 2 FC 680 (CA)). Usually, this can only be proved by indirect evidence and it is impossible to say in advance "how much." Deciding whether the evidence is sufficient is a practical judgment made on a case-by-case basis.
>
> [35] Because it is difficult to describe in words or in numbers the amount of evidence that will be sufficient to buttress a claim, sufficiency is an issue that will attract much deference on the part of reviewing courts (*Perampalam* at para 31). But like other factual findings, findings of insufficiency must be explained. One problem that often arises is that an "insufficient evidence" conclusion is really a manner of disguising an unexplained (or "veiled") credibility finding (*Liban v Canada (Citizenship and Immigration)*, 2008 FC 1252 at para 14; *Begashaw v Canada (Citizenship and Immigration)*, 2009 FC 1167 at paras 20–21; *Adetunji v Canada (Citizenship and Immigration)*, 2011 FC 869 at para 11; *Abusaninah v Canada (Citizenship and Immigration)*, 2015 FC 234 at para 54 [*Abusaninah*]; *Majali v Canada*

> *(Citizenship and Immigration)*, 2017 FC 275 [*Majali*]; *Ahmed* at para 38). Decision-makers should not "move the goalposts," as it were, when they have mere suspicions about credibility that they are unable to explain.
>
> [My emphasis.]

[28] In assessing whether a decision-maker reasonably assessed the sufficiency of the evidence, it is useful to ask what other evidence could reasonably have been produced and would have been satisfactory. In other words, what kind of corroborative evidence did the officer deem necessary or require but that was not offered. In the case at hand, the Officer did not specify why it was not enough or what would have been considered to be adequate corroborative evidence for a positive determination.

[29] It appears that the core of the narrative demonstrates the potential peril to the Applicants both in reference to the personal subjective evidence and the objective evidence on file as is abovementioned. Further to the Officer having examined the entire narrative, it would be important to have an understanding of that which did not satisfy the requirements of the legislation in respect of the PRRA.

[30] Finally, this Court recognizes that certain peripheral evidence does appear to embellish, to strengthen the narrative; nevertheless, the core of the narrative needs due consideration before the peripheral evidence can be said to be an embellishment.

[31] For all the above reasons, the matter is returned to be considered anew by a different officer.

VII. Conclusion

[32] In light of the above, this judicial review is granted.

JUDGMENT in IMM-1526-19

THIS COURT'S JUDGMENT is that the application for judicial review be granted and the matter be considered anew. There is no serious question of general importance to be certified.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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