

Federal Court



Cour fédérale

Date: 20190726

Docket: IMM-40-19

Citation: 2019 FC 1007

Ottawa, Ontario, July 26, 2019

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

**PREYE BENEDICTA OBOZUWA
ET AL**

Applicants

And

**MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants are citizens of Nigeria. They ask the Court to set aside a decision of the Refugee Appeal Division [RAD] confirming the denial of their claims for refugee protection by the Refugee Protection Division [the RPD]. The basis of the denial at both tribunals was credibility. For the reasons that follow, this application for judicial review is dismissed.

II. Background

[2] The Applicants consist of the Principal Applicant, her husband, and their three minor children. They allege a fear of persecution by traditional elders and the husband's family based on their refusal to circumcise their two daughters and have their son cleansed and dedicated as required by traditions. The Applicants allege having been threatened and attacked by the agents of persecution since their marriage in 2012.

III. RPD Decision

[3] The RPD found that the Applicants' fear was not credible. More specifically, it found that the Applicants, despite having been persecuted by the same individuals for over five years, could not identify their persecutors. It also noted that the Applicants had travelled to the United States [US] in 2016 for a three-week vacation, but then reavailed themselves to Nigeria, after failing to declare that trip until mid-hearing. Even prior to the US trip, the RPD noted that the Applicants had remained in Nigeria for several years despite the alleged threats, stating they were unable to afford leaving the country. The RPD further determined that the corroborative documents provided were of little weight, including the psychological report, and could not cure the credibility shortcomings.

IV. RAD Decision

[4] The RAD agreed with the RPD that the Applicants had not established their claim, despite overreaching in certain plausibility findings regarding the Applicants' inability to

identify their persecutors. On the whole, however, the RAD found inconsistencies in the Applicants' evidence.

[5] The RAD also found the US vacation to be a relevant factor, raising a number of credibility issues, including that it offered a means of obtaining protection abroad, and therefore speaks to their alleged fear of persecution.

[6] The RAD identified other credibility issues including objective evidence indicating that the husband's father was not a King, as was alleged in his Basis of Claim narrative [BOC] and that the Applicants' description of the incidents of persecution was not consistent with the objective evidence.

[7] The RAD determined that the RPD erred in failing to sufficiently consider the Applicants' supporting documentation before making credibility findings. It therefore conducted its own independent assessment of the letters, photographs and police report. The RAD determined that the letters did not have sufficient probative value to overcome the credibility issues, that the photographs were untitled and undated, and that the police report contained numerous problems on its face and did not conform with the description of the samples provided.

V. Issues and Standard of Review

[8] The Applicants challenge the RAD's decision on two main grounds: that the RAD's credibility determinations were both procedurally unfair and unreasonable.

[9] The standard for determining whether the decision-maker complied with the duty of procedural fairness is correctness (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 34), while the RAD's assessment of the evidence and findings involving a consideration of questions of mixed fact and law are owed deference and are reviewed against a standard of reasonableness (*Zhang v Canada (Citizenship and Immigration)*, 2019 FC 870 at para 9). Reasonableness also applies to the RAD's assessment of the admissibility of new evidence (*Eribo v Canada (Citizenship and Immigration)*, 2019 FC 735 at para 14).

VI. Analysis

A. *Preliminary issue*

[10] The Respondent takes issue with the Applicants' attachment of extrinsic evidence to their affidavit, namely a decision of the High Court of Justice of the Edo State of Nigeria as evidence that the husband's father was the King of the Okumagbe of Weppa Wano Kingdom. The decision was not before the RAD and is presented to challenge the RAD's finding that there is objective evidence that suggests that the husband's father was not the King.

[11] As held in *Anenih v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 718, evidence which could have been before the decision-maker, but was not, is inadmissible (at paras 6–7). Furthermore, affidavits must be confined to facts within the deponent's personal knowledge (*Federal Courts Rules*, SOR/98-106, r 81(1)). The Court may strike any portion of an affidavit where it contains opinion, argument or legal conclusion (*Anenih* at para 7). More

generally, the standard for the introduction of new evidence on judicial review is high; new evidence may be introduced on judicial review to demonstrate a breach of procedural fairness or jurisdiction rather than to support arguments about the merits of a decision (*Molnar v Canada (Citizenship and Immigration)*, 2012 FC 530 at para 39).

[12] The Applicants acknowledge that the evidence is extrinsic, but rely on *Dimgba v Canada (Citizenship and Immigration)*, 2018 FC 14 at paragraphs 9–10 for the proposition that they are obliged to present any additional evidence in response to the RAD’s adverse credibility finding.

[13] First, the RAD did not breach procedural fairness by relying on publicly available documents (*Shah v Canada (Citizenship and Immigration)*, 2018 FC 537 at paras 35–36). Rather, the appellate tribunal, in making its own credibility findings as required by *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 and *Rozas del Solar v Canada (Citizenship and Immigration)*, 2018 FC 1145, was simply doing the job it was created to do, namely determining the appeal on a correctness basis.

[14] Second, the Respondent aptly refers to *Kahumba v Canada (Citizenship and Immigration)*, 2018 FC 551 at paragraphs 51–54 where Justice Kane distinguished *Dimgba*. There, Justice Kane noted that *Dimgba* arose in the context of the decision of a visa officer who refused an application for a work permit based on the documentary evidence, where there was no oral hearing. She determined that before the RAD, on the other hand, extrinsic evidence was not admissible because it did not fall within one of the recognized exceptions.

[15] Here, like in *Kahumba*, the Applicants were afforded an oral hearing before the RPD where they were alerted to the credibility concerns in their case. The decision of the High Court of Justice of the Edo State of Nigeria does not fall within one of the recognized exceptions: it does not provide context; it was not filed to support an allegation of breach of procedural fairness; and, was not filed to demonstrate the absence of evidence (*Kahumba* at para 53). Rather, the Applicants are only attempting to introduce the new evidence to impugn one of the many credibility concerns identified by the RAD.

[16] The portion of the Applicants' affidavit containing the extrinsic evidence will accordingly not be considered in this application for judicial review.

B. Was the RAD's decision procedurally fair?

[17] The Applicants argue that the RAD's decision was procedurally unfair because it failed to hold an oral hearing and denied the Applicants an opportunity to clarify the issues raised by the RPD and RAD.

[18] However, the Applicants did not file any new, admissible evidence before the RAD. Furthermore, the RAD did not make additional findings on issues unknown to the Applicants: credibility was at the heart of the RPD decision, and served as the grounds for appeal before the RAD. The Applicants were therefore aware of credibility issues in their claims and were given the opportunity to respond to said concerns in submissions provided to the RAD.

[19] The RAD must proceed without a hearing pursuant to subsection 110(3) of *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], and may decide to hold a hearing if satisfied that new evidence presented to the RAD raises a serious issue with respect to credibility, is central to the decision, and would be determinative of the claim (subsection 110(6), IRPA). Finally, where the claimant's credibility is at the heart of the RPD's decision and the grounds for appeal to the RAD, the RAD is entitled to make independent findings in this regard, without having to question the claimants about it or otherwise give them an opportunity to make submissions (*Corvil v Canada (Citizenship and Immigration)*, 2019 FC 300 at para 13).

C. Was the RAD's decision reasonable?

[20] The Applicants advance a multitude of arguments that boil down to allegations that the RAD erred in its many negative credibility findings, including (i) plausibility; (ii) lack of subjective fear; (iii) inconsistencies in testimony and objective evidence; and (iv) treatment of the documentary evidence presented. Simply put, these arguments amount to a request for this Court to reweigh the evidence and arrive at a conclusion that they would prefer.

[21] I will briefly address these impugned credibility findings of the RAD, and explain why they are reasonable.

(1) *Plausibility*

[22] Implausibility, inconsistency, omission and contradiction are the cornerstones of adverse credibility findings (*Akzibekian v Canada (Citizenship and Immigration)*, 2019 FC 278 at para

18). However, such findings should not be based on a microscopic evaluation of issues peripheral or irrelevant to the case (*Clermont v Canada (Citizenship and Immigration)*, 2019 FC 112 at para 30).

[23] I agree with the Respondent that it appears the Applicants are attacking the plausibility finding made by the RPD. In its Decision, the RAD states as follows (Decision at para 11):

[11] I have considered the arguments of the Appellants, as detailed below. The RPD may have overreached in its plausibility finding regarding the Appellants' inability to identify their persecutors but it was a valid credibility finding.

[...]

[15] While I agree with the Appellants that a plausibility finding should only be made in the clearest of cases, I do not agree with the Appellants that the case law they cite stands for the proposition that plausibility findings can only be made "where documentary evidence demonstrates that events could not have happened in the manner asserted." The correct legal test is that "implausibility determinations must be based on clear evidence, as well as a clear rationalization process supporting the Board's inferences, and should refer to relevant evidence which could potentially refute such conclusions." The test does not specifically require documentary or objective evidence, just clear evidence and a clear rationalization process.

[Footnotes omitted]

[24] I find that the RAD reasonably stated the test for implausibility findings and reasonably applied the facts to the test. In applying the legal test, the RAD found that the RPD had overreached when it found implausible that the Applicants could not name their persecutors but agreed with the RPD's credibility finding given the "material inconsistency" between the Applicants' testimony that they were not able to identify their persecutors and the husband's testimony that he was a professional politician who mounted a sophisticated campaign apparatus

to identify his constituents which would have included the elders from his home village. The RAD is allowed to rely on inconsistencies in making an adverse credibility finding and this inconsistency in the Applicants' story concerns central elements of the claims, including whether the alleged events in fact occurred.

(2) *Subjective Fear*

[25] Both the RPD's and then the RAD's independent consideration of the Applicants' late-disclosed US vacation was open to the respective tribunals. The Applicants' return to Nigeria after years of claimed persecution and fear of their future, undermines the credibility of those claims and their subjective fear (*Khakimov v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 18 at para 27). Indeed, when asked by the RPD about the purpose of the trip to the US, the husband explained that it was purely a vacation after his tenure as a councillor, as the family needed a break. This was inconsistent with the family's claim that they had no financial means in prior years to leave Nigeria.

[26] While the Applicants posit that the trip was "insignificant and inconsequential" and had "nothing to do with the Applicants' claims", the Board's findings were entirely reasonable, particularly in light of alleged threats, home invasion, and attempted abduction of the daughters shortly before the US vacation.

(3) *Inconsistencies*

[27] While the above findings allow the decision to stand, the Applicants also challenge other aspects of the RAD decision. These challenges also lack merit. For instance, they attack findings regarding inconsistency in testimony.

[28] A board, however, is entitled to draw conclusions concerning applicants' credibility based on implausibilities, common sense and rationality. It can reject evidence if it is inconsistent with the probabilities affecting the case as a whole, or where inconsistencies are found in the evidence (*Lawani v Canada (Citizenship and Immigration)*, 2018 FC 924 at para 26). Such findings regarding the evidence related to circumstances surrounding police protection and attempted forced circumcision stand up to judicial review.

(4) *Documentary Evidence*

[29] Regarding the police report presented, a board cannot find a document to be inauthentic on the basis of speculation: it must do so on the evidence (*Mohamud v Canada (Citizenship and Immigration)*, 2018 FC 170 at para 6). Here, the RAD did not find the police report inauthentic on the basis of speculation. Rather it based its finding on the evidence having compared the report to accepted samples in the National Documentation Package [NDP]. And contrary to the assertions of the Applicants, the RAD did not base its findings on the prevalence of fraudulent documents in Nigeria.

[30] While I agree with the Applicants that the board avails itself of documentation authentication expertise from time to time (see for instance, *Bahati v Canada (Citizenship and Immigration)*, 2018 FC 1071 at para 20), this was not such a case given the plethora of other

credibility issues, and the numerous issues on the face of the police report quite apart from the NDP comparison.

[31] Equally, the Applicants would have this Court reweigh the RAD's assessment of the four letters and photographs which it found the RPD improperly failed to assess. The RAD's conclusions that these letters and photos had insufficient probative value to overcome the various credibility findings were entirely reasonable.

[32] Finally, the Applicants argue that the psychologist's report was not properly considered by the RPD. However, the Applicants did not challenge the RPD's treatment of the report before the RAD which thus cannot be faulted (see *Osikoya v Canada (Citizenship and Immigration)*, 2018 FC 720 at para 56).

VII. Conclusion

[33] There were numerous reasonable credibility findings which led the RAD to conclude that overall, the claim was not credible. Looking at the decision as an organic whole (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at para 54), the RAD independently and fairly assessed the evidence, and provided intelligible and transparent explanations in reaching a justifiable conclusion. As a result, the application for judicial review is dismissed. Appropriately, neither party posed any question for certification.

JUDGMENT IN IMM-40-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. No question is proposed for certification.
3. There is no award as to costs.

"A. Diner"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-40-19

STYLE OF CAUSE: PREYE BENEDICTA OBOZUWA
ET AL v. THE MINISTER OF
CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: CALGARY, ALBERTA

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