Federal Court  Cour fédérale

Date: 20210514

Docket: IMM-7899-19

Citation: 2021 FC 450

Ottawa, Ontario, May 14, 2021

PRESENT: Madam Justice Pallotta

BETWEEN:

FRANCISCA OGAGA AGHEDO AND HENRY AGHEDO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicants, Francisca Ogaga Aghedo and Henry Aghedo, seek judicial review of a decision of the Refugee Appeal Division of the Immigration and Refugee Board (RAD), upholding the Refugee Protection Division's (RPD) determination that they are not Convention

refugees or persons in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] The applicants and their two minor daughters are citizens of Nigeria. The family sought refugee protection in Canada based on a fear of persecution from members of Mr. Aghedo's extended family, who repeatedly pressured the applicants to allow their daughters to undergo female genital circumcision (FGC). The RPD denied their refugee claims.

[3] The RAD allowed the appeal in part, setting aside and substituting the RPD's decision with respect to the two daughters. Although the RAD found that the daughters are not at risk of forced FGC by the extended family members, the RAD determined that they are at risk of persecution in view of objective country condition evidence that girls of Edo ethnicity who do not undergo FGC when family traditions require it are at risk of ostracism, shunning and physical abuse, and that children are not expected to withstand the same pressures as adults.

[4] Unlike their daughters, the RAD determined that the applicants are not Convention refugees or persons in need of protection. The RAD found that in Nigeria, parents can generally object to FGC for their daughters without repercussions amounting to persecution. The RAD considered the applicants' allegations that Mr. Aghedo had received death threats from the extended family members. The RAD found that the threats that Mr. Aghedo would "face consequences" if he did not produce his daughters, and that Mr. Aghedo's father was killed by this same type of stubbornness, were spiritual threats that Mr. Aghedo's life would be taken by higher powers if he did not comply. The RAD was not satisfied that either of the parents would

face serious consequences in not complying with the demands, and concluded that the applicants do not have a well-founded fear of persecution or harm.

[5] The applicants submit the RAD unreasonably determined that they do not have a well-founded fear of persecution or harm, by failing to properly consider the evidence. Furthermore, the applicants argue that the RAD breached procedural fairness by raising a new issue regarding the existence of a well-founded fear of persecution, and deciding their claim based on that issue without first providing an opportunity for the applicants to present evidence and submissions on it.

[6] I find that the RAD breached procedural fairness by raising a new issue that was central to the appeal, without affording the applicants an opportunity to respond. For the reasons below, this application is granted.

II. **Issues and Standard of Review**

[7] As noted above, the two issues on this application are: 1) whether the RAD breached procedural fairness by raising a new issue on appeal without notice; and 2) whether the RAD's finding that the applicants do not have a well-founded fear of persecution or harm is reasonable. As my finding on the first issue is determinative of this application, it is unnecessary to address the second issue.

[8] The applicants make no submissions on the applicable standard of review. The respondent argues that the presumptive standard of reasonableness applies.

[9] I agree with the respondent that the presumptive standard of reasonableness applies to the second issue: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. However, *Vavilov* has not changed the approach for questions of procedural fairness. The first issue engages a fairness review, on a standard that is akin to correctness: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*Canadian Pacific Railway*]. The duty of procedural fairness is "eminently variable", inherently flexible and context-specific: *Vavilov* at para 77. A court assessing a procedural fairness argument is required to ask whether the procedure was fair having regard to all of the circumstances: *Canadian Pacific Railway* at para 54.

III. **Analysis**

A. *Did the RAD raise a new issue without notice?*

[10] The applicants submit that the RAD breached procedural fairness by raising a new issue that was determinative of their refugee claims, without first providing notice or an opportunity to respond. The applicants submit that the RPD had rejected their claims (as well as their daughters' claims) based on a general finding of lack of credibility. They successfully challenged the RPD's credibility findings on appeal to the RAD—the RAD agreed that the RPD had erred in a number of its credibility findings, and found that the cumulative credibility issues pointed out by the RPD did not warrant a general finding of lack of credibility. However, the RAD allowed the appeal only in part, with respect to the daughters' claims. The applicants submit that the RAD dismissed the appeal with respect to their own refugee claims by

introducing a new issue of a well-founded fear of persecution or harm, finding that while the family had been subjected to threats, those threats were "spiritual" in nature. The applicants submit that the distinction between spiritual and physical threats was not a focus at the RPD hearing, was not supported by the documentary evidence, and was not discussed in the RPD's decision. The applicants submit that it was improper for the RAD to take an entirely different course from the RPD, as the applicants had no opportunity to file evidence or submissions addressing the new issue the RAD introduced: *Ching v Canada (Citizenship and Immigration)*, 2015 FC 725 at paras 67–72 [*Ching*]. This, they submit, led to the RAD's erroneous conclusion that the applicants were not threatened with physical harm.

[11] Furthermore, the applicants argue that the RAD trivialized the nature of the threats by introducing the notion of spiritual threats to imply that the threats were not real, or they were not serious. They argue that the RAD failed to give due regard to the meaning of "persecution" developed in the case law, which includes harassment, discrimination, and other acts of cruelty or punishment that are sufficiently serious: *AB v Canada (Citizenship and Immigration)*, 2009 FC 640 at paras 27ff.

[12] The respondent argues that the RAD did not raise a new issue, but rather conducted an independent analysis of the record and arrived at a different assessment of the evidence than the RPD. The respondent relies on *Chen v MCI*, 2015 FC 1174 at paras 10–11 [*Chen*], citing *R v Mian*, 2014 SCC 54 [*Mian*] for the principle that an issue is not new unless it is "legally and factually distinct from the grounds of appeal raised by the parties…and cannot reasonably be said to stem from the issues as framed by the parties". The respondent argues that the RAD is

entitled to independently assess the evidence and make credibility findings (*Bebri v MCI*, 2018 FC 726 at paras 16–17 [*Bebri*]) and the applicants have not alleged that the RAD made new credibility findings that had not been addressed by the RPD, or had not been raised in the applicants' submissions to the RAD. According to the respondent, the assessment of a well-founded fear of persecution or harm stems from the issues as framed by the applicants, and the RAD was conducting an assessment that was central to the parents' claims.

[13] There is no question that the RAD made its determination without providing notice and an opportunity to address the nature of the threats or the effect of the nature of the threats on whether the parents face a well-founded fear of persecution. The question for this Court is whether the failure to provide that notice constitutes a breach of procedural fairness because the RAD was raising a new issue.

[14] In general, the RAD decides appeals without a hearing unless new documentary evidence is admitted, and even then, only when the evidence meets certain statutory requirements: section 110 of the *IRPA*. Where a hearing is not warranted, the RAD may, "without further notice to the appellant and to the Minister, decide an appeal on the basis of the materials provided": Rule 7 of the *Refugee Appeal Division Rules*, SOR/2012-257.

[15] Case law recognizes an exception to this rule when procedural fairness requires the RAD to give notice to the applicants that it has raised a new issue, and provide an opportunity for submissions: *Kwakwa v Canada (Citizenship and Immigration)*, 2016 FC 600 [*Kwakwa*]. The key consideration is whether the applicant knew the case to meet, and had an opportunity to

respond to any new issue. As the Federal Court put it in *Husian v Canada (Minister of Citizenship and Immigration)*, 2015 FC 684 at para 10, "if the RAD chooses to take a frolic and venture into the record to make further substantive findings, it should give some sort of notice to the parties and give them an opportunity to make submissions."

[16] In the case of *Mian*, the Supreme Court of Canada considered the scope of an appellate court's jurisdiction to raise new issues, as well as the procedural requirement for notice to the parties. The Court held that new issues are "legally and factually distinct from the grounds of appeal raised by the parties…and cannot reasonably be said to stem from the issues as framed by the parties": *Mian* at para 30. Issues that are rooted in or are components of an existing issue are also not new issues: *Mian* at para 33. An appellate court should only raise a new issue when failing to do so would risk an injustice, and generally, the parties must be notified and given the opportunity to respond to the new issue: *Mian* at paras 30, 54.

[17] The principles in *Mian* were applied to the immigration judicial review context in *Ching*. The Court noted that the RAD conducts a full fact-based appeal, and is not precluded from considering new issues not raised on the appeal. However, in doing so, the RAD should consider whether raising a new issue is necessary to avoid an injustice and if so, the applicant should have an opportunity to make submissions on the issue: *Ching* at paras 72–74.

[18] Therefore, while the RAD must conduct its own assessment of the evidence *de novo* (*Huruglica v Canada (Citizenship and Immigration)*, 2014 FC 799), and is entitled to "set aside the [RPD's] determination and substitute a determination that, in its opinion, should have been

made" (*IRPA*, para 111(1)(b)), where the RAD intends to base its determination on a new issue that was not addressed in the RPD's decision or the parties' submissions, it must first give notice and an opportunity to respond.

[19] In this case, the general question of a well-founded fear of persecution or harm, being part of the test under sections 96 and 97 of *IRPA*, was a live issue before the RPD, and was mentioned in the RPD decision, the RPD hearing transcript and Ms. Aghedo's affidavit in support of the RAD appeal. However, the RPD did not question the nature of the threats, and seemed to accept that the threats, if believed, were threats of physical harm. The nature of the threats against the applicants was not in issue before the RPD, and first became an issue in the RAD's reasons.

[20] In my view, the present case is distinguishable from cases such as *Chen* and *Bebri*, where the RAD upheld a credibility finding on a different basis from the RPD. This case is more similar to *Ching*, where the determinative issue before the RPD had been delay in seeking protection, and the RAD raised new issues of credibility without providing notice: *Ching* at para 73.

[21] In the present case, the RPD's rejection was based on negative credibility findings that were, according to the RPD, central to the core issues of all four family members' claims. The RPD concluded that the negative credibility findings "cumulatively cause the panel to doubt the veracity of all of the evidence presented by the claimant[s], including with respect to their allegations that [Mr. Aghedo's] extended family will kill the adult claimants, and forcibly make

the minor claimants undergo female genital mutilation." The RAD, on the other hand, accepted the parents' evidence that the extended family made threats of harm that would befall them for refusing FGC for their daughters, but characterized these as spiritual rather than physical threats. While there are elements of credibility in the findings of both the RPD and the RAD, in my view there is a distinction in that the RPD did not believe the applicants, whereas the RAD believed them but found they were mistaken in their belief about the nature of the threats. Furthermore, the nature of the threats was not only raised as a new issue, but one that was key to the RAD's ultimate decision to allow the daughters' claims, and to refuse the parents' claims.

[22] I disagree with the respondent that the assessment of a well-founded fear of persecution or harm stems from the issues as framed by the applicants. It is true that, if the RAD accepts arguments on appeal, the RAD is then required to independently assess and decide the refugee claims; however, in my view the RAD's findings did not arise from the issues as framed by the applicants, nor can it be said that the applicants should have anticipated the new reason for rejecting their claim. In any event, anticipation may not obviate the need for notice in every situation, as the Supreme Court recognized that it may be appropriate to provide an opportunity for submissions even where the issue is a component of the overall analysis, and not, strictly speaking, a new issue: *Mian* at para 33.

[23] For the reasons noted above, I find that the RAD breached procedural fairness, and the application should be allowed.

B. *Was the RAD's decision reasonable?*

[24] Given my findings on the first issue, it is not necessary or appropriate to address the second issue raised on this application for judicial review.

IV. **Conclusion**

[25] This application is granted. I find that the RAD breached procedural fairness by raising a new issue that was central to the appeal, without affording the applicants an opportunity to respond.

[26] The applicants seek an order setting aside the RAD's decision and declaring the applicants to be Convention refugees or persons in need of protection. In the alternative, they ask this Court to set aside the RAD's decision and remit the matter to a differently constituted panel of the RAD.

[27] An order setting aside the tribunal's decision and referring the matter back to the tribunal is generally the appropriate remedy: *Vavilov* at para 141. The applicants have not established that the general rule should not be followed in this case. In my view, the appropriate remedy is an order setting aside the RAD's decision, and returning the matter for redetermination by a differently constituted panel of the RAD.

[28] Neither party has proposed a question for certification. In my view, this matter does not raise a question for certification.

JUDGMENT in IMM-7899-19

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted.
2. The RAD's decision is set aside and the matter shall be referred back to a different decision-maker for redetermination.
3. There is no question to certify.

"Christine M. Pallotta"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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