Federal Court  Cour fédérale

Date: 20161110

Docket: IMM-659-16

Citation: 2016 FC 1253

Ottawa, Ontario, November 10, 2016

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

TOSAN ERHUN EHONDOR and TELMA OSASENAGA OGEDEGBE, by her Litigation Guardian, TOSAN ERHUN EHONDOR

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants, Tosan Erhun Ehondor and her four year old daughter, Telma Osasenaga Ogedegbe, are citizens of Nigeria who were smuggled into Canada from the United States on October 15, 2014. Ms. Ehondor was then about eight months pregnant; her son was born in Canada on November 16, 2014. Shortly after her arrival in Canada, Ms. Ehondor made a claim for refugee protection, citing a fear of abuse and persecution at the hands of her former partner in

Nigeria. Although the Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB] rejected the claim in a decision dated January 7, 2015, the Refugee Appeal Division [RAD] of the IRB allowed Ms. Ehondor's appeal in a decision dated April 22, 2015 and referred the matter back to the RPD.

[2] The RPD, however, again rejected Ms. Ehondor's claim for protection in a decision dated August 12, 2015, finding that she could relocate to a place outside of her home city of Benin to a different city such as Abuja. Ms. Ehondor's appeal of the RPD's second decision to the RAD was dismissed in a decision dated January 12, 2016. It is this second decision by the RAD in respect of which Ms. Ehondor has applied for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [*Act*].

I. The RAD's Decision

[3] The RAD rejected the Applicants' appeal and confirmed the RPD's decision. The RAD characterized the Applicants' two main concerns on the appeal as being a flawed internal flight alternative [IFA] analysis and a flawed credibility analysis by the RPD.

[4] As to whether Abuja was a viable IFA for the Applicants, the RAD identified the two-pronged test emanating from *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1991] FCJ No 1256, [1992] 1 FC 706, (FCA), and *Thirunavukkarasu v Canada (Minister of Employment and Immigration) (CA)*, [1994] 1 FC 589, [1993] FCJ No 1172, noting that the burden was upon the Applicants to show they did not have an IFA. Based on the documentary evidence, the RAD found that there are resources available in Abuja to vulnerable women that

can provide assistance to the Applicants should they require it. The RAD also discussed whether the Boko Haram's presence increased the Applicants' risk. The RAD found that the Boko Haram targeted media houses in Abuja and, as a result, the Applicants were not at risk because they were not affiliated with any media houses. The RAD acknowledged that the RPD had erred by not considering the presence of the Boko Haram in the second prong of the IFA test, but this was not fatal because the documentary evidence strongly pointed to the fact that the threat of the Boko Haram is concentrated in northeastern Nigeria and there was no evidence that it is based in Abuja where it is conducting regular attacks. After reviewing the threat of the Boko Haram in Nigeria, the RAD concluded that Abuja was a viable and supportable IFA location for the Applicants.

[5] As to the ability or inability of Ms. Ehondor's former partner to find her in Abuja, the RAD stated that this issue directly related to her lack of credibility. After reviewing the transcript of the hearing before the RPD, the RAD stated that it had "serious concerns with respect to the credibility of the Principal Appellant's [Ms. Ehondor's] oral testimony. The evidence shows that she obfuscates her answers and is evasive." The RAD pointed to examples where it found a "serious contradiction" in Ms. Ehondor's testimony, "evasiveness" which diminished her credibility, and "internally contradictory" testimony, as well as examples which raised "concerns of omissions" from her basis of claim form. Thus, the RAD concluded as follows:

> [31] … the RAD finds the Principal Appellant's testimony to be disjointed and confusing. It appears that the RPD panel did not get many straight answers to her questions. Which is why, the RAD finds the Principal Appellant not credible.
>
> [32] In addition to the significant omissions found by the RPD in her documentary evidence and her testimony, RAD finds the Principal Appellant's testimony to be evasive and vague. Having found the Principal Appellant not credible, the minor daughter has

> no independent claim apart from her mother and therefore she has no reason to acquire protection in Canada.

II. Issues

[6] This application for judicial review raises the following issues:

1. What is the appropriate standard of review?
2. Did the RAD deny the Applicants procedural fairness because it made a general finding of lack of credibility against Ms. Ehondor without affording the Applicants an opportunity to make submissions on this issue?
3. Was the RAD's finding that the Applicants had an IFA in Abuja reasonable?

III. Analysis

A. *What is the appropriate standard of review?*

[7] The appropriate standard of review for this Court when reviewing a decision of the RAD is one of reasonableness (see *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35, 396 DLR (4th) 527). Accordingly, the RAD's assessment of the evidence before it is entitled to deference (see *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 53, [2008] 1 SCR 190 [*Dunsmuir*]; also see *Tota v Canada (Citizenship and Immigration)*, 2015 FC 890 at para 19, [2015] FCJ No 877).

[8] Moreover, although the Court can intervene "if the decision-maker has overlooked material evidence or taken evidence into account that is inaccurate or not material" (*James v Canada (Attorney General)*, 2015 FC 965 at para 86, 257 ACWS (3d) 113), the RAD's decision

should not be disturbed so long as it is justifiable, intelligible, and transparent, and defensible in respect of the facts and the law (*Dunsmuir* at para 47). Those 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, [2011] 3 SCR 708). The RAD's decision must be considered as an organic whole and the Court should not embark upon a line-by-line treasure hunt for error (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper Ltd.*, 2013 SCC 34 at para 54, [2013] 2 SCR 458; see also *Ameni v Canada (Minister of Citizenship and Immigration)*, 2016 FC 164 at para 35, [2016] FCJ No 142).

[9] It is well-established that determinations on the availability of an IFA are reviewed on the reasonableness standard (see *Momodu v Canada (Citizenship and Immigration)*, 2015 FC 1365 at para 6, [2015] FCJ No 1470; also see *Verma v Canada (Citizenship and Immigration)*, 2016 FC 404 at para 14, [2016] FCJ No 372).

[10] Whether any rules of procedural fairness were breached by the RAD is an issue subject to the correctness standard of review (see *Mission Institution v Khela*, 2014 SCC 24 at para 79, [2014] 1 SCR 502; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43, [2009] 1 SCR 339). This requires the Court to determine whether the RAD in rendering its decision achieved the level of fairness required by the circumstances of the matter (see *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 115, [2002] 1 SCR 3). It is, therefore, not so much a question of whether the RAD's decision is correct as it is a

question of whether the process followed by it in making the decision was fair (see *Hashi v Canada (Citizenship and Immigration)*, 2014 FC 154 at para 14, 238 ACWS (3d) 199; and *Makoundi v Canada (Attorney General)*, 2014 FC 1177 at para 35, 249 ACWS (3d) 112).

B. *Did the RAD deny the Applicants procedural fairness because it made a general finding of lack of credibility against Ms. Ehondor without affording the Applicants an opportunity to make submissions on this issue?*

[11] The RPD generally accepted Ms. Ehondor's testimony and evidence, except with respect to the issue of whether Abuja was a viable IFA. The RAD placed more weight on the documentary evidence than Ms. Ehondor's testimony in this regard. The RPD found Ms. Ehondor's account of how her former partner previously found her in Abuja to be "not credible" primarily because she had omitted these events from her basis of claim form. The RPD did not make any other credibility findings. The RAD, however, went further and concluded that Ms. Ehondor was "not credible" and found that her testimony was "disjointed and confusing" as well as "evasive and vague."

[12] The Applicants argue that the RAD erred by considering the issue of Ms. Ehondor's general credibility, an issue which they did not raise or address in their written submissions to the RAD. According to the Applicants, the RAD's determination about Ms. Ehondor's general credibility was procedurally unfair because she did not have an opportunity to respond to the RAD's concerns and findings in this regard. In contrast, the Respondent maintains that the RAD did not breach natural justice but, rather, was overly cautious and scrupulous in assessing Ms. Ehondor's credibility. In the Respondent's view, the RAD only examined and assessed

credibility as it related to the IFA issue and it did not consider a new issue because it only relied on evidence that was before the RPD.

[13] Case law has established that the duty of procedural fairness requires the RAD, when considering an issue that was not raised by an appellant or by the RPD, to provide the appellant with an opportunity to make submissions on the issue. For example, in *Jianzhu v Canada (Citizenship and Immigration)*, 2015 FC 551, [2015] FCJ No 527, the Court determined that the RAD's decision was unreasonable because it raised and decided the issue of an applicant's refugee *sur place* claim when the matter had not been determined by the RPD and had not been raised by the applicant on the appeal to the RAD. To similar effect is the Court's decision in *Ojarikre v Canada (Citizenship and Immigration)*, 2015 FC 896, 257 ACWS (3d) 922 [*Ojarikre*], where the RAD's decision was set aside because it had raised and decided the issue of an IFA which was not raised by either party before the RAD and the RPD had made no determination concerning an IFA; this constituted "a failure of procedural fairness" in *Ojarikre* because "when the RAD raises a new issue without first providing the parties with an opportunity to file new documentary evidence and submissions on the point, …it deprives the parties of an opportunity to make submissions to the RAD on the issue that it considers to be determinative of the matter" (at para 22).

[14] In *Ching v Canada (Citizenship and Immigration)*, 2015 FC 725 at para 71, 255 ACWS (3d) 805, Justice Kane noted that the duty of procedural fairness requires the RAD to "first consider if the issue is 'new' and if failing to raise the new issue would risk injustice. If the RAD pursues the new issue, it seems clear that… the party or parties affected be given notice and an

opportunity to make submissions." Similarly, in *Husian v Canada (Citizenship and Immigration)*, 2015 FC 684 at para 10, [2015] FCJ No 687, Justice Hughes observed: "The point is that 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." More recently, Justice Strickland summarized the case law in this regard in *Tan v Canada (Minister of Citizenship and Immigration)*, 2016 FC 876, [2016] FCJ No 840, stating as follows:

> [40] …in the context of a RAD appeal, where neither party raises or where the RPD makes no determination on an issue, it is generally not open to the RAD to raise and make a determination on the issue, as this raises a new ground of appeal not identified or anticipated by the parties thereby potentially breaching the duty of procedural fairness by depriving the affected party of an opportunity to respond. This is particularly so in the context of credibility findings (*Ching* at paras 65-76; *Jianzhu* at para 12; *Ojarikre* at paras 14-23). …

[15] The question then is whether the RAD's determination that Ms. Ehondor was not credible raised a new issue. In *R v Mian*, 2014 SCC 54 at para 30, [2014] 2 SCR 689, the Supreme Court defined new issues to be "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." In this case, the RPD's findings provide context to address this question. Ms. Ehondor had indicated that "she could not relocate to Abuja as she had previously attempted to live there in August 2014 but was found by her former partner." However, the RPD found that Ms. Ehondor's account of how her former partner previously found her in Abuja was not credible because she failed to disclose such a significant event in her basis of claim form. The RPD made no other credibility findings.

[16] Nevertheless, the RAD went further and made several findings about Ms. Ehondor's general or overall credibility despite the fact that the Applicants had not raised her credibility as an issue on the appeal and the RPD had made no general determination in this regard. The RPD's single, specific credibility finding was limited to Ms. Ehondor's account of how her former partner found her in Abuja; it does not amount to a general finding of Ms. Ehondor's lack of credibility. A general finding of lack of credibility, which the RAD made in this case, is a distinct finding which taints or impugns all of a claimant's evidence (see, e.g., *Rusznyak v Canada (Minister of Citizenship and Immigration)*, 2014 FC 255 at para 45, 239 ACWS (3d) 173, and *Abid v Canada (Citizenship and Immigration)*, 2012 FC 483 at para 21, [2012] FCJ No 709).

[17] Given that Ms. Ehondor's general credibility was not raised by the Applicants as an issue before the RAD, nor for that matter raised and assessed by the RPD in the reasons for its decision, the RAD should have focused its analysis solely on whether Ms. Ehondor's narrative about her former partner locating her in August 2014 was credible. If, as the RAD stated, it had "serious concerns" about the credibility of Ms. Ehondor's oral testimony, it should have looked to subsection 110(6) of the *Act* and convoked an oral hearing where her general credibility could be fairly assessed.

[18] The RAD erred in this case by raising Ms. Ehondor's general credibility as a new issue and making a finding about it. The RAD breached its duty of procedural fairness to the Applicants by failing to provide them with an opportunity to make submissions concerning Ms. Ehondor's general credibility. This is unfair to Ms. Ehondor because not only was she deprived

of an opportunity to address the RAD's concerns about her general credibility, but this finding could taint or impugn her credibility in some future proceeding or application. The RAD's decision will therefore be set aside.

[19] In view of the foregoing, it is not necessary to address the issue of whether the RAD's assessment of an IFA in Abuja was reasonable.

IV. Conclusion

[20] The Applicants' application for judicial review is granted. The RAD breached its duty of procedural fairness to the Applicants and the matter is returned to the RAD for a new determination by a different panel member in accordance with these reasons for judgment. No question of general importance is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that: the application for judicial review is allowed; the matter is returned to the Refugee Appeal Division of the Immigration and Refugee Board for redetermination by a different panel member in accordance with the reasons for this judgment; and no question of general importance is certified.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	TOSAN ERHUN EHONDOR and TELMA OSASENAGA OGEDEGBE, by her Litigation Guardian, TOSAN ERHUN EHONDOR v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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APPEARANCES:

D. Clifford Luyt	FOR THE APPLICANTS
Christopher Ezrin	FOR THE RESPONDENT

SOLICITORS OF RECORD:

D. Clifford Luyt Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT