Federal Court  Cour fédérale

Date: 20180410

Docket: IMM-3006-17

Citation: 2018 FC 384

Ottawa, Ontario, April 10, 2018

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

ROSEMARY AGBONMHERE CALEB OSELUOLE EMMANUELLA CALEB (BY HER LITIGATION GUARDIAN, ROSEMARY AGBONMHERE CALEB) ERONMHOSELE PRINCE MOSES CALEB (BY HIS LITIGATION GUARDIAN, ROSEMARY AGBONMHERE CALEB)

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Ms. Rosemary Agbonmhere Caleb is acting as litigation guardian for her two minor children in this application: her nine year old daughter Oseluole Emmanuella Caleb and seven year old son Eronmhosele Prince Moses Caleb. The three applicants are citizens of Nigeria.

[2] Ms. Caleb reports that her husband's family believes that female children must undergo a circumcision ritual, also referred to as female genital mutilation [FGM]; Ms. Caleb vehemently opposes this procedure. She fears her husband's family and the community he is from will subject her female children to FGM. They have claimed protection in Canada.

[3] The Refugee Protection Division [RPD] determined that Ms. Caleb had failed to present credible evidence of risk and concluded Ms. Caleb and her children were neither Convention refugees nor persons in need of protection as contemplated by sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The Refugee Appeal Division [RAD] dismissed their appeal, finding on a balance of probabilities that the applicants were lacking in credibility and subjective fear.

[4] In seeking judicial review of the decision, Ms. Caleb states that the RAD breached their right to procedural fairness. She further states that the RAD unreasonably assessed their credibility and subjective fear, based the decision on only part of the evidence and failed to assess the objective elements of the section 96 and 97 claims.

[5] The application is denied. Although the RAD did mischaracterize the nature of reported threats to Ms. Caleb and her family, after having looked to the record and the evidence before the RAD, I am unable to conclude the error renders the decision unreasonable. There was no breach of procedural fairness nor does the record disclose a reviewable error in the RAD's treatment of the evidence or assessment of the objective elements of the claim.

II. Background

[6] Ms. Caleb reports that her husband's family have demanded that they subject their daughter Emmanuella, born in 2008, to FGM. The demands were first made shortly after Emmanuella's birth. Ms. Caleb is vehemently opposed to the procedure although she has not openly expressed this opposition to her husband's family. Instead she and her husband have stalled and delayed by providing vague promises that their daughter will undergo the ritual at some unspecified future date.

[7] Ms. Caleb reports that in July or August 2009 she was confronted in her home by representatives of her husband's family who threatened her and accused her of influencing her husband in not allowing Emmanuella to be subjected to FGM. Following this incident the family relocated from Port Harcourt to Abuja to ensure Ms. Caleb's safety and avoid the possibility of Emmanuella being subjected to FGM. Despite the move the threats continued by phone, and her husband's family subsequently located them in Abuja.

[8] In 2010 Ms. Caleb's second child was born, their son Prince. The family pressure to subject Emmanuella to FGM continued and promises were made to do so prior to her reaching 10 years of age. As a result of the pressure and stress Ms. Caleb reports becoming depressed and anxious. To gain temporary relief from the stress and pressure Ms. Caleb and her husband travelled to the U.K. in 2015 for a visit. The children did not travel with them.

[9] In January 2016, Ms. Caleb learned she was pregnant with twin girls. She reports that, knowing she would face pressure from her husband's family to subject the infants to FGM, she refused to give birth in Nigeria. She and her husband travelled to Canada in March 2016 and she gave birth to the twin girls in April 2016. The twins are Canadian citizens. Again neither Emmanuella nor Prince accompanied Ms. Caleb and her husband to Canada in March 2016.

[10] Despite her reported fear of the threat posed by her husband's family she and her husband returned to Nigeria in June 2016 with the twins. Ms. Caleb states she returned on the basis that her husband had promised to protect the children and that Nigerian culture compelled her to respect her husband's decisions.

[11] In September 2017 the whole family travelled to Canada. Mr. Caleb then returned to Nigeria and in October 2017 Ms. Caleb initiated her claim for protection. The RPD refused the claim in January 2017 and an appeal to the RAD was pursued.

[12] In dismissing the appeal the RAD noted that the RPD had found:

A. Ms. Caleb's evidence relating to the pressure she faced from her husband's family not to be credible;

B. Ms. Caleb's failure to make a refugee claim during travel to the U.K. in 2015 or to Canada in March 2016 undermined her credibility and demonstrated a lack of subjective fear; and

C. Ms. Caleb and her husband were educated people and it therefore did not accept as credible evidence that Mr. Caleb needed convincing as to the dangers of FGM before allowing his family to return to Canada to make a refugee claim.

[13] The RAD acknowledged that the RPD had erred in respect of some factual findings but nonetheless concluded the evidence as presented supported the core finding of the RPD – a lack of subjective fear because: (1) the parents' travels abroad without their children demonstrated a lack of subjective fear for their safety in Nigeria; and (2) any misunderstanding relating to Mr. Caleb's employment did not undermine the key finding that he would have been aware of the harms of FGM.

[14] The RAD then made additional credibility and subjective fear findings, noting the claims were not credible because: (1) despite allegedly being threatened since 2008 Ms. Caleb had been able to "postpone the circumcision for years, and…they were never physically attacked and no attempts were made to take the children away;" and (2) despite Ms. Caleb's testimony that her husband had been threatened because of the delay, he chose to "return to Nigeria to complete a certification in I.T." The RAD also found Rosemary's return to Nigeria "after visiting the U.K. and Canada, despite having asked about making a refugee claim, [was] demonstrative of a lack of subjective fear." The RAD found "on a balance of probabilities that the Appellants do not face the risks they allege."

[15] The RAD then found that the documentary evidence – in the form of affidavit evidence from Ms. Caleb's friend and articles concerning FGM in Nigeria – did not overcome the credibility and subjective fear concerns.

III. Preliminary Matter - Style of Cause

[16] The applicants have named the Minister of Immigration, Refugees and Citizenship Canada as the respondent in this matter. The correct respondent is the Minister of Citizenship and Immigration (*Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, s 5(2) and IRPA). Accordingly, the respondent in the style of cause is amended to the Minister of Citizenship and Immigration.

IV. Issues

[17] The application raises the following issues:

A. Did the RAD breach the applicants' right to procedural fairness?

B. Did the RAD unreasonably assess the applicants' credibility and subjective fear?

C. Is the decision unreasonable because the RAD based its decision on only part of the evidence?

D. Did the RAD err in failing to assess the objective elements of sections 96 and 97 of the IRPA?

V. Standard of Review

[18] The applicants submit the RAD's decision is reviewable for reasonableness *(Canada (Minister of Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35). I agree.

[19] Issues of procedural fairness are reviewable against a standard of correctness (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12), and it is necessary to determine whether the duty to act fairly has been satisfied within the specific context of the matter before the Court (*Moreau-Bérubé v Nouveau Brunswick (Judicial Council)*, 2002 SCC 11 at para 75, citing *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 21, 174 DLR (4th) 193).

VI. Analysis

A. *Did the RAD breach the applicants' right to procedural fairness?*

[20] The RAD accepted that the RPD had mistakenly concluded that Ms. Caleb's children had accompanied her to the U.K. and Canada. Despite this error the RAD concluded the circumstances of Ms. Caleb's travel to the U.K. and Canada nonetheless undermined her claim of subjective fear. Ms. Caleb now argues that this was a new determination by the RAD. She relies on *Ching v Canada (Citizenship and Immigration)*, 2015 FC 725 to argue that in pursuing this new issue the RAD was obligated to give notice and an opportunity to make submissions.

[21] In *Ching*, Justice Catherine Kane considered what constitutes a new issue. She states the following:

> [66] In *R v Mian*, 2014 SCC 54, [2014] 2 SCR 689 [*Mian*], the Supreme Court of Canada addressed the scope of an appellate court's jurisdiction to raise new issues, what constitutes a new issue, when such jurisdiction should be exercised and the procedures to be followed. Although *Mian* was a criminal case, the principles have been applied in other proceedings, including the administrative context.
>
> [67] The Court defined a "new issue" at para 30:
>
> > An issue is new when it raises a new basis for potentially finding error in the decision under appeal beyond the grounds of appeal as framed by the parties. Genuinely new issues are legally and factually distinct from the grounds of appeal raised by the parties (see *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712, at para. 39) and cannot reasonably be said to stem from the issues as framed by the parties. It follows from this definition that a new issue will require notifying the parties in advance so that they are able to address it adequately. [Emphasis added.]

[22] In considering the reasonableness of the RPD's subjective fear findings based upon the RPD's mistaken belief that the children had accompanied Ms. Caleb to the U.K. and Canada, the RAD was responding to an issue raised on the appeal. The issue was one that was framed within Ms. Caleb's grounds of appeal. It was not an issue that was legally or factually distinct from the issue raised, nor was it an issue that would have surprised Ms. Caleb. In addressing this ground of appeal it was neither unfair nor improper for the RAD, in considering the very issue raised by Ms. Caleb, to review the evidence and come to its own conclusions. This is consistent with the RAD's role (*Huruglica* at para 103).

[23] The circumstances here are also readily distinguishable from those in *Husian v Canada (Citizenship and Immigration)*, 2015 FC 684 [*Husian*]. In *Husian* Justice Roger Hughes found the RAD, in embarking on its own review of the record, made findings of fact that were contrary to the evidence and clearly in error. It was in this context that Justice Hughes found there was a duty to give notice and an opportunity to make submissions (*Husian* at paras 9 and 10). In this case Ms. Caleb takes issue with the RAD's conclusions in respect of an issue on the appeal but does not allege the RAD made new and erroneous findings of fact.

[24] There was no breach of procedural fairness.

B. *Did the RAD unreasonably assess the applicants' credibility and subjective fear?*

[25] Ms. Caleb submits there were no internal inconsistencies in her evidence and as a result there was no basis for the RAD to question either her credibility or subjective fear. Ms. Caleb submits that these findings were instead based on impermissible plausibility findings and mischaracterizations of her evidence.

[26] Plausibility findings may form the basis of a negative credibility finding where the "facts as presented are outside the realm of what could reasonably be expected, or where the documentary evidence demonstrates that the events could not have happened in the manner asserted by the claimant" (*Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 at para 7).

[27] Ms. Caleb's evidence was that she and her family had been threatened at least twice after the birth of her daughter in 2008. Her evidence was that members of her husband's family attended at their home, that they threatened her life and stated that if she did not allow her daughter to be circumcised she would suffer the consequences. As a result of these threats the family relocated from Port Harcourt to Abuja. The evidence was that the pressure and threats continued by phone, and that her husband's family found them in Abuja. Ms. Caleb's evidence was also to the effect that her husband's family again sent emissaries who again made threats and demanded that Emmanuella undergo FGM. Despite the nature and degree of the persecution alleged Ms. Caleb's evidence was that she travelled with her husband to the U.K. and then to Canada while leaving her children in Nigeria.

[28] The RAD found that, in light of the threats reported, leaving the children in Nigeria undermined Ms. Caleb's subjective fear and the credibility of the allegations that had been made. I am unable to conclude that this was an error. The RAD decision does suggest, as Ms. Caleb has argued, that the RAD incorrectly interpreted the reported threats as including a direct threat to take or remove Emanuella. While the evidence was mischaracterized by the RAD this mischaracterization does not detract from the seriousness of the threats that were reportedly made in 2009. The conclusion that leaving Emmanuella in Nigeria while her parents travelled to the U.K. and Canada undermined the credibility of the applicants' claims was not unreasonable.

[29] Ms. Caleb characterizes a number of other findings as impermissible plausibility findings. In all but one of the findings cited I am satisfied that the RAD's conclusions are rooted in the evidence and as such are reasonably available to the RAD. The one exception relates to the

RAD's finding that Ms. Caleb's husband would have been aware of the risks of FGM based on his past employment. I agree with Ms. Caleb, this finding is nothing more than speculation. However the Court must consider the decision as a whole. This one finding – even when coupled with the mischaracterization of evidence discussed in the previous paragraph – does not reflect a misapprehension of the overall narrative and does not justify the Court's intervention (*Ilyas v Canada (Minister of Citizenship and Immigration),* 2004 FC 1270 at para 60).

[30] The RAD did not unreasonably assess the applicants' credibility and subjective fear.

C. *Is the decision unreasonable because the RAD based its decision on only part of the evidence?*

[31] Ms. Caleb submits that the RAD unreasonably dismissed documentary evidence in the form of an affidavit from Gloria Udom that was supportive of her claim merely on the basis that the evidence reiterated allegations that the RAD found were not credible. Ms. Caleb relies on *Chen v Canada (Citizenship and Immigration),* 2013 FC 311 [*Chen*] at para 20 to argue this is inverted reasoning. I disagree.

[32] In *Chen* Justice Donald Rennie states at para 21 that "[t]he Board identified no basis for concluding that the visiting card was fraudulent, other than its inconsistency with the conclusion already reached on credibility." In this case the RAD identified a basis beyond its negative credibility finding. The RAD noted the affiant did not have independent knowledge of the facts reported and also noted an inconsistency as between the affiant's name in the affidavit and the Basis of Claim Form. I have reviewed the affidavit. It contains a single sentence in relation to the

threats Ms. Caleb reports. Neither the threats nor their timing are described. There is no statement as to how the affiant acquired the knowledge being attested to. The RAD's decision to assign no weight to the affidavit was not unreasonable.

[33] The RAD also gave little weight to the documentary evidence relating to FGM in Nigeria. As the RAD explained, it did not question the content of this evidence or doubt that FGM occurs in Nigeria; it simply concluded that Ms. Caleb had failed to demonstrate that she was a similarly situated individual and as such the evidence was of little assistance. Again this conclusion was not unreasonable.

D. *Did the RAD err in failing to assess the objective elements of sections 96 and 97 of the IRPA?*

[34] Ms. Caleb argues that the RAD had a duty to conduct a separate section 97 analysis where there is a well-founded fear of persecution or risk of torture or cruel and unusual treatment. She submits the RAD had a duty to consider the applicants' individual profiles, and in particular Emmanuella's, in light of the country condition evidence to determine if they were in need of protection.

[35] The agents of persecution in this case were identified as the community and family of Ms. Caleb's husband, a discrete and defined group. It was the risk from this group that was assessed and determined not to be credible. In *Tan v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1280, the applicant feared persecution from the Chinese government for her political opinion; in *Kurtkapan v Canada (Minister of Citizenship and Immigration)*, 2002

FCT 1114 the applicant, who was homosexual, feared persecution from Turkish society in general and Turkish police – who had photographed and fingerprinted him, and required him to report-in weekly – in particular.

[36] As noted the claimed fear here arises in the context of a threat from a discrete and identified family group rather than a government or a police force or society as a whole. Having concluded that the applicants lacked credibility and subjective fear in respect of the alleged threat from this discrete group, the RAD did not err in failing to consider whether there was an objective basis for their fear.

[37] I also note that Ms. Caleb did not raise the RPD's failure to conduct a separate section 97 analysis on appeal to the RAD. The jurisprudence does not impose a duty on the RAD to independently identify and address issues. It would in turn be inconsistent with the role of a court on judicial review to intervene where the issue was not raised before the RAD. Indeed, there is case law to suggest that if the RAD were to determine an issue that was neither addressed by the RPD nor raised on appeal by either party, the RAD would be infringing the applicant's statutory procedural rights (*Ojarikre v Canada (Citizenship and Immigration)*, 2015 FC 896 at para 21).

VII. Conclusion

[38] The RAD's decision is transparent, justified and intelligible and it falls within the range of possible, acceptable outcomes based on the facts and the law. I am satisfied that there was no breach of procedural fairness. The application is dismissed.

[39] The parties have not identified a question of general importance for certification, and none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.
2. No question is certified.
3. The style of cause is amended to name the Minister of Citizenship and Immigration as the respondent.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3006-17
STYLE OF CAUSE:	ROSEMARY AGBONMHERE CALEB OSELUOLE EMMANUELLA CALEB (BY HER LITIGATION GUARDIAN, ROSEMARY AGBONMHERE CALEB) ERONMHOSELE PRINCE MOSES CALEB (BY HIS LITIGATION GUARDIAN, ROSEMARY AGBONMHERE CALEB) v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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