Federal Court  Cour fédérale

Date: 20181211

Docket: IMM-1685-18

Citation: 2018 FC 1241

Ottawa, Ontario, December 11, 2018

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

BENEDICTA OSEMEN AMBROSE-ESEDE
(A.K.A. BENEDICTA OSEMEN AMBROSE ESEDE)
ELIZABETH EMIKE ESEDE (MINOR)
CLARE OSHIORIAMHE ESEDE (MINOR)
PAULA OLERE ESEDE (MINOR)

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], for judicial review of the decision of the Immigration and Refugee Board of Canada, Refugee Appeal Division [RAD or the Board], dated March 19, 2018 [Decision],

which dismissed the Applicants' appeal of the Refugee Protection Division's [RPD] denial of their claims for refugee protection.

II. BACKGROUND

[2] The Principal Applicant, Benedicta Osemen Ambrose-Esede, and her three daughters (together, the Applicants) are citizens of Nigeria. The Principal Applicant claims that her ex-husband and his family members insist upon the performance of certain rituals including female genital mutilation [FGM] on the daughters.

[3] The Applicants fear violence from her ex-husband and his family if they are returned to Nigeria. The Principal Applicant fears that she will be killed if she does not consent to having FGM performed on her daughters. Additionally, the Principal Applicant fears that her ex-husband will take the daughters away by force in order to perform FGM.

[4] The RPD determined that the Applicants were credible. The RPD accepted, on a balance of probabilities, the claim that the ex-husband and his family are seeking to perform FGM on the Principal Applicant's daughters.

[5] The RPD determined, however, that a viable internal flight alternative [IFA] exists in Nigeria at Port Harcourt. The RPD took into consideration the specific circumstances of the Applicants in arriving at this conclusion. In particular, the RPD considered the Principal Applicant's argument that her profession as a lawyer would enable her ex-husband to

track her down through publicly available information. The RPD also took judicial notice that Nigerian lawyers are able to work without advertising their name and services publicly.

III. DECISION UNDER REVIEW

[6] The RAD dismissed the Applicants' appeal from the RPD's decision on March 19, 2018. The RAD held that the presence of a viable IFA in Port Harcourt was determinative of the appeal.

[7] The RAD considered the Applicants' submission of two new items of evidence. In order to effect this analysis, the RAD relied upon the requirements set out in s 110(4) of the IRPA as well as the factors set out in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385.

[8] The first piece of evidence, an affidavit from the ex-husband's friend, Etokhana Raphael, was deemed inadmissible because it was reasonably available prior to the RPD's decision. The explanation that the affiant previously did not wish to provide the affidavit prior to the RPD's determination was deemed insufficient by the RAD.

[9] The second piece of evidence, an online newspaper article and evidence from the Nigerian Bar Association website, was deemed admissible. The Applicants argued that the evidence was not reasonably available because they were unaware that the RPD would take judicial notice on the issue of the public nature of legal work in Nigeria and was not raised in the hearing. The RAD agreed with this argument and allowed the evidence.

[10] The RAD, however, determined that the RPD had erroneously used the term "judicial notice," and found no breach of procedural fairness had occurred because the RPD had not made a finding based on specialized knowledge. Instead, the RPD had merely made an "erroneous assumption."

[11] The RAD examined the newly admitted evidence which demonstrated the existence of a publicly accessible database which lists all Nigerian lawyers. The RAD determined that the database lists the names and registration numbers of lawyers, but not other personal information. The RAD determined that registering on the public database would not place the Principal Applicant at risk on a balance of probabilities.

[12] The RAD determined that the RPD had made no error in assessing the risk that the Applicants would face in Port Harcourt. The Applicants had testified to the RPD that the ex-husband's business activities in Port Harcourt placed them at risk in that city. The RPD, however, stated that the Applicants had merely "mentioned" the ex-husband's business activities. This, according to the Applicants, meant that the RPD had misconstrued the testimony. According to the RAD, the RPD undertook a detailed line of questioning about the ex-husband's business interests in the city.

[13] The RAD held that the RPD had made no error in considering the first prong of the IFA test. In arriving at this conclusion, the RAD determined that there is no evidence indicating that the ex-husband would have any knowledge that the Applicants had relocated to Port Harcourt.

Additionally, the RAD found that the fact that the Applicants had been located before by the ex-husband in a separate Nigerian state did not mean that they would be located in Port Harcourt.

[14] The RAD determined that the RPD had correctly considered the specific circumstances of the Applicants in determining that it was not unreasonable to move to Port Harcourt. According to the Applicants, the RPD failed to consider an array of factors related to the challenges facing women who relocate in Nigeria. For example, the Applicants referred to unemployment, discrimination, and difficulty securing affordable housing as issues which render relocation unreasonable in Port Harcourt. The RAD held that relocation to Port Harcourt would be challenging, but not unreasonable given the personal circumstances of the Applicants. In arriving at the conclusion that the second prong of the IFA test was met, the RAD emphasized the high threshold applicable to the determination of whether an IFA is unreasonable.

[15] The RAD disagreed with the Applicants' argument that the RPD had failed to properly apply the Board's *Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution* and held that the RPD had considered the personal circumstances of the Applicants.

[16] The RAD determined that the RPD had erred by failing to consider the psychotherapist report. The RAD then proceeded to conduct its own assessment of the report. The report described the various mental health conditions that the Principal Applicant reported to her psychotherapist. The psychotherapist reported that these conditions would worsen if the Principal Applicant were returned to Nigeria.

[17] The RAD concluded that the psychotherapist did not distinguish between different areas of Nigeria when discussing the Principal Applicant's mental health. The RAD assigned little probative value to the report because it did not touch upon the issue of the IFA.

IV. ISSUES

[18] The issues to be determined in the present matter are the following:

(1) What is the standard of review?

(2) Did the RAD breach the duty of procedural fairness?

(3) Was the Decision unreasonable?

V. STANDARD OF REVIEW

[19] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*], held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[20] According to the Applicants, the standard of review applicable to the issue of procedural fairness is correctness. Courts have recently held that the standard of review for an allegation of procedural unfairness is 'correctness' (*Mission Institution v Khela*, 2014 SCC 24 at para 79; (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61 [*Khosa*]).

[21] While an assessment of procedural fairness is consistent with recent jurisprudence, it is not a doctrinally sound approach. A better conclusion is that no standard of review at all is applicable to the question of procedural fairness. The Supreme Court in *Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11 stated (at para 74) that the issue of procedural fairness,

> requires no assessment of the appropriate standard of judicial review. Evaluating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation.

[22] The Applicants say that the standard of reasonableness should be applied to the remaining issues. The Respondent agrees that the standard of reasonableness should be applied to findings of fact, credibility determinations, and the assessment of evidence.

[23] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at para 47, and *Khosa*, above, at para 59. Put another way, the Court should intervene only if the

Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

VI. STATUTORY PROVISIONS

[24] The following statutory provisions of the IRPA are relevant to this application for judicial review:

Evidence that may be presented	**Éléments de preuve admissibles**
110(4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.	**110(4)** Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet.
Proceedings	**Procédure**
171 In the case of a proceeding of the Refugee Appeal Division,	**171** S'agissant de la Section d'appel des réfugiés
…	…
(b) the Division may take notice of any facts that may be judicially noticed and of any other generally recognized facts and any information or opinion that is within its specialized knowledge.	**b)** la section peut admettre d'office les faits admissibles en justice et les faits généralement reconnus et les renseignements ou opinions qui sont du ressort de sa spécialisation.

VII. ARGUMENT

A. *Applicants*

[25] The Applicants say that the RAD erred in rejecting the affidavit of Etokhana Raphael which was submitted as new evidence. The RAD did not properly consider why this affidavit was unavailable to the Applicants before the RPD hearing. The affiant deposed that he did not want to anger the Principal Applicant's ex-husband. After the rejection of the Applicants' claim for refugee protection, however, the affiant's concerns for the safety of the Principal Applicant and her children outweighed his fear of the ex-husband. The Applicants say that the RAD unreasonably failed to consider this explanation. Additionally, the Applicants say that the affidavit meets the requirements set out in s 110(4) of the IRPA because of its relevancy to the viability of the IFA in Port Harcourt.

[26] The Applicants also argue that the RAD erred in holding that the RPD did not breach the duty of procedural fairness by taking judicial notice of a fact without providing the Applicants with an opportunity to respond. The breach was not remedied by the RAD's acceptance of the evidence about the Nigerian legal database because the Applicants were still denied the opportunity to respond.

[27] The Applicants also say that the RAD failed to conduct an appropriate IFA analysis. On the first prong of the IFA analysis, the Applicants argue that the RAD erroneously found no serious possibility of persecution in Port Harcourt. The two factors underpinning the flawed

analysis include the ability of the ex-husband to use the Nigerian Bar Association website to locate the Applicants and the ex-husband's business activities in Port Harcourt. The Applicants say that the Nigerian Bar Association database allows the public to obtain personal information about a lawyer with relative ease. Additionally, it is asserted that the ex-husband's purchasing of goods in Port Harcourt was not adequately assessed by the RAD.

[28] On the second prong of the IFA test, the Applicants argue that the RAD erroneously concluded that it would be reasonable for the Applicants to relocate to Port Harcourt. The Applicants say that the RAD failed to consider the difficulty of the Principal Applicant's securing and affording housing as a single mother. Additionally, the Applicants say that the RAD did not properly consider that advertising legal services would surely attract the attention of the Principal Applicant's ex-husband.

[29] The Applicants say that the RAD unreasonably ignored the evidence contained in the psychological report. According to the Applicants, the RAD should have considered whether the Principal Applicant's mental health issues rendered the IFA unreasonable. It was an error to assign low probative value to the report simply because it did not touch upon the issue of the IFA.

B. *Respondent*

[30] The Respondent defends the RAD's Decision and says that it was reasonable for the RAD to deem inadmissible the affidavit submitted as new evidence. According to the Respondent, the Applicants have not put forward a substantive argument as to why the affidavit

was not readily available before the RPD. Instead, the Applicants simply disagree with the RAD's finding on this issue.

[31] The Respondent also argues that the RAD was correct in finding that the RPD did not breach procedural fairness by taking judicial notice of the registration requirements for lawyers in Nigeria. If this erroneous assumption did breach procedural fairness, however, it was not a material breach. Moreover, the RAD undertook an independent assessment of the registration requirements for Nigerian lawyers.

[32] The Respondent says that the RPD did not misconstrue the Applicants' testimony in respect of the ex-husband's business interests in Port Harcourt.

[33] According to the Respondent, it was reasonable for the RAD to find that the Principal Applicant's mental condition would not be affected because "she would not be returning to a place where they experienced past stress and trauma."

[34] The Respondent says that the RAD reasonably conducted the two-prong IFA test. The Applicants' arguments impugn the RAD's assessment of the evidence, but have not demonstrated a reviewable error.

VIII. ANALYSIS

[35] For the most, I agree with the Applicants that the RAD has made a number of serious errors in this Decision which require that the matter be returned for reconsideration.

A. *New Evidence*

(1) Affidavit of Etokhana Raphael

[36] The Applicants submitted as new evidence before the RAD the affidavit of Etokhana Raphael, who is a friend and business associate of the Principal Applicant's ex-husband who, together with his family members, is seeking the Applicants for the purpose of having circumcision performed on them. The RAD excluded this highly material affidavit on the grounds that it was reasonably available prior to the rejection of the Applicants' claim before the RPD. The RAD reasoned as follows:

> [13] In this case the Appellant's explanation is that the affiant did not wish to provide the affidavit for the purposes of her claim before the RPD. The explanation that he changed his mind is insufficient an [*sic*] explanation as to what changed that made him decide to swear to the affidavit at the time that he did. The claim before the RPD was heard on April 12, 2017 and May 25, 2017. A decision was rendered on July 14, 2017. There were a total of 4 months in which the principal Appellant could have submitted this evidence and yet did not do so. Her statement is silent as to why she did not attempt to make the request prior to the rejection of the claim and any time after March 2017 when she first made the request. That the affiant changed his mind shortly after the rejection of the claim not only does not provide an adequate explanation but appears too fortuitous in these circumstances. I find that the affidavit was reasonably available prior to the rejection of the claim and therefore I am rejecting this evidence.

[37] This reasoning does not properly address the reasons why the affidavit was not provided earlier. The cavalier suggestion that the affiant simply "changed his mind after the rejection claim" in a way that "appears too fortuitous" masks a simple refusal by the RAD to engage with the evidence itself.

[38] The affiant explains that he did not provide the affidavit earlier because he did not want his friend and business associate – the Principal Applicant's ex-husband who is seeking her and her children – to regard him as an enemy. However, once the RPD rejected the Applicants' claim, he realized that their lives were in danger and so he changed his mind and came forward with the affidavit:

> 7. That I am swearing to this affidavit because the life of Benedicta and her children are in danger in Nigeria.
>
> 8. That when Funmilayo Adeyinka first requested for an affidavit from me in March, 2617, I refused I didn't want Ambrose to see me as his enemy. But I decided to swear to this affidavit when she called me again on the 20th August, 2017 for the safety of Benedicta and children.

[39] The RAD makes no clear adverse credibility findings regarding the affiant. And there is nothing inherently implausible or "fortuitous" about a friend and business associate's reluctance to jeopardize a long-standing relationship before he learns that his initial refusal has placed the Applicants in danger. The RAD does not explain why the affiant's explanation is not "adequate" and appears "fortuitous." It is the affiant himself who provides the explanation, not the Applicants.

[40] The affidavit of Etokhana Raphael is sworn and credible, and it is entitled to the presumption of truth. It was an error of judgment for the RAD to reject it for the reasons given, and its rejection had extremely serious consequences for the RAD's IFA analysis.

[41] The affidavit is highly material for the RAD's IFA analysis because it makes the ex-husband's ties to Port Harcourt abundantly clear and effectively eliminates Port Harcourt as a viable IFA. The affiant explains the situation as follows:

> 3. That AMBROSE ESEDE is my friend and we are also into the same business, I have been a family friend to the Esede family for a long time, even before he got married, I am very much aware of the fact that the family wants to force Benedicta to perform some barbaric rituals, drink some concoction and carry out circumcision on her children which she refused.
>
> 4. That on several occasions, when I tried to let my friend, Ambrose realize that such act was inhuman and barbaric, it is usually leads to disagreements between two of us, he will act and walk away like a manipulated and diabolically/hypnotized person. Until I heard Esede family could no longer find the where about of Benedicta and her children. I was happy because I know her life and that of her children were in danger when she refused to do what they asked for.
>
> 5. That while I reside at the above address, Ambrose lives in No. 22, Old Port Harcourt, Aleto, Eleme, Port Harcourt, Nigeria, We are both into the business of purchasing and distribution of petroleum products (Gasoline, Kerosene and diesel fuel). I trade under the company name of Uralo Petroleum Ltd, while Ambrose trade under the company name of Esambrose Investment Nigeria Ltd. Our main depot is the NNPC refinery, Port Harcourt, Nigeria, Eleme Depot. Our day to day business operations includes purchasing petroleum products at Eleme Depot (filling our Trailer Tanks) and distributing to different petrol/gas stations. Distributions of these takes us to different locations which can be anywhere in Port Harcourt or outside Port Harcourt. Purchase at the depot takes turns. Whenever it is mine or his company's turn, we do joint purchase and distribute together and share profit together.
>
> 6. That Ambrose and his family are still looking for Benedicta and her children. Every time we are together, I experience how Ambrose laments over the fact that Benedicta ran away with his children, thereby preventing him from performing the rituals and moving forward in life, At different times during our distributions, Ambrose is always on the lookout for his ex-wife and children. His uncle and mother keep calling him to remind him and encourage him to continue to look for them. At different times he has mistaken other persons for his ex-wife, but when he gets closer to

> them he always feels disappointed when they turn out to be another person.

B. *IFA – First Prong*

[42] The RAD's analysis of the first prong of the IFA test (see *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 at para 103) is unreasonable because the available evidence reveals that the ex-husband lives in Port Harcourt and carries on business there. The evidence also shows that the ex-husband is constantly seeking the Applicants and that he will easily be able to locate the Principal Applicant if she practices law in Port Harcourt.

[43] I agree with the Applicants that the RAD's conclusions about what information the Nigerian Bar Association membership portal reveals is erroneous. Page 131 of the Certified Tribunal Record [CTR] shows that the "NBA presents world class membership portal," and the Nation Nigeria, March 26, 2013, reveals that the portal has the following features:

> a) The details of all lawyers from the dates preceding the establishment of the Nigerian Law School up to those who have recently been called to bar are all made available on the portal.
>
> b) The list of all lawyers who carried out the verification exercise, including updated vital details of members (for example, post call to bar names for married women, basic contact information such as mobile/cell phone numbers, email addresses residential and official, contact addresses, passport photographs, etc.).
>
> c) The public can easily conduct a search on Nigerian Lawyers using the "find a lawyer" interface on the portal.

[44] In my view, the Nigerian Bar Association membership portal provides an easy way to locate the Applicants but, even without this, the risk of the ex-husband being able to locate the Applicants in Port Harcourt needs to be re-assessed in light of the new evidence from Etokhana Raphael.

C. *Other Issues*

[45] The Applicants raise other issues regarding a breach of procedural fairness and the unreasonableness of the RAD analysis of the second prong of the IFA test. I am in agreement with the Applicants' position on these issues but there is no need to proceed further with the analysis. Given my findings on the exclusion of the affidavit of Etokhana Raphael and the first prong of the IFA test, this matter must be returned for reconsideration by a different RAD.

[46] However, I think I should make it clear that, even without Etokhana Raphael's evidence, the RAD's IFA analysis is, in my view, unreasonable. For example, on the second prong of the IFA test, the RAD disregards the Applicants' testimony and misconstrues the documentary evidence.

[47] In her affidavit, the Principal Applicant made it clear that:

> a) She does not have a home there or anybody she knows. She does not have enough money to rent an apartment in a secure place. She does not want her children to end up on the street because there is no shelter for them, or to live in an unsafe neighbourhood and face the risk of rape and armed robbery.
>
> b) In order to work as a lawyer, she needs to advertise. Her ex-husband and his family would find her and the children through the address she uses to advertise. She does not want to work odd jobs like she did in the United States. The unemployment in

> Nigeria is high. She would not be able to find customers or a job because nobody knows her.
>
> c) Landlords will not give her accommodation because they will feel that single women are not supposed to five atone; it is the belief that every single mother that lives alone with her children is a wayward or prostitute.
>
> (See Affidavit of Benedicta Osemen Ambrose-Esede, Application Record at 54-56, paras 8-9, 13-15.)

[48] The RAD concluded that the Principal Applicant could obtain employment in the south because she is a highly educated and travelled woman. However, Item 5.9 of the National Documentation Package [NDP] for Nigeria reads as follows:

> According to the University of Nigeria professor, it is easier for a woman to live alone without male support if she is educated and has a high social status because she can use "family connections" and is more likely to gain employment through connections to powerful individuals and politicians than through education.
>
> (CTR at page 613)

[49] The RAD simply ignores the need for "family connections" even when a woman is well educated. The Principal Applicant makes it clear in her unquestioned testimony that she does not have this kind of support in the proposed IFA.

[50] On the important issue of available housing, the RAD again simply ignores the information in Item 5.9 of the NDP that it is very difficult for women who run their own household to find housing without male support and fails to explain how the Principal Applicant would be able to afford the steep prices and pay three years of rent in advance, as well as

commission to rental agents in a city where she does not know anybody and does not yet have a job.

[51] The RAD also fails to reasonably assess how the psychological evidence presented by the Applicants will affect their ability to relocate to Port Harcourt. The RAD says:

> [44] This evidence does not differentiate as to where in Nigeria the Appellants would go. In the case at hand the Appellants are not required to return to the city or location where they experienced past stress and trauma but, rather, to another city on the other side of the country. While I accept the assessment that the principal Appellant has reported such feelings to a psychotherapist, I find that this evidence does not address the specific issue of IFA. I afford the assessment limited probative value as it is silent on the issue of IFA.

[52] The RAD does not explain how psychological evidence could or should address an IFA, which is not identified until the RPD hearing.

[53] In my view, the psychological report in the present case was not reasonably addressed in accordance with the jurisprudence of this Court.

[54] All in all, the Decision contains a significant number of reviewable errors and must be returned for reconsideration.

[55] Counsel agree there is no question for certification and I concur.

JUDGMENT IN IMM-1685-18

THIS COURT'S JUDGMENT is that

1. The application is allowed. The Decision is quashed and the matter is returned to a differently constituted RAD for re-determination in accordance with my reasons.
2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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