Federal Court  Cour fédérale

Date: 20190116

Docket: IMM-995-18

Citation: 2019 FC 59

Ottawa, Ontario, January 16, 2019

PRESENT: The Honourable Mr. Justice Norris

BETWEEN:

CHINENYE EVELYN OBUMUNEME,
WISDOM CHISOM NDUKAKU,
SUCCESS CHIOMA NDUKAKU AND
MARVELLOUS EBUB NDUKAKU

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] Article 1E of the *United Nations Convention Relating to the Status of Refugees*, 189 UNTS 150 [*Refugee Convention*] states: "This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having

the rights and obligations which are attached to the possession of nationality in that country." This provision is incorporated into Canadian domestic law by section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] Chinenye Evelyn Obumuneme, the principal applicant, is a citizen of Nigeria who claimed refugee protection in Canada. The other applicants are her minor children – two sons and a daughter – who also claimed protection. (Ms. Obumuneme has a fourth child who was born in Canada.)

[3] The applicants arrived in Canada in May 2012. When she claimed refugee protection a short time later, Ms. Obumuneme said that she and her children had fled Nigeria for Canada because of domestic abuse by her common law spouse and they feared returning there. When her case came before the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada for a hearing in October 2017, however, Ms. Obumuneme disclosed that she and her children had actually lived legally in Italy for several years before coming to Canada via the United States. The grounds she had presented for seeking protection were a fabrication, having been made up by her previous lawyer. She claimed that in fact she was a victim of human trafficking in the sex trade. She was seeking protection in Canada because she feared persecution, a risk to her life, and cruel and unusual punishment if she returned to Nigeria. She also claimed that her daughter was at risk of genital mutilation there.

[4] In a decision dated February 9, 2018, the RPD rejected the claims. The member was satisfied that the applicants had all established their personal identity as citizens of Nigeria. The

member concluded, however, that the applicants are excluded from refugee protection under section 98 of the *IRPA* because they fell within Article 1E of the *Refugee Convention* due to their permanent resident status in Italy. The member also found, in the alternative, that there was no credible or trustworthy evidence on which he could have made a favourable decision and, therefore, the claims had no credible basis within the meaning of section 107(2) of the *IRPA*.

[5] The applicants now apply for judicial review of this decision under section 72(1) of the *IRPA*.

[6] For the reasons that follow, I am dismissing this application. The determinative issue is whether the applicants are excluded from refugee protection under section 98 of the *IRPA* and Article 1E of the *Refugee Convention*. I have concluded that there is no basis for interfering with the RPD's conclusion that they are. The applicants also challenged the finding that there is no credible basis to their claims but it is not necessary to address this issue. While this finding barred them from access to the Refugee Appeal Division [RAD] (see section 110(2)(c) of the *IRPA*), the applicants did not have access to the RAD in any event because they submitted their claims for protection prior to that body's creation (see section 36(1) of the *Balanced Refugee Reform Act*, SC 2010, c 8, as amended by the *Protecting Canada's Immigration System Act*, SC 2012, c 17).

II. BACKGROUND

[7] Ms. Obumuneme provided an evolving account not only of the basis of her claim for protection but also of her travels and residency.

[8] Ms. Obumuneme was born in Nigeria in March 1979. When she first claimed refugee protection in June 2012, she stated that she had fled Nigeria for Canada on May 8, 2012, because of her fear of continuing abuse by her common law spouse, Cyriacus Mentus. She stated in her Personal Information Form [PIF] that she had flown to Toronto from Lagos via Amsterdam, arriving in Canada on May 9, 2012. All of her answers to questions in the PIF were consistent with her claim that she came directly to Canada from Nigeria and had not resided in any other country in the interim or, indeed, ever.

[9] When she arrived in Canada, Ms. Obumuneme was accompanied by the three children she had at the time. They were ages 8, 5 and 2. Ms. Obumuneme made claims for refugee protection on their behalf as well, relying on the same grounds as she advanced in her own claim. The children's respective PIFs all stated that they were born in Nigeria and had not resided anywhere else. Ms. Obumuneme provided documents purporting to be the children's Nigerian birth certificates (all of which were dated May 7, 2012) in support of the claims.

[10] The applicants were all assisted by the same lawyer in filing their refugee claims. In or around October 2014, they retained a new lawyer to assist them with their claims but this retainer was short-lived.

[11] In late September 2017, the applicants retained a third lawyer, Mr. Maierovitz, to assist them. By this point, their hearing before the RPD had been scheduled for October 30, 2017. Shortly after being retained, Mr. Maierovitz wrote to the RPD to request a one month postponement of the hearing. He explained that this additional time was required to prepare a

revised PIF narrative and to collect supporting documents. This was necessary because, according to Ms. Obumuneme, the narrative alleging domestic abuse included with their PIFs was the invention of her first lawyer and did not reflect the information she had provided to that lawyer.

[12] The request for a postponement was denied and the hearing commenced as scheduled on October 30, 2017. At the opening of the hearing, Ms. Obumuneme confirmed in response to questions from the member that she had signed her PIF dated June 22, 2012, and that she understood that by signing the document she had affirmed that its contents were complete, true and accurate. As well, she confirmed that this was also the case with respect to her children's PIFs, which she had signed on their behalf. However, Ms. Obumuneme then immediately stated to the member: "But the things in that PIF is [*sic*] not my story. It's not true."

[13] Ms. Obumuneme went on to explain that her first lawyer had made up the allegations of domestic abuse. She signed the original PIFs but she did not understand fully what they said because she could not read. Ms. Obumuneme claimed that in a later meeting with the lawyer she came to understand that the narrative he had presented was not her own but he convinced her that if she used the real story she would be deported to Italy and that she should take his advice and use the story he had created for her. (When Mr. Maierovitz brought these allegations to the attention of Ms. Obumuneme's first lawyer, the latter denied it categorically.)

[14] According to Ms. Obumuneme, the second lawyer she retained advised her that it was too late to change her story so she should just go ahead with what she had said in her original claim,

even though Ms. Obumuneme had told her that that account was not true. She claimed that it was only after she retained Mr. Maierovitz that she was able to advance the true reason she was seeking protection before the RPD. (The second lawyer also denied Ms. Obumuneme's allegations against her when Mr. Maierovitz brought them to her attention. Ms. Obumuneme did not make a complaint to the Law Society against either of her former lawyers.)

[15] Ms. Obumuneme described how she had unwittingly fallen victim to a human trafficking ring in Nigeria, how she had been taken to Italy, how she had been forced to work as a prostitute there, how she had been unable to discharge the debt she owed to those who had taken her to Italy, and how she and her family had been subjected to ongoing threats and harassment from the "madam" and her cohorts.

[16] Ms. Obumuneme also testified that she and her husband were married in Italy and that their three children were all born there. In response to a question from the member, Ms. Obumuneme stated that they all had "status" in Italy, although she added that "the agency" had taken it away from her "when they were carrying us." Ms. Obumuneme then clarified that it was "the agent" who had taken their status away. (The member did not ask Ms. Obumuneme what she meant by this. Given what she testified to later on, it would appear that she meant that an agent who facilitated her family's travel had taken their Italian residence permit. As it happened, her husband had made a copy of the permit and this was ultimately provided to the RPD.)

[17] Ms. Obumuneme testified that after several years in Italy, she and her husband decided to return to Nigeria. They stayed in Nigeria for about a year but then returned to Italy. They found that things had not improved there so they decided to go to the United States. They then made their way to Canada, where they all sought refugee protection.

[18] After Ms. Obumuneme had related this account to the RPD member, there was a problem with the recording equipment. Ms. Obumuneme said she herself was feeling unwell. The member also recognized that it would be best if Mr. Maierovitz had an opportunity to obtain and present the necessary supporting evidence given the material changes in the basis of Ms. Obumuneme's claim for protection. Accordingly, the member decided to adjourn the hearing. The matter was scheduled to continue on January 23, 2018.

[19] On December 4, 2017, the RPD provided notice to the Minister of Citizenship and Immigration under Rule 26 (possible exclusion under Article 1E of the *Refugee Convention*) and Rule 27 (issues relating to the integrity of the refugee protection system) of the *Refugee Protection Division Rules*, SOR/2012-256. A copy of this notice was provided to counsel for the applicants. A letter to the RPD dated January 17, 2018, from Citizenship and Immigration Canada confirmed that the Minister would not be intervening in the proceeding.

[20] Prior to the next hearing date, Ms. Obumuneme completed a comprehensive narrative setting out the new basis of her claim for protection. She provided many additional details which filled out the account of her experiences as a victim of human trafficking that she had given at the hearing in October 2017. She reiterated this narrative in her testimony at the continuation of

the hearing in January 2018. Ms. Obumuneme also provided a number of supporting documents to the RPD.

[21] It is not necessary for present purposes to set out the details of how Ms. Obumuneme claimed to have found herself in Italy originally or her life there. It suffices to note the following.

[22] Ms. Obumuneme stated that she had lived in Italy since November 1998. While there, she went by the name Faith Okoye. She met her husband, Meltus, in Italy in 2000. Meltus was also of Nigerian nationality. The two were married in Italy in March 2003 (as confirmed by a Record of Marriage from the Municipality of Ferrara). Their three children were all born in Italy (as confirmed by birth certificates also issued by the Municipality of Ferrara).

[23] Ms. Obumuneme stated that in 2001, a Christian outreach group helped her to escape her life as a prostitute and to regularize her status in Italy. She obtained a Nigerian passport (albeit in the name of Faith Okoye) as well as a renewable one-year permit allowing her to live and work in Italy (the permit was also in the name of Faith Okoye). Ms. Obumuneme provided the RPD with a copy of a Residence Permit ("*Permesso di Soggiorno*") issued in Ferrara on January 26, 2010, for herself and her three children. The permit stated that it was of "indefinite" ("*illimitata*") duration.

[24] Ms. Obumuneme stated that she remained in Italy until September 2010, when she and her husband and their children returned to Nigeria. They stayed there until the end of June 2011,

when they all returned to Italy. They stayed in Italy until February 2012, when Ms. Obumuneme and her children travelled to the United States with the assistance of an agent. After staying in the United States for a few months, they entered Canada irregularly on or about May 9, 2012, at a location which Ms. Obumuneme believed was somewhere in Quebec. They were driven to Toronto where they made their refugee claims.

[25] In response to a question from the member, Ms. Obumuneme confirmed that their Italian residence permit was valid when she and her children left Italy for the United States. When asked whether it was still valid, Ms. Obumuneme replied that it was not because the permit had to be renewed every five years and she had not done so. When asked why not, she stated that this was because she was not in Italy. When the member asked her why she did not try to renew the permit at the Italian embassy or a consulate, Ms. Obumuneme stated that the agent in the United States had taken the permit: "We don't have it so we can't renew it."

[26] Ms. Obumumene's husband had stayed behind in Italy. At the end of 2012, he too came to Canada via the United States. He made a separate claim for refugee protection with the assistance of Ms. Obumuneme's first lawyer but it was rejected. His application for leave to commence an application for judicial review of the RPD's decision was dismissed in February 2014. He was ordered removed from Canada but it appears he evaded removal (at least for a time).

[27] At the January 2018 hearing, counsel for the applicants asked Ms. Obumuneme a number of questions eliciting details about her fears for herself and her daughter if they returned to

Nigeria. When counsel had completed his questions, the member asked: "Before – did you want to touch anything – I am considering 1E. Did you want to touch up anything on that?" Counsel replied that he did not.

[28] In oral submissions to the member, counsel for the applicants pointed to an Immigration and Refugee Board Response to Information Request [RIR] dated April 23, 2012, concerning the Italian long-term residence permit ("*Carta di Soggiorno*") and the European Commission [EC] long-term residence permit (which had replaced the old *Carta di Soggiorno*, although the latter was still in some use as of the date of the report). It appears that everyone was proceeding on the assumption that Ms. Obumuneme's *Permesso di Soggiorno* was what the RIR referred to as an EC long-term residence permit. Thus, counsel pointed to information in the RIR stating that an EC long-term residence permit "can be revoked" if, among other things, it had been acquired fraudulently, if the holder had been absent from EU territory for 12 consecutive months, or if the holder had been absent from Italy for more than six years. In light of this, counsel submitted that the length of time since Ms. Obumuneme had last been in Italy (nearly six years by that point) "would render her status void." Counsel also submitted that Ms. Obumuneme's having obtained the permit in a false name would preclude her still having status there.

III. DECISION UNDER REVIEW

[29] The member began his reasons by quoting Article 1E of the *Refugee Convention*. As the member then observed, this provision is incorporated into Canadian domestic law by section 98 of the *IRPA*, which states, *inter alia*, that a person referred to in Article 1E of the *Refugee Convention* is not a Convention refugee or person in need of protection.

[30] The member noted that the applicants had tendered a *Permesso di Soggiorno* issued on February [*sic*] 26, 2010, which stated on its face that it was of "indefinite" validity. Having regard to the RIR report, the member concluded that holders of permanent resident status in Italy enjoy rights which are sufficient to bring them within Article 1E of the *Refugee Convention*, citing the test in *Shamlou v Canada (Minister of Citizenship and Immigration)* (1995), 103 FTR 241 (FCTD).

[31] Next, the member noted that there was no evidence before him that the applicants' permanent resident status had been revoked. The member therefore concluded that the applicants still enjoyed this status in Italy.

[32] Finally, the member considered whether, notwithstanding their status in Italy, the applicants should be exempted from the application of Article 1E of the *Refugee Convention* because they had a well-founded fear of persecution in Italy. Citing a number of factors including the filing of a false claim for protection at the outset, Ms. Obumuneme's willingness to use false or fraudulent documents, and her delay in coming forward with what she claims to be the truth, the member found Ms. Obumuneme not to be credible and, on this basis, rejected any suggestion that she was at risk of persecution in Italy. The member also found that, in any event, Ms. Obumuneme had not rebutted the presumption of state protection in Italy.

[33] The member therefore concluded that the applicants were excluded from refugee protection by Article 1E of the *Refugee Convention* and section 98 of the *IRPA*. (As noted above, the member also concluded, in the alternative, that there was no credible basis for the claims.)

IV. STANDARD OF REVIEW

[34] It is well-established that this Court reviews the RPD's assessment of the evidence before it, including its credibility determinations, on a reasonableness standard (*Hou v Canada (Citizenship and Immigration)*, 2012 FC 993 at paras 6-15; *Nweke v Canada (Citizenship and Immigration*), 2017 FC 242 at para 18; *Aguebor v Canada (Minister of Employment and Immigration)* (1993), 160 NR 315 (FCA) at para 4). This standard also applies to the RPD's determination that a claimant is excluded from refugee protection under section 98 of the *IRPA* and Article 1E of the *Refugee Convention* (*Canada (Citizenship and Immigration) v Zeng*, 2010 FCA 118 at para 11 [*Zeng*]; *Majebi v Canada (Citizenship and Immigration)*, 2016 FCA 274 at paras 5-6).

[35] Reasonableness review "is concerned with the reasonableness of the substantive outcome of the decision, and with the process of articulating that outcome" (*Canada (Attorney General) v Igloo Vikski Inc*, 2016 SCC 38 at para 18). The reviewing court examines the decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determines "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). These 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). The reviewing court should intervene only if these criteria are not met. It is not the role of the reviewing court to reweigh the

evidence or to substitute its own view of a preferable outcome (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61).

V. ISSUE

[36] As I have stated, the determinative issue is whether the RPD member reasonably concluded that the applicants are excluded from refugee protection because of their status as permanent residents of Italy.

VI. ANALYSIS

[37] The applicants challenge the RPD's decision in only two respects: the member's conclusion that they still had permanent resident status in Italy and the member's adverse credibility finding with respect to Ms. Obumuneme. In my view, the member did not err in either respect.

[38] Looking first at Article 1E of the *Refugee Convention*, the test for exclusion under this provision was articulated by the Federal Court of Appeal in *Zeng* as follows (at para 28):

> Considering all relevant factors to the date of the hearing, does the claimant have status, substantially similar to that of its nationals, in the third country? If the answer is yes, the claimant is excluded. If the answer is no, the next question is whether the claimant previously had such status and lost it, or had access to such status and failed to acquire it. If the answer is no, the claimant is not excluded under Article 1E. If the answer is yes, the RPD must consider and balance various factors. These include, but are not limited to, the reason for the loss of status (voluntary or involuntary), whether the claimant could return to the third country, the risk the claimant would face in the home country, Canada's international obligations, and any other relevant facts.

[39] In the present case, the member did not proceed beyond the first question in this decision tree because he found that the claimants had status in Italy which was substantially similar to that of nationals of that country. This finding was based on the evidence that the applicants had had such status on an indefinite basis as of January 2010 and the absence of evidence that they had lost that status in the interim.

[40] There is no question that the applicants were on notice that exclusion under Article 1E could be in issue. At the very latest, this would have been clear when the RPD wrote to the Minister in December 2017 regarding a potential intervention. The applicants did not challenge the evidence that they had had permanent resident status in Italy of indefinite duration. This is not surprising since they were the ones who produced it. Nor did they argue that permanent resident status in Italy did not give them "the rights and obligations which are attached to the possession of nationality of that country," as this phrase in Article 1E has been understood. Instead, they submitted to the RPD that, given the passage of time since they left Italy, and given the fact that the status was obtained under a false name, their permanent resident status would have been revoked.

[41] Refugee claimants do not bear an initial evidentiary burden to show that they are not excluded from protection: see, generally, *Ramirez v Canada (Minister of Employment and Immigration)*, [1992] 2 FC 306 at 314 (FCA) [*Ramirez*] (cited with approval in *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 at para 29); see also, with specific reference to Article 1E of the *Refugee Convention*, *Shahpari v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 7678 at para 6 (which also relies on *Ramirez*). Nevertheless, this

Court has held that when there is evidence suggesting on a *prima facie* basis that a claimant has status in another country that would engage Article 1E, the onus shifts to the claimant to establish that he or she does not have such status in the third country (*Murcia Romero v Canada (Citizenship and Immigration)*, 2006 FC 506 at para 8).

[42] In this connection, I do not agree with the applicants' submission that this shift can occur only when the Minister has intervened in the proceeding and has led evidence in relation to Article 1E of the *Refugee Convention*. While this might be the typical scenario, what matters for the RPD's fact-finding is whether there is credible or trustworthy evidence suggesting that Article 1E is engaged, not which party has adduced that evidence. If there is such evidence, a claimant runs the risk of an adverse conclusion if it is left unanswered.

[43] In my view, the RPD did not err in finding against the applicants on this question of fact. While the RIR provided evidence that they could have lost their status for the reasons they pointed to, the applicants did not adduce any evidence that this had actually happened. Especially considering the absence of evidence that the applicants had ever attempted to ascertain their current status in Italy, it was open to the RPD to conclude that they still enjoyed permanent resident status there. The circumstances of the present case bear a close resemblance to those of *Omorogie v Canada (Citizenship and Immigration)*, 2015 FC 1255, and *Rrotaj v Canada (Citizenship and Immigration)*, 2016 FC 152 [*Rrotaj*], where the same result was reached by the RPD and upheld on judicial review. If anything, the evidence in the present case is less favourable to the applicants' position than that considered by the RPD in these other cases.

[44] For the sake of completeness, I note that at the hearing before the RPD, counsel for the applicants did not rely on Ms. Obumuneme's evidence that the permanent residence permit would have expired because she had failed to renew it within five years. While Ms. Obumuneme may well have been correct about this, it did not follow that the applicants would have lost their status in Italy due to this alone. According to another RIR (dated March 6, 2015) concerning Italian permanent residence permits which is included in a National Documentation Package that was before the RPD, while permanent residence permits must be updated with a new photograph every five years to remain valid as photo identification, the failure to do so does not invalidate one's status as a permanent resident.

[45] Turning to the RPD's adverse credibility determination, the applicants challenge this solely on the basis that the member erroneously found that Ms. Obumuneme had not disclosed to the member that her original narrative was false until some 45 minutes into the hearing on October 30, 2017. I agree with the applicants that this finding is not supported by the record. Ms. Obumuneme made this disclosure very early in the hearing, at the first reasonable opportunity to do so. Indeed, the entire issue of the timing of her disclosure at the hearing is a red herring given that the applicants had stated unequivocally in their request to postpone their refugee hearing that they were disavowing the original narrative. Nevertheless, in my view the member's erroneous finding on this point is immaterial. Many other more substantial considerations – which the applicants do not challenge – weighed heavily against Ms. Obumuneme's credibility. The member rejected her allegation that the original narrative was the invention of her first lawyer. He found instead that it was Ms. Obumuneme herself who had advanced what she now admits to be a false basis for her claim for protection. She

continued to rely on this false narrative for some five-and-a-half years, she had tendered fraudulent documents to the RPD (the Nigerian birth certificates for her children) to support it, and she had omitted an important but inconvenient fact – her lengthy stay in Italy with permanent resident status there. Against this backdrop, the member's adverse credibility determination was altogether reasonable, even though he erred concerning when Ms. Obumuneme signalled that her story had changed.

VII. CONCLUSION

[46] For these reasons, the application for judicial review is dismissed.

VIII. QUESTION FOR CERTIFICATION

[47] The applicants requested that the Court certify the following question under section 74(d) of the *IRPA*:

> Does Article 1E of the *Refugee Convention*, as incorporated into the *IRPA*, apply if a claimant's third country residency status (including the right to return) is subject to revocation at the discretion of that country's authorities?

[48] The respondent opposes the certification of this question and does not suggest any others.

[49] As the applicants noted, this is the question that was certified in *Rrotaj*. The Federal Court of Appeal dismissed the appeal in *Rrotaj* for want of jurisdiction, holding that this question should not have been certified: *Rrotaj v Canada (Citizenship and Immigration)*, 2016 FCA 292. I can only reach the same conclusion here.

JUDGMENT IN IMM-995-18

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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