Federal Court  Cour fédérale

Date: 20190329

Docket: IMM-1124-18

Citation: 2019 FC 384

Ottawa, Ontario, March 29, 2019

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

MUSILI AMOKE IDAHOSA
EHIZEME JAYDEN IDAHOSA
ESEOSA JASON IDAHOSA
OSARUMEN JARREL IDAHOSA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review under section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision rendered on February 13, 2018, by the Refugee Appeal Division [RAD]. On appeal, the RAD confirmed the Refugee Protection

Division's [RPD] decision dated February 23, 2017, to reject the Applicants' joint claim for refugee protection. For the reasons that follow, the application for judicial review is dismissed.

II. Background

[2] The Principal Applicant is Musili Amoke Idahosa. The Secondary Applicants are her three sons. All of the Applicants are citizens of Nigeria. The Principal Applicant claims that she is at risk of genital mutilation in Nigeria.

[3] The following alleged events underpin the refugee claim. After the Principal Applicant made unwanted advances on a former female lover in June 2016, the female lover contacted the police and who then came to her home to investigate the same-sex solicitation. The villagers learned of her bisexuality and decreed that the Principal Applicant and her sons "must be cleansed spiritually or else they will give the police all necessary assistance" The villagers were of the view that the Principal Applicant's sexual orientation was due to the fact that she had not been circumcised. The police came to her home a second time and, at this point, she was in hiding at the home of a different former female lover.

[4] The Principal Applicant's husband advised her to leave the country and on August 31, 2016, all of the Applicants left Nigeria for the United States of America (USA) to stay with a nephew. Upon arrival, the nephew refused to let them stay with him due to the Primary Applicant's sexual orientation. Other relatives insulted her and threatened to signal her presence to immigration authorities in order to have her sent back to answer to the Nigerian police. Due to her family's reaction to her bisexuality and upon learning that the USA administration is

unfavourable to refugees, the Applicants entered Canada on December 20, 2016, and sought refugee protection.

III. Impugned decision

[5] The RAD upheld the RPD's conclusion that the Applicants are not Convention refugees or persons in need of protection. The determinative issue for the RAD was credibility. The relevant portions of the RAD decision will be reviewed below.

[6] The RAD first considered the Principal Applicant's explanation for not claiming asylum in the USA in a timely manner. The RAD took into account the Principal Applicant's assertion that she was not aware of her ability to claim refugee status, that she had numerous relatives in the USA who were unhappy with her lifestyle, and that the USA's stance on refugees was not favourable, and then determined that her failure to live in the USA for approximately three and a half months undermined her credibility.

[7] Next, the RAD considered the Principal Applicant's failure to provide any documentation relating to her USA visa applications. The RAD noted that she was able to obtain her 2014 USA visa application documentation but not her 2016 documentation. The RAD found that the missing documentation was an important part of her narrative. The RAD drew a negative inference from the lack of the 2016 USA visa documentation and that this undermined the Principal Applicant's credibility.

[8] The RAD then cumulatively found that based on the evidence, including her openness about her same sex desires, the Principal Applicant's credibility was seriously undermined. The RAD then reviewed the RPD's findings on the weight ascribed to the psychotherapist report and noted that the Principal Applicant did not contest the RPD's finding. The RAD then reviewed the RPD's treatment of the letter from the Principal Applicant's former lover and found that the RPD erred in giving it no weight. The RAD instead gave the letter limited weight. Respecting the communications with a LGBT organization, the RAD found these exchanges to be of limited value. The RAD found that the documentary evidence was not sufficiently persuasive to overcome the credibility findings it had identified.

[9] As such the RAD found that the Primary Applicant had not established, on a balance of probabilities, that she is bi-sexual or was at risk of genital mutilation or that she or her children would face a serious possibility of persecution if they were returned to Nigeria. The Principal Applicant also failed to establish that she is a person in need of protections under s 97(1) of the IRPA.

IV. Standard of Review

[10] As acknowledged by both parties, the applicable standard of review is that of reasonableness (*Minister of Citizenship and Immigration v Huruglica,* 2016 FCA 93 at para 53; *Majaros v Canada (Citizenship and Immigration),* 2017 FC 667 at para 24). For this reason, the Court shall only intervene if the decision falls outside "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).

V. Issues

[11] The Court will review the reasonableness of the RAD decision rendered February 23, 2017; more specifically, the RAD's treatment of (1) credibility issues and (2) the documentary evidence.

VI. Relevant Provisions

[12] Sections 96 and 97 of the IRPA read as follows :

Convention refugee	**Définition de réfugié**
96 A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	96 A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
Person in need of protection	**Personne à protéger**
97 (1) A person in need of protection is a person in	97 (1) A qualité de personne à protéger la personne qui se

Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

Person in need of protection

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of

trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Personne à protéger

(2) A également qualité de personne à protéger la personne qui se trouve au

protection.	Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

VII. Submissions of the Parties

A. *Credibility Issues*

(1) Applicants' Submissions

[13] The Applicants submit that there are four reasons why the RAD's negative credibility inference based on the Primary Applicant's failure to seek asylum in the USA is unreasonable. Firstly, the RAD speculated by asserting that the Primary Applicant must have had some understanding that the USA would provide her with some protection. According to the Applicants, the only reasonable inference that can be made from the Primary Applicant's procurement of a USA visa is that she intended to leave Nigeria.

[14] In addition, the RAD's credibility findings related to the Primary Applicant's failure to seek asylum in the USA before the Presidential election was based on the presumption that the election of President Trump was not expected. This presumption has no evidentiary basis. Objectively, the USA's perceived anti-immigration and anti-asylum policies make it highly reasonable for the Primary Applicant not to consider applying for asylum in the USA. Furthermore, it is only the Primary Applicant's subjective feelings on this matter that count. Incidentally, these were never doubted or challenged.

[15] Also, the Applicants argue that the RAD fundamentally misunderstood the Primary Applicant's reason for wanting to leave the USA. The RAD asserted that the Primary Applicant fled the country out of fear that her family members would seek her and harm her. The Applicants plead that this is untrue. Rather, she simply did not want to be around her family once they began to harass her because of her sexual orientation.

[16] Finally, the RAD failed to consider the personal circumstances of the Primary Applicant justifying the delay in applying for refugee status. The Primary Applicant was alone in the USA, without the support of her spouse. She was in shock and she had three children under the age of five under her care, she was stranded in a church for some time, and her visitor status was only valid until February 2017.

[17] The Applicants also argue that it was unreasonable for the RAD to draw negative credibility inferences based on the absence of documentation related to the 2016 USA visa application. The Applicants submit that a note on the 2014 visa application which reads "only print if you want a copy for your own records" shows that, other than by printing a copy, obtaining a copy of a visa application is difficult. The Applicants remind the Court that a plausibility finding can only be made in the clearest of cases (*Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 at para 7). The Primary Applicant's inability to access the 2016 USA visa application does not meet this high threshold.

[18] In oral argument, counsel for the Applicant argued that the Principal Applicant's evidence of her sexual orientation was, on its own, dispositive of the matter. Counsel emphasized

that the letter from her former lover and the letter from her husband were not properly dealt with by the RAD.

(2) Respondent's Submissions

[19] The Applicants argue that the RAD erred by citing fear of harm from her relatives as their reason for not seeking asylum in the USA, whereas the Respondent submits that the alternative reason put forward by the Applicants (that she did not want to be around her family once they started harassing her) does not make her rationale for delaying her asylum claim any more meritorious. The purported need for protection is difficult to believe if the Primary Applicant was ready to forgo possible protection in a country as large and as populated as the USA simply because she did not want to be around some people residing in two states within the USA.

[20] As for the RAD's findings related to the election of President Trump as a basis for her decision not to seek asylum in the USA, the Respondent submits that they are reasonable. The RAD reviewed the time the Applicants were in the USA before and after the USA elections. Further to this point, the Respondent argues that the RAD's finding that the encounter, with the taxi driver who advised the Principal Applicant to seek asylum in Canada, was not credible, was a reasonable finding.

[21] The Respondent offers a different reading of the statement on the 2014 USA visa application than the Applicants. The Respondent submits that it does not necessarily indicate that it could be difficult to obtain a copy if the application is not printed. To support this submission, the Respondent refers the Court to the statement preceding the one flagged by the Applicant:

"We do not need a printed copy of your application at any point during your interview process." In addition, the RAD noted that there is no evidence that online access to the USA visa application information had changed between 2014 and 2016.

B. *Documentary Evidence*

(1) Applicants' Submissions

[22] The Applicants submit that the RAD's decision is unreasonable based on its treatment of three elements of the documentary evidence.

[23] The first element of documentary evidence is a corroborating letter from the Primary Applicant's former female lover who allegedly housed her while the police were looking for her. The Applicants argue that it was unjustifiable for the RAD to not give any weight to the letter on the grounds that it constitutes hearsay. Furthermore, the Applicants plead that the RAD ignored that the author personally witnessed and experienced certain events, notably same-sex encounters between herself and the Primary Applicant. According to the Applicants, the RAD's rejection of this letter is a fatal error because its admission could have significantly increased the Applicant's chances of succeeding. Also, the Applicants argue that the woman's credibility was not impugned.

[24] In addition to the letter, the Applicants argue that it was unreasonable for the RAD to assign no weight to the Primary Applicant's e-mail exchanges with the LGBT organization, the

519, on the grounds that the exchange was not affirmed and that the exchanges do nothing more than restate the Primary Applicant's claim that she is bisexual.

[25] The Applicant also argued that the RAD failed to consider or mention the Primary Applicant's husband's sworn statement consenting to the Applicants fleeing Nigeria due to the harassment they were encountering. The Applicants argue that this is contrary to the notion that "the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact" (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 157 FTR 35 (FCTD) at para 17)

(2) Respondent's Submissions

[26] The Respondent argues that the RAD's conclusion and its treatment of the documentary evidence was reasonable. The Respondent submits that the Applicants mischaracterized the RAD's treatment of the evidence. In fact, the RAD disagreed with two of the reasons provided by the RPD to justify attributing "low evidentiary weight" to the letter: that it was unsworn, and that the Primary Applicant requested that the woman write the letter. The RAD did however attribute "limited weight" to the content of the letter related to how the police sought to arrest the Applicant for soliciting a same-sex relationship. This is reasonable because this part of the letter is hearsay.

[27] According to the Respondent, the e-mail exchanges with the 519 organization do not strengthen the Applicant's claim that she is bisexual.

[28] On a general note, the Respondent argues that the RAD's analysis was not "so unreasonable as to warrant intervention" (*Aguebor v Canada (Minister of Employment & Immigration)*, [1993] FCJ No 732 (FCA)). The Respondent also submits that the RAD "cannot be satisfied that evidence is credible or trustworthy unless satisfied that it is probably so, not just possibly so" (*Orelien v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 592 (CA) at para 20).

VIII. Analysis

[29] The application for judicial review is dismissed.

[30] As a preliminary matter, the Court notes that the Respondent is identified incorrectly in the style of cause. The Court orders that the style of cause be amended to properly identify the Respondent as The Minister of Citizenship and Immigration.

A. *Credibility Issues*

[31] The RAD carefully reviewed the evidence and articulated sound reasons for rejecting the appeal in detail. If true facts were dismissed by the RAD, this is because the Primary Applicant was not credible. The Court notes that the record shows that she made contradictory statements about her knowledge of USA law and policy. On one hand, she defends her decision to come to

Canada, in part, based on her concerns about upcoming changes in American refugee policies. She qualifies these concerns as reasonable, given that she is an "intellectual individual" and a "highly educated woman who speaks English fluently". On the other hand, the Primary Applicant denies that she knew she could have filed a refugee claim in the USA, claiming it is speculative to assume she had some understanding that refugees have a right to protection in the USA. These two positions are incompatible. The Applicants' argument that the RAD speculated by expecting the Primary Applicant to have some understanding that the USA would provide refugees some protection is without merit.

[32] Even more troubling is the Primary Applicant's claim that she created a paper trail of sexually suggestive messages to a former lover who she knew had become a church pastor. The RAD found this to be implausible because her overt pursuit could so easily be used against her. The Primary Applicant's sexual pursuit of the church pastor is the event that allegedly triggered her persecution. The Applicants do not dispute the characterization of this finding in front of the RAD or this Court.

[33] In such circumstances, it is reasonable for the RAD to be inclined to conclude that other parts of the Primary Applicant's story are also fabricated. To quote Justice Michel Shore, "An applicant who trifles with the truth in legal proceedings cannot expect to be successful; thus, a Court may discredit even true statements, not knowing where the truth begins and ends, and a climate of uncertainty then prevails." (*Navaratnam v Canada (Citizenship and Immigration)*, 2011 FC 856 at para 1).

[34] The Court agrees with the Applicants that the RAD erred by asserting, without any supporting documentary evidence, that President Trump's election victory was generally not expected. The RAD's overall conclusion is nonetheless reasonable. The RAD also found that the Primary Applicant's decision not to apply for refugee protection after the elections (November 8, 2016, to December 20, 2016) is at odds with a genuine fear of persecution.

[35] Furthermore, the Applicants' submission that the RAD erred when articulating the reason why she left the USA is irrelevant. The Applicants assert that the Primary Applicant left the USA, a country with the potential to provide refuge from persecution, not out of fear of harm from her family members, but rather because they simply did not want to be near unsupportive family members. The Court agrees with the Respondent that it only further compromises the credibility of the Primary Applicant's claim of subjective fear of persecution.

[36] As for the Applicants' submission that the RAD failed to consider her personal circumstances, this argument does not have merit. The RAD recognized that the Primary Applicant would no doubt "have confronted numerous obstacles during her three-and-one-half month stay in the US but there has been no evidence submitted to show that she was in shock to the point that she was unable to seek help from the US authorities".

[37] Also, the Court finds that it was also open to the RAD to draw a negative credibility inference from the Primary Applicant's inability to show documentation related to the 2016 USA visa application and her failure to explain why the 2016 application is inaccessible. The Applicants made no effort to seek out the documentation between the first and second sittings, as

requested. Furthermore, the Court is persuaded by the argument of the Respondent regarding the interpretation of the note on the 2014 US visa application.

[38] An applicant who does not provide acceptable documents for elements of their claim "must explain why they were not provided and what steps were taken to obtain them" (*Refugee Protection Division Rules*, SOR/2012-256, r 11). As a result, the RAD is entitled "to take into account the applicant's lack of effort to obtain corroborative evidence to establish [elements of his claim] and to draw a negative inference of his credibility based on this" (*Samseen v Canada (Minister of Citizenship and Immigration)*, 2006 FC 542 at para 30).

B. *Documentary Evidence*

[39] The Applicants mischaracterize the RAD's appreciation of the letter from the purported former lover who hid the Primary Applicant in August 2016. The Applicants assert that the RAD essentially gave it "no weight" because some elements constitute hearsay. This is incorrect. First, the RAD accords it "limited weight", not "no weight". Secondly, the RAD distinguishes the aspects of the letter that represent first-hand accounts from those that are based on reports by the Primary Applicant. The RAD's evaluation of the probative force of the letter is reasonable.

[40] The RAD's appreciation of the 2015 email exchanges with the LGBT organization, the 519, is also reasonable. Contrary to the Primary Applicant's submission, the RAD did not dismiss the emails because they are not sworn. Rather, the RAD found that the emails do not add anything new to the evidence already presented.

[41] Although the RAD makes no mention of the husband's sworn statement, this does not mean that it was not considered. An administrative tribunal is assumed to have considered all the evidence before it and is not required to draw an explicit conclusion regarding every element of evidence (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16). A judicial review is not a "line-by-line treasure hunt for error" (*Communications, Energy and Paperworks Union of Canada, Local 30 v Irving Pulp & Paper, Ltd.*, 2013 SCC 34 at para 54).

[42] More importantly, the Applicants fail to demonstrate how the husband's sworn statement bolsters their claim. The Applicants even acknowledged that some statements within it are untrue. Whereas the letter reads that the Applicants "should flee to Canada for safety due to the harassment and threats they experienced from our family members in Nigeria, and from the Primary Applicant's relatives in the United States of America because of her sexual orientation and her refusal to be circumcised", the Primary Applicant explains that she only fears persecution in Nigeria, not in the USA.

[43] The RAD's decision is reasonable and falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para 47).

IX. Conclusion

[44] The application for judicial review is dismissed. No question of general importance is certified.

JUDGMENT in IMM-1124-18

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed. There is no question of general importance for certification. The style of cause is also amended to properly identify the Respondent as The Minister of Citizenship and Immigration.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1124-18
STYLE OF CAUSE:	MUSILI AMOKE IDAHOSA, EHIZEME JAYDEN IDAHOSA, ESEOSA JASON IDAHOSA, OSARUMEN JARREL IDAHOSA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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