

Federal Court



Cour fédérale

Date: 20191016

Docket: IMM-1543-19

Citation: 2019 FC 1298

Ottawa, Ontario, October 16, 2019

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

**ONYEBUCHI BENEDICTA KUBA
(AKA NWAOKOLO)**

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Onyebuchi Benedicta Kuba (aka Nwaokolo) is a citizen of Nigeria. She arrived in Canada on September 5, 2015, after living in the United States of America for almost two years. On March 14, 2016, she was convicted of six counts of fraud in New Brunswick. She received custodial sentences of 60 days, 30 days and 16 days, but was released after three months.

[2] Ms. Kuba submitted a refugee claim on November 16, 2016, alleging a well-founded fear of persecution in Nigeria due to her sexual orientation and reprisals from the criminal gang she had associated with in Canada. The Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB] rejected her claim. The determinative issue was credibility. The Refugee Appeal Division [RAD] of the IRB denied Ms. Kuba's appeal. She did not seek leave to commence an application for judicial review of the RAD's decision.

[3] On July 24, 2018, Ms. Kuba requested a pre-removal risk assessment [PRRA]. She submitted two additional documents in support of her application: a letter from a woman with whom she claimed to be in a relationship in Toronto; and an affidavit from her mother, who said that unnamed individuals had threatened Ms. Kuba in Nigeria.

[4] The Senior Immigration Officer [Officer] who conducted Ms. Kuba's PRRA held that the additional documents she had provided did not constitute "new" evidence. The Officer concluded that Ms. Kuba would not face a risk to life or a risk of cruel and unusual treatment or punishment in Nigeria. The Officer also concluded that Ms. Kuba was not a person in need of protection pursuant to ss 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[5] Ms. Kuba seeks judicial review of the Officer's decision.

[6] For the reasons that follow, the Officer unreasonably found that Ms. Kuba's additional evidence was not new, and unreasonably dismissed this evidence because it originated from parties "who have a vested interest in the outcome" of the PRRA application.

[7] Nevertheless, the Officer's finding that Ms. Kuba's additional evidence could not overcome the overwhelming credibility concerns identified by the RPD was reasonable, and is sufficient to sustain the decision. The application for judicial review is therefore dismissed.

II. Preliminary Matter: Ms. Kuba's Daughter

[8] Ms. Kuba's daughter is improperly named as an applicant in this application for judicial review. The RPD dismissed the daughter's refugee claim because she was born in, and is a citizen of, the United States. The daughter was not included in the PRRA, and her name should be removed from the style of cause.

III. Background

[9] Ms. Kuba says she has been bisexual since her teenage years. She married a man in 2010, but the relationship did not last. She claims to have briefly dated a woman after the failure of her marriage. She then became engaged to the man with whom she had her daughter.

[10] In 2013, Ms. Kuba travelled to the United States for "vacation and business". She says she had told her fiancé she was bisexual, and he then told his cousin who informed the rest of his

family. Ms. Kuba was in the United States when she learned of her fiancé's indiscretion, but she did not seek asylum in that country. Instead, she remained in the United States for approximately two years before coming to Canada.

IV. Proceedings before the IRB

[11] The RPD heard Ms. Kuba's refugee claim on January 14, February 23, April 21 and June 20, 2016. The Minister of Citizenship and Immigration [Minister] intervened to address concerns regarding Ms. Kuba's credibility.

[12] While the proceedings before the RPD were ongoing, Ms. Kuba was convicted of six counts of fraud and identity theft. The charges arose from Ms. Kuba's participation in a scheme to defraud a cellphone retailer in New Brunswick. Ms. Kuba was found in possession of numerous forged Canadian identification cards with her picture and various false names, as well as a Nigerian passport with the surname Nwaokolo. She was also in possession of a boarding pass with a false name for a flight from Toronto to Fredericton.

[13] The RPD rejected Ms. Kuba's refugee claim on September 19, 2016, finding that she had failed to prove she was bisexual or under threat by a criminal gang in Nigeria. The RAD dismissed Ms. Kuba's appeal on January 20, 2017.

V. Decision under Review

[14] The Officer found that Ms. Kuba had failed to identify any new risk development arising after the RPD and RAD rejected her refugee claim. The Officer held that the additional evidence provided by Ms. Kuba was not new; it was similar to the evidence presented to the RPD and RAD; it did not originate from disinterested parties; and it was insufficient to overcome the overwhelming credibility issues identified by the RPD.

VI. Issue

[15] The sole issue raised by this application for judicial review is whether the Officer's decision was reasonable.

VII. Analysis

[16] The Officer's factual findings are reviewable by this Court against the standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 53). Whether the Officer applied the correct legal tests in assessing the risks faced by Ms. Kuba is reviewable against the standard of correctness (*Kaneza v Canada (Citizenship and Immigration)*, 2015 FC 231 at para 25). The Officer's application of the legal tests to the facts is a question of mixed fact and law, and is reviewable against the standard of reasonableness (*Talipoglu v Canada (Citizenship and Immigration)*, 2014 FC 172 at para 22).

[17] Subsection 113(a) of the IRPA provides as follows:

113 Consideration of an application for protection shall be as follows:

(a) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection;

113 Il est disposé de la demande comme il suit :

a) le demandeur d'asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'il n'était pas raisonnable, dans les circonstances, de s'attendre à ce qu'il les ait présentés au moment du rejet;

[18] Ms. Kuba argues that the Officer improperly required her to demonstrate new risks that arose after the RPD and RAD decisions. In *Kailajanathan v Canada (Citizenship and Immigration)*, 2017 FC 970 [*Kailajanathan*] at paras 12-13, Justice Ann Marie McDonald confirmed that an applicant need not identify new risks, but may rely on new evidence to establish previously identified risks:

[12] While an Officer is obligated to take heed of the RPD decision and its credibility findings (*Obeng v Canada (Citizenship and Immigration)*, 2009 FC 61 at para 29), an exception exists if the Applicant offers new probative evidence to establish the alleged risks (*Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 at para 13). Importantly, the Applicant need not identify new risks, but only new evidence to establish previously identified risks (*Jimenez v Canada (Citizenship and Immigration)*, 2016 FC 938 at para 10 [*Jimenez*]).

[13] As such, the test for the acceptance of new evidence on a PRRA is whether there are “new developments, either in country conditions or in the applicant’s personal situation” (*Elezi v Canada (Citizenship and Immigration)*, 2007 FC 240 at para 27) which

may have affected the outcome of the board hearing (*Jiminez*, at para 11).

[19] The Officer acknowledged that the letter and affidavit arose after the RPD and RAD decisions, but concluded that this evidence was not “new”. The Officer nevertheless considered the letter and affidavit, but rejected this evidence for three reasons:

- (a) it was similar to evidence previously considered by the RPD and RAD;
- (b) it did not originate from impartial sources; and
- (c) it was insufficient to overcome the overwhelming credibility concerns identified by the RPD and RAD.

[20] Counsel for the Minister concedes that the evidence could fairly be characterized as “new”, and could not be rejected solely because it originated from interested parties (*Kailajanathan* at para 16; *Tabatadze v Canada (Citizenship and Immigration)*, 2016 FC 24 at paras 6-7).

[21] However, the Officer’s finding that the new evidence could not overcome the overwhelming credibility concerns identified by the RPD was reasonable. The RPD’s reasons for rejecting Ms. Kuba’s credibility included the following:

- (a) Ms. Kuba did not provide an adequate explanation for failing to seek asylum in the United States, where she spent 26 months, suggesting a lack of subjective fear of persecution;
- (b) Ms. Kuba's oral testimony was unclear and lacked consistency on a number of key points, undermining central elements of her claim;
- (c) the authenticity of an earlier affidavit of Ms. Kuba's mother was doubtful and could be given no weight;
- (d) Ms. Kuba did not provide adequate documentation to corroborate her alleged bisexuality or overcome the overwhelming adverse findings regarding her credibility — she produced documentation from LGBT organizations in Toronto, but none from Chicago where she had lived for more than two years; and
- (e) Ms. Kuba's credibility was also undermined by her previous criminal activity — her alleged fear of the criminal gang she had associated with in Canada was unsupported by any credible or trustworthy evidence.

[22] PRRA officers may rely on adverse credibility findings made by previous decision-makers (*Perampalam v Canada (Citizenship and Immigration)*, 2018 FC 909 at para 20; *Ahmed v Canada (Citizenship and Immigration)*, 2018 FC 1207 at para 36). However, this does not mean that PRRA officers may disbelieve every piece of evidence brought by an applicant for the sole reason that the applicant was found not to be credible by the RPD or RAD (*Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14 [*Magonza*] at para 66).

[23] When importing credibility findings from prior proceedings, PRRA officers must explain how those findings affect the evidence before them. In principle, the evidence presented to the PRRA officer must be different from that before the RPD and RAD [*Magonza* at para 67].

[24] The Officer's reasons were not perfect, but nor were they required to be (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 18). The Officer's reasons provide an adequate explanation of why the additional evidence was not qualitatively different from that before the IRB, and could not overcome the numerous adverse credibility findings of the RPD, subsequently confirmed by the RAD. The Officer's reasons are therefore sufficient to sustain the decision under review.

VIII. Conclusion

[25] The application for judicial review is dismissed. The style of cause is amended to remove the name of Ms. Kuba's daughter. Neither party proposed that a question be certified for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed; and
2. The style of cause is amended to remove the name of Ms. Kuba's daughter, with immediate effect.

"Simon Fothergill"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: OCTOBER 9, 2019

JUDGMENT AND REASONS: FOTHERGILL J.

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