Federal Court Cour fédérale

Date: 20200226

Docket: IMM-4886-19

Citation: 2020 FC 305

Ottawa, Ontario, February 26, 2020

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

EMIAGEDE PRECIOUS AISOWIEREN,
DORIS UYINWEN AISOWIEREN (MINOR),
DANNY OSAZE UYIOGHOSA AISOWIEREN (MINOR)

Applicants

and

THE MINISTER OF IMMIGRATION,
REFUGEES AND CITIZENSHIP CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision by the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada, which dismissed the Applicants' appeal and confirmed a decision of the Refugee Protection Division [RPD] that the Applicants are neither Convention refugees nor persons in need of protection pursuant to paragraph 111(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] The Principal Applicant, her son and daughter, the Minor Applicants, are citizens of Nigeria. The Applicants allege their family will force the female Minor Applicant to undergo female genital mutilation [FGM] if they return to Nigeria. Both the Principal Applicant and her husband [Husband], the father of the Minor Applicants, oppose FGM.

[3] In the Applicants' Basis of Claim form [BOC], the Principal Applicant alleges that in Spring of 2016, her family tried to force her to undergo FGM while pregnant with her son. As a result, the Principal Applicant fled to the United States in May, 2016 where she gave birth to the male Minor Applicant.

[4] In August, 2016, the Husband's family unsuccessfully attempted to take the female Minor Applicant to undergo FGM. As a result, the Husband and his daughter relocated within Nigeria. The Principal Applicant returned to Nigeria. In December, 2016, the Applicants allege that a number of elders and youths came to the Applicants' house and tried to take the female Minor Applicant to force her to undergo FGM. Her BOC stated that the Husband "and some of his friends resisted and prevented them" from taking the daughter by force [December, 2016 Incident].

[5] Before the RPD and the RAD there were reports from psychotherapists that spoke to the Principal Applicant's state of mind. One psychotherapist's report said that:

> Ms. Aisowieren often feels distracted by negative and scary thoughts, which causes her to experience cognitive issues. She reports to be having problems with concentration and focus which interferes with fluidity of thought, conversation, and daily tasks. Ms. Aisowieren also has impaired short-term recall (i.e. short-term

> memory toss) which causes her to have difficulty retaining or recalling information.
>
> …
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> Based on my observations and evaluations, it is my clinical impression that Ms. Aisowieren is exhibiting symptoms consistent with post-traumatic stress disorder. Post-traumatic stress disorder (PTSD) is a condition created by exposure to one or more psychologically distressing events outside the range of usual human experience, which would be markedly distressing to almost anyone. These events tend to intense fear terror, and helplessness and symptoms fall under the categories of numbing/depression. Ms. Aisowieren exhibits symptoms from all of these categories.

[6] After a hearing, the RPD determined the Applicants were neither Convention refugees nor persons in need of protection [RPD Decision]. The determinative issues were credibility and the availability of an internal flight alternative [IFA] elsewhere in Nigeria.

[7] The Applicants appealed the RPD Decision to the RAD. The Applicants submitted three affidavits and a support letter as new evidence before the RAD. Two of the affidavits spoke to the December, 2016 Incident. The third affidavit was from a woman from the same region in Nigeria as the Applicants who was at risk of FGM and had to escape. The support letter detailed the prevalence of FGM in a certain area in Nigeria.

[8] The RAD dismissed the appeal and confirmed the RPD Decision in a decision dated March 29, 2019 [Decision].

[9] Four issues arise in this judicial review: new evidence, credibility, documentary evidence, and IFA.

[10] The standard of review is reasonableness which in a case such as this requires respectful attention to the decision-maker: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, majority reasons by Chief Justice Wagner, at para 84 [*Vavilov*]. In assessing reasonableness the Court must look at the reasoning *process* in terms of coherent and rational chain of analysis, and the *outcome* of the reasoning in terms of the legal and factual constraints facing the decision-maker: *Vavilov* at paras 83-86. The decision under review must be justified, intelligible and transparent: *Vavilov* at para 99. Judicial review is not a treasure hunt for errors: *Vavilov* at para 102.

[11] In terms of the new evidence, the RAD rejected the documents essentially because there was inadequate explanation as to why the documents were not produced earlier to the RPD, let alone to the RAD: they were submitted late to the RAD and were not submitted to the RPD at all. In my view, this finding should not be disturbed because it accords with the factual and legal constraints.

[12] In terms of the credibility assessment I would make a number of observations.

[13] The first is the difficulty the Principal Applicant had recalling the date when a group tried to kidnap her daughter i.e., the December, 2016 Incident. While she pinpointed the date in her BOC, she could not recall the date at the hearing, which the RAD found undermined her credibility. I am concerned with this finding given the jurisprudence against memory tests and microscopic criticism.

[14] The second credibility issue concerns the Principal Applicant's description of the December, 2016 Incident itself. Certain details were added in oral testimony that were not included on the BOC. The additions (or omissions from the BOC) are material, but it may be possible to construe the testimony as providing additional information to the BOC narrative and not inconsistencies as the RAD found.

[15] The third issue concerns documentary evidence. The RAD gave no weight to an affidavit of the husband supporting this claim. The RAD endorsed the RPD's reasoning that it should be given little weight because "it is from a non neutral source who has a vested interest in the outcome of the claims". This Court has repeatedly held that decision-makers such as the RAD act unreasonably if they reject the evidence of family members for reasons such as this: see *Tabatadze v Canada (Citizenship and Immigration)*, 2016 FC 24 [*Tabatadze*]:

> [4] While counsel canvassed a number of issues, in my view, the determinative issue is the RPD's blanket rejection of all affidavit evidence filed by the Applicant's family and relatives. The RPD gave this evidence "no weight", saying: "[d]ocuments signed by his family members are self-serving since they are from his family members who have interests in the outcome of the claimant's refugee claim in Canada and as a result, the panel gives no weight to these documents." This Court has repeatedly criticized the outright rejection of evidence provided by relatives and family members of an applicant or claimant because such evidence is self-serving: see *Kaburia v Canada (Citizenship and Immigration)*, 2002 FCT 516 at para 25; *Ahmed v Canada (Citizenship and Immigration)*, 2004 FC 226 at para 31; *Mata Diaz v Canada (Citizenship and Immigration)*, 2010 FC 319 at para 37; *Magyar v Canada (Citizenship and Immigration)*, 2015 FC 750 at para 44; and *Cruz Ugalde v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 458 at para 26, as examples. I repeat those criticisms here.
>
> [5] This Court stated one of the underlying reasons why this approach is unreasonable in *Varon v Canada (Citizenship and Immigration)*, 2015 FC 356 at para 56:

> …If evidence can be given "little evidentiary weight" [or no weight at all in the case at bar] because a witness has a vested interest in the outcome of a hearing then no refugee claim could ever succeed because all claimants who give evidence on their own behalf have a vested interest in the outcome of the hearing.…

> [6] In addition, rejection of evidence from family and friends because it is self-serving or because the witnesses are interested in the outcome, is an unprincipled approach to potentially probative and relevant evidence. To allow a tribunal to reject otherwise relevant and probative evidence in this manner creates a tool that may be used at any time in any case against any claimant. It therefore defeats a primary task of such decision-makers which is to assess and weigh the evidence before them.

[16] And see to the same effect: *Avril v Canada (Minister of Citizenship and Immigration)*, 2019 FC 1512, per Kane J at paras 66-67; *George v Canada (Minister of Citizenship and Immigration)*, 2019 FC 1385, per McHaffie J at para 61; *Nugent v Canada (Minister of Citizenship and Immigration)*, 2019 FC 1380, per O'Reilly J at para 16; *Rahman v Canada (Minister of Citizenship and Immigration)*, 2019 FC 941, per Walker J at paras 20, 22; *Magonza v Canada (Minister of Citizenship and Immigration)*, 2019 FC 14, per Grammond J at paras 44-56; *Duroshola v Canada (Minister of Immigration, Refugees and Citizenship)*, 2017 FC 518, per Manson J at para 21; *Abusaninah v Canada (Citizenship and Immigration)*, 2015 FC 234, per Diner J at paras 38 and 39; *Ugalde v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 458, per de Montigny J (as he then was) at para 28. *Contra*, see *Fadiga v Canada (Citizenship and Immigration)*, 2016 FC 1157 at para 14 pre Annis J.

[17] Also in dealing with the husband's affidavit, the RAD stated: "Corroboration does not make an incredible story credible". With respect, while this observation might have applied to

the particular facts of a particular case (see *Gomez v Canada (Minister of Citizenship and Immigration)*, 2005 FC 849, per Harrington J), I am not persuaded it is well-founded as a rule of evidence law. It may be that poor quality corroborative evidence will not overcome shortcomings in some testimony. However, it also may be that corroborative evidence will persuade a trier of fact to accept evidence that otherwise would be rejected. In my view, this determination is for decision-makers to assess in each case. Reliance on the test used in this case was not justified by legal constraints.

[18] The other concern with respect to documentary evidence involved country condition documents. The RAD quoted from country condition documents indicating parents may refuse to have FGM performed on their daughters in the area where the Principal Applicant resided. FGM was also illegal in this area. However, the Applicant pointed to documentary evidence from Canada's National Documentation Package Item 5.28 of March, 2019, to the effect that FGM is "widely embraced", "'deeply' engrained" and "widespread". Moreover, the same documentary evidence was that "even in states that have enacted legislation against it [FGM], the laws are weak in and most times not even implemented". This contrary documentary evidence forms part of the factual constraints facing this decision-maker, but was not considered. It is not apparent how the RAD decision is justified in relation to these constraints.

[19] The foregoing discussion has led me to conclude that the Decision is unreasonable. Notwithstanding having paid respectful attention to the RAD's decision, and recognizing that judicial review is not a treasure hunt for errors, I am not satisfied the outcome of the reasoning, in terms of the legal and factual constraints facing the RAD, is justified. I have also considered

the reasoning process and have found a lack of a coherent and rational chain of analysis. Therefore, judicial review will be granted.

[20] As a consequence, it is not necessary to review the submissions on IFA.

[21] Neither party proposed a question of general importance for certification, and none arises.

JUDGMENT in IMM-4886-19

THIS COURT'S JUDGMENT is that the application for judicial review is granted, the Decision is set aside, the matter is remanded for reconsideration by a differently constituted RAD, no question of general importance is certified, and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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