Federal Court  Cour fédérale

Date: 20210430

Docket: IMM-7586-19

Citation: 2021 FC 385

Ottawa, Ontario, April 30, 2021

PRESENT: Madam Justice Pallotta

BETWEEN:

OLUTOLA KIKELOMO AWONUSI
OLOLADE MARIAM AWONUSI
IDOWU MUBARAQ AWONUSI
MAZILDA KEHINDE AWONUSI
MUIZ TAIYE AWONUSI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Ms. Olutola Kikelomo Awonusi and her four children seek judicial review of a decision of the Refugee Appeal Division (RAD), confirming the Refugee Protection Division's (RPD)

decision that they are neither Convention refugees nor persons in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act,* SC 2001, c 27 [*IRPA*].

[2] The applicants are citizens of Nigeria who allege a fear of persecution by Ms. Awonusi's estranged husband and his family, due to domestic violence and the threat of female genital mutilation (FGM) to two of the applicants, Ms. Awonusi's daughters. The RAD determined there was insufficient evidence to support the applicants' claims that they are Convention refugees or persons in need of protection, including insufficient evidence of a serious possibility of risk of FGM. The RAD also found there were contradictions and inconsistencies regarding key elements of the claim, and found Ms. Awonusi's credibility to be a central and significant factor.

[3] The applicants submit that the RAD's decision is unreasonable. They submit that the RAD erred in its credibility assessment. They also submit the RAD erred in refusing to hold an oral hearing, and in failing to properly consider the evidence.

[4] I find that the applicants have not established that the RAD's decision is unreasonable. For the reasons below, this application for judicial review is dismissed.

II. **Facts**

[5] Ms. Awonusi is Christian and her estranged husband is Muslim. At the time they were married in 2006, Ms. Awonusi believed religion would not have a bearing on the marriage; however, in the following year, Ms. Awonusi's husband began complaining about her clothing

and appearance. When Ms. Awonusi refused to change her clothing, her husband physically abused her. Ms. Awonusi alleges that she reported the incident to the police, but was told it was a family matter. Her husband became frequently abusive and took steps to force her to convert to Islam. He and his parents wanted the daughters to undergo FGM after their 10th birthdays. The first daughter's FGM had been scheduled for November 2016.

[6] The family went on vacation in the United States in September 2016. Ms. Awonusi left her husband and did not return to Nigeria. She and her children sought help from and stayed with a family friend who was living in the U.S. Ms. Awonusi alleged that her husband and his family continued to pursue her. The husband's parents, who had also been visiting the U.S. at the time, went to the friend's house and demanded that Ms. Awonusi return to Nigeria. In September 2017, the husband showed up at the friend's house in an attempt to reconcile; when Ms. Awonusi refused, the husband became physically aggressive and threatened to kill her and himself. Ms. Awonusi went to the police and filed a complaint. When she returned, the husband had left a divorce decree of the Nigerian court dated January 24, 2017. Ms. Awonusi alleged that her husband obtained the divorce without her knowledge.

[7] Ms. Awonusi did not learn about the asylum process until January 2018, and did not want to make a claim in the U.S., as she feared a negative attitude toward those seeking asylum. She and her children travelled to Canada on March 13, 2018 and claimed refugee protection. The RPD hearing was held on December 13, 2018 and by decision dated March 5, 2019, the RPD held there was insufficient credible evidence to support the refugee claims. The applicants appealed to the RAD. The RAD dismissed the appeal on November 20, 2019.

III. **Issues and Standard of Review**

[8] The issues on this application for judicial review are as follows:

(1) Did the RAD err in refusing to admit evidence and hold an oral hearing?

(2) Did the RAD err in its credibility assessment, or by failing to properly assess the evidence?

(3) Did the RAD breach procedural fairness by not providing an opportunity to address a new issue?

[9] The applicable standard of review for the first two issues is reasonableness, under the revised framework for reasonableness review set out in the Supreme Court's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]: *Akinyemi-Oguntunde v Canada (Citizenship and Immigration)*, 2020 FC 666 at para 15; *Armando v Canada (Citizenship and Immigration)*, 2020 FC 94 at para 31; *Singh v Canada (Citizenship and Immigration)*, 2020 FC 350 at para 17.

[10] The applicants submit that issues of procedural fairness are determined on a correctness standard. In my view, the first two issues raised on this application are reviewable on the reasonableness standard. This includes the issue regarding the RAD's refusal to admit evidence and hold an oral hearing: *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 [*Singh*] at paras 23 and 29. The third issue, where an issue of procedural fairness is engaged, is reviewable on the correctness standard: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 43.

[11] The reasonableness standard requires a deferential but robust form of review: *Vavilov* at paras 12-13, 75 and 85. A reviewing court must determine whether the decision bears the hallmarks of reasonableness—justification, transparency and intelligibility: *Vavilov* at para 99. A reasonable decision is based on an internally coherent and rational chain of analysis and it is justified in relation to the facts and law that constrain the decision maker: *Vavilov* at para 85. The party challenging the decision bears the onus of demonstrating that it is unreasonable: *Vavilov* at para 100.

IV. **Analysis**

A. *Did the RAD err in refusing to admit evidence and hold an oral hearing?*

[12] The applicants sought to admit new evidence on appeal, including an affidavit from Ms. Awonusi's sister, a police report, a counselling report, and 17 articles.

[13] The RAD admitted the counselling report as new evidence on appeal, as well as one of the articles about the practice of FGM. The RAD did not convene an oral hearing on the basis that the newly admitted evidence did not meet the statutory requirements for holding a hearing, as it did not raise a serious issue regarding the applicants' credibility, and did not have sufficient persuasive value to justify allowing or rejecting the claim: *IRPA* s. 110(6).

[14] The applicants submit that the RAD's decision to reject all but two of the newly tendered documents was unreasonable. Also, the applicants requested an oral hearing, and they submit the RAD erred in concluding that an oral hearing was not warranted. They submit the RAD improperly imposed an onus on them, when the RAD bears the onus of considering and applying

the statutory criteria reasonably, in order to decide whether to hold an oral hearing: *Horvath v Canada (Citizenship and Immigration),* 2018 FC 147 at para 18.

[15] In their submissions, the applicants focused on the RAD's refusal to admit the sister's affidavit and the police report, and did not elaborate on the RAD's error in rejecting any other documents.

[16] The applicants assert that the sister's affidavit and the police report are important because they contradict a key finding underpinning the RAD's rejection of their claim, namely the RAD's (and the RPD's) finding of insufficient evidence of a forward-looking risk based on the ex-husband's lack of interest since 2017. They assert these documents show that the ex-husband continued to show interest in the applicants as late as December 2018. According to the sister's affidavit and the police report, Ms. Awonusi's husband showed up at the sister's house in Ketu, Nigeria with police on December 26, 2018, and returned the next day, threatening to kill the sister if she did not produce Ms. Awonusi and the children. The applicants sought to have their credibility re-assessed by the RAD in light of these new documents.

[17] I am not persuaded that the RAD erred by refusing to admit the sister's affidavit and the police report. The RAD reasonably excluded the documents for failing to meet the admissibility requirements of section 110(4) of the *IRPA*. The applicants failed to establish that at the time of the RPD's rejection, the documents were not reasonably available or the applicants could not reasonably have been expected to have presented them. Both documents were dated December 28, 2018, and therefore pre-dated the RPD's decision by more than two months. The RAD noted

that Ms. Awonusi had known about the incident at the time it occurred, and the applicants did not explain why the documents had not been submitted earlier.

[18] The Federal Court of Appeal's decision in *Singh* is the leading authority on the admissibility of new evidence before the RAD. In *Singh*, the FCA held that the explicit conditions set out in section 110(4) must be met, and on an appeal to the RAD, an applicant may present only new evidence that arose after the RPD's rejection, or evidence that 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: *Singh* at para 35. These conditions are inescapable and leave no room for discretion on the part of the RAD: *Singh* at para 35. Thus, the RAD made no error in refusing to admit these documents for failing to meet the section 110(4) requirements, correctly noting that this alone was sufficient to exclude them.

[19] The RAD further noted an additional reason to exclude the sister's affidavit and the police report: credibility. The RAD found insufficient evidence, in terms of the source and the circumstances in which they came into existence, to establish the credibility of the documents. The RAD found the timing and content of the documents were "suspiciously convenient", as the documents addressed a specific point made by the RPD member to Ms. Awonusi during the hearing on December 13, 2018 that, according to her evidence, her ex-husband had not shown any interest in the applicants for an extended period of time. The RAD also found the content of the police report wavered back and forth between the first and third person and did not make sense. The applicants submit the RAD erred in these findings because, after determining that the documents should be excluded pursuant to section 110(4), the RAD went on to assess the

documents' content and authenticity to make adverse credibility findings against the applicants, and not merely against the documents.

[20] Contrary to the applicants' assertions, the RAD did not impugn their credibility based on the sister's affidavit and the police report. The RAD did not confuse distinct credibility concepts. Documents that meet the statutory criteria under section 110(4) of the *IRPA* may nonetheless be excluded if they are not credible: *Singh* at para 44; *Raza v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385, [2007] F.C.J. No 1632 at para 13. The RAD considered the credibility of the police report and affidavit in assessing their admissibility, and not in its assessment of the credibility of the applicants' claims. The RAD did not err by providing an additional reason for refusing to admit the documents, based on their credibility.

[21] With respect to the remaining 16 articles tendered as new evidence on appeal, the applicants have not established that the RAD erred in refusing to admit them. I agree with the respondent that the RAD reasonably excluded articles that pre-dated the RPD decision on the basis that they did not meet the section 110(4) criteria for admitting new evidence. The applicants did not explain why these articles were not available, or why it was not reasonable to expect that they would have been provided to the RPD prior to the RPD's rejection. Other articles were reasonably rejected on the basis of their limited relevance or lack of credibility.

[22] The applicants have not established that the RAD erred in refusing to convene an oral hearing. As noted above, the RAD may hold a hearing where, among other requirements, newly admitted evidence raises a serious issue with respect to the credibility of the person who is the

subject of the appeal: section 110(6) of the *IRPA*. Thus, an oral hearing is not required if otherwise credible evidence does not also raise a serious issue with respect to an applicant's general credibility: *Singh* at para 44. I am not persuaded by the applicants' argument that the RAD imposed a burden on the applicants to satisfy the requirements for an oral hearing (*Horvath v Canada (Citizenship and Immigration)*, 2018 FC 147 at para 18). The RAD assessed the applicable factors for convening an oral hearing under section 110(6) of the *IRPA*, and reasonably found that the newly admitted evidence did not warrant an oral hearing.

B. *Did the RAD err in its credibility assessment, or by failing to properly assess the evidence?*

[23] The applicants allege that the RAD made a series of errors in assessing the credibility of their claim. They submit that the RAD:

1. made veiled credibility findings by commenting on the lack of corroborative documentary evidence (*Liban v Canada (Citizenship and Immigration)*, 2008 FC 1252 at para 14); an applicant's testimony is presumed to be truthful, and the applicants maintain that the RAD failed to provide a reasonable basis to rebut this presumption (*Maldonado v Canada (Minister of Employment and Immigration)* (1979), [1980] 2 FC 302, [1979] FCJ No 248 (CA));

2. found that they had misrepresented facts or presented fraudulent documents, such as the divorce decree, without "clear and convincing evidence" to support the finding (*Xu v Canada (Citizenship and Immigration)*, 2011 FC 784 [*Xu*] at para 16);

3. disregarded Ms. Awonusi's statutory declaration attesting to her divorce, on the basis that she lacked credibility (*Yu v Canada (Citizenship and Immigration)*, 2015 FC 1138 at para 34);

4. failed to apply the *Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution* [the *Gender Guidelines*] and give due consideration to Ms. Awonusi's experiences of domestic violence when assessing her credibility—the husband's control over Ms. Awonusi's life rendered it unreasonable to draw negative inferences from her lack of knowledge about the details of the U.S. vacation or her husband's religion;

5. engaged in a microscopic assessment of the evidence and ignored reasonable explanations for the inconsistencies—inconsistencies about the divorce are

explained by Ms. Awonusi's evidence that the divorce degree might not be genuine, as she was in the U.S. when her estranged husband filed for divorce in Nigeria, and her lack of knowledge about her husband's religion is explained by the fact that she did not have any interest in practising Islam;

6. erred in making plausibility findings, which require a high threshold of certainty (*Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 at para 7);

7. did not adequately consider the country condition documentation in determining whether the claims were credible, and failed to recognize that the applicants' fear was not dependent on Ms. Awonusi's credibility as they have a very real fear based on country conditions, independent of her credibility (*A.B. v Canada (Citizenship and Immigration)*, 2018 FC 373 [*A.B.*] at para 8);

8. failed to assess the issue of personalized risk in an "independent and fair manner", as a result of the negative credibility findings;

9. failed to apply a forward-looking test regarding the possibility of persecution and risk of harm, fixating instead on credibility: *Fixgera Lappen v Canada (Citizenship and Immigration)*, 2008 FC 434 [*Lappen*]; as a result, the applicants allege the RAD lost sight of the key issue of whether they would be subject to a risk of persecution based on domestic violence and FGM; and

10. did not have proper regard to the evidence in the record and failed to properly weigh the evidence (*Herrera Andrade v Canada (Citizenship and Immigration)*, 2012 FC 1490 at para 11).

[24] I am not persuaded by the applicants' arguments that the RAD erred in its credibility assessment, or by failing to properly assess the evidence. It is within the RAD's discretion and expertise to weigh the evidence: *Vavilov* at paras 83-87, 93, and 125-126. While the applicants disagree with the RAD's findings, in my view, the applicants have not established that the RAD's reasons demonstrate the errors alleged above.

[25] A number of the arguments are general assertions, not tied to the RAD's reasons or to the evidentiary record. On appeal, the RAD noted that the applicants' arguments lacked supporting details, as well as references to where the RPD erred. The RAD noted that it is an applicant's

responsibility to point to the RPD's errors, and an applicant who fails to specify where and how the RPD erred does so "at their own peril": *Ghauri v Canada (Minister of Citizenship and Immigration)*, 2016 FC 548 at para 34. The RAD cannot be faulted for its failure to address errors that were not properly identified on appeal.

[26] The RAD assessed the RPD's credibility findings based on the record before the RPD, including evidence about Ms. Awonusi's divorce, her knowledge of her husband's religion, and her knowledge about the family vacation in the U.S. The RAD reasonably found that Ms. Awonusi's account of events described in her basis of claim (BOC) narrative and oral testimony were inconsistent with the information in the divorce decree, undermining the credibility of her narrative. Similarly, the RAD reasonably determined Ms. Awonusi's lack of knowledge regarding her husband's religion to be a significant issue, given that a central reason underlying the domestic abuse was coercion in converting her to the Muslim faith. The RAD found it was implausible that she could not describe the religion in any detail after being in the relationship for 10 years, and receiving lessons from an Imam as part of an attempt to force her to convert. Also, the RAD found it implausible that Ms. Awonusi would not know basic details about the U.S. vacation, particularly in view of her background as a teacher and the children's anticipated absence from school. The RAD considered the psychological report indicating Ms. Awonusi's forgetfulness, but found that the inconsistences in the evidence did not stem from memory difficulties.

[27] The applicants have not identified which findings of the RAD constituted veiled credibility findings and they have not identified corroborative evidence that the RAD failed to consider.

[28] The RAD did not make a finding of misrepresentation. The *Xu* decision is unhelpful since it relates to a finding of misrepresentation under section 40 of the *IRPA*, and there were no such findings in the present case. Also, the RAD did not find the divorce document to be fraudulent. Indeed, the RAD disagreed with the RPD, and stated that the RPD had "extrapolate[d] too much" by concluding that the divorce decree had been forged in order to allow Ms. Awonusi to travel with the children. Nevertheless, the RAD found that there were serious inconsistencies between the facts as set out in the divorce decree and Ms. Awonusi's account of events, and the inconsistencies undermined her credibility. Ms. Awonusi had explained the inconsistencies by stating that the document may not be genuine; however, the RAD found that, if the document was not genuine, the fact that Ms. Awonusi submitted a false divorce decree at least called into question her account of the marriage breakdown.

[29] The RAD correctly pointed out that the applicants had not raised any specific provisions of the *Gender Guidelines* that applied to their case. On judicial review, the applicants submit the RAD failed to consider Ms. Awonusi's experiences of domestic violence when considering her knowledge about the family trip to the U.S.; however, they have not explained how the *Gender Guidelines* ought to have been applied, and I am not persuaded that the RAD erred in its consideration of Ms. Awonusi's knowledge about the family trip.

[30] The applicants have not established that the RAD conducted a microscopic assessment of the evidence, or made improper findings based on implausibility. To the contrary, Ms. Awonusi was unable to provide satisfactory explanations for serious inconsistencies in her evidence. While marriage breakdown was central to her claim, the timeline and facts presented in the divorce decree were inconsistent with Ms. Awonusi's account of events. The RAD did not ignore Ms. Awonusi's explanation, but found the explanation—that she did not know whether the divorce decree was authentic—was insufficient to address the inconsistencies. Based on the numerous inconsistencies as outlined in the RAD's reasons, it was reasonable for the RAD to conclude that the divorce decree weighed against the credibility of Ms. Awonusi's narrative, regardless of its authenticity. Similarly, it was reasonable for the RAD to conclude that Ms. Awonusi's lack of knowledge regarding basic details about the U.S. vacation—including how long the family planned to be away—weighed against her credibility. Furthermore, given the length of time she was coerced to learn Islamic teachings, the RAD reasonably found it implausible that Ms. Awonusi did not know which branch of the Muslim faith her husband followed. The RAD's implausibility findings were not made in a vacuum, but rather in the context of other examples of unclear evidence.

[31] I am not persuaded that the RAD was fixated on the issue of credibility, or that it failed to properly assess the applicants' fear of persecution or harm based on a forward-looking risk. The applicants' reliance on *A.B.* and *Lappen* is misplaced. In those cases, the tribunal erred by failing to address a risk of persecution supported by the country documentation, which was not tied to the tribunal's negative credibility findings. In the present case, the applicants have not pointed to

any failure by the RAD to address alleged fears or risk based on the country documentation in the record, that are not tied to the RAD's credibility findings.

[32] In considering the weight of the evidence regarding a forward-looking risk, the RAD accepted affidavit evidence, the counselling report, and Ms. Awonusi's account of domestic violence, and acknowledged that she is a member of a particular social group as a battered woman. The RAD concluded that the applicants are not Convention refugees, noting Ms. Awonusi's lack of contact with her ex-husband since November 2017, and her own evidence that her ex-husband divorced her in 2017 (even in the face of an invalid divorce decree). Similarly, the RAD noted the declining popularity of the practice of FGM, Ms. Awonusi's *de facto* care and control of the children, and the evidence of the ability of people to refuse FGM. The RAD reasonably considered evidence of a forward-looking risk and determined that there was insufficient evidence to establish that the applicants face more than a mere possibility of persecution in Nigeria, and insufficient evidence to establish that they are persons in need of protection in Nigeria: sections 96 and 97 of the *IRPA*.

[33] The RAD specifically noted that the tests for risk of persecution or harm are forward-looking, and did not err in applying them. The RAD reasonably determined there was insufficient objective evidence of a forward-looking risk.

C. *Did the RAD breach procedural fairness by not providing an opportunity address a new issue?*

[34] The applicants submit the RAD made new, independent credibility findings that were not made by the RPD, without providing an opportunity for the applicants to make submissions.

[35] Credibility was an issue before the RPD, and was also a key aspect of the applicants' appeal to the RAD. Contrary to the applicants' assertions, the RAD did not raise a new credibility issue that would require an opportunity to respond: *Ching v Canada (Citizenship and Immigration)*, 2015 FC 725 at paras 70-71; *Husian v Canada (Citizenship and Immigration)*, 2015 FC 684 at para 10. As such, the RAD was not required to provide an opportunity for the applicants to make further submissions, in addition to those set out in the memorandum of fact and law filed on appeal: *Ibrahim v Canada (Minister of Citizenship and Immigration)*, 2016 FC 380 at para 30.

V. **Conclusion**

[36] For the reasons above, the RAD's decision is reasonable. This application for judicial review is dismissed.

[37] Neither party proposed a question for certification and in my view, there is no question to certify.

JUDGMENT in IMM-7586-19

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. There is no question for certification.

"Christine M. Pallotta"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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