Federal Court  Cour fédérale

Date: 20121127

Docket: IMM-1838-12

Citation: 2012 FC 1377

Ottawa, Ontario, November 27, 2012

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

NNAEMEKA GODFREY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (Act) for judicial review of the decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated 3 February 2012 (Decision), which refused the Applicant's application to be deemed a Convention refugee or a person in need of protection under sections 96 and 97 of the Act.

BACKGROUND

[2] The Applicant is a 34-year-old citizen of Nigeria. He came to Canada in 2001 to study at the University of Saskatchewan. His uncle, who was in Canada at the time, acted as the Applicant's sponsor for his studies. His uncle returned to Nigeria in 2003. The Applicant finished school in 2004 and moved to Toronto, where he lived with friends who supported him.

[3] The Applicant claimed refugee protection on 13 March 2011. An oral hearing was held on 16 December 2011. Between 13 December and 15 December, the Applicant filed four separate sets of disclosure, including an amended Personal Information Form (PIF) narrative. The PIF sets out the details of his claim.

PIF Narrative

[4] In 2008, the Applicant's uncle decided to get into politics in Nigeria. A few months later the uncle was arrested by the Nigerian Police and accused of being a financier for the Movement for the Actualization of the Sovereign State of Biafra (MASSOB). The uncle's wife told the Applicant on the phone that his uncle was not actually a MASSOB member, and it was all a ploy by his political opponents to quash his political ambitions. Since that time, the Applicant's uncle has been detained by Nigerian state security agents at an undisclosed location.

[5] Before the Applicant's uncle was arrested, state agents ransacked his house in Nigeria. They took receipts from electronics, furniture, and other items the Applicant had sent from Canada to Nigeria in 2003. They also asked the uncle's wife lots of questions about the Applicant. The interrogators thought the Applicant was acting for MASSOB as a conduit for foreign money.

[6] The Applicant was having financial problems in Canada without his uncle's help. He called home to his family in Nigeria saying that he wanted to come back, but his parents told him to try and stay in Canada because the police and state security agents suspected him of financing MASSOB and that he would be a target if he returned to Nigeria.

[7] The uncle's wife was interrogated again by state agents in December 2010. They asked her about the Applicant and whether he had any plans to visit Nigeria. This has made the Applicant scared to return to Nigeria because he fears he will be arrested and detained like his uncle.

Oral Hearing

[8] The RPD heard the Applicant's claim on 16 December 2011. At the oral hearing, the RPD asked the Applicant why he submitted an expanded PIF. The Applicant replied that he wanted to "connect some things…[that he] felt would be necessary to have in [it]." When the Applicant was asked why it took him so long to change his PIF he replied that he wanted to elaborate and that he had only learned of some information later on. For example, the Applicant said that he only learned about his uncle's wife being interrogated in December 2010, two or three weeks before the hearing; he did not talk to her often because of faulty telephone lines.

[9] The Applicant explained he did not include the information about the state agents seizing the receipts for the furniture he bought for his uncle in the original PIF because he did not learn until later on that it was the reason the Nigerian authorities thought he was involved with MASSOB. The RPD asked the Applicant for details on how he shipped the furniture from Saskatoon to Nigeria. The Applicant replied that he had a friend who was involved with shipping, but when asked for receipts he could not provide any. The RPD asked the Applicant why receipts for furniture would

indicate to anyone that he was a financier for MASSOB, especially considering that it would be possible to check whether the furniture had passed through customs. The Applicant replied that it is because Canada is on the Nigerian authorities' list as a place where lots of MASSOB funds are raised, and because he is almost like a child to his uncle, so the authorities would just assume he was involved in whatever his uncle was involved in.

[10] The RPD asked the Applicant why he did not claim refugee protection in 2008, and the Applicant replied that he initially thought his uncle would be released, so he was not worried. He said that he did not see his life as in danger at that point. The Applicant went on to say that his family told him not to come back at some point in 2009, but he still did not feel his life was in danger. It was at the point in 2010 when his uncle's wife was interrogated that he became worried about the police arresting him if he were to return to Nigeria. The Applicant also said that his father had been arrested in 2011 for inquiring about his uncle. The RPD said that it found it strange that this was not included in the Applicant's PIF.

[11] On 3 February 2012, the RPD rejected the Applicant's claim.

DECISION UNDER REVIEW

[12] The RPD rejected the Applicant's claim because it found that his delay in filing his refugee claim rendered him non-credible.

[13] The RPD acknowledged that delay in claiming will not always be determination, but if a reasonable explanation is not provided it may play a decisive role. In this case, considering the length of the delay and the circumstances of the Applicant, the RPD did not accept the Applicant's

explanation for the delay as reasonable. The RPD also said that the Applicant could have provided corroborative evidence of the information he claimed to have received from Nigeria in the way of affidavits or letters, but he did not.

[14] The Applicant arrived in Canada on 1 September 2001, and his visa expired in April 2004. He waited from this time until March 2011 to make his claim. When the Applicant was asked why he waited so long to claim refugee protection, he stated that he simply did not think that he needed it.

[15] When the Applicant was asked why he did not inquire about his status prior to the time he made his claim he said it was because he was afraid of being deported. The RPD asked why he did not try to obtain information online about refugee protection, and he replied that he was being looked after by his friends. The RPD rejected this explanation, and found it unreasonable. The RPD found that the Applicant did not seek any assistance in filing a refugee claim between 2004 and March 2011. The Applicant is educated, and the RPD would have expected him to be more diligent in filing for refugee status.

[16] The RPD found on a balance of probabilities that the Applicant had not provided a reasonable explanation for the delay. Delay has been recognized as an important factor in the assessment of an applicant's credibility and subjective fear. A seven year delay in claiming is very substantial, and it undermined the Applicant's credibility (*Mesidor v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1245; *Espinosa v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1324).

[17] The RPD cited the case of *Williams v Canada (Minister of Citizenship and Immigration)*, 2009 FC 793 [*Williams*], as authority that delay can be determinative of a claim if the "explanations of the applicant, viewed in the context of her uncorroborated evidence in its entirety, warranted the dismissal of her claim by the Board." The RPD rejected the Applicant's explanation for the delay, and found he is not a Convention refugee or person in need of protection.

STATUTORY PROVISIONS

[18] The following provisions of the Act are applicable in this proceeding:

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;	*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;
[…]	[…]
97. (1) A person in need of protection is a person in 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	**97.** (1) A qualité de personne à protéger la personne qui se 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*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	*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*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	*b*) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(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,	(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) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(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) the risk is not caused by the inability of that country to provide adequate health or medical care	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
[…]	[…]

ISSUES

[19] The Applicant raises the following issue in this application:

a. Whether the RPD's credibility finding was reasonable.

STANDARD OF REVIEW

[20] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[21] The standard of review applicable to the issue in this case is reasonableness. It is well established that the standard of review applicable to the RPD's findings on credibility is reasonableness. See *Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 (FCA); *Elmi v Canada (Minister of Citizenship and Immigration)*, 2008 FC 773, at paragraph 21, and *Wu v Canada (Minister of Citizenship and Immigration)*, 2009 FC 929, at paragraph 17.

[22] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

ARGUMENTS

The Applicant

[23] The Applicant submits that the RPD's credibility finding was unreasonable. The RPD based its analysis of the delay on the seven years between 2004 and 2011, but the Applicant explained that he did not fear returning to Nigeria until December 2010.

[24] The Applicant explained to the RPD that he did not think his life was at risk in Nigeria until he heard about his uncle's wife being interrogated about his whereabouts in December 2010. The RPD did not acknowledge this explanation offered by the Applicant and simply rejected it. The Applicant submits that this renders the Decision unreasonable.

The Respondent

Reasonable Credibility Finding

[25] The Respondent submits that the RPD's negative credibility finding was reasonable due to the following errors, omissions, and inconsistencies in the Applicant's testimony:

a. He wrote in his PIF that his problems began "sometime in 2003," but then alleged that his uncle became involved in politics in 2008;

b. In the three days before his hearing, the Applicant filed four separate sets of disclosure, including an amended PIF. At the hearing, the RPD commented on this and expressed concern that the Applicant submitted a new narrative which had "changed quite a bit," and questioned why it had taken him "so long" to amend his PIF. The Applicant was asked at the hearing why certain information was omitted from his first narrative;

c. The Applicant could have validated the information he allegedly received from Nigeria, but he did not;

d. The Applicant did not provide the RPD with a reasonable explanation for the delay in seeking refugee protection.

[26] The Respondent submits that the RPD was entitled to dismiss the Applicant's claim after finding he had failed to provide a reasonable explanation for the delay. The RPD noted the Applicant said that he did not claim protection earlier because he did not fear returning to Nigeria until he spoke with his parents; the RPD was not, however, required to accept this explanation. The Respondent points out that the RPD noted the Applicant's education, and that he could have been more diligent in seeking advice.

[27] The Respondent submits that in the case of *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, the Supreme Court of Canada held at paragraph 15 that a reviewing court may, if necessary, look to the record for the purpose of assessing the reasonableness of the outcome. In light of the record that was before the RPD, it was reasonable to dismiss the Applicant's claim.

[28] The Respondent further submits that it is not required that every element of reasoning in the Decision must pass an independent test for reasonableness (*Law Society of New Brunswick v Ryan*, 2003 SCC 20 at paragraph 56; *Corona v Canada (Minister of Citizenship and Immigration)*, 2012 FC 174 at paragraphs 29-31; *Gan v Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 1329 at paragraphs 16-17). The RPD relied on the *Williams* decision, above, where a two year delay was sufficient to dismiss a claim in light of overall credibility

concerns. Regardless of the length, it was reasonable for the RPD to dismiss the Applicant's claim based on delay.

[29] The Respondent submits that in light of the record that was before the RPD – including things such as the transcript from the hearing and the omissions from the PIF – it was reasonable for the RPD to dismiss the Applicant's claim. The RPD's credibility finding was reasonable, as was the Decision as a whole.

ANALYSIS

[30] Delay in claiming protection was a significant factor in the RPD's Decision:

> 7. Delay in filing a claim for refugee protection is not always a determinative factor in a refugee claim. However, there are circumstances, based on the failure of the claimant to satisfactorily provide an explanation for the delay, where the delay will assume a decisive role.
>
> 8. The claimant arrived in Canada on September 01, 2001, and was permitted to remain in Canada on a student visa to attend school. From April 2004, he waited for over seven years to make a claim for protection. He was asked why he had delayed so long in filing for refugee protection in Canada and he testified that simply he did not see it, in what he needed at the time.
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> 9. The claimant further testified that it was not until he spoke to his parents in Nigeria, that he felt that he could not go back and as a result filed a refugee claim.
>
> 10. The claimant could have validated the information which he alleges to have received from Nigeria in the way of letters or affidavits from family, relatives or friends. He was asked why he did not go to Canadian Immigration himself to inquire about the status and he stated that he was afraid of being deported. He was asked why he did not try to obtain information "online" with respect to applying for refugee protection in Canada and he testified that he was being fed and housed by friends, who at times would also give him money. The panel rejects this explanation as being unreasonable. The

> claimant, neither in his oral testimony nor in his documentary evidence, has not produced any evidence to corroborate the allegation that between September 2004 and March 2011, he sought the legal advice of immigration lawyers or consultants with respect to filing a refugee claim in Canada.
>
> 11. The panel rejects the explanation given by the claimant as to why he failed to file for refugee protection between the years 2004 and 2011. The panel finds, on a balance of probabilities, that the claimant did not seek the assistance of a lawyer or consultant between the years 2004 and 2011, to determine whether he would have been eligible to file for refugee status. The claimant has eleven years of education and the panel would have expected him to be more diligent in seeking advice about claiming in a timely fashion.
>
> 12. For all of the above reasons, the panel finds on a balance of probabilities that the claimant has failed to provide any satisfactory explanation for his delay in filing a claim for refugee protection.
>
> 13. Delay has been recognized by the Federal Court as an important factor in assessing claimants' credibility and their subjective fear. It is reasonable to assume that persons with a well-founded fear of persecution will attempt to apply for refugee protection without unreasonable delay. The delay in this matter is so substantial — over seven years — that it undermines the claimant's credibility and his allegation that he faces serious harm in Nigeria if he were to return.

[31] In the recent decision of *Garcia v Canada (Minister of Citizenship and Immigration)*, 2012 FC 412 (CanLII), at paras 19-25, Justice David Near had occasion to review and apply the relevant jurisprudence of the Court dealing with delay:

> Delay in making a refugee claim "is not a decisive factor in itself" but it is a "relevant element which the tribunal may take into account in assessing both the statements and the actions and deeds of a claimant" (*Huerta v Canada (Minister of Employment and Immigration)* (1993), 157 NR 225, [1993] F.C.J. No. 271 (CA)). It is reasonable to expect that the Applicants would make a claim at the first possible opportunity (see *Jeune v Canada (Minister of Citizenship and Immigration)*, 2009 FC 835, [2009] F.C.J. No. 965 at para 15).

Recent jurisprudence also suggests that while the delay itself is not determinative, it "may, in the right circumstances, constitute sufficient grounds upon which to dismiss a claim" (*Duarte v Canada (Minister of Citizenship and Immigration)*, 2003 FC 988, [2003] F.C.J. No. 1259 at para 14). Absent a satisfactory explanation for the delay, it "can be fatal to such claim, even where the credibility of an applicant's claims has not otherwise been challenged" (*Velez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 923, [2011] F.C.J. No. 1138 at para 28).

While the Board implied that the nineteen month delay in this instance would be fatal to the claims, it proceeded to raise several other issues associated with the Applicants' credibility, notably evasive testimony and the lack of corroborating documents. It is evident from the remainder of the decision that the delay was a significant factor, but hardly the only basis for the negative credibility findings. The Board stressed that there were "cumulative reasons" for its conclusions regarding the Applicants.

As a consequence, the Applicants' reference to *Juan v Canada (Minister of Citizenship and Immigration)*, 2006 FC 809, [2006] F.C.J. No. 1022 at para 11 is of limited assistance. In that case, Justice Eleanor Dawson faulted the Board because its "finding with respect to delay is, by itself, an insufficient basis for maintaining its denial of the claim." In contrast, the Board's issue with the Applicants' story was the delay in conjunction with other relevant factors. In addition, more recent jurisprudence referred to above, suggests there are certain circumstances when the delay would be fatal to the claim.

Given various credibility concerns raised, it was also reasonable for the Board to seek some independent documentary corroboration. This was one of many factors considered in the assessment of their claims. As the Respondent points out, factors relevant to credibility were the delay in seeking protection, the lack of effort to obtain documents, and evasive responses to questions regarding their story.

The Applicants' reliance on the decisions of *Ahortor v Canada (Minister of Employment and Immigration)* (1993). 65 FTR 137, [1993] F.C.J. No. 705 at para 45 and *Zheng v Canada (Minister of Citizenship and Immigration)*, 2007 FC 974, [2007] F.C.J. No. 1267 at para 9 is therefore misplaced. These cases suggest, in the absence of contradictory evidence, the Board errs in requiring an applicant to produce corroborative evidence and make a negative credibility finding based solely on their failure to do so.

> However, as discussed, that is not what occurred in the Board's consideration of the Applicants' claims. Credibility was already raised as an important factor based on the delay and evasiveness in answering questions. The Respondent appropriately draws the Court's attention to the determination in *JJW v Canada (Minister of Citizenship and Immigration)*, 2009 FC 793, [2009] F.C.J. No. 915 at paras 24-26 concerning delay where it was stated that "the explanations of the applicant, viewed in the context of her uncorroborated evidence in its entirety, warranted the dismissal of her claim by the Board."

[32] In the present case, the RPD in effect pointed out that the Applicant had failed to corroborate the exchange with his parents that triggered his fears of returning to Nigeria. The Applicant says there was some corroborative evidence in his mother's and his aunt's affidavits, but this evidence does not corroborate the specific targeting of the Applicant that was so crucial to his case. Even though there is a presumption of truth in favour of the Applicant, it was not unreasonable of the RPD to expect documentation in the form of affidavits or letters from family and friends given the RPD's other concerns about late filing. Thus, the Applicant had not attempted to corroborate the triggering event that caused him to claim protection in March, 2011, even though it would have been easy for him to do so.

[33] The RPD goes on to question why the Applicant did not seek refugee protection between 2004 and 2011. It seems to me that the RPD does this because it does not accept the Applicant's evidence that there was a triggering event in 2010. Consequently, the RPD looks at the whole of the time the Applicant spent in Canada before making a claim, and this is the basis for rejecting the claim.

[34] The RPD says at paragraph 17 of the Decision that "Given the extensive delay, seven years, in filing a claim for refugee protection, and the fact that I reject the claimant's explanation as to the

his extensive delay in claiming, the panel finds that the claimant is neither a convention refugee nor a person in need of protection."

[35] At the judicial review hearing before me, the Applicant argued that the RPD made a mistake in this regard because it assessed his credibility and subjective fear against the whole period extending from 2004 to 2011, while the evidence shows that the Applicant had no reason to fear a return to Nigeria before at least 2008, when the troubles with his uncle began.

[36] The Applicant's account of why he waited until 2011 to make his claim is rejected by the RPD because of a lack of corroboration in regards to what he was told by his parents or other family members at the material time. This leaves the Applicant to account for the delay in making his claim since he came to Canada in 2004. He now argues that the evidence shows he had no reason to fear returning to Nigeria until 2008 when his uncle was targeted for his political activities. As the Decision makes clear, however, the RPD "rejects the explanation given by claimant as to why he failed to file for refugee protection between the years 2004 and 2011." In other words, the Applicant's explanation that he did not need to seek protection until his uncle was targeted by the Nigerian authorities is not accepted by the RPD. A reading of the CTR reveals that the RPD did not regard the Applicant as a credible witness and, as the Decision again makes clear, it concluded that he had failed to provide a satisfactory explanation as to why he waited so long after 2004 to make a refugee claim. Given all of the factors mentioned by the RPD, I cannot say that this conclusion was unreasonable. Not only was there a delay in claiming protection, the Applicant failed to provide corroborative evidence in a situation where it would have been easy to obtain from his family, and he could not adequately explain the late changes to his PIF. The RPD had good reason to suspect his narrative and explanation for the late claim.

[37] In other words, I do not think the RPD accepts the Applicant's explanation that relates his position in Canada to what may have happened to his uncle in Nigeria. This is why the RPD "rejects the explanation given by the claimant as to why he failed to file for refugee protection between the years 2004 and 2011." It might have been preferable for the RPD to have elaborated on this finding, but a reading of the Decision as a whole against the background of the CTR leads me to conclude that the Decision was not unreasonable in this regard.

[38] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-1838-12
STYLE OF CAUSE:	**NNAEMEKA GODFREY** - and - **THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	Toronto, Ontario
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DATED:	November 27, 2012

APPEARANCES:

Dov Maierovitz	**APPLICANT**
Leila Jawando	**RESPONDENT**

SOLICITORS OF RECORD:

Etienne Law Office Barristers and Solicitors Toronto, Ontario	**APPLICANT**
William F. Pentney Deputy Attorney General of Canada	**RESPONDENT**