Federal Court  Cour fédérale

Date: 20160707

Docket: IMM-5040-15

Citation: 2016 FC 749

Toronto, Ontario, July 7, 2016

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

TIMOTHY EJERE
FAITH OKOSUN
FLOURISH EJERE - MINOR

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is a judicial review of a decision of the Refugee Appeal Division (RAD) of the Immigration and Refugee Board of Canada dated October 22, 2015 wherein in the Applicants' appeal was dismissed and the decision of the Refugee Protection Division (RPD) denying the Applicants' claim for refugee protection in Canada, was affirmed.

[2] The Applicants' claim was based on the claim of the principal applicant of harm in Nigeria as a bisexual man. The other Applicants' are his wife and daughter. All are citizens of Nigeria.

[3] The RPD found, in its decision dated July 29, 2015, that the Principal Applicant was not a credible witness, and had not established on a balance of probabilities his sexual identity as bisexual. As a result the RPD found that the Principal Applicant would not face a serious possibility of persecution or risk of harm based on his sexual orientation should he return to Nigeria. The RPD also found, on a balance of probabilities, that the other Applicants would not face a serious possibility of persecution or risk of harm should they return to Nigeria.

[4] There are three issues to be determined:

1) Should the RAD have convoked a hearing?

2) Did the RAD (and the RPD) err in not accepting and not giving proper weight to certain Nigerian affidavits?

3) Did the RAD err in agreeing with the RPD that the Applicant failed to provide persuasive evidence that, on a balance of probabilities he was bisexual?

[5] As to the first issue, failure to convoke a hearing, the *Immigration and Refugee Protection Act*, SC 2001, c. 27, as amended in section 110 provides for an appeal from a decision of the RPD to the RAD in circumstances such as the present. Subsection 110(6) provides that the RAD may hold a hearing in certain circumstances:

Hearing	***Audience***
(6) The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3) *(a) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal;* *(b) that is central to the decision with respect to the refugee protection claim; and* *(c) that, if accepted, would justify allowing or rejecting the refugee protection claim.*	*(6) La section peut tenir une audience si elle estime qu'il existe des éléments de preuve documentaire visés au paragraphe (3) qui, à la fois :* *a) soulèvent une question importante en ce qui concerne la crédibilité de la personne en cause;* *b) sont essentiels pour la prise de la décision relative à la demande d'asile;* *c) à supposer qu'ils soient admis, justifieraient que la demande d'asile soit accordée ou refusée, selon le cas.*

[6] Justice Heneghan of this Court has written about this provision in her decision in *Sow v Canada (Minister of Citizenship and Immigration)* 2016 FC 584 at paragraphs 33 and 34:

> *[33] The Applicant's submissions about breach of procedural fairness turn on the refusal of the RAD to convene an oral hearing of her appeal, after it had decided to accept the new evidence presented. The acceptance of new evidence by the RAD does not automatically mean that an oral hearing will be accorded. I referred to subsection 110(6) of the Act, which is set out above.*
>
> *[34] In my opinion, this provision gives the RAD discretion whether to allow an oral hearing, when it accepts new evidence. Since it has a discretion, it is not obliged to conduct an oral hearing, arguably on the grounds that it is satisfied that it can determine the relevant issue without a hearing.*

[7] Justice Heneghan, at paragraph 32 of the same decision, in reliance upon the Supreme Court of Canada decision in *Canada (Citizenship and Immigration) v Khosa*, [2009] 1 SCR 339

at paragraph 43 held that an issue of procedural fairness is to be reviewed on a standard of correctness. However, where the rules respecting how and when a hearing is to be held are followed and a board, such as the RAD, is governed by its Rules that provide that it "may" hold a hearing, it cannot be said that failure to hold a hearing is incorrect and the decision ultimately reached must be set aside. As the Supreme Court of Canada has stated in *Hryniak v Mauldin*, [2014] 1 SCR 87, the best forum for reading a dispute may not be the most painstaking procedure as long as the process is fair and proportionate Karakatsanis J. for the Court, wrote at paragraph 28:

> *[28] This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible — proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.*

[8] The *Refugee Appeal Division Rules*, SOR/2012-257 provide that an Applicant must submit a written statement requesting that a hearing be held and that the Applicants' memorandum must set out a full and detailed submission regarding why a hearing should be held. I set out Rules 3(d)(ii) and 3(g)(v):

(3) The appellant's record must contain the following documents, on consecutively numbered pages, in the following order:	*(3) Le dossier de l'appelant comporte les documents ci-après, sur des pages numérotées consécutivement, dans l'ordre qui suit :*
...	*...*
(d) a written statement indicating	*d) une déclaration écrite indiquant :*
...	*...*
(ii) whether the appellant is requesting that a hearing be	*(ii) si l'appelant demande la tenue de l'audience visée au*

held under subsection 110(6) of the Act, and if they are requesting a hearing, whether they are making an application under rule 66 to change the location of the hearing, and	*paragraphe 110(6) de la Loi et, le cas échéant, s'il fait une demande de changement de lieu de l'audience en vertu de la règle 66,*
…	*...*
(g) a memorandum that includes full and detailed submissions regarding	*g) un mémoire qui inclut des observations complètes et détaillées concernant :*
…	*…*
(v) why the Division should hold a hearing under subsection 110(6) of the Act if the appellant is requesting that a hearing be held.	*(v) les motifs pour lesquels la Section devrait tenir l'audience visée au paragraphe 110(6) de la Loi, si l'appelant en fait la demande.*

[9] The RAD provides for the assistance of the parties a particular form for making a request under Rule 3(d)(ii) for an oral hearing.

[10] In this case the Applicant did not submit a written request using the form. In the Applicant's Affidavit filed with the RAD there is buried in paragraph 2, last sentence, the following:

> *"I am requesting an oral hearing pursuant to subsection 110(6) of that Act (IRPA) if the Division deems necessary."*

[11] Nowhere in the Memorandum filed by the lawyer representing the Applicant was there any mention of a request for a hearing, let alone why it would be necessary.

[12] The RAD, in its Reasons, at paragraph 3 wrote:

> *[3] The Appellant did not ask that an oral hearing be held, pursuant to section 110(6) of the Immigration and Refugee Protection Act.*

[13] While in the Applicant's Affidavit there was such a request made "if the Division deems it necessary" there was no separate Written Statement as such, whether on the form provided or otherwise. Nowhere was the matter addressed on the Memorandum as required by subrule 3(g)(v).

[14] The RAD is not obliged to hold a hearing simply because a hearing was requested (*Sow*, *supra*, para 34). Here the request was imperfectly made and never addressed in the Memorandum. The question remains, should the RAD, even at its own volition, have held a hearing. In this case, the Applicant did provide further documents and the RAD asked for originals and gave the Applicant an opportunity to provide them. They arrived only after the decision was dispatched. The RAD had examined the copies of the documents it had and came to reasonable conclusions in respect of those documents. I find that there was no need for a hearing.

[15] The second issue is that in respect of the Nigerian affidavits. The RPD found, and the RAD agreed, that the affidavits were most probably not genuine. They lacked certain security features and, in the case of affidavits such as those purportedly sworn in the High Court lacked a photograph of the affidavits as required by the Rules of that Court. Given the record before the RPD and the RAD, I find their conclusions to be reasonable.

[16] The third issue is whether the finding of the RPD, as affirmed by the RAD, that the evidence offered by the Applicant that he was bisexual, was insufficient. I have examined the record before those tribunals and have determined that those findings were reasonable.

[17] No party requested a certified question.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.

2. No question is certified.

3. No Order as to costs.

"Roger T. Hughes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5040-15
STYLE OF CAUSE:	TIMOTHY EJERE, FAITH OKOSUN, FLOURISH EJERE - MINOR v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATES OF HEARING:	JUNE 27 AND 30, 2016
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DATED:	JULY 7, 2016

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