Federal Court  Cour fédérale

Date: 20161230

Docket: IMM-918-16

Citation: 2016 FC 1418

Ottawa, Ontario, December 30, 2016

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

CHIZOBA OZOMBA
DAVID CHIDIOGO OJINKEYA (MINOR)

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Ms. Ozomba alleges she is a citizen of Nigeria. Her son David was born in the United States and is a citizen of that country. The applicants claimed protection on arrival in Canada. The Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB] denied

their claim. The RPD found that Ms. Ozomba had failed to establish her identity and that David had failed to establish subjective or objective fear of persecution.

[2] The applicants appealed the RPD decision to the Refugee Appeal Division [RAD]. In doing so, Ms. Ozomba sought to place new evidence before the RAD relating to her identity. The RAD refused to accept the new evidence on the basis that it did not meet the requirements of subsection 110(4) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [IRPA]. The appeal was dismissed.

[3] The applicants seek to set aside the RAD's decision and ask this Court to declare them to be Convention refugees or persons in need of protection. In the alternative, the applicants ask that the matter be returned for redetermination by a differently constituted panel. In written submissions the applicants argued that the RAD erred: (1) in applying the wrong standard of review in considering the RPD decision; (2) by refusing to admit and consider the new evidence; and (3) in not granting an oral hearing. The applicants further submit that the RAD's determination on the issue of identity was unreasonable.

[4] Although the applicants assert in written submissions that the RAD applied the wrong standard of review, they advanced no arguments in support of this position. The issues raised in the application are:

A. Did the RAD err in refusing to admit new evidence and denying the request for an oral hearing?

B. Is the decision reasonable?

[5] I am not convinced that the RAD erred in addressing the applicants' new evidence or denying the request for an oral hearing. The RAD's findings do not warrant the intervention of this Court. The application is denied for the reasons that follow.

II. Standard of Review

[6] There is no dispute as between the parties on the standard of review. Where the Court is reviewing a decision of the RAD involving questions relating to the admissibility of new evidence under subsection 110(4) of the IRPA a reasonableness standard of review is to be applied (*Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 [*Singh FCA*] at para 29 and *Ogundipe v Canada (Citizenship and Immigration)*, 2016 FC 771 at para 19). The RAD's findings with regard to questions of identity and credibility are questions of fact that are also to be reviewed on a reasonableness standard (*Canada (Citizenship and Immigration) v Kabunda*, 2015 FC 1213 [*Kabunda*] at para 17).

III. Analysis

A. *Did the RAD err in refusing to admit new evidence and denying the request for an oral hearing?*

[7] The RAD first identified the proposed new documentary evidence which included:

A. Government of Enugu State of Nigeria Identification Certificate [Document A];

B. Letter of Identification/Attestation dated December 9, 2015 [Document B];

C. Letter of Attestation of Birth, from National Population Commission [Document C]; and

D. Letter from Enugu State Association [Document D];

[8] With respect to Documents A and B the RAD identified inconsistencies in the documents and concluded on a balance of probabilities that the documents were not genuine. The RAD concluded that it would assign the documents little to no weight. The RAD also concluded that Ms. Ozomba had failed to adequately explain why this documentation was not available prior to the RPD hearing where identity was an issue.

[9] With respect to Document C, the RAD noted spelling errors on the document and also noted that it "… is very different from the Attestation of birth that [Ms. Ozomba] presented at her RPD hearing". Specifically, the RAD noted that Document C was issued by a different state, and at a different date. The RAD also concluded that Document D, a letter from a Toronto-based organization attesting Ms. Ozomba's membership and participation in their charitable events, failed to indicate how Ms. Ozomba had been identified. The RAD noted that "[t]here is nothing to tie this letter specifically to the principal Appellant."

[10] The RAD noted that each of the documents advanced as new evidence postdated the RPD decision. The RAD also noted Ms. Ozomba's explanation for each of the documents, that she had not reasonably foreseen that the RPD would take issue with the identification evidence she had placed before it and that she therefore obtained the additional documentation to establish her identity before the RAD. However, the RAD concluded that she had failed to provide any

persuasive evidence to demonstrate that the proposed new evidence did not exist, or if it did exist, why she could not have been expected to place the evidence before the RPD. The RAD concluded that these documents failed to meet the requirements of subsection 110(4) of the IRPA and were not admissible.

[11] Ms. Ozomba placed one other piece of evidence before the RAD: a Greyhound Canada receipt and itinerary showing a one-way travel between Toronto and Ottawa. Ms. Ozomba explained that this evidences an attempt to obtain a new passport from the Nigerian Embassy in Ottawa. The RAD did not address this document.

[12] Having found all the new evidence inadmissible, and after reviewing subsections 110(3), 110(4) and 110(6) of the IRPA, the RAD concluded that it was required to proceed without an oral hearing. The applicants' request for an oral hearing was therefore denied.

[13] The applicants submit that all the proposed new evidence should have been admitted. They submit that the RAD's concerns with Documents A and B were based on speculation and it should have requested a forensic expert to assess authenticity in light of the concerns.

[14] With regard to Document C the applicants argue that it was unreasonable for the RAD to set aside this document solely because it contained a spelling error and because it was issued by a state other than the state where Ms. Ozomba was born. The applicants argue that any agency or corporate body could have committed spelling errors and the applicants advanced a reasonable explanation for the differences between Document C and the documentation before the RPD. As

for the “Letter from Enugu State Association”, the applicants submit that its exclusion was unreasonable as was the failure to address the proof of transport from Toronto to Ottawa.

[15] The applicants rely on *Abdullahi v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1164 [*Abdullahi*], to argue that subsection 110(4) of the IRPA should be interpreted to allow for the admission of new evidence where an applicant is surprised that the evidence presented to the RPD was not sufficient to establish identify. They further submit that if an oral hearing had been granted, the RAD’s concerns could have been addressed. I disagree.

[16] The Federal Court of Appeal has stated that where the RAD is considering a request to admit new evidence “[t]here is no doubt that the explicit conditions set out in subsection 110(4) have to be met.” (*Singh FCA* at para 34). Those explicit conditions require that the new evidence a party seeks to place before the RAD be evidence that: (1) arose after the rejection of the claim by the RPD; (2) was not reasonably available; or (3) was reasonably available, but that the person could not reasonably have been expected in the circumstances to have presented the evidence, at the time of the rejection.

[17] The applicants do not dispute that the new evidence itself (as opposed to the documents containing that evidence) existed at the time of the RPD hearing. There is also no evidence on the record to indicate that the existing evidence was not reasonably available to the applicants. Rather, relying on *Abdullahi*, the applicants submit that they could not reasonably have foreseen the need for the evidence. However, *Abdullahi* is a decision that follows from a unique factual

circumstance, a point made recently by Justice Simon Fothergill in *Canada (Minister of Citizenship and Immigration) v Desalegn*, 2016 FC 12 at para 23, where he stated:

> [23] *Abdullahi* must be understood within its unique factual context. In that case, the RPD instructed the claimant to provide an affidavit or letter from his roommate to establish his identity. The claimant provided a letter. The RPD then faulted him for not providing an affidavit. Justice Hughes found this to be unreasonable because the claimant had been presented with both options. *Abdullahi* cannot be taken as authority for the proposition that an appellant before the RAD may present new evidence every time he or she is surprised by the RPD's decision.

[18] *Abdullahi* does not assist the applicants here. Identity was clearly an issue before the RPD and it is trite to note that it is the applicants that bear the onus of establishing identity. In doing so, an applicant has the obligation to put their best foot forward in advancing their claim before the RPD. It is not open to an applicant "… to wait to forward requisite and relevant evidence until after the RPD rendered a negative determination." (*Cabdi v Canada (Minister of Citizenship and Immigration)*, 2016 FC 26 at para 24). This is exactly what has occurred here.

[19] The RAD did not address the Greyhound Canada receipt and itinerary showing a one-way trip between Toronto and Ottawa. However, this document is of no value in establishing identity. It simply shows that a ticket was purchased for travel. It does not demonstrate that the travel took place that the purpose of the trip was to visit the Nigerian Embassy, nor a refusal to issue a new passport, as Ms. Ozomba alleges. The applicants note the RAD's failure to address this piece of evidence but they do not argue that the failure to do so, in itself renders the decision unreasonable. In my view, it does not.

[20] The RAD considered the proposed new evidence and undertook a detailed analysis of that evidence. Having reasonably concluded that the explicit conditions set out in subsection 110(4) of the IRPA had not been met, the RAD had no authority to admit that evidence (Singh FCA at paras 34 and 35). While the RAD also highlighted concerns with the credibility and trustworthiness of Documents A, B and C, non-compliance with the explicit conditions set out in subsection 110(4) of the IRPA was determinative of the issue.

[21] Having concluded that the new evidence was not admissible, the RAD reasonably concluded that it must proceed without an oral hearing (subsections 110(3) and (6) of the IRPA and *Singh FCA* at paras 48 and 71). The RAD did not err in refusing to admit new evidence and in denying the request for an oral hearing.

B. *Is the decision reasonable?*

[22] The identity of a refugee claimant "… is at the very core of every refugee protection claim" and the Court should be cautious about intervening in such decisions (*Kabunda* at para 18 citing *Barry v Canada (Minister of Citizenship and Immigration)*, 2014 FC 8 at para 19 and *Toure v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1189 [*Toure*] at para 32). The burden is on the claimant to establish identity.

[23] In this case, the RAD noted that the RPD's credibility findings deserved deference. However, it also undertook an independent assessment of the evidence and provided reasons for its conclusions, including its determination that the RPD was justified in not accepting a poor quality copy of a passport as proof of identity given the "… impossibility of verifying its

genuineness …". The decision reflects the requirements of justification, transparency and intelligibility and falls within the range of possible, acceptable outcomes in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

IV. Conclusion

[24] The RAD reasonably concluded that the applicants' new evidence was inadmissible and the request for an oral hearing was to be denied. The decision itself is reasonable and the application is denied.

[25] The parties have not proposed a question for certification and none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed. No question is certified.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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