Federal Court  Cour fédérale

Date: 20170308

Docket: IMM-1143-16

Citation: 2017 FC 267

Ottawa, Ontario, March 8, 2017

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

JIMOH OLANREWAJU BAKARE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Jimoh Olanrewaju Bakare, is a 44 year old citizen of Nigeria who, shortly after his arrival in Canada in October 2014, made an inland claim for refugee protection on the basis that his life was at risk from the Ogboni cult in Akure, Nigeria. His claim was rejected, however, by the Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB] in a decision dated February 4, 2015.

[2] Accordingly, the Applicant appealed the RPD's decision to the Refugee Appeal Division [RAD] of the IRB; but in a decision dated May 29, 2015, the RAD dismissed the appeal based on the availability of an internal flight alternative. After the Applicant applied for judicial review of the RAD's decision, the parties consented to the matter being returned for redetermination by another member of the RAD who, in a decision dated February 17, 2016, dismissed the appeal and confirmed the RPD's decision that the Applicant was neither a Convention refugee nor a person in need of protection. The Applicant has now applied under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 for judicial review of the RAD's decision.

I. Background

[3] The Applicant's father was the leader of the Ogboni cult in Akure until he died in January 2014. Shortly after his father's death, high ranking members of the cult approached the Applicant to determine when he would like to be initiated into the cult. The Applicant refused, citing his conversion to Christianity. The cult members indicated that the Applicant had no choice in the matter. A few members of the cult later visited the Applicant's home, harassing his family and informing him that if he did not choose a date for his initiation his death would be certain. The Applicant chose a date for his initiation to appease his wife and the cult members departed. The Applicant then contacted the local police for assistance in dealing with the Ogboni, but the police refused to help because it was a cultural matter and told him he should resolve the matter with the cult.

[4] Before the scheduled initiation date, the Applicant moved his family to Oshogbo, Nigeria, and later learned from a neighbour that his house had been vandalized and the police took no action. The Applicant then moved his family to Lagos, Nigeria. While in Lagos, a cult member contacted the Applicant and informed him that he must return to Akure for initiation in order to avoid unpleasant consequences. The Applicant instead made arrangements to travel to Canada where he made an inland claim for refugee protection.

[5] In his testimony before the RPD, the Applicant explained that his father would host meetings for the Ogboni cult at his home twice a month and that, from the age of seven to the age of 20, he attended the meetings unless he was away at school. The Applicant told the RPD he was allowed to attend these meetings and described the cult's organization, its secret incantations, and the topics discussed at meetings. The RPD questioned the Applicant about his knowledge of specific practices of the Ogboni cult based on two scholarly articles submitted by the Applicant, one by Peter Morton-Williams published in 1960 and the other by Ojo Arewa and Kerry Stroup published in 1977. The RPD found the Applicant's testimony revealed a depiction of the Ogboni cult which was inconsistent with these two articles, concluding that it was unlikely the Applicant had any significant contact with the cult and that the articles contradicted his claim that the Ogboni allowed an uninitiated person to attend its meetings for 13 years. The Applicant's unfamiliarity with basic information about the cult led the RPD to determine that the Applicant was not credible or trustworthy and not a person of interest to the Ogboni.

[6] In his submissions to the RAD, the Applicant argued that the RPD had erred by ignoring and misconstruing relevant evidence, notably a Response to Information Request [RIR] about

Ogboni society. The Applicant further argued that the RPD failed to review and assess relevant documentary evidence and committed factual errors. According to the Applicant, the RPD's reliance on the two scholarly articles was erroneous because they focused on the role of the Ogboni cult in pre-colonial Nigeria, not in contemporary Nigeria. The Applicant submitted that the RPD had failed to address two other documents which provided a contemporary perspective of the Ogboni cult, and that the RPD had committed a factual error by assessing the Applicant's knowledge of secret practices of the Ogboni cult although he never claimed to be a member. The Applicant did not submit any new evidence to the RAD, nor did he request an oral hearing.

II. The RAD's Decision

[7] In its decision dated February 17, 2016, the RAD stated that, in view of *Huruglica v Canada (Citizenship and Immigration)*, 2014 FC 799, 4 FCR 811, its role was to conduct a hybrid appeal and to review all aspects of the RPD's decision to come to an independent assessment of the Applicant's refugee claim, deferring to the RPD only where the RPD enjoyed a particular advantage, such as on issues of credibility. The RAD then proceeded to review the RPD's decision, the Applicant's oral testimony and documentary evidence, and his submission to the RAD.

[8] The RAD noted the Applicant's submissions that there is a great difference between pre-colonial Ogboni cult practices and the contemporary Ogboni cult, and that the RPD erred in relying on information concerning obsolete pre-colonial practices. The RAD rejected these submissions, however, finding it was likely that any differences between Ogboni cult practices in pre-colonial Nigeria, colonial Nigeria, and those subsequent to 1960, when Nigeria achieved

independence, would have been considered by the authors of the 1977 article who had based their account of Ogboni practices on the 1960 article and other more recent studies. The RAD further noted that the issue was not whether the role and power of the Ogboni cult had changed in contemporary Nigerian society but, rather, the cult's secrecy and the nature of its rituals, ceremonies and practices.

[9] The RAD agreed with the Applicant that the RPD had ignored relevant evidence and had failed to assess the probative value of some of the documents in the record, namely, an article from ACCORD, the RIR about Ogboni society, and a Nigerian newspaper article. Upon review and assessment of these documents, the RAD found that: the newspaper article had no relevance to the Applicant's claim; the RIR provided no evidence that the cult's ceremonies, beliefs, and emphasis on secrecy had changed; and the ACCORD article showed that the Ogboni rituals and beliefs cited by the RPD retain their relevance in contemporary Ogboni practices.

[10] The RAD then reviewed the RPD's findings concerning the affidavits from the Applicant's wife, his brother, and a friend. Although the Applicant had made no submissions to the RAD about such findings, the RAD nevertheless reviewed the three affidavits, finding that the RPD had not erred in assigning these documents little evidentiary weight. It also reviewed and assessed the evidence in the record concerning the Applicant's knowledge of Ogboni cult rituals and practices, finding that the RPD did not err in its testing of his knowledge in this regard. The RAD also found that the RPD:

> …did not err in finding that after 13 years of attending such meetings twice a month; [*sic*] it was likely that he would have knowledge of these rituals and practices. The RAD acknowledges that the Federal Court has indicated that there is a low bar as to a

> claimant's religious knowledge when tested in a refugee hearing. The RAD finds, on the basis of its review of the documentary evidence and the Appellant's responses to the panel's questions in this regard, that the Appellant has not met even this low expectation, and that it is likely he would have substantially more accurate information if he actually attended the meetings to which he testified.

[11] The RAD thus concluded and concurred with the RPD that there was insufficient credible and trustworthy evidence to find the Applicant's allegations truthful. Consequently, the RAD confirmed the RPD's determination that the Applicant was neither a Convention refugee nor a person in need of protection.

III. Issues

[12] This application for judicial review raises three issues which can be formulated as follows:

1. What is the appropriate standard of review?
2. Was it procedurally unfair for the RAD to review and analyse documents which were not addressed by the RPD?
3. Was the RAD's decision reasonable?

IV. Analysis

A. *Standard of Review*

[13] The applicable standard for this Court's review of the RAD's decision is that of reasonableness (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35, 396 DLR (4th) 527).

[14] Accordingly, the Court should not intervene if the Officer's decision is justifiable, transparent, and intelligible, and it must determine "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190 [*Dunsmuir*]. Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes": *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708. Additionally, "as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome"; and it is also not "the function of the reviewing court to reweigh the evidence": *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61, [2009] 1 SCR 339 [*Khosa*].

[15] The standard of review for questions of procedural fairness is correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79, [2014] 1 SCR 502; *Khosa* at para 43). Under the correctness standard, a reviewing court shows no deference to the decision maker's reasoning

process and the court will substitute its own view and provide the correct answer if it disagrees with the decision maker's determination (see *Dunsmuir* at para 50). Moreover, the Court must determine whether the process followed in arriving at the decision under review achieved the level of fairness required by the circumstances of the matter (see: *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 115, [2002] 1 SCR 3). When applying a correctness standard of review, it is not only a question of whether the decision under review is correct, but also a question of whether the process followed in making the decision was fair (see: *Hashi v Canada (Citizenship and Immigration)*, 2014 FC 154 at para 14, 238 ACWS (3d) 199; and *Makoundi v Canada (Attorney General)*, 2014 FC 1177 at para 35, 249 ACWS (3d) 112).

B. *Was it procedurally unfair for the RAD to review and analyse documents which were not addressed by the RPD?*

[16] The Applicant contends he was denied procedural fairness by not being afforded an opportunity to provide submissions with respect to those documents which were not addressed by the RPD, but which were reviewed and analysed by the RAD. In this regard, the Applicant relies upon *Kwakwa v Canada (Citizenship and Immigration)*, 2016 FC 600, [2016] FCJ No 619 [*Kwakwa*], where the Court observed that:

> [21] In various recent decisions, this Court has confirmed the limits to which the RAD must be held in conducting its analysis on appeal of RPD's decisions. As pointed out by Mr. Justice Hughes in *Husian* at para 10, "[t]he point is that if the RAD chooses to take a frolic and venture into the record to make further substantive findings, it should give some sort of notice to the parties and give them an opportunity to make submissions."

[17] The Applicant's reliance upon *Kwakwa* is misguided. This is not a case where, as in *Kwakwa*, the RAD raised a new question or issue and identified additional arguments and

reasoning, going beyond the RPD decision under appeal, without affording the appellant an opportunity to respond to them. Nor is this case like *Jianzhu v Canada (Citizenship and Immigration)*, 2015 FC 551, [2015] FCJ No 527, where the Court found the RAD's decision unreasonable because it had raised and decided the issue of an applicant's refugee *sur place* claim when the issue had not been determined by the RPD or raised by the appellant on the appeal to the RAD. To similar effect is the Court's decision in *Ojarikre v Canada (Citizenship and Immigration)*, 2015 FC 896, 257 ACWS (3d) 922, where the RAD's decision was set aside because it had raised and decided the issue of an internal flight alternative which had not been raised by either party before the RAD and the RPD had made no determination on the issue. More recently, Justice Strickland summarized the case law in this regard in *Tan v Canada (Citizenship and Immigration)*, 2016 FC 876, [2016] FCJ No 840, stating as follows:

> [40] …in the context of a RAD appeal, where neither party raises or where the RPD makes no determination on an issue, it is generally not open to the RAD to raise and make a determination on the issue, as this raises a new ground of appeal not identified or anticipated by the parties thereby potentially breaching the duty of procedural fairness by depriving the affected party of an opportunity to respond. This is particularly so in the context of credibility findings (*Ching* at paras 65-76; *Jianzhu* at para 12; *Ojarikre* at paras 14-23).

[18] In this case, the RAD did not raise a new issue merely by reviewing and analyzing some of the documentary evidence which had not been explicitly assessed by the RPD as to its relevance or probative value. On the contrary, it was the Applicant himself who raised the RPD's failure in this regard on the appeal to the RAD. It is disingenuous for the Applicant now to say he was denied procedural fairness when the RAD addressed and rectified the very issue he identified. The RAD simply referenced and assessed other pieces of evidence in the record, identified by the Applicant, and found that this evidence was not relevant to the Applicant's

claim and that it did not undermine the RPD's findings as to the Ogboni cult's ceremonies, beliefs and practices.

[19] The RAD did not embark upon a romp and plunge into the record to make substantive findings beyond those of the RPD without providing the Applicant an opportunity to make submissions. In the present case, the RAD reviewed and assessed the documents identified by the Applicant because the Applicant had raised them as an issue in his written submissions. As noted by the Court in *Ibrahim v Canada (Citizenship and Immigration)*, 2016 FC 380 at para 30, [2016] FCJ No 358, the RAD "was not raising a new issue; rather, it was addressing the very issue raised by the applicant… It was entitled, and indeed obliged to review and assess the evidence afresh. It did so. The fact that it saw some of the evidence differently is not a basis to challenge the decision on fairness grounds when no new issue was raised." Similarly, in this case, because no new issue was raised by the RAD, its decision cannot be impugned on grounds of procedural unfairness.

C. *Was the RAD's decision unreasonable?*

[20] The Applicant contends that the RAD improperly and unreasonably relied on the two scholarly articles to test his knowledge of the Ogboni cult, noting in particular that the Morton-Williams article focused on the Ogboni cult in the Oyo region which is 150 kilometres away from his home region of Ondo. The Applicant says the RAD erred in expecting him to maintain knowledge of Ogboni rituals and practices because he acquired a basic knowledge while he was a child and his last attendance at a meeting would have been more than 22 years ago. The Applicant also says the RAD failed to appreciate the likelihood that Ogboni practices have

evolved since publication of the Arewa and Stroup article in 1977 and the time of the Applicant's narrative in 2014. According to the Applicant, it was unreasonable for the RAD, like the RPD, to find he lacked credibility, because his testimony did not reflect information contained in the two articles, and to speculate as to the knowledge he should possess.

[21] The Respondent defends the RAD's decision, arguing that this case turns on credibility and the RAD was entitled to defer to the RPD's credibility findings. According to the Respondent, the RAD conducted its own analysis of the entire record, including the audio recording of the proceedings before the RPD. It was reasonable, the Respondent says, for the RAD not only to determine that the Applicant did not have the expected knowledge of someone who had attended cult meetings over the course of 13 years, but also to review and assess the additional documents overlooked by the RPD. The Respondent further says the RAD reasonably assessed the evidence and found there was an evidentiary basis for the negative credibility findings.

[22] In this case, the RAD reasonably exercised and fulfilled its appellate role. It reviewed the RPD's findings and further assessed the documentation which the RPD had overlooked, as identified by the Applicant. The RAD concurred with the RPD's findings and reviewed the same issues as the RPD. The determinative issue was whether the Applicant had provided sufficient and credible evidence that the Ogboni cult was pursuing him. Both the RAD and the RPD concluded that the Applicant should have had a basic knowledge of the cult's practices and rituals if he was privy to meetings over the course of 13 years. The RAD compared information about the Ogboni cult's practices and rituals in the two scholarly articles submitted by the

Applicant with the Applicant's responses to the RPD's questions. The RAD agreed with the RPD that the Applicant's failure to have even a basic knowledge of the Ogboni cult's practices and rituals undermined the credibility of his claim. While the RAD does not account for any regional differences in Ogboni cult practices, it cannot be faulted for relying on the documentary evidence submitted by the Applicant to understand basic Ogboni practices. Given the duration and frequency of the Applicant's attendance at cult meetings, the RAD's determination in this regard was reasonable.

[23] As to the Applicant's argument that the RAD failed to appreciate that the Ogboni cult's practices would have changed between publication of the Arewa and Stroup article in 1977 and the time of the Applicant's claim in 2014, this argument is devoid of merit because the relevant timeframe for Ogboni practices was when the Applicant claims to have attended meetings between 1979 and 1992. The Arewa and Stroup article was published in 1977, only two years before when the Applicant claims to have started attending Ogboni meetings. It was reasonable, therefore, for the RAD to rely upon this article as well as other documentary evidence in the record to understand the Ogboni cult's ceremonies, beliefs, and emphasis on secrecy.

V. Conclusion

[24] For the reasons stated above, this application for judicial review is dismissed. The RAD's decision in this case was a reasonable one rendered without any denial of procedural fairness.

[25] Neither party proposed a question of general importance for certification; so, no such question is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that: the application for judicial review is dismissed; and no question of general importance is certified.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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