Federal Court  Cour fédérale

Date: 20190809

Docket: IMM-4368-18

Citation: 2019 FC 1064

Ottawa, Ontario, August 9, 2019

PRESENT: The Honourable Mr. Justice Norris

BETWEEN:

JOSEPHINE OSARI EDOBOR,
EXCELLENT OSAGU EDOBOR AND
DIVINE OGHOSA EDOBOR

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The principal applicant, Josephine Osari Edobor, claims to be a citizen of Nigeria who fears persecution at the hands of her husband's family there. In particular, she claims that she fled Nigeria in October 2014 with her then nearly six year old daughter Excellent Osagu Edobor and four year old son Divine Oghosa Edobor after repeated threats by members of her extended family to perform genital mutilation on her daughter. According to Ms. Edobor, she and her

children travelled from Nigeria to Italy on false passports obtained with the assistance of an agent. They remained in Italy for less than a week before travelling to Canada. They made claims for refugee protection immediately upon arriving in Canada.

[2] The claims for refugee protection were heard by the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada [IRB] over two days on August 17 and September 8, 2017. For reasons dated October 20, 2017, the claims were rejected on the basis that the applicants had failed to establish their identities and because of concerns about Ms. Edobor's credibility.

[3] The applicants appealed this decision to the Refugee Appeal Division [RAD] of the IRB. For reasons dated August 9, 2018, the RAD dismissed the appeal and confirmed the decision of the RPD.

[4] The applicants now seek judicial review of the RAD's decision under section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. They submit that the RAD's determination that they failed to establish their identities is unreasonable.

[5] For the reasons set out below, I do not agree. As a result, the application will be dismissed.

[6] There is no dispute concerning the legal principles governing this application. The RAD's determinations of factual issues and issues of mixed fact and law are reviewed on a

reasonableness standard (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35 [*Huruglica*]). This includes the question of identity, a fact-driven determination (*Denis v Canada (Citizenship and Immigration*), 2018 FC 1182 at para 5 [*Denis*]; see also pre-RAD jurisprudence such as *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 at para 48, and *Su v Canada (Citizenship and Immigration)*, 2012 FC 743 at para 5 [*Su*]).

[7] On judicial review under this standard, it is not the role of the Court to reweigh the evidence or to substitute its own view of a preferable outcome (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61). Rather, the Court should examine the decision for "the existence of justification, transparency and intelligibility within the decision-making process" and 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).

[8] It is incontrovertible that proof of identity is a pre-requisite for a person claiming refugee protection. Without this, there can "be no sound basis for testing or verifying the claims of persecution or, indeed for determining the Applicant's true nationality" (*Jin v Canada (Minister of Citizenship and Immigration)*, 2006 FC 126 at para 26; see also *Liu v Canada (Citizenship and Immigration)*, 2007 FC 831 at para 18 [*Lui*] and *Behary v Canada (Citizenship and Immigration)*, 2015 FC 794 at para 61). A failure to prove identity is fatal to a claim; there is no need to examine the basis for the claim any further (*Elmi v Canada (Citizenship and Immigration)*, 2008 FC 773 at para 4; *Diallo v Canada (Citizenship and Immigration)*, 2014 FC

878 at para 3; *Liu* at para 18; and *Ibnmogdad v Canada (Minister of Citizenship and Immigration)*, 2004 FC 321 at para 24).

[9] The importance of establishing a claimant's identity is reflected in section 11 of the *Refugee Protection Division Rules*, SOR/2012-256 [*Rules*]:

11 The claimant must provide acceptable documents establishing identity and other elements of the claim. A claimant who does not provide acceptable documents must explain why they were not provided and what steps were taken to obtain them.	11 Le demandeur d'asile transmet à la Section des documents acceptables pour établir son identité et les autres éléments de sa demande. S'il ne peut le faire, il en donne la raison et indique quelles mesures il a prises pour s'en procurer.

[10] Section 106 of the *IRPA* draws an express link between this obligation to produce acceptable documentation establishing identity (or to explain why it has not been produced) and a claimant's credibility. It provides as follows:

106 The Refugee Protection Division must take into account, with respect to the credibility of a claimant, whether the claimant possesses acceptable documentation establishing identity, and if not, whether they have provided a reasonable explanation for the lack of documentation or have taken reasonable steps to obtain the documentation.	106 La Section de la protection des réfugiés prend en compte, s'agissant de crédibilité, le fait que, n'étant pas muni de papiers d'identité acceptables, le demandeur ne peut raisonnablement en justifier la raison et n'a pas pris les mesures voulues pour s'en procurer.

[11] Read together, section 11 of the *Rules* and section 106 of the *IRPA* clearly establish that the onus is on a claimant to take reasonable steps to obtain acceptable documentation

establishing his or her identity. If a claimant cannot obtain such documentation, he or she must provide a reasonable explanation for the lack of documentation. This is a heavy burden (*Su* at para 4; *Malambu v Canada (Citizenship and Immigration)*, 2015 FC 763 at para 41; *Tesfagaber v Canada (Citizenship and Immigration)*, 2018 FC 988 at para 28). What is "acceptable documentation establishing identity" is not defined in the *IRPA* or the *Rules*; it is for the RPD to determine in each case (subject to appeals to the RAD and judicial review). Further, the RPD "must" take this into account "with respect to the credibility of a claimant." If a claimant fails to produce acceptable documentation establishing identity and fails to provide a reasonable explanation for the lack of documentation, this can have a serious adverse impact on his or her credibility.

[12] When the applicants arrived in Canada, the only identity documents they produced were a Nigerian Attestation of Birth for Ms. Edobor dated January 4, 2012, and Nigerian birth certificates for the children (both also dated January 4, 2012). The applicants did not have passports. Ms. Edobor claimed that she had given the ones they used to board the flight in Italy – which were fraudulent in any event – to an agent who had travelled on the plane with them.

[13] The RPD determined that the attestation of birth and the birth certificates were insufficient to establish the applicants' identities as nationals of Nigeria because they were not "primary identification documents." Since they lacked security features, the RPD found it "difficult to ascertain their veracity." At the RPD hearing, the applicants also produced other documents (e.g. medical records and statutory declarations of age) to corroborate their identities

but the RPD gave these documents "little weight" because "they are not primary identification documents" and they did not establish the applicants' citizenship in any event.

[14] In addition to finding that the applicants had failed to establish their identities, the RPD did not find Ms. Edobor's account of her journey from Nigeria to Canada to be credible. Ms. Edobor claimed to have known nothing at the time about the passports on which she and her children were travelling, something the RPD found not to be credible given the likelihood of questions being asked when she and her children entered or left Italy. There was evidence suggesting that they had used Italian passports. Ms. Edobor acknowledged that when she left Italy she was questioned in Italian. She claimed to have been able to respond in Italian because the agent had taught her the necessary phrases during the few days she was there and also coached her over the phone when she was being questioned at the airport. The RPD did not find this credible. There was other evidence suggesting that Ms. Edobor spoke "fluent" Italian when interviewed in Italy and, further, that while they were waiting to be processed after they arrived in Canada, the children conversed with each other in Italian. This suggested that they had been in Italy longer than Ms. Edobor was claiming.

[15] On appeal to the RAD, the applicants sought to rely on additional documents purporting to establish their identities. Applying section 110(4) of the *IRPA*, the RAD found the new evidence to be inadmissible. This finding is not challenged on this application for judicial review.

[16] With regard to the identity documents considered by the RPD, the applicants submitted to the RAD that the RPD had erred by failing to consider them in the context of the totality of the evidence and had breached the principles of natural justice in its assessment of them. The RAD was not persuaded by either submission.

[17] On this application, the applicants do not take issue with the RAD's rejection of the ground of appeal relating to the principles of natural justice but they do contend that the RAD's assessment of the issue of identity is unreasonable. They submit that the RAD failed to conduct an independent analysis of the documentary evidence of identity that was produced before the RPD, as it was required to do.

[18] In considering the appeal, the RAD member instructed herself correctly in accordance with the decision of the Federal Court of Appeal in *Huruglica*. As the member understood her role, she was required to review the RPD's decision on a correctness standard with respect to questions of law and findings of fact and mixed fact and law. The member acknowledged that it may be appropriate to defer to the RPD's credibility determinations with respect to oral testimony if the RPD had a meaningful advantage over the RAD but in this case the member found that the RPD enjoyed no such advantage and deference was not warranted. It is also clear from the RAD's reasons that the result does not turn on deference to the RPD's assessment of the documentary evidence of identity.

[19] The applicants contend that the RAD's decision is unreasonable because the member failed to engage in any way with the RPD's conclusion that insufficient evidence of identity was

provided. The RAD member simply states that "the RPD was correct in finding that the Appellants provided insufficient evidence to establish their identity." The RAD does not address in any way the RPD's conclusion that the attestation of birth and the birth certificates were insufficient evidence of identity because they are "not primary identification documents" and because they lack "security features." As well, the RAD does not address any of the other documents tendered by the applicants at the RPD to establish their identities. According to the applicants, this failure to engage in an independent assessment of the documentary evidence of identity that was presented at the RPD leaves the RAD's decision lacking in transparency, intelligibility and justification.

[20] Considered in isolation, I agree with the applicants that the RAD's decision is flawed in this respect. There are genuine issues with respect to the legal soundness of the RPD's findings concerning the documentary evidence tendered to establish identity which the RAD should have addressed in its reasons (cf. *Denis* at paras 41-49). It was not sufficient for the RAD simply to state that the RPD "was correct in finding that the Appellants provided insufficient evidence to establish their identity" without any further analysis. Nevertheless, in my view this does not render the decision as a whole unreasonable. The member's reasons were responsive to written submissions that raised these issues only in passing. For the most part, the submissions emphasized the need to consider the documentary evidence of identity in the wider context of the evidence as a whole. The RAD addressed the appeal accordingly. Unfortunately for the applicants, doing so did not assist their claims.

[21] The RPD had questioned Ms. Edobor about why she had not presented any other evidence to establish her identity (e.g. a national identification card or a driver's license). From its own analysis of Ms. Edobor's answers, the RAD did not find her explanations credible. This finding is not challenged here. Further, at the hearing before the RPD, Ms. Edobor agreed that she could apply for a Nigerian passport here in Canada yet she took no steps to do so after the first day of her hearing despite knowing that questions were being raised about her identity and nationality. The RAD drew an adverse inference regarding her credibility from this, a finding that is not challenged on this application. As well, the RAD concluded that the RPD was correct in impugning Ms. Edobor's credibility with respect to her journey to Canada. Ms. Edobor knew that how long she had been in Italy would be in issue before the RPD because the Minister intervened there on credibility grounds, relying on evidence suggesting that the applicants were more established in Italy than they admitted. Despite this, Ms. Edobor did not produce any evidence to corroborate her narrative (e.g. the tickets for the flight from Nigeria to Italy). Before the RAD, Ms. Edobor did not challenge the RPD's fundamental doubts about the truthfulness of her account of her journey from Nigeria to Canada.

[22] Given all of this, the flaw in the RAD's assessment of the identity documents that were before the RPD is immaterial. It was reasonably open to the RAD to find that the applicants had failed to establish their identities, as they were required to do. Read as a whole, the RAD's decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[23] For these reasons, the application for judicial review will be dismissed.

[24] The parties did not suggest any serious questions of general importance for certification under section 74(d) of the *IRPA*. I agree that none arise.

JUDGMENT IN IMM-4368-18

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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