

Federal Court



Cour fédérale

Date: 20191113

Docket: IMM-754-19

Citation: 2019 FC 1407

Ottawa, Ontario, November 13, 2019

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

SUNDAY JOSEPH ABIMBOLA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant, Sunday Joseph Abimbola, seeks a judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, LC 2001, c 27 [IRPA] to set aside a decision of the Refugee Protection Division [RPD], rejecting the Applicants' refugee claim based on adverse credibility findings.

II. Facts

[2] The Applicant is a citizen of Nigeria. He claims to be at risk from his father-in-law relating to alleged threats that he was requiring his wife and daughter to undergo female genital mutilation. The Applicant's narrative mostly asserted threats against his spouse, which allegedly indirectly placed him at risk. The Applicant's spouse came to Canada before the Applicant and advanced a separate refugee claim. It was rejected by the time the Applicant followed her to Canada.

[3] The Applicant left Nigeria under another identity and traveled to the United States on November 16, 2017. He entered Canada from the United States after obtaining a visa and sought refugee protection. In his Basis of Claim (BOC) document, he indicated that his spouse's claim had been rejected.

III. Impugned Decision

[4] The Applicant's credibility was the principal issue before the RPD. The RPD assessed the Applicant's narrative in comparison with his oral testimony and found that the Applicant was not credible as related to events in Nigeria based on omissions, embellishments, inconsistencies and implausibilities in his evidence.

[5] In addition, since the Applicant's allegation arose largely from his spouse and children's personal circumstances, the RPD found he was not credible in failing to provide her narrative from her refugee claim. However, after the hearing, the Applicant provided his wife's BOC to

the RPD member. The RPD found the information provided in her narrative also conflicted with parts of the Applicant's testimony.

IV. Issues

[6] Before the Federal Court, the Applicant claimed that the RPD breached procedural fairness when he was found not credible because he failed to submit his spouse's BOC; and then when providing her BOC after the hearing, by not being provided with an opportunity to respond.

V. Standard of Review

[7] Issues of procedural fairness are reviewed on a standard of correctness. *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R.190, at para 127; *Kastrati v. Canada (Citizenship and Immigration)*, 2008 FC 1141, at paras. 9-10.

VI. Analysis

[8] I dismiss the Applicant's claim in the first instance on the basis that there is no suggestion that reference to inconsistencies in the spouse's BOC were determinative of the credibility issue. Extensive other evidence, mostly with respect to problems with his testimony, was more than sufficient to support the adverse credibility finding, such that the issues argued concerning natural justice could not affect that outcome. Nevertheless, I will consider the issues as the Applicant submitted them.

[9] With respect to the first issue regarding his failure to produce his spouse's BOC during the hearing, I disagree that this raises any procedural fairness question. Decision-makers are entitled to draw a negative credibility finding when highly relevant documentation, that is known to be under the control of a party, is not introduced into the evidence. This is all the more so in a context of a hearing before the RPD where there are no mandatory rules for the disclosure of relevant documentation in the control of the party, as found in most civil adversarial proceedings.

[10] Moreover, such information that is expected to corroborate the Applicant's case, if not produced, infringes, or at least sets up an adverse credibility finding based on Rule 11 of the *Refugee Protection Division Rules* (SOR/2012-256) ["the Rules"]. Rule 11 requires that "[a] claimant must provide acceptable documents establishing their identity and other elements of the claim" and that "[a] claimant who does not provide acceptable documents must explain why they did not provide the documents and what steps they took to obtain them (the Court's emphasis)". It is assumed such documentation as the spouse's BOC would corroborate the Applicant's testimony, such that when he does not enter it into the evidence without explanation, the RPD is entitled to conclude that the lack of explanation as to its absence undermines the credibility and probative sufficiency of his case.

[11] Turning to the second issue, the RPD considered the spouse's BOC and found that its information was inconsistent with, and not helpful to the Applicant's case. In the circumstances where the Applicant had failed to produce this highly relevant document, and thereby preventing oral questions being posed on its contents, there was no obligation on the RPD to advise the Applicant that the evidence reflected negatively on him, or to provide an opportunity for him to

respond when produced after the hearing. Those are the consequences of failing to provide known relevant evidence under the party's control during the hearing without a reasonable explanation. In most instances after a full hearing a represented applicant should be able to anticipate any problematic aspects that the new document might arise. Thus, anticipatory explanations can be provided on these points, as is often done at trials when the party heads off difficult aspects of his or her testimony in direct examination, rather than waiting for it to be unearthed in cross-examination.

[12] Moreover, there is no duty on the panel member, as argued by the Applicant, to obtain information from other claims not introduced by the parties and to communicate them to him as seemingly argued pursuant to by Rules 21(1) and (2). These Rules are as follows:

Disclosure of information from another claim

21 (1) Subject to subrule (5), the Division may disclose to a claimant personal and other information that it wants to use from any other claim if the claims involve similar questions of fact or if the information is otherwise relevant to the determination of their claim.

Notice to another claimant

(2) If the personal or other information of another claimant has not been made public, the Division must make reasonable efforts to notify the other claimant in writing that

- a) it intends to disclose the information to a claimant; and

Communication de renseignements d'une autre demande d'asile

21(1) Sous réserve du paragraphe (5), la Section peut communiquer au demandeur d'asile des renseignements personnels et tout autre renseignement qu'elle veut utiliser et qui proviennent de toute autre demande d'asile si la demande d'asile soulève des questions de faits semblables à celles d'une autre demande ou si ces renseignements sont par ailleurs utiles pour statuer sur la demande.

Avis à un autre demandeur d'asile

(2) Dans le cas où des renseignements – personnels ou autres – concernant un autre demandeur d'asile n'ont pas déjà été rendus publics, la Section fait des efforts raisonnables pour aviser par écrit celui-ci des faits suivants :

- a) elle a l'intention de les communiquer à un demandeur d'asile;

b) the other claimant may object to that disclosure

b) l'autre demandeur d'asile peut s'opposer à cette communication

[13] Rule 21(1) provides that the RPD “may disclose” information from another claim. It has no application in the circumstances where it is the Applicant that possessed the document and should have disclosed it to the RPD, which ultimately he did. Similarly, Rule 21(2) is equally irrelevant. It relates only to advising the other claimant (the Applicant’s spouse) concerning personal information that may be disclosed by the RPD.

[14] Nevertheless, I would agree that in circumstances where the RPD relies on information obtained by its own efforts, and uses it to make a negative finding against a party, the RPD would infringe the rules of procedural fairness, being a reviewable process error, by failing to disclose the information and providing the claimant with an opportunity to respond, (if not already done so during the hearing).

[15] Finally, when the Applicant advances a procedural unfairness claim in a judicial review application, such as in this matter involving responses that he submits potentially could have been provided if the adverse conclusions were known, the party is required to introduce affidavit evidence before the Court demonstrating the prejudice that resulted from the claimed unfairness, i.e. that it would have affected the outcome. No such evidence has been provided in support of this application. This is another ground for rejecting the application.

VII. Conclusion

[16] Accordingly, for the reasons described above the application is dismissed. No questions for appeal have been advanced for certification and none will be certified.

THIS COURT'S JUDGMENT is that

1. The application is dismissed.
2. Not certified questions have been raised.

"Peter Annis"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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