Federal Court  Cour fédérale

Date: 20210412

Docket: IMM-5947-19

Citation: 2021 FC 315

Ottawa, Ontario, April 12, 2021

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

EDIRIN RICHARD ENAMEJEWA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Edirin Richard Enamejewa, seeks judicial review of a decision of the Refugee Appeal Division ("RAD"), confirming the determination of the Refugee Protection Division ("RPD") that the Applicant is neither a Convention refugee nor a person in need of protection under sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*"). The RAD rejected the Applicant's claim for refugee protection because it found

that he was not credible. The RAD also refused to admit new evidence submitted by the Applicant upon appeal, which corroborated a police raid on the Applicant's farm in Nigeria that occurred shortly after the Applicant's RPD hearing.

[2] The thrust of the Applicant's argument is that the RAD unreasonably refused to admit his new evidence.

[3] I find that the RAD's decision is unreasonable, as it is not internally coherent or justified in relation to the relevant facts and law. In refusing to admit the Applicant's new evidence, the RAD made findings of fraud that are not grounded in the evidence, overzealously relied upon typographical errors, and imposed unsupported requirements on the Applicant to authenticate his evidence. I therefore grant this application for judicial review.

II. Facts

A. *The Applicant*

[4] The Applicant is a 47-year-old male and citizen of Nigeria. He and his wife own a poultry farm in Port Harcourt, Nigeria.

[5] On November 16, 2016, the Applicant travelled to Aba, Nigeria to purchase equipment for the farm. While in Aba, the Applicant was arrested by the local police, who accused him of being a member of the Indigenous People of Biafra ("IPOB"). The police in Aba beat and detained the Applicant for one week.

[6] On November 23, 2016, the Applicant was released on bail after paying a bribe. However, the police instructed the Applicant to report to the police station every two weeks. The Applicant reported to the police station as instructed, but each time the police would threaten the Applicant with arrest and force him to pay a further bribe.

[7] On October 14, 2017, the Applicant travelled to Canada for a vacation. On November 1, 2017, while the Applicant was in Canada, the police and military searched for the Applicant at his house in Nigeria, as the Applicant had not reported to the police station for approximately one month. The Applicant's wife called the Applicant and informed him of the incident.

[8] After the November 1, 2017 police visit, the Applicant decided to seek refugee protection in Canada. In a decision dated November 26, 2018, the RPD rejected the Applicant's claim because it found that he was not credible. The Applicant subsequently appealed the RPD's decision to the RAD.

B. *Decision Under Review*

[9] In a decision dated September 6, 2019, the RAD confirmed the RPD's decision and rejected the Applicant's claim for refugee protection. The Applicant now seeks judicial review of the RAD's decision.

[10] Upon appeal to the RAD, the Applicant claimed that three policemen entered the Applicant's farm on November 23, 2018 and asked the employees about the Applicant's

whereabouts. When the employees informed the police that they did not know where the Applicant was located or how to contact him, the police assaulted one of the employees.

[11] The Applicant submitted evidence to corroborate the November 23, 2018 police attack, but the RAD found that all of the Applicant's new evidence was inadmissible and accordingly dismissed his request for an oral hearing.

[12] On the merits of the Applicant's claim, the RAD held that the Applicant was not credible. The RAD found that the Applicant failed to adequately explain how he could miss multiple appointments with the police without facing consequences, and why he did not attempt to clear his name of the accusation that he was an IPOB member.

III. Issue and Standard of Review

[13] The sole issue on this application for judicial review is whether the RAD's decision is reasonable.

[14] I agree with the Respondent that reasonableness is the applicable standard of review for the RAD's decision to admit new evidence upon appeal (*Ifogah v Canada (Citizenship and Immigration)*, 2020 FC 1139 at para 35, citing *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*")).

[15] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). The court must determine whether the decision under review, including both its rationale and

outcome, is transparent, intelligible, and justified (*Vavilov* at para 15). A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker (*Vavilov* at para 85). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[16] Where a decision provides reasons, those reasons are the starting point for review (*Vavilov* at para 84). Reasons for a decision need not be perfect; as long as the reasons allow the reviewing court to understand why the decision-maker made its decision and determine whether the conclusion falls within the range of acceptable outcomes, the decision will normally be reasonable (*Beddows v Canada (Attorney General)*, 2020 FCA 166 at para 25, citing *Vavilov* at para 91). However, where a decision-maker's rationale for an essential element of the decision is not addressed in the reasons and cannot be inferred from the record, the decision will normally be unreasonable (*Vavilov* at para 98).

[17] For a decision to be unreasonable, an applicant must establish that the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). A reviewing court must refrain from reweighing or reassessing evidence before the decision-maker, and it should not interfere with findings of fact absent exceptional circumstances (*Vavilov* at para 125).

IV. Analysis

[18] Section 110 of *IRPA* governs appeals of RPD decisions to the RAD. Under subsection 110(3), the RAD generally "must proceed without a hearing, on the basis of the record of the proceedings of the [RPD]." Subsection 110(4) enumerates the exceptions to this general rule, in which a claimant may present evidence to the RAD that was not before the RPD:

Evidence that may be presented	**Éléments de preuve admissibles**
(4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.	(4) Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet.

[19] Once the RAD finds that new evidence meets the criteria under subsection 110(4) of *IRPA*, the RAD must then consider whether that evidence is credible, relevant, and material (*Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 ("*Singh*") at paras 38-49, citing *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 ("*Raza*") at paras 13-15). These latter admission criteria are known as the "*Raza* factors."

[20] Under subsection 110(6) of *IRPA*, the RAD may hold an oral hearing if it admits new evidence that raises a serious issue with respect to the credibility of the claimant, and that is central and determinative:

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

[21] The Applicant submits that the RAD unreasonably refused to admit three sets of evidence upon appeal: (1) an affidavit sworn by Mr. Roland Richard Orikaku, the Applicant's employee who was assaulted by the police, and an affidavit sworn by Ms. Ruth Ibukunoluwa Okenbaloye, another employee who witnessed the attack; (2) a letter from God's Favour Hospital, which describes the injuries and treatment of Mr. Orikaku; and (3) the pictures of Mr. Orikaku in hospital.

(1) The affidavits sworn by the Applicant's employees

[22] The RAD determined that the affidavits sworn by the Applicant's employees met the admission requirements under subsection 110(4) of *IRPA*, but refused to admit them because they were not credible. In coming to this conclusion, the RAD relied primarily upon three findings: (i) the suspicious timing of the November 23, 2018 police attack; (ii) the fact that the affidavits were commissioned at the Customary Court of Appeal; and (iii) the availability of fraudulent documents in Nigeria. In particular, the RAD stated:

> I am suspicious of the timing of the events described in the affidavit. At 1:05:00 of the RPD hearing, the RPD asked the Appellant if he had heard anything since the last police visit on November 1, 2017, to which the Appellant replied no. Fifteen days after this question was asked, and one year and 22 days after their last visit, the police once again seek out the Appellant at his farm. I also note that the second police visit was on the anniversary of the Appellant's release on bail. I also find it somewhat unusual that the affiant, after being beaten up by the police, would go to a court and swear out an affidavit stating this fact. In addition, instead of going to a customary court, magistrate court, or the state's High Court of Justice, the affiant went to the Customary Court of Appeal, which only has jurisdiction in appeals of certain matters. I also find it unusual that the commissioner for oaths, who is an officer of the court, would witness an affidavit alleging that police officers had been involved in harassing and beating the affiant. The objective evidence is that fraudulent affidavits are widely available in Nigeria and that the seals are easily forged.

[23] In my view, it was unreasonable for the RAD to impugn the authenticity of the affidavits on the basis that the affidavits were commissioned at the Customary Court of Appeal. The RAD relied on the limited jurisdiction of the Customary Court of Appeal to raise doubts concerning the authenticity of the affidavits. However, Item 9.4 of the July 10, 2018 National

Documentation Package ("NDP") for Nigeria, as cited by the RAD, does not indicate that the Customary Court of Appeal cannot or usually does not commission affidavits. The RAD was also suspicious of the fact that the affidavits were sworn before a commissioner of oaths at the registry of the Customary Court of Appeal. However, Item 9.2 of the July 10, 2018 NDP for Nigeria, also cited by the RAD, states that "any court registrar 'not less than grade level 7' could act as a Commissioner for Oaths."

[24] Fraud is a serious finding that must be grounded in the evidence (*Balyokwabwe v Canada (Citizenship and Immigration)*, 2020 FC 623 at para 45, citing *Oranye v Canada (Citizenship and Immigration)*, 2018 FC 390 ("*Oranye*") at para 24). In this case, the RAD's determination that the affidavits are not genuine is not internally coherent or justified in relation to the country condition evidence (*Vavilov* at para 85). The Respondent essentially concedes this point, and rightfully so.

[25] The Respondent asserts that despite the above issues in the RAD's reasoning, the RAD's remaining grounds for impugning the affidavits' credibility are sufficient to uphold its decision. With respect to the proximity between the November 23, 2018 police attack and the RPD asking the Applicant if the police had visited his home, I find that this timing is capable of raising a reasonable suspicion, and it was open to the RAD to find as such (*Li v Canada (Citizenship and Immigration)*, 2018 FC 877 at paras 9-10). With respect to the finding that fraudulent documents are widely available in Nigeria, I find that this evidence is not alone a reasonable basis for impugning the credibility of the affidavits, as it can only alert the RAD to authenticity concerns (*Oranye* at para 29). Thus, the only reasonable ground that the RAD relied on to impugn the

credibility of the affidavits is the suspicious timing of the November 23, 2018 police attack and the commissioning of the affidavits.

[26] It is not the purpose of judicial review to reweigh the evidence and determine whether the suspicious timing is alone sufficient to discount the affidavits' credibility; rather, this Court must determine whether there are reviewable errors in the RAD's decision that are sufficiently central or significant (*Vavilov* at paras 100, 125). In light of the conclusion that the RAD's reliance on the circumstances of the affidavits' commissioning was one of the two grounds for impugning the credibility of the affidavits, I find this error is sufficient to render the RAD's decision unreasonable.

(2) The letter from God's Favour Hospital

[27] The RAD relied on two findings in determining that the letter from God's Favour Hospital was inadmissible: (i) typographical errors, which impugned the letter's credibility; and (ii) a lack of detail, which impugned the letter's relevance. In particular, the RAD stated:

> Turning to the *Raza* factors, I have issues with the credibility of the letter. There are two spelling mistakes in the letterhead. Instead of "Port Harcourt", the letterhead says "Porthacourt" and instead of "Rivers State", the letterhead says "RiverState". Regarding relevance, the letter describes injuries, but does not identify the cause of these injuries. For all these reasons, I do not accept the letter into evidence.

[28] In my view, the RAD's concerns implicitly speak to authenticity, as the RAD uses the typographical errors to cast doubt on whether a letter from a genuine doctor at a genuine hospital

would contain such errors in its official letterhead. Generally, whether a document contains typographical errors has no reasonable bearing on whether that document is credible, unless those errors are so egregious that they rise to the level of impugning the document's authenticity.

[29] This Court has consistently held that minor typographical errors should not alone be taken as establishing that a document is fraudulent (*Azenabor v Canada (Citizenship and Immigration)*, 2020 FC 1160 at para 30, citing *Mohamud v Canada (Citizenship and Immigration)*, 2018 FC 170 at paras 6-8; *Adebayo v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 330 at para 34; *Oranye* at paras 22-25). In this case, the RAD impugned the letter's authenticity by relying on two typographical errors. In the absence of any further grounds upon which to base its decision, I find that it was unreasonable for the RAD to determine that the letter is not authentic.

[30] Similarly, I find it was unreasonable for the RAD to conclude that the letter was not relevant because the letter failed to describe the cause of Mr. Orikaku's injuries. Evidence is relevant if it is capable of proving or disproving a fact that is relevant to a claim (*Singh* at para 38). If accepted as credible, the letter is clearly capable of proving that Mr. Orikaku was injured on or about November 23, 2018, which is highly relevant to the Applicant's claim that the police attacked Mr. Orikaku on that date. In my view, the question is whether the letter contains enough detail to corroborate the November 23, 2018 police attack — a question that concerns the letter's weight, not its relevance. I therefore find that the RAD's conclusion that the letter is not relevant, without further elaboration as to how a lack of detail supports that conclusion, is not sufficiently justified, transparent, and intelligible (*Vavilov* at para 99).

(3) The photographs of Mr. Orikaku in hospital

[31] The RAD did not admit the photographs of Mr. Orikaku in hospital because the photographs were not dated, and there was no affidavit affirming when and where the photographs were taken. In finding that the photographs were inadmissible, the RAD did not specify whether the photographs failed to meet the admission criteria under subsection 110(4) of *IRPA* or the factors in *Raza*. The Respondent submits that the photographs are inadmissible because they are not material: without a date or signature, the event depicted may be unrelated to the November 23, 2018 police attack.

[32] In my view, the RAD unreasonably refused to admit the photographs of Mr. Orikaku in hospital. The RAD's finding that evidence must be dated or supported by a sworn affidavit to be admitted pursuant to either subsection 110(4) or the *Raza* factors is not justified in relation to the relevant law (*Vavilov* at para 85). The Respondent has provided no authority for these requirements, nor does the RAD identify one in its decision.

[33] Furthermore, I find that the RAD failed to justify its decision in relation to the evidence that corroborates the timing and materiality of the photographs. The photographs contain the following written statement: "photos of Orikaku Roland in the hospital." Both the affidavits of Mr. Orikaku and Ms. Okenbaloye affirm that Mr. Orikaku attended the clinic in Port Harcourt for medical treatment after the November 23, 2018 police attack, which is further corroborated by the letter from God's Favour Hospital. Instead of grappling with this evidence, the RAD viewed the photographs in isolation, treating them as if they could depict anyone, anywhere.

V. Conclusion

[34] I find that the RAD unreasonably refused to admit the new evidence submitted by the Applicant upon appeal. I therefore grant this application for judicial review.

[35] The parties have not identified a question of general importance for certification. I agree that none arises.

JUDGMENT IN IMM-5947-19

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted. The decision under review is set aside and the matter returned for redetermination by a differently constituted panel.

2. There is no question to certify.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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