

Federal Court



Cour fédérale

Date: 20220127

Docket: IMM-1324-21

Citation: 2022 FC 94

Ottawa, Ontario, January 27, 2022

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

**RUKAYAT TITILOPE OGUNMODEDE
OLADIMEJI FOLAYEMI OGUNMODEDE**

Applicants

and

**THE MINISTER OF
CITIZENSHIP AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Principal Applicant [PA] and her 6-year-old son are both citizens of Nigeria. The PA reports that she fears persecution in Nigeria from fanatical members of the Muslim community as a result of her having entered into an interfaith marriage.

[2] The Refugee Protection Division [RPD] found the Applicants not to be Convention refugees or persons in need of protection. Credibility was the determinative issue. The Refugee Appeal Division [RAD] upheld the RPD determination and the Applicants now apply under section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 for judicial review of the RAD's February 10, 2021 decision.

[3] For the reasons set out below, I am satisfied that the RAD's decision is reasonable. The Application is dismissed.

II. Background

[4] The PA states that she was raised in a devout Muslim home and became romantically involved with a Christian man while at college. Her family eventually accepted the PA's partner and they became engaged.

[5] She reports that Muslim students and Muslim clerics began to gossip about and criticize her decision to marry a Christian man. She states that in January 2015 she was attacked and threatened by a group of strangers while on her way home from evening prayers and that around this time her parents also began to receive harassing and threatening phone calls regarding the planned marriage. She reports that on January 15, 2015, her fiancé was attacked and threatened by a group of Muslim fanatics on his way home from work.

[6] The attack on her fiancé was reported to police but the police advised that they would not be able to investigate.

[7] The couple married in a private ceremony on March 21, 2015, and travelled to Ghana for a month-long honeymoon. On their return to Nigeria, the PA states she received threatening phone calls. The two moved to several different cities in Nigeria over the course of the following year as they tried to escape the harassment. They reported the threats to the police, who simply stated that the family should move elsewhere and ultimately advised that the family leave Nigeria because their safety could not be guaranteed.

[8] The family received visas to the United States in November 2016 but decided against travelling there at that time due to the political situation. The PA reports that she divorced her husband on May 17, 2017, in an effort to stop the threats, but she claims the threatening calls continued. The family travelled to the United States on May 20, 2017.

[9] The PA and her son arrived in Canada on July 24, 2017, and made a refugee claim. The PA reports she has since converted to Christianity.

III. Decision under Review

[10] The Applicants raised two issues before the RAD. The Applicants disputed the RPD's conclusion that the PA was not a credible witness and the finding that the Applicants had a viable IFA in Nigeria. The Applicants placed new evidence before the RAD consisting of two affidavits. The new evidence was accepted and considered, but the RAD concluded it was insufficient to refute the significant credibility concerns identified.

[11] The Applicants argued the RPD erred in finding there were inconsistencies in the PA's narrative and drawing negative credibility inferences as a result. Specifically, the Applicants took issue with the RPD's assessment of the evidence surrounding (1) an alleged physical assault on the PA's husband, (2) her husband's return to Ibadan, and (3) the reported agent of persecution, Boko Haram. The Applicants also took issue with the RPD's treatment of the documentary evidence.

[12] In addressing these concerns, the RAD found the RPD had correctly concluded the PA had failed to credibly establish her claims, noting:

- A. The evidence relating to the alleged physical assault of her husband in an encounter with a group of Muslims on January 15, 2015, was inconsistent. The PA testified that no physical assault occurred, yet the police report, her ex-husband's affidavit and a friend's letter all describe the incident as involving physical assault. The RAD found the PA's explanation for the inconsistency – in Nigerian culture, harassment is equal to physical assault – simply failed to explain why the police would describe the incident as a physical assault when the incident did not involve physical contact. The RAD found the incident was material to the claim and the inconsistency was sufficient to rebut the presumption of truth. The RAD assigned no weight to the police report, her ex-husband's affidavit and the friend's letter.
- B. As did the RPD, the RAD found the PA was not truthful when she testified that she left the city of Ibadan in mid-2015 and did not return. Despite this claim, the documentary evidence established that the PA's son was born in a hospital in Ibadan in December 2015 and that the PA obtained an in-person divorce in Ibadan in May 2017. The RAD rejected

as unreasonable the PA's explanation that she had understood the RPD to be asking whether she had ever moved back to Ibadan, noting that her son's birth and her divorce were significant events. The RAD found the PA did not establish that she fled Ibadan as claimed. The RPD had also found the PA's ex-husband had returned to Ibadan after the family had reportedly left Nigeria for the United States and concluded this, in turn, negatively impacted the PA's credibility. The RAD disagreed, finding the ex-husband's location was not material to the claim and drawing no negative inference on this basis.

- C. The RAD also found the PA's assertion that Boko Haram was behind her family's harassment in Ibadan was speculative. In considering the documentary evidence, the RAD further concluded Boko Haram has no history of carrying out the type of threats alleged by the Applicant. The RAD found the PA did not establish that her family was the target of harassment by any person or group.
- D. In considering the supporting documentary evidence, the RAD noted that a letter from a friend of the PA's ex-husband did not indicate the basis for the writer's conclusion as to the identity of the agent of persecution. In addition, the information in the letter relating to the alleged persecution was obtained from the ex-husband. The letter was assigned no weight. Similarly, evidence in the form of an affidavit and police report stating there had been a fire at the Applicants' house in Nigeria may well have established that a fire occurred, but this evidence failed to address why the fire had been attributed to the reported agents of persecution. The RAD assigned no weight to this evidence.

IV. Issues and Standard of Review

[13] The parties have not agreed on the framing of the issues. I have concluded the issues raised are best framed as follows:

- A. Whether the PA's evidence contained material inconsistencies and omissions;
- B. Whether the RAD reasonably assessed the supporting evidence;
- C. Whether the RAD properly identified the claimed agent of persecution; and
- D. Whether the Court can consider various issues raised by the Applicants on judicial review that were not before the RAD.

[14] The RAD's treatment of the evidence is reviewable on a reasonableness standard. A decision will be reasonable if it "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" (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 85).

V. Analysis

- A. *The RAD reasonably concluded the PA's evidence contained material inconsistencies and omissions*

[15] There was ample reason for the RAD to conclude the PA's evidence regarding the attack on her husband on January 15, 2015, was inconsistent. The PA stated during her testimony that her husband was "just threatened" and not touched or hit, yet the corroborating evidence states

that her husband was physically assaulted. The RAD considered but rejected the PA's explanation for the inconsistency – that the police may have misinterpreted her statement and her husband's because she perceived a physical assault and forceful threats to be one and the same.

[16] This explanation does not address the remainder of the evidence indicating there had been a physical assault, including the evidence of her ex-husband. As such, it was reasonably open to the RAD to conclude, as it did, that the evidence was inconsistent in respect of a material aspect of the narrative and to draw a negative inference as a result.

[17] The Applicants submit there was some confusion as to which incident involving threats was in issue. I disagree. The record demonstrates that the RAD was aware of reported instances involving threats and was not confused.

[18] Similarly, the evidence as it related to Ibadan and whether the PA returned after her reported departure in mid-2015 was also inconsistent with the documentary evidence. While the PA seeks to explain the inconsistency as a misunderstanding, the RAD was under no obligation to accept this. The RAD detailed its reasoning for rejecting the explanation – the events in issue were significant life events (the birth of her son and her divorce) and the RAD found it unreasonable that the PA would omit or forget where she was when these events occurred. I also note, as did the RAD, that when pressed by the RPD as to whether she had returned to Ibadan the PA responded she was not sure or did not know. This response highlights the inconsistency the RAD identified and relied upon. It also reinforces my view that the RAD's ultimate conclusion was reasonably available to it.

B. *The RAD did not err in assessing the supporting evidence*

[19] The Applicants submit that the RAD erred in giving no weight to the documentary evidence corroborating the reported assaults and establishing the burning of the family home. The Applicants argue the RAD did not make any negative determinations regarding the authenticity of this evidence, so finding the evidence was of no probative value was unjustified. It is also argued the RAD further erred by discounting the evidence on the basis of a negative credibility finding.

[20] I disagree. The insufficiency of the evidence itself led to the “no weight” determination.

[21] The RAD was entitled to note deficiencies in the documentary evidence. In doing so, the RAD accepted that evidence for what it said. However, the RAD was not prepared to draw inferences from that evidence. This was not unreasonable in light of the RAD’s previously noted credibility concerns. The RAD’s treatment of the documentary evidence does not disclose any error warranting intervention.

C. *The RAD did not err in identifying the reported agent of persecution*

[22] Contrary to the Applicants’ submissions, the Applicants took the position both in their submissions to the RAD and in evidence before the RPD that the agent of persecution was Boko Haram. For example, in submissions to the RAD, the Applicants stated, “the Appellant is seeking protection in Canada on the basis of persecution by the Islamist militant group Boko Haram.”

The RAD identified the documentary evidence relied upon and explained its reasons for concluding that the PA's fear of Boko Haram is speculative.

D. *The Applicants' fairness and sur place issues are not properly before the Court*

[23] The Respondent submits that the issues of fairness and the RPD's negative *sur place* finding, issues raised on judicial review, were not raised before the RAD. The Respondent submits these issues are not properly before the Court.

[24] In *Canada (Citizenship and Immigration) v RK*, 2016 FCA 272, the Federal Court of Appeal addressed the question of whether the applicant was precluded from arguing the RAD erred in failing to conduct a *de novo* hearing where a *de novo* hearing was not sought before the RAD. The Federal Court of Appeal held that a decision of the RAD cannot normally be impugned on the basis of an issue not put to it:

[6] In my view, this appeal turns on a single issue: the failure of the claimants, the respondents in this Court, to request a *de novo* hearing before the Appeal Division. Because the claimants did not request that the Appeal Division conduct a *de novo* hearing on all of the evidence, they were precluded from raising in the Federal Court any issue relating to the Appeal Division's failure to hold a *de novo* hearing. This is because the reasonableness of the Appeal Division's decision cannot normally be impugned on the basis of an issue not put to it particularly where, as in the present case, the new issue raised for the first time on judicial review relates to the Appeal Division's specialized functions or expertise (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at paragraphs 23-25).

[25] In addition, Rule 3(3)(g) of the *Refugee Appeal Division Rules*, SOR/2012-257, states:

(3) The appellant's record must contain the following documents, on consecutively numbered pages, in the following order:

[...]

(g) a memorandum that includes full and detailed submissions regarding

(i) the errors that are the grounds of the appeal,

(ii) where the errors are located in the written reasons for the Refugee Protection Division's decision that the appellant is appealing or in the transcript or in any audio or other electronic recording of the Refugee Protection Division hearing,

[...]

(3) Le dossier de l'appelant comporte les documents ci-après, sur des pages numérotées consécutivement, dans l'ordre qui suit :

[...]

g) un mémoire qui inclut des observations complètes et détaillées concernant :

(i) les erreurs commises qui constituent les motifs d'appel,

(ii) l'endroit où se trouvent ces erreurs dans les motifs écrits de la décision de la Section de la protection des réfugiés portée en appel ou dans la transcription ou dans tout enregistrement audio ou électronique de l'audience tenue devant cette dernière,

[...]

[26] The Applicants argue that the fairness concerns are not being raised for the first time on judicial review. They submit the PA's affidavit before the RAD referenced language difficulties the PA experienced before the RPD and that this triggered an obligation upon the RAD to explore fairness concerns. The Applicants submit the RAD was also required to identify and address what the Applicants now argue was a microscopic examination of the evidence before the RPD. I am unpersuaded.

[27] I first note that it is a well-established principle that a party must raise an issue of procedural fairness at the first opportunity. Failure to do so will amount to an implied waiver of the perceived breach (*Hashim v Canada (Citizenship and Immigration)*, 2021 FC 676 at para 17).

[28] In this case, the Applicants were represented before the RPD, yet they did not identify concerns with the fairness of the proceeding or the quality of the translation or raise the PA's ability to understand and respond to the RPD's questions before the RPD. Nor does the PA's reference to her language skills in her supporting affidavit before the RAD, set out under the heading "Credibility", identify a fairness concern at that point in the process. This falls short of the Applicants' obligation, as set out in the RAD Rule cited above, to make full and detailed submissions regarding the errors that ground the appeal.

[29] The Applicants failed to raise any concern with fairness at the first opportunity before the RPD and then again before the RAD. Any procedural fairness argument must fail on this ground alone. However, independent of this point, I also conclude there was no breach of fairness in this instance.

[30] The transcript discloses that at one point the PA indicated she was unable to express herself and the RPD rephrased the question posed. At another point, the RPD reminded the PA that she could rely on the translator if she was having difficulty interpreting a document. These two incidents do not indicate an overarching comprehension problem, nor do the Applicants point to any part of the transcript to suggest this was the case. I am satisfied the PA meaningfully participated in and understood the proceedings before the RPD.

[31] The *sur place* findings of the RPD were not raised or challenged before the RAD. The RAD cannot now be faulted for failing to address this issue.

VI. Conclusion

[32] I am satisfied that the RAD's decision was reasonable for the reasons set out above. The Application is dismissed.

[33] The parties have not identified a question of general importance for certification, and I am satisfied none arises.

JUDGMENT IN IMM-1324-21

THIS COURT'S JUDGMENT is that:

1. The Application is dismissed.
2. No question is certified.

"Patrick Gleeson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1324-21

STYLE OF CAUSE: RUKAYAT TITILOPE OGUNMODEDE, OLADIMEJI
FOLAYEMI OGUNMODEDE v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: BY VIDEOCONFERENCE

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