Federal Court  Cour fédérale

Date: 20230131

Docket: IMM-1892-21

Citation: 2023 FC 141

Ottawa, Ontario, January 31, 2023

PRESENT: Mr. Justice Norris

BETWEEN:

SUSAN IVIE EWEKA
GARRY EFOSA EWEKA (MINOR)
BARRY ESOSA EWEKA (MINOR)
AISOSA TERRY EWEKA (MINOR)
OSAWESE WAYNE EWEKA (MINOR)

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicants – a mother and her four children – are citizens of Nigeria. They sought refugee protection in Canada on the basis of their fear of persecution at the hands of the children's paternal grandfather and great uncle. In particular, they claimed to fear persecution because Ms. Eweka and her husband refused to allow the twin boys – Garry and Barry – to be

subjected to traditional rituals and blood oath-taking, as demanded by members of the husband's family.

[2] In a decision dated December 17, 2019, the Refugee Protection Division ("RPD") of the Immigration and Refugee Board of Canada ("IRB") rejected the claims. While the RPD member expressed a number of concerns about Ms. Eweka's credibility, the availability of an Internal Flight Alternative ("IFA") in Port Harcourt was ultimately found to be determinative.

[3] The applicants appealed this decision to the Refugee Appeal Division ("RAD") of the IRB. In a decision dated February 22, 2021, the RAD dismissed the appeal and confirmed the determination of the RPD. However, contrary to the RPD's approach, the RAD concluded that the determinative issues were Ms. Eweka's credibility and the sufficiency of evidence. Both were found to be lacking such that the RAD concluded that the applicants did not face a serious possibility of persecution. Accordingly, it was not necessary to consider the issue of an IFA. The RAD therefore dismissed the appeal and, for reasons different from those of the RPD, confirmed that the applicants are neither Convention refugees nor persons in need of protection.

[4] The applicants now apply for judicial review of the RAD's decision under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*"). They contend that the manner in which the RAD dealt with their appeal was contrary to the requirements of procedural fairness and, as a result, the matter must be remitted for reconsideration by the RAD.

[5] As I explain in the reasons that follow, I do not agree.

[6] The applicants' submission that the requirements of procedural fairness were breached arises from the following circumstances.

[7] While their appeal was pending, the RAD member seized with the appeal directed that a communication be sent to the applicants. The communication (dated January 21, 2021) stated that the member was requesting "submissions in response to the following credibility concern arising from the evidence." The communication then went on to note that Ms. Eweka had given conflicting accounts of when she had received a threatening telephone call while the family was in hiding in Lagos, Nigeria. The communication also noted that Ms. Eweka had given a different narrative of events to her psychotherapist (whose report had been filed at the RPD) compared to her Basis of Claim narrative and/or her testimony before the RPD. Three specific respects in which Ms. Eweka appeared to have given different accounts at different times were identified. The applicants were asked to provide submissions no longer than seven pages before the end of the day on February 4, 2021.

[8] Counsel for the applicants responded by letter dated February 3, 2021. In summary, his response was, first, that the RAD cannot consider the issues identified in the communication because the alleged inconsistencies were never brought to the attention of Ms. Eweka at the hearing before the RPD. Second, since it was the availability of an IFA and not credibility that was determinative for the RPD, this was the only issue addressed by the applicants in their appeal. And third, "it will amount to a violation of the natural justice rights of the Appellants

were counsel to speculate in his submissions as to the explanation for any alleged inconsistencies which were not brought to the attention of the Appellants at the RPD hearing." The submissions of counsel were "no substitute" for a claimant's testimony, including any explanations the claimant was able to provide after being confronted with the alleged inconsistencies. Counsel for the applicants therefore submitted that, if the matters identified in the communication from the RAD were considered material, the only appropriate recourse would be for the RAD to allow the appeal, set aside the RPD's decision, and remit the matter for reconsideration by the RPD.

[9] In its decision dismissing the appeal, the RAD explained why it was not persuaded by these submissions.

[10] First, contrary to the position advanced by counsel, the RAD was obliged to conduct its own independent analysis of the record to determine whether or not the RPD's decision was wrong. While the RAD is to be guided by the Appellants' Memorandum of Argument and the alleged errors identified there, it was not limited to considering only those arguments. The RAD member stated: "As a neutral and independent adjudicator, I must make a decision that is grounded in a fulsome and meaningful engagement with the evidence. Sometimes this means raising issues that the RPD did not or pointing to evidence in the record that the RPD did not reference."

[11] Second, the member maintained that it was within the RAD's purview to consider the new concerns about Ms. Eweka's credibility. However, given that the RPD had considered the availability of an IFA to be determinative, the RAD member had concluded that, in the interests

of fairness, it was appropriate to "seek clarification" from the applicants – even though, strictly speaking, procedural fairness did not necessarily require this. (In support of the latter proposition, the RAD cited *Sary v Canada (Citizenship and Immigration)*, 2016 FC 178. In that case, Justice Gascon had held (at paras 30-32) that relying on an additional piece of evidence in the tribunal's file to support the RPD's findings on a claimant's lack of credibility does not raise a new issue triggering a right to notice and the opportunity to be heard.)

[12] Third, despite receiving the communication from the RAD, the applicants did not provide any affidavits or other evidence in response to the questions raised. The applicants were represented by "very experienced" counsel who should have understood that they had "the right to make applications to introduce late evidence via a Rule 29 application, [footnote omitted] and that they could have done so while also maintaining their right to a redetermination of their claim."

[13] In conclusion on this point, the RAD found that counsel's submissions "ignore[d] the role and purpose of the RAD". The member did not accept counsel's arguments and drew "negative inferences from the lack of response to the credibility concerns that were raised."

[14] Returning to this issue later in the reasons, the RAD member noted that while an inconsistency between Ms. Eweka's account of relevant events to her psychotherapist and her testimony at the hearing had been drawn to the applicants' attention (in the January 21, 2021, communication), "they did not provide any response." The member found that "their silence on the issue further detracts from Ms. E's credibility generally, in regard to this incident."

[15] As I understand their submissions on this application for judicial review, the crux of the applicants' complaint is that the RAD placed improper constraints on their ability to respond to the concerns identified in the January 21, 2021, communication and that, as a result, they were left unable to meet the RAD's concerns. This, according to the applicants, gave rise to a breach of the requirements of procedural fairness.

[16] To determine whether the requirements of procedural fairness were met, a reviewing court must conduct its own analysis of the process followed by the decision maker and determine for itself whether the process was fair having regard to all the relevant circumstances, including those identified in *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at paras 21-28: see *Canadian Pacific Railway Co v Canada (Attorney General)*, 2018 FCA 69 at para 54; and *Lipskaia v Canada (Attorney General)*, 2019 FCA 267 at para 14. This is functionally the same as applying the correctness standard of review: see *Canadian Pacific Railway Co* at paras 49-56 and *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35.

[17] The burden is on the applicants to demonstrate that the requirements of procedural fairness were not met. The ultimate question is whether they knew the case to meet and had a full and fair chance to respond: see *Canadian Pacific Railway Co* at para 56.

[18] The applicants have not persuaded me that they were denied a fair chance to respond to the RAD's new concerns about Ms. Eweka's credibility (as expressed in the January 21, 2021, communication). I agree with the applicants that, if the RAD had limited their ability to respond

to its concerns to providing the submissions of counsel and had actually precluded them from filing additional evidence, this could well have given rise to a breach of the requirements of procedural fairness. However, I am not persuaded that the RAD placed any such limitation on the applicants.

[19] The January 21, 2021, communication may not have been phrased as clearly as it could have been when, having identified the areas of concern, it simply invited "submissions" from the applicants. While this language is consistent with the leading jurisprudence on this point (see, for example, *Husian v Canada (Minister of Citizenship and Immigration)*, 2015 FC 684 at para 10), read in isolation, it could suggest that the opportunity to submit further evidence was not being extended. Nevertheless, the applicants have not persuaded me that they were precluded from submitting further evidence. As the RAD pointed out in its reasons, it was always open to them to apply for the admission of new evidence under Rule 29 of the *Refugee Appeal Division Rules*, SOR/2012-257 ("RAD Rules"). Other things being equal, if that evidence was responsive to the concerns raised in the January 21, 2021, communication, it is difficult to imagine that the RAD would not allow the application to submit additional evidence. Indeed, that is exactly how the RAD treated the February 3, 2021, submissions from counsel.

[20] It may be the case that a new issue identified by the RAD in a procedural fairness letter requires responsive evidence together with submissions. Or it may be the case that the issue can be addressed simply with further submissions. Read against the backdrop of the RAD Rules, the January 21, 2021, communication allowed for both possibilities. In short, there is no reason to think that the RAD member intended that *only* submissions would be entertained. If the

applicants had had any concerns about this in light of how the January 21, 2021, communication was worded, they should have raised them with the RAD before providing submissions that simply presumed that no further evidence would be accepted.

[21] Moreover, even if the RAD member had precluded the filing of new evidence that was responsive to its concerns (which I have found it did not), the applicants have not established that this caused them any prejudice. This is because they have not given any indication of the evidence they would have provided to the RAD if only they had been permitted to. Put another way, the applicants have failed to establish that they had anything to say in answer to the RAD's concerns apart from the submissions of their counsel. In such circumstances, any breach of the requirements of procedural fairness would be a technical one at worst.

[22] As the applicants have not challenged the RAD's decision in any other respect, this application for judicial review must, therefore, be dismissed.

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

JUDGMENT IN IMM-1892-21

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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