Federal Court Cour fédérale

Date: 20150107

Docket: IMM-5549-13

Citation: 2015 FC 15

Ottawa, Ontario, January 7, 2015

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

OLUWAFUNMILAYO ADESHINA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant submits that the Pre-Removal Risk Assessment [PRRA] decision should be set aside and her application returned for re-determination because the officer misinterpreted paragraph 113(a) of *Immigration and Refugee Protection Act*, SC 2001 c 27, unreasonably engaged with the evidence, and failed to assess the applicant's risk in being returned to Nigeria. For the reasons that follow, I agree.

[2] The applicant entered Canada on June 25, 2011, using someone else's passport. The basis of her claim was that she was Nigerian and feared being killed by members of the Boko Haram. She says that her husband's mother was forcing them to join Boko Haram and that the group persecuted her and her husband because they refused.

[3] The Refugee Protection Division [RPD] did not accept her refugee claim. It was rejected based on her failure to establish her identity as Nigerian and based on credibility. The applicant produced her Nigerian driver's license at the hearing, but its authenticity was questioned by the RPD. The RPD noted that she was unable to produce a passport, birth certificate, or marriage certificate. The decision does not address country conditions in Nigeria, because the RPD held on a balance of probabilities that the applicant failed to establish her identity.

[4] With her PRRA application the applicant submitted documentary evidence including:

a) Marriage and baptism certificates;

b) Testimonies concerning her identity, her kidnapping and persecution,

c) Correspondence supporting the validity of her driver's licence, which validity the Board had questioned;

d) Medical assessments indicating that the applicant had previously suffered physical abuse;

e) Psychological assessments and research concerning the circumstances of the applicant when she testified before the RPD; and

f) Country condition documents concerning the current threat posed by book Haram and the status of state protection.

[5] The officer held that the applicant failed to submit "new" evidence pursuant to paragraph 113(a) of the Act sufficient to persuade him to arrive at a different conclusion than the RPD. Specifically, the officer held that the documents that the applicant submitted did not relate to new developments:

> [C]ase law insisted the new evidence relate to new developments, either in country conditions or in the applicant's personal situation, instead of focusing on the date the new evidence was produced, to prevent that a failed refugee claimant could easily muster 'new' affidavits and documentary evidence to counter the Board's finding and bolster her story, turning the process a PRRA application into an appeal of the Board's decision. I find this to be the case. [*sic*]

[6] The officer assigned little weight to the expert opinions offered because they were "not experts on country conditions in Nigeria" and their opinions are based on facts as told by the applicant. The officer concluded:

> I have reviewed the application, and current documentary evidence, and I am satisfied that country conditions have not deteriorated since the Board's rejection so as to place the applicant at risk of persecution, at risk of torture, or risk to life, or at risk of cruel and unusual treatment or punishment in Nigeria. This application is not allowed.

[7] The officer did not address either the baptism or marriage certificate and did not conduct an analysis of the country conditions in Nigeria.

[8] The parties agree that the standard of review for the application of paragraph 113(a) of the Act is reasonableness: See *Aboud v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 1019. However, the interpretation of paragraph 113(a) of the Act has previously been held to

be reviewable on the standard of correctness: *Hillary v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 1462.

[9] Paragraph 113(a) of the Act reads as follows:

113. Consideration of an application for protection shall be as follows:	113. Il est disposé de la demande comme il suit :
(a) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection;	a) le demandeur d'asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'il n'était pas raisonnable, dans les circonstances, de s'attendre à ce qu'il les ait présentés au moment du rejet;

[10] The Federal Court of Appeal in *Raza v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385 [*Raza*] at para 13, interpreted the "newness" requirement of this provision as follows:

> Newness: Is the evidence new in the sense that it is capable of:
>
> (a) proving the current state of affairs in the country of removal or an event that occurred or a circumstance that arose after the hearing in the RPD, or
>
> (b) proving a fact that was unknown to the refugee claimant at the time of the RPD hearing, or
>
> (c) contradicting a finding of fact by the RPD (including a credibility finding)?
>
> If not, the evidence need not be considered.

[11] The test for "newness" described above is disjunctive, given the multiple use of the word "or". Accordingly, documents produced by an applicant are "new" if they are capable of contradicting a finding of fact by the RPD (including credibility findings). The officer erred in interpreting the case law to mean that documents are new only if they can be used to prove a new country condition or changes in the applicant's circumstances. On this basis alone, the decision must be set aside.

[12] The failure of the officer to address the identity documents (birth and baptismal certificates) presented is another reason for setting the decision aside. This evidence is clearly material. It may be found not to be credible, and it may be that an officer would reject it on other grounds; however, the evidence cannot simply be ignored. Similarly, the letters and emails submitted by the applicant that speak to the credibility of her story should also have been addressed. They cannot be dismissed only because they do not speak to a change in the situation of the applicant since the RPD decision.

[13] Lastly, the officer did not properly consider the psychological evidence. It was dismissed for being based on facts that he considered not credible; however, the applicant submitted the evidence of her psychological condition at the time of the RPD hearing as relevant to its credibility findings. Such evidence was allowed as new in *Abbasova v Canada (Minister of Citizenship and Immigration)*, 2011 FC 43.

[14] It is deeply troubling to the court, and it is unreasonable, and possibly contrary to law, that the applicant is to be removed to Nigeria without there being any real assessment of her risk.

The RPD did no such analysis having rejected her claim on the basis of the failure to establish her identity. The officer conducting the PRRA only noted that risk circumstances had not changed in Nigeria since the RPD decision without assessing what that risk was. The Supreme Court of Canada in *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, makes it clear that a person has a right to a proper risk assessment prior to removal. It may be that this applicant is not at risk; however, that has never been determined.

[15] Neither party proposed a question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is allowed, the decision is set aside, the applicant's Pre-Removal Risk Assessment is to be assessed by a different officer, and no question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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