Federal Court  Cour fédérale

Date: 20170519

Docket: IMM-4661-16

Citation: 2017 FC 518

Ottawa, Ontario, May 19, 2017

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

OLAJUMOKE DUROSHOLA
DAVID OLUFEMI (MINOR)

Applicants

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for leave and judicial review, under section 72(1) of the *Immigration and Refugee Protection Act*, SC 2002, c 27 [IRPA], of a decision of a Pre-Removal Risk Assessment ("PRRA") Officer (the "Officer"), dated October 11, 2016, in which the Officer found that the Applicants would not be at risk upon return to Nigeria (the "Decision").

II. Background

[2] Olajumoke Duroshola (the "Principal Applicant") is a citizen of Nigeria; her son, David Olufemi (the "Minor Applicant"), is a citizen of the United States (collectively, the "Applicants"). In February 2012, the Applicants made a claim for refugee protection, based upon the Principal Applicant's allegations of risk from domestic violence at the hands of her ex-partner, Tayo Alabi. This application was declined by the Refugee Protection Division (the "RPD") in a decision dated August 9, 2013. A further appeal to the Refugee Appeal Division (the "RAD") and an application for leave and judicial review of the RPD decision were refused.

[3] The Applicants made an application for a PRRA on February 12, 2012, which was refused in a decision dated October 11, 2016. In their PRRA application, the Applicants claim that the Principal Applicant continues to fear harm at the hands of Mr. Alabi, his family members, and now some of her own family members. The Applicants submit that significant changes have occurred in the Principal Applicant's life that put her at additional risk in Nigeria.

[4] Since coming to Canada, the Principal Applicant has entered into a romantic relationship with a woman, Sarah Kwaji, whom she married on October 5, 2013. Ms. Kwaji is a Convention refugee in Canada. Following her positive determination, Ms. Kwaji submitted an application for permanent residency as a Protected Person. Initially, the Applicants were listed on Ms. Kwaji's permanent resident application; however, they were later removed from the permanent residency application, in the hopes that this would expedite Ms. Kwaji's application. Ms. Kwaji is now a

permanent resident of Canada. She continues to be married to the Principal Applicant, and states that she intends to sponsor the Principal Applicant to Canada as her spouse.

[5] Following the marriage, the Applicants alleged that Mr. Alabi learned of the Principal Applicant's sexual orientation, and began making threats against her and spreading the news of her sexual orientation throughout the community. Moreover, the Applicants allege that Mr. Alabi reported the Principal Applicant's lesbianism to the police in Nigeria. In November 2014, the Principal Applicant received a phone call from her sister, who said that the police had been to her house and served her with a summons for the Principal Applicant to appear in court on November 7, 2014. The Principal Applicant did not return to Nigeria to attend the summons, and her sister was allegedly later served with a warrant for her arrest (the "Arrest Warrant").

A. *The PRRA Decision*

[6] The Officer reviewed the Applicants' PRRA application, along with the supporting documents, and found that the Principal Applicant is not a Convention refugee or a person in need of protection. The Officer held that the Applicants provided insufficient corroborative documentary evidence to demonstrate that the Principal Applicant is wanted by the police in Nigeria, that Mr. Alabi and his family members are seeking to locate and harm her, that her family members are seeking to harm her, or that she will be viewed as a homosexual in Nigeria.

[7] The Officer did not assign significant weight to either the statutory declaration of the Principal Applicant's sister (the "Sister's Affidavit") or the Arrest Warrant. The Officer stated that the sister was a source that was highly proximate to the Principal Applicant, therefore, she

lacked objectivity and independence. The Arrest Warrant was determined to be an objective and independent source of information; but, because the document is void of security features and states that the Principal Applicant was caught in an "act of lesbianism" in Nigeria, in November 2014, when she was in Canada, the Officer found that it lacked probative value. The Officer also noted that the assessment of the evidentiary weight of the Arrest Warrant is supported by the fact that the National Documents Package ("NDP") states that fraudulent documents are readily available in Nigeria.

[8] Further, the Officer noted a lack of further corroborative evidence supporting the Principal Applicant's claim that Mr. Alabi's family and her family would be interested in harming her due to her sexual orientation. At the RPD, the board found that the Principal Applicant's story of the events leading to her claim for refugee protection lacked credibility. The Officer stated that the Applicants had not provided sufficient evidence to overcome the RPD's credibility findings.

[9] The Officer also held that the Principal Applicant is not a person covered under section 97(1)(a) of the IRPA, because she did not demonstrate that she is more likely than not to be tortured by a public official or another person acting in an official capacity. Similarly, the Principal Applicant is not a person under section 97(1)(b), because she did not show that she faces a risk of death or a serious violation of her fundamental human rights, should she return to Nigeria. Moreover, the Officer observed that, while domestic violence and mistreatment of sexual minorities is a major problem in Nigeria, the Applicants did not adduce sufficient

evidence to demonstrate that the Principal Applicant would be affected by these adverse conditions.

[10] Finally, the Officer noted that this PRRA was not the correct forum to conduct a spousal evaluation, stating that the Principal Applicant will have the opportunity to submit evidence of the genuineness of her relationship, once the spousal sponsorship application is submitted. As there were no allegations of risk made with respect to the United States with regards to the Minor Applicant, that issue was not assessed in the PRRA.

III. Issues

[11] Three issues are raised:

A. Did the Officer erroneously assess the documentary evidence, making the Decision unreasonable?

B. Did the Officer erroneously state the relevant considerations under section 97 of the IRPA?

C. Did the Officer err in failing to convoke an oral hearing pursuant to section 167 of the *Immigration and Refugee Protection Regulatio*ns, SOR/2002-227 [IRPA Regulations]?

IV. Standard of Review

[12] The standard of review that applies to the finding of facts made by the Officer is reasonableness (*Kulanayagam v Canada (Minister of Citizenship and Immigration)*, 2015 FC 101 at para 21; *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47 and 53 [*Dunsmuir*]).

[13] With respect to questions of mixed fact and law, the appropriate standard of review is also reasonableness.

[14] In *Nadarajan v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 403 [*Nadarajan*], Justice Michael Phelan discussed the fact that the jurisprudence of the Court is divided on the standard of review applicable to the decision to hold an oral hearing during a PRRA. Justice Phelan noted that the Court has sometimes characterized the issue as one of procedural fairness; and at other times held that, because the PRRA officer decides whether to hold an oral hearing by considering the PRRA application against the requirements of section 113(b) of the IRPA and the factors in section 167 of the IRPA Regulations, the question is one of mixed fact and law, requiring the application of a reasonableness standard (*Nadarajan*, above, at para 12).

[15] I agree with Justice Phelan that the standard of review for whether an oral hearing should be convoked in a PRRA assessment is correctness. Section 167(c) of the IRPA Regulations becomes operative where credibility is an issue, and as such whether a hearing should be convoked is an issue of procedural fairness. The standard of review is correctness for questions of law and procedural fairness (*Khosa v Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12 at para 43).

V. Analysis

A. *Was the Decision unreasonable?*

[16] The Respondent asserts that the Officer did not err by taking the "personal interest" nature of the Sister's Affidavit into account in assigning evidentiary weight, and that it was not unreasonable for the Officer to prefer the unbiased and credible documentary evidence over the Sister's Affidavit. Similarly, the Respondent contends that there was no error in giving the Arrest Warrant less weight because there was no corroborative evidence, which could have countered the Officer's concerns about counterfeit documents. The RPD in its earlier decision had found that the Sister's Affidavit and Arrest Warrant were not sufficient to overcome their credibility findings, which the Officer considered.

[17] The Respondent further states that the Officer properly assessed whether the Principal Applicant would be at risk in Nigeria and found that the Applicants did not adduce sufficient evidence to demonstrate that the Principal Applicant would be affected by the adverse conditions for sexual minorities. The Respondent contends that the Officer turned her mind to the relevant issues and submits that questions of evidentiary weight and credibility are entirely within the discretion of the Officer.

[18] The Applicants argue that the Officer failed to appreciate the gravity of the issues in the PRRA application. The Applicants take issue with two aspects of the Decision: (1) the treatment of the Sister's Affidavit and (2) the treatment of the Arrest Warrant. They submit that the Officer failed to handle these pieces of evidence in a principled or intelligible way. Further, the

Applicants argue that the Officer failed to assess, based on the NDP evidence, whether the Applicants were at risk of harm in Nigeria based upon the current risk to members of the lesbian, gay, bisexual, transgendered, queer/questioning ("LGBTQ") community.

[19] The Officer did not engage in any sort of analysis with the contents of the Sister's Affidavit and simply rejected the document because it was authored by the Principal Applicant's sister; moreover, the decision to give the Arrest Warrant little weight was prompted solely by the general availability of fraudulent documents from Nigeria.

[20] The Decision suggests that the Officer's reason for giving the Sister's Affidavit and the Arrest Warrant little evidentiary weight is that the underlying RPD decision found that the Principal Applicant's testimony lacked credibility, thereby making it necessary to independently corroborate any evidence tendered by the Applicants. However, although the RPD found that there were credibility issues with the Principal Applicant's story of domestic violence and her travel to and from Nigeria, the RPD did not make a finding that the Principal Applicant was not a credible or trustworthy witness, such that the claim had no credible basis pursuant to section 107(2) of the IRPA. It was unreasonable for the Officer to approach the Sister's Affidavit and the Arrest Warrant from the position that the two documents needed corroboration due to credibility concerns. The Sister's Affidavit and the Arrest Warrant are new pieces of evidence that are not related to the Principal Applicant's testimony at the RPD.

[21] Moreover, I find that the Officer rejected the Sister's Affidavit without properly assessing its value, because the Officer misunderstood and misapplied the credibility findings of the RPD.

In *Tabatadze v Canada (Minister of Citizenship and Immigration)*, 2016 FC 24 at paragraph 6 [*Tabatadze*], Justice Henry Brown stated that "rejection of evidence from family and friends because it is self-serving or because the witnesses are interested in the outcome, is an unprincipled approach to potentially probative and relevant evidence". Justice Brown observed that allowing a tribunal to reject evidence in this manner creates a tool that can be used at any time against a claimant and that this type of dismissal of family-sourced evidence, which speaks directly to a fundamental part of a decision, makes it impossible for a reviewing court to determine "what the decision would have been if the [decision-maker] had reasonably considered and assessed this rejected evidence" (*Tabatadze*, above, at paras 6 to 7).

[22] I am not persuaded by the Respondent's argument that the sister's interest in the outcome was such that the Sister's Affidavit "requires corroboration if it is to have probative value" (*Ferguson v Canada (Minster of Citizenship and Immigration)*, 2008 FC 1067 at para 27). While the sister certainly has an interest in the well-being of the Principal Applicant, I find that the application of the principle from *Tabatadze* means this fact alone is not sufficient for the Officer to rebut the presumption that sworn affidavits are credible (*Maldonado v Canada (Minister of Employment and Immigration)*, [1979] FCJ No 248 (FCA)).

[23] Further, I agree with the Applicants that it would be difficult to conceptualize a situation whereby the Applicants could have presented this evidence in a manner that was not characterized as self-serving, if that characterization was the inevitable result of from the evidence emanating from a family member, who is the only source of information regarding

what happened after the Applicants left Nigeria. As such, I find that the Officer's treatment of the Sister's Affidavit unreasonable.

[24] Similarly, I find the Officer's treatment of the Arrest Warrant unreasonable. This Court has held that documents issued by foreign authorities are presumed to be valid (*Chen v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1133 at para 10). Although the Officer states that the presumption of validity is rebutted because of the lack of official seals and the fact that it states that the Principal Applicant was caught in an act of "lesbianism" at a time when she was in Canada, there is no evidence of what, if any, security features a Nigerian arrest warrant would have, nor is there evidence suggesting that the Nigerian police would check to ensure that the person accused of "lesbianism" was actually in the country at the time alleged in a complaint. Instead, there is documentary evidence suggesting that the Nigerian police are severely underfunded and lack basic resources.

[25] There is also evidence that the rights of LGBTQ Nigerians are neither respected nor protected by the police. Further, I agree with the Applicants that the statement of Justice James Russell from *Ogunrinde v (MPSEP & MCI)*, 2012 FC 760, is applicable here:

> … As for the lack of a police warrant of the name of the "Investigating Officer", the Officer is being wilfully blind in expecting normal formalities in a country where, as the documentary evidence before the Officer makes clear, homosexuality is not tolerated and the authorities are not likely to treat gay people with any kind of respect or due process.

[26] As such, I agree with the Applicants that the Officer unreasonably imposed Western concepts on the evaluation of the Arrest Warrant.

[27] Finally, I find that the Officer misinterpreted the nature of the risk the Principal Applicant faces in Nigeria. The Officer states that the Principal Applicant has not established that she will face persecution in Nigeria as a bisexual woman, and that she will not be viewed as a homosexual. The finding that the Principal Applicant will not face persecution because of her sexual orientation disregards all of the documentary evidence showing that LGBTQ Nigerians face persecution and discrimination from a significant portion of society in Nigeria. It also ignores the fact that Nigeria has legislation that makes same sex marriage illegal, the *Same Sex Marriage (Prohibition) Act of 2013*.

[28] Aside from finding that the Sister's Affidavit has little probative value, the Officer did not give reasons for why the Principal Applicant would not be viewed as a homosexual in Nigeria, when she is married to a woman in Canada and, although this marriage would not be recognized in Nigeria, there is documentary evidence of the marriage. The Officer also did not consider the fact that the *Same Sex Marriage (Prohibition) Act of 2013* makes it an offense, punishable by 14 years in prison, to enter into a marriage contract or civil union with a person of the same sex and what that could possibly mean for the Principal Applicant. The Officer's conclusion regarding the Principal Applicant's risk of persecution is unreasonable.

B. *Section 97(1) of the IRPA*

[29] The Applicants argue that the Officer erroneously stated the that the Applicants would have to show that they face a risk of death or "a serious violation of their fundamental human rights" to be persons in need of protection under section 97(1)(b) of the IRPA. They state that the

requirement is only that the Applicants demonstrate a risk to their lives or a risk of cruel and unusual treatment or punishment under certain conditions.

[30] However, while the Respondent did misstate the test under section 97 (1)(b), it is not determinative of the outcome of this decision.

C. *Oral Hearing*

[31] The Respondent argues that the Officer did not make any credibility findings and, therefore, an oral hearing was not required. Rather, the determinative issue was that there was insufficient evidence regarding the Applicants' claimed persecution.

[32] As stated above, despite the Officer's statement that the problem was sufficiency of evidence, I find that credibility was an underlying key issue in the Decision; the Officer relied on credibility findings of the RPD and then conflated that reliance with an alleged insufficiency of evidence. Had the Officer found the Sister's Affidavit and the Arrest Warrant credible, it is unclear how that same evidence would not have been sufficient to show that the Principal Applicant was at risk of harm, if she returned to Nigeria. Therefore, I find that the Officer erred in not convoking an oral hearing to reassess the Applicants' credibility.

JUDGMENT in IMM-4661-16

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed and the matter is referred back to a different officer for re-consideration.

2. There is no question of general importance for certification.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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