

Federal Court



Cour fédérale

Date: 20180404

Docket: IMM-4234-17

Citation: 2018 FC 363

Ottawa, Ontario, April 4, 2018

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

ESTHER OBIAJULU ODIA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Ms. Odia, is a 53 year old citizen of Nigeria who obtained a visa to travel to Canada in June, 2016, to attend a friend's wedding and visit her sister, who is a Canadian citizen. While in Canada, the Applicant claims she accidentally sent a romantic and sexually explicit text message intended for her same-sex partner to her cousin in Nigeria, who denounced her and reported her sexual orientation to her husband and other family members. She says that her husband threatened her and that she would be subject to ritual cleansing should she return to

Nigeria. She further says that should the cleansing fail, her family would report her to the police and she would be subject to criminal sanctions for her bisexual identity.

[2] After her sexual orientation had been disclosed in Nigeria, the Applicant made a refugee claim by way of a Basis of Claim [BOC] form dated October 13, 2016. However, in a decision dated February 15, 2017, the Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB] rejected her claim for Canada's protection. The RPD found the Applicant's credibility was undermined, since she inadequately explained why the allegations about ritual cleansing had not been stated in her BOC form, and that her testimony concerning important issues, such as her feelings when she realized her sexual orientation and the danger she and her family members faced, was neither reliable nor spontaneous and was evolving and contradictory. The Applicant appealed the RPD's decision to the Refugee Appeal Division [RAD] of the IRB, and in a decision dated September 11, 2017, the RAD dismissed the appeal and pursuant to paragraph 111(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [IRPA], confirmed the RPD's decision. The Applicant has now applied under subsection 72(1) of the IRPA for judicial review of the RAD's decision. She asks the Court to set aside the RAD's decision and return the matter for redetermination by another member of the RAD.

[3] The applicable standard for review of the RAD's decision is reasonableness (see: *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35, [2016] 4 FCR 157 [Huruglica]). Accordingly, the Court should not intervene if the RAD's decision is intelligible, transparent, justifiable, and defensible in respect of the facts and the law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190. Those criteria are met if "the reasons

allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes”: *Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708.

[4] According to the Applicant, the RAD’s assessment of her credibility was unreasonable. The Applicant says it was not reasonable for the RAD to determine that the RPD’s error, in rejecting photocopies of screen shots of various text messages, was not fatal to the RPD’s decision. In the Applicant’s view, it was unreasonable for the RAD to find, as did the RPD, that it was a significant omission in her BOC form to leave out details of the alleged persecution she faces with respect to ritual cleansing should she return to Nigeria. The Applicant further says it was unreasonable for the RAD not to consider the letters from the 519 Church Street Community Centre.

[5] Upon review of the RAD’s decision, I see no basis upon which the Court’s intervention is warranted. In this case, the RAD appropriately identified and stated its role in view of *Huruglica* (at para 103) to review the RPD’s decision on a correctness standard, including the issue of credibility, and to conduct its own analysis of the record to determine whether the RPD had erred. The RAD reasonably determined that the RPD was not in an advantageous position to assess and determine the Applicant’s credibility since the RAD was able to listen to and understand the recording of the RPD hearing and to review the RPD’s conclusions in its reasons (see *Huruglica* at para 70).

[6] I agree with the Respondent that the RAD's credibility findings were reasonable. It was not unreasonable for the RAD to find that the Applicant's credibility was seriously undermined, not only in view of a significant omission in her BOC form concerning the details of the alleged persecution with respect to ritual cleansing, but also because of her evolving and contradictory testimony about important issues, such as her feelings when she realized her sexual orientation and the danger she and her family members faced. It is accepted that significant deference is owed to credibility determinations (see: *Martinez Giron v Canada (Citizenship and Immigration)*, 2013 FC 7 at para 14, 176 ACWS (3d) 505). As noted by the Court in *Njeri v Canada (Citizenship and Immigration)*, 2009 FC 291:

[11] On credibility findings, I have noted the reluctance that this Court has, and should have, to overturn such findings except in the clearest case of error (*Revolorio v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1404). The deference owed acknowledges both the contextual circumstances and legislative intent, as well as the unique position that a trier of fact has to assess testimonial evidence. That deference is influenced by the basis upon which credibility is found. The standard is reasonableness subject to a significant measure of deference to the Immigration and Refugee Board.

[7] I disagree with the Applicant that it was not reasonable for the RAD to determine that the RPD's error in rejecting photocopies of screen shots of various text messages was not fatal to the RPD's decision. Although these messages do speak directly to the issue of the Applicant's sexual orientation, the credibility of her claim in that regard was not the basis upon which the RAD denied the appeal. The messages rejected by the RPD did not explain the omission in the Applicant's BOC form about the threats and mistreatment she feared if returned to Nigeria, nor did they account for her evolving and inconsistent testimony, and it was reasonable for the RAD to find that the Applicant's claim would not have changed despite the RPD's error in this regard.

[8] I also disagree with the Applicant that it was unreasonable for the RAD not to consider the letters from the 519 Church Street Community Centre. The reasonableness of a decision by the RAD cannot normally be impugned upon judicial review on the basis of an issue that was not put to it. As this Court stated in *Abdulmaula v Canada (Citizenship and Immigration)*, 2017 FC 14, [2017] FCJ No 3:

[15] The difficulty with this argument is that it was never presented to the RAD. As the Federal Court of Appeal explained in *Canada (Citizenship and Immigration) v R. K.*, 2016 FCA 272 at paragraph 6, “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).” The Federal Court of Appeal’s decision in *Huruglica* at paragraph 79 is to similar effect.

[16] Because the argument that the 2015 UNHCR report should be deemed a part of the record was not advanced before the RAD, it cannot form the basis for a successful application for judicial review in this case.

[9] In her appeal to the RAD, the Applicant did not challenge the RPD’s determination to give little weight to her support letters and photographs. Consequently, it was reasonable for the RAD not to address the RPD’s findings in this regard.

[10] In conclusion, I find that the RAD reasonably reviewed the RPD’s decision and conducted its own analysis of the record before it. It was reasonable for the RAD to find that there was a significant omission in the BOC form which was not adequately explained by the Applicant, and that her credibility was seriously undermined by her evolving and contradictory testimony. The RAD’s reasons provide an intelligible and transparent explanation for its decision

to dismiss the Applicant's appeal, and the outcome is defensible in respect of the facts and the law.

[11] Neither party proposed a question of general importance for certification; so, no such question is certified.

JUDGMENT in IMM-4234-17

THIS COURT'S JUDGMENT is that: the application for judicial review is dismissed;
and no question of general importance is certified.

"Keith M. Boswell"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4234-17

STYLE OF CAUSE: ESTHER OBIAJULU ODIA v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: MARCH 22, 2018

JUDGMENT AND REASONS: BOSWELL J.

DATED: APRIL 4, 2018

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