Federal Court  Cour fédérale

Date: 20220628

Docket: IMM-129-20

Citation: 2022 FC 966

Ottawa, Ontario, June 28, 2022

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

EHIZOGIE ALBERT ALUFA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application to set aside a decision made on November 21, 2019 by a Senior Immigration Officer (the Officer) who rejected the Applicant's Pre-Removal Risk Assessment Application (the Decision).

[2] For the reasons that follow, I find the Decision was unreasonable and procedurally unfair.

[3] The Officer assigned low weight to two critical documents without first determining the authenticity or genuineness of the documents when there were concerns about the source of each document. The Officer also failed to provide reasons as to why an oral hearing would not be convened despite the credibility issues identified.

[4] The Decision will be set aside and returned for redetermination by a different officer.

II. **Background Facts**

[5] The Applicant is a 46 year old citizen of Nigeria who is married and has four children born between 2008-2018.

[6] On December 5, 2017, the Applicant was convicted in the United States of committing an offence under section 37.10 of the Texas Penal Code of Tampering with Government Records. The Applicant pled guilty, was convicted and sentenced to one day in jail on December 6, 2017.

[7] On December 9, 2017, the Applicant entered Canada from the United States, by crossing at Lacolle, Quebec.

[8] On December 20, 2017, a Departure Order was issued against the Applicant and a Report was written under subsection 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c27 [*IRPA*] on the basis that the authorities had reasonable grounds to believe the Applicant was inadmissible to Canada under paragraph 36(1)(b) of the *IRPA* as the offence of which he was convicted was equivalent to an offence under subsection 403(1) of the *Criminal Code* of Canada.

[9] An inadmissibility hearing was held on July 19, 2018. On August 2, 2018, the Applicant was found to be inadmissible to Canada for serious criminality and a deportation order was issued that day.

III. **The PRRA decision**

[10] The Applicant submitted a PRRA application under both section 96 and 97 on January 28, 2019. Written submissions and supporting documentary evidence, including an affidavit by the Applicant, were made on February 11, 2019.

[11] The PRRA submissions stated that the Applicant would be at risk of harm from his family in Nigeria, particularly from his uncles and his elder brother Robert Alufa (Robert) because the Applicant had refused to have his daughters circumcised.

[12] The submissions highlighted that the Applicant never had the benefit of making a refugee claim therefore all of the claims and materials put forward by the Applicant were relevant to the assessment of his risk.

[13] The submissions also noted that credibility would be a central issue since it had never been tested in an oral hearing before a tribunal. The Applicant submitted that the factors set out in section 167 of the *Immigration and Refugee Protection Regulations* were met, thereby necessitating an oral hearing.

[14] The Officer noted that the Applicant and his wife fled from their village and moved to Lagos, but when the Applicant told his father that he would not have his daughters circumcised his father repeatedly threatened him. Subsequently the father became ill and Robert contacted the Applicant, threatening to use his influence as a police officer to find and harm the Applicant and his family if the father's illness became worse.

[15] Several months later, in November 2016, the Applicant's father died and the Applicant's brother, John, told him that Robert had promised to avenge their father's death by tracking the Applicant down and punishing him. That is when the Applicant and his wife decided to leave Nigeria and travel to Canada by way of the United States.

[16] The Officer determined the Applicant would not face more than a mere possibility of risk under any of the Convention grounds set out in section 96 of the *IRPA* nor would he face, on a balance of probabilities, a risk of torture, a risk to life or risk of cruel and unusual punishment as described in paragraphs 97(1)(a) or (b) of the *IRPA* if he were to return to Nigeria.

[17] The Applicant in his submissions to the Officer requested an oral hearing so that his credibility, which had never been assessed, could be tested. The Officer dismissed the Applicant's PRRA application without holding an oral hearing. No reasons were provided as to why an oral hearing would not be convened.

IV. **Issues**

[18] The main issue in this application is whether the Officer committed a reviewable error by failing to assess whether an oral hearing would be required. Where credibility is a determinative factor, a failure to convene a hearing without adequate reasons may amount to a reviewable error: *Csoka v Canada (Citizenship and Immigration)*, 2016 FC 653 at para 14 (*Csoka*).

V. **Standard of Review**

[19] Subject to certain exceptions that do not apply here, the standard of review of the Decision presumptively is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 10 (*Vavilov*).

[20] The jurisprudence on the applicable standard of review for the decision not to hold an oral hearing in the context of a PRRA remains divided. Some decisions have applied a standard of correctness as a matter of procedural fairness, while others have applied a standard of reasonableness on the basis that the question is one of mixed fact and law.

[21] In this application, I am satisfied that reasonableness is the appropriate standard of review as the Officer has to consider their governing legislation in determining whether or not to hold an oral hearing: *Vavilov* at para 25

VI. **Legislation**

[22] The *IRPA* sets out in subsection 113(b) that a hearing may be held when, on the basis of prescribed factors, the Minister is of the opinion that a hearing is required. To justify an oral hearing, all of the factors must be met: *Huang v Canada (Minister of Citizenship and Immigration)*, 2018 FC 940 at para 14.

[23] Section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 establishes three prescribed factors:

Hearing — prescribed factors	Facteurs pour la tenue d'une audience
167 For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors are the following:	167 Pour l'application de l'alinéa 113b) de la Loi, les facteurs ci-après servent à décider si la tenue d'une audience est requise :
(a) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;	a) l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur;
(b) whether the evidence is central to the decision with respect to the application for protection; and	b) l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;
(c) whether the evidence, if accepted, would justify allowing the application for protection.	c) la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

VII. **Analysis**

[24] The Applicant submits that the Officer made several veiled credibility findings concerning two critical documents: (1) the Police ID card of his brother Robert who is both a police officer in Nigeria and the agent of persecution; and (2) the Police Statement Report documenting a complaint made by the Applicant's wife to the Nigerian police.

[25] The Applicant further submits that an explicit credibility finding was made when the Officer found that the Applicant demonstrated he lacked subjective fear by residing in the United States for eight months, without seeking asylum.

[26] In addition, the Applicant submits the Officer unreasonably failed to consider the context, as set out in his Affidavit, that he was dealing with the criminal charge since July 13, 2018.

[27] The Respondent submits that the Officer was not required to hold an oral hearing because the issue was one of sufficiency in that the Applicant failed to meet his evidentiary burden of demonstrating a risk in Nigeria.

[28] In *Ahmed v Canada (Citizenship and Immigration)*, 2018 FC 1207, Mr. Justice Norris noted it can be difficult to determine the nature of a finding as the distinction between sufficiency and credibility is not clear or categorical. At paragraph 31, Justice Norris laid out a useful test to help make such a determination:

> One useful test in the present context is for the reviewing court to ask whether the factual propositions the evidence is tendered to

> establish, assuming them to be true, would likely justify granting the application for protection. If they would not, then the PRRA application failed, not because of any sort of credibility finding, but simply because of the insufficiency of the evidence. On the other hand, if the factual propositions the evidence is tendered to establish, assuming them to be true, would likely justify granting the application and, despite this, the application was rejected, this suggests that the decision maker had doubts about the veracity of the evidence.

[29] This is the test I will apply in reviewing several statements made by the Officer in the Decision.

A. *Police ID card*

[30] Evidence of the risk from Robert is set out in the Applicant's affidavit and is supported by a photocopy of the front and back of his Robert's Nigerian Police ID card. The Applicant attests to his belief that Robert will track him down to avenge their father's death.

[31] In examining the Police ID card, the Officer noted there was a picture of an individual on the front of the card, a crest on the front and back, and that the card indicates that an individual by the name of Robert Alufa is a member of the Nigeria Police Edo State Command.

[32] The Officer found that "there is nothing on this ID card, such as an issuance or expiry date, to indicate that it is a current, *valid* police ID for a member of the Nigerian police force. As well, I note that no accompanying documentation from the Nigerian police force has been provided to indicate that this ID card is a valid police ID that belongs to the applicant's brother, Robert Alufa.". (my emphasis).

[33] For those reasons, the Officer concluded the photocopy of the Police ID was not sufficient to demonstrate the Applicant's brother, Robert Alufa, is a police officer in Nigeria.

[34] In arriving at that conclusion, the Officer had before them not only the Applicant's attestation that Robert was a police officer, they also had an affidavit from another brother, Sunday John.

[35] Sunday John confirmed the nature of the dispute with the Applicant, being the refusal to agree to circumcision of the Applicant's daughters and wife and stated that Robert is a police officer in Nigeria who made threats against the Applicant and his family after the father died. Sunday John also attested to Robert and one of the uncles going to the Applicant's home in Lagos.

[36] The Officer set out the above from Sunday John's affidavit and concluded that Sunday John "is a close family member" and then the Officer gave "some weight" to his affidavit. Without more, the Officer concluded that they "do not find that the affidavit of Sunday John is sufficient, by itself, to demonstrate that the applicant would face a personalized, forward looking risk of harm in Nigeria."

B. *Statement Report*

[37] Before leaving on April 3, 2017, the Applicant and his wife were at the market and subsequently saw his uncle, brother Robert and two police officers leaving his house. The Applicant and his wife immediately went to the police station to report that event.

[38] A copy of the Statement Report was submitted to the Officer who found there were several discrepancies between the information in the Statement Report and the information in the Applicant's affidavit. For example, the affidavit states both the Applicant and his wife made the report but the Statement Report indicates it was only his wife. Another example was that in his affidavit, the Applicant stated the police told him and his wife that it would be very difficult to proceed with an action against an individual who is an influential police officer. The Officer noted there was no mention of that in the Statement Report.

[39] The Officer also noted that although the Statement Report was issued by the police in Nigeria, it did not contain any information that the Applicant's brother, Robert is a member of the Nigerian police force.

[40] The Officer reviewed the August 28, 2018 Response to Information Request (RIR) for Nigeria - NGA 106159.E and found it states "it is very difficult to assess the reliability of police documents from Nigeria" because "the reliability and verifiability of [police] documents is unclear as we know little about how well-maintained and accurate Nigeria's police records management system is."

[41] The Officer noted that another RIR indicated the police do not issue written documents to a complainant, but an interim police investigation report can be issued after some action has been taken.

[42] Based on the discrepancies in the information between the Applicant's affidavit and the Statement Report plus the research findings concerning the reliability of police documents from Nigeria and the unusual date on the statement report the Officer assigned "little weight" to the Statement Report.

VIII. **Conclusion**

[43] An oral hearing is generally required if there is a credibility issue regarding evidence that is central to the decision and which, if accepted would justify allowing the application. The first step in this analysis is to determine whether a credibility finding was made, and if it was, whether it was central to or determinative of the decision: *Hare v Canada (Citizenship and Immigration)*, 2020 FC 763 at paras 20-21.

[44] Here, the Officer's veiled credibility findings were central to the decision. Although the Officer did not use the words "credibility" or "reliability" or "authenticity" the Officer clearly had a number of concerns about the reliability of the Police ID and the Statement Report.

[45] If a decision-maker is not convinced of the authenticity of a document, then they should say so and give the document no weight whatsoever. Decision makers should not cast aspersions on the authenticity of a document, and then endeavour to hedge their bets by giving the document "little weight": *Sitnikova v Canada (Citizenship and Immigration)*, 2017 FC 1082 at para 20. As Justice Nadon observed in *Warsame*, "[i]t is all or nothing":*Warsame v Canada (Minister of Employment and Immigration)*, [1993] FCJ No. 1202 at para 10.

[46] Below are other statements made by the Officer. I have added underlining to highlight what appears to be the Officer's concern about the source of the evidence:

> "… I note that no accompanying documentation from the Nigerian police force has been provided to indicate that this ID is a valid police ID that it belongs to the applicant's brother, Robert Alufa."
>
> "it is very difficult to assess the reliability of police documents from Nigeria" citing RIR NGA 106159.E
>
> "it is not usual practice for an individual to be given a written document by the police in Nigeria at the time that they make a complaint" citing RIR NGA 106208.E
>
> "my research findings concerning both the difficulty of determining the reliability and verifiability of police documents from Nigeria"
>
> "the unusual date on the applicant's Statement Report"

[47] Using the language of insufficiency, the Officer cast doubt on the authenticity of the Police ID card and the Statement Report, which were highly probative as evidence of previous persecution demonstrating forward-looking risk faced in Nigeria. While there is no express mention of credibility of this evidence, the Officer's reasons demonstrate a failure to determine the reliability of the source of the police ID card and the Statement Report.

[48] Considering the test in *Ahmed*, it is clear to me that although the Officer did not expressly say it, they found the Police ID and the Statement Report were not credible. Each was tendered to show that Robert was the agent of persecution and, since he was a police officer, he had the ability to find the Applicant. When this evidence is accepted as true I find it would likely justify granting the application.

[49] When the section 167 factors are met, and thus become operative, an officer must turn their mind to the appropriateness of an oral hearing: *Hare v Canada (Citizenship and Immigration)*, 2020 FC 763 at para 20. Although it is generally not compulsory to explain why an oral hearing was not convened, adequate reasons are necessary where credibility is a determinative issue: *Csoka* at para 14.

[50] The Officer erred when they failed to provide any reason as to why the request for an oral hearing would be denied in the face of the serious veiled and explicit credibility concerns identified.

[51] For all the foregoing reasons, the application is granted and the Decision is set aside. This matter is remitted for redetermination by another Officer.

[52] There is no serious question of general importance for consideration.

JUDGMENT in IMM-129-20

THIS COURT'S JUDGMENT is that:

1. The application is granted and the Decision is set aside. This matter is remitted for redetermination by another Officer.
2. There is no serious question of general importance for consideration.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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