

Federal Court



Cour fédérale

Date: 20150218

Docket: IMM-4753-13

Citation: 2015 FC 205

Ottawa, Ontario, February 18, 2015

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

**IFY FAVOUR OCHIE
TREASURE CHUKWUEBUKA NEBO
(MINOR)
MICHELE CHISOM NEBO (MINOR)**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s. 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board [RPD or the Board], dated June 21, 2013 [Decision], which

refused the Applicants' application to be deemed Convention refugees or persons in need of protection under ss. 96 and 97 of the Act.

II. BACKGROUND

[2] The Applicants are a mother [Principal Applicant], her five-year-old son and her two-year-old daughter. They say they fled Nigeria and came to Canada because they feared the children's father would harm the Principal Applicant and the female child.

[3] The Principal Applicant claims that she has suffered a history of domestic abuse at the hands of her former common-law spouse. She claims that she was pressured for sex and beaten if she refused. She claims that he was jealous and controlling and forced her to sleep outside when he suspected that she had been unfaithful.

[4] The Principal Applicant says that while she was expecting their second child, her former spouse moved out and she heard that he married someone else. She says that she did not hear from her former spouse or his family for several months after he moved out. When her daughter was a couple of months old, she claims that her former spouse's family contacted her and told her that when the child was three years old, she would be taken to be circumcised.

[5] The Principal Applicant says that she and her children lived in hiding for over a year in her aunt's home in another village. She says that they were forced to remain indoors for the entire year because of their fear that her former spouse would find them. She says that her former

spouse went to her mother's home to look for them, and she became so afraid that he would find them that she moved her family to a friend's house in Lagos.

[6] The Principal Applicant says that this friend arranged for them to leave Nigeria so that her former spouse could not find them. The Applicants arrived in Canada on January 1, 2013. Their refugee claim was made on January 10, 2013.

III. DECISION UNDER REVIEW

[7] The Applicants' refugee claims were heard on March 18, 2013. Their claims were rejected on June 21, 2013.

[8] The RPD first addressed the lack of documentary evidence to support the Principal Applicant's allegations of domestic violence. The RPD noted that the only document that had been submitted was a letter from a medical centre. The letter states that the Principal Applicant went to the hospital because she was assaulted and that she was treated for a miscarriage. The Principal Applicant said that she did not ask for the letter and described it as a copy of a medical report detailing her treatment. She said that it was provided to her when she left the hospital.

[9] The RPD noted that the document was addressed "To Whom It May Concern" which suggested it was a letter and not a medical report detailing treatment. The RPD also noted that the Principal Applicant testified that she told the doctor that she fell while cleaning. The Principal Applicant had no explanation as to why the doctor would write that she sought treatment because of an assault. The Principal Applicant testified that she fell after she was

slapped and her injuries should have been consistent with her story that she fell while cleaning. The RPD found that the report was “highly suspicious and that it was most likely produced for the purposes of bolstering the principal claimant’s refugee claim” (Certified Tribunal Record [CTR] at 7). The RPD gave no weight to the report to corroborate the Principal Applicant’s allegations of abuse. It further drew a negative inference from the Principal Applicant’s inability to explain why the document was provided to her and why it mentioned an assault.

[10] The RPD made a number of findings based on contradictions and implausibilities in the Principal Applicant’s testimony. The RPD found that the Principal Applicant had not provided a reasonable explanation as to why her former spouse would support her family after he had moved out, married another woman and not contacted the Principal Applicant and her family for over three months.

[11] The RPD also drew a negative inference from the Principal Applicant’s failure to make efforts to determine how she could support her family after her former spouse left. The RPD said that “on a balance of probabilities, a mother with two small children would investigate how much money she would require to pay for rent, and when the current lease was set to expire” (CTR at 7).

[12] The RPD also found it improbable that the Principal Applicant’s former spouse’s family would contact her six months after she last had contact with her former spouse. The Principal Applicant was unable to explain how his family became aware of when her daughter was born or what the baby’s sex was.

[13] The RPD also noted that the Principal Applicant was unable to provide a reasonable explanation regarding the RPD's concerns with the registration of the children's births. The RPD said that there was no reasonable explanation as to why she registered her children's births while she was in hiding; why she listed her former spouse as the children's father; and why her last name was listed as her former spouse's last name. The Principal Applicant testified that in her country, a woman could use the last name of a man she was living with even if they were unmarried. The RPD said that this contradicted her testimony that she had not lived with her former spouse for nearly two years when she registered the children's births.

[14] Finally, the RPD found that the Principal Applicant failed to provide a reasonable explanation regarding why she moved her family to Lagos after they had been safely hiding in her aunt's home for over a year. The RPD noted that Lagos was her former spouse's last known location. The Principal Applicant testified that the reason she moved her family was because the family could not go out while they were hiding in her aunt's home. The RPD found that the Principal Applicant failed to explain how this was different from hiding in Lagos where she was physically closer to her former spouse. The RPD found that her voluntary return to Lagos indicated a lack of subjective fear and drew a negative credibility inference.

[15] The RPD concluded that the Applicants had not established a s. 96 or s. 97 claim based on the lack of credible and trustworthy evidence.

IV. ISSUES

[16] The Applicants raise two issues in this application:

1. Did the RPD err in its negative credibility finding?
2. Did the RPD breach procedural fairness by failing to provide the Principal Applicant an opportunity to respond to its concerns?

V. STANDARD OF REVIEW

[17] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[18] The Applicants say that the Decision should be reviewed on a standard of reasonableness: *Dunsmuir*, above. The Respondent agrees that the Decision should be reviewed on a standard of reasonableness. The Respondent says that the Board is a specialized tribunal and the Court may not lightly interfere with its findings of fact: see *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 at paras 24-46; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 [*Khosa*].

[19] The Court agrees that the jurisprudence is well-established that the RPD's credibility assessments are reviewed on a standard of reasonableness: *Aguebor v Minister of Employment*

and Immigration (1993), 160 NR 315 (FCA); *Singh v Minister of Employment and Immigration* (1994), 169 NR 107 (FCA). Procedural fairness matters are reviewable on a standard of correctness: *Mission Institution v Khela*, 2014 SCC 24 at para 79; *Exeter v Canada (Attorney General)*, 2014 FCA 251 at para 31.

[20] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with “the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”: see *Dunsmuir*, above, at para 47; *Khosa*, above, at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the “range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

VI. STATUTORY PROVISIONS

[21] The following provisions of the Act are applicable in this proceeding:

Convention refugee

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is

Définition de « réfugié »

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d’être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité

unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

Person in need of protection

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or

et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Personne à protéger

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne

incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Person in need of protection

Personne à protéger

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

VII. ARGUMENT

A. *Applicants*

[22] The Applicants say that the RPD erred in basing its adverse credibility finding on the lack of documentary evidence to support the Principal Applicant's claim of domestic abuse. The Applicants say that in addition to the medical report, they also submitted two sworn affidavits corroborating the claim of domestic abuse: one from a neighbour and one from the Principal Applicant's brother. The RPD erred by ignoring evidence in reaching its decision: *Utoh v Canada (Citizenship and Immigration)*, 2012 FC 399.

[23] The Applicants also submit that the RPD erred in making an adverse credibility finding based on the medical report. The medical report corroborates the Principal Applicant's Basis of Claim form and is consistent with her testimony. The Principal Applicant testified that the doctor did not believe that she had fallen. This explanation is consistent with why the doctor noted that her visit was due to an assault.

[24] The Applicants also say that the RPD erred in making an adverse credibility finding on the Principal Applicant's failure to investigate the details of the lease. The Principal Applicant's testimony was that the lease was still valid and that her former spouse was sending her money through an office driver. The RPD's implausibility finding was not supported by the evidence before it: *Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 at para 7 [Valtchev].

[25] The Applicants also say that the RPD erred in making an adverse credibility finding based on the Principal Applicant's claim that her former spouse's family wanted to circumcise her daughter. The RPD found this claim implausible because his family did not know that she had given birth to a daughter. The RPD ignored the Principal Applicant's explanation that her former spouse and his family knew that she had a daughter because her former spouse had informants in the area.

[26] The Applicants further submit that the RPD erred in making an adverse credibility finding based on the Principal Applicant's use of her former spouse's name on her daughter's

birth certificate. The RPD ignored the Principal Applicant's explanation that her culture allows for a woman who lives with a man to take his name.

[27] The RPD also erred in finding that the Principal Applicant had no explanation for leaving Agbor and not remaining in hiding there. The Principal Applicant explained that the only way for them to remain in Agbor was to remain indoors forever. The Principal Applicant testified that the family had to leave Agbor after her former spouse went to her mother's home in Agbor to look for them.

[28] The Applicants also claim that the RPD improperly impugned the Principal Applicant's credibility based on her testimony that she registered the children's births in October 2012 in Lagos. The Applicants say that they were denied procedural fairness because this issue was not presented to the Principal Applicant for a response: *Muliadi v Canada (Minister of Employment and Immigration)*, [1986] 2 FC 205 (CA).

B. Respondent

[29] The Respondent says that the RPD reasonably found the Principal Applicant was not credible based on inconsistencies in her written and oral evidence. The RPD is entitled to draw negative inferences on inconsistencies in the evidence and to reject evidence that is implausible: *Castroman v Canada (Secretary of State)* (1994), 81 FTR 227; *Moualek v Canada (Citizenship and Immigration)*, 2009 FC 539 at para 1. The Applicants' arguments are simply a restatement of the evidence that has already been assessed by the Board. The Court cannot reweigh that evidence.

[30] The Respondent says that the RPD was not required to confront the Principal Applicant about the inconsistency regarding the registration of her children's births: *Lawal v Canada (Citizenship and Immigration)*, 2010 FC 558 at paras 16-17. The Respondent also says that, contrary to the Applicants' assertion, the Principal Applicant was questioned regarding why she obtained the documents while she was in hiding (CTR at 262-263).

[31] The RPD was also not required to specifically mention the affidavits from the Principal Applicant's neighbour and brother. These affidavits simply restated the Principal Applicant's own allegations without addressing the inconsistencies in her evidence. The affidavits have little probative value and the RPD did not err in failing to refer to them: *Cesar v Canada (Minister of Citizenship and Immigration)*, 2004 FC 536 at paras 29-30 [*Cesar*]. The RPD is presumed to have considered all of the evidence presented and there is no obligation to mention each piece of evidence considered: see *Cesar*, above, at paras 29-30; *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35.

[32] The Respondent also disputes the Applicants' claim that the Principal Applicant testified that her former spouse had informants in the area. Rather, the Principal Applicant testified that she believed someone was watching her but that her former spouse's family did not know whether she had given birth to a boy or girl. She said that she thought this was discovered after her former spouse's mother contacted her.

[33] The Respondent further submits that while the Applicant has raised an explanation for each of the RPD's negative inferences, this does not mean that the RPD had to accept her

explanations: *Allinagogo v Canada (Citizenship and Immigration)*, 2010 FC 545 at para 7; *Eustace v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1553; *Ma v Canada (Citizenship and Immigration)*, 2011 FC 417 at para 39.

VIII. ANALYSIS

[34] This is a very difficult case to assess because the Principal Applicant gave explanations, or failed to give explanations, that reasonably caused the Board to be suspicious of the claim. However, whether the Board reasonably assessed the evidence is a different issue.

[35] For example, the Board says that the “principal claimant provided little documentary evidence to support her allegations of domestic violence. The one item provided, dated February 25 2010, is from the Robertson Medical Centre” (CTR at 6).

[36] It is clear from the record that the Principal Applicant provided three items to support her allegations of domestic violence: the note from the Robertson Medical Centre; an affidavit sworn by Rita Aluebhose, the Principal Applicant’s neighbour; and an affidavit from Happy Ochie, the Principal Applicant’s brother.

[37] The Respondent says that the Board’s failure to address the two affidavits is of no consequence because the Board is presumed to have considered all the evidence and, in any event, the affidavits simply duplicate what the Principal Applicant has to say, and she was found to be not credible. The Respondent also points out that the affidavits were discussed at the hearing and so the Board did not overlook them.

[38] If the Board says that only one item was provided (“The one item provided...”) then the Board itself rebuts the presumption that it looked at or considered all of the evidence. This is because three items were provided but the Board says only one item was provided. The Board fails to refer to two of the three items. The fact that the affidavits were mentioned at the hearing does not mean they were considered for purposes of the Decision, and the Board gives a clear indication in the Decision that only one item (the medical report) was considered for the purposes of the Decision.

[39] In addition, the fact that the affidavits repeat what the Principal Applicant says does not render them irrelevant to the Board’s assessment of the inconsistencies or contradictions in the Principal Applicant’s own evidence. These affidavits support the Principal Applicant’s claim that she will be subject to domestic abuse if she is returned to Nigeria. The Respondent’s logic is that because the Board has found inconsistencies in the Principal Applicant’s testimony, then the only relevant evidence is evidence that would explain those inconsistencies. But the Board found inconsistencies – in some cases implausibilities – by weighing all of the evidence before it, and if it failed to weigh affidavits that support and corroborate the Principal Applicant’s case, it can hardly be said that its findings are sound or reasonable.

[40] In addition, although the affidavits confirm some of what the Principal Applicant says about abuse (the affiants say they witnessed it, but they provide no details and do not explain how and where they witnessed it), the affidavits do provide direct evidence of crucial factors.

Rita Aluebhose, for example, swears to the following (CTR at 204-205):

8. That I am a witness, that on *1st of October, 2011, IFY FAVOUR OCHIE* came to hide in my house with her two

children and her younger brother saying **HENRY NEBO** threaten to kill her.

9. That I am a witness, that I told **IFY FAVOUR OCHIE** to flee from AGBOR to LAGOS, and I took her to my sister's house to hide her and that was where the arrangement was made for her and the kids to flee to CANADA.

10. That I am a witness, that **HENRY NEBO** and his family continue to look for **IFY FAVOUR OCHIE** and the kids, he came to my house with some Policemen to look for them saying I am hiding them.

11. That I am a witness, that **IFY FAVOUR OCHIE** and the kids fled to Canada, **HENRY NEBO** and his family had came to my house several times to look for them and he said he will continues to search for them and threaten to harm them anytime he finds them.

[emphasis in original]

[41] The Principal Applicant could not give direct evidence of her former spouse coming to Ms. Aluebhose's house and issuing threats.

[42] Similarly, Happy Ochie swears that "since [the Principal Applicant] and kids has [sic] fled to Canada, **HENRY NEBO** has came [sic] to my house to look for them" and that "**HENRY NEBO** threatened to harm [the Principal Applicant] if she did not bring the baby girl for circumcision" (CTR at 206, emphasis in original).

[43] There may be reasons why the Board might reject these affidavits, or give them little weight, but the Board cannot simply ignore them or, in this case, fail to appreciate when it rendered the Decision that more than one item was provided to support the domestic violence claim.

[44] If the Board had examined these affidavits and accepted them, the Decision could have been entirely different. And this means that this matter must be returned for reconsideration on this ground alone. See *Lozano Vasquez v Canada (Citizenship and Immigration)*, 2012 FC 1255 at paras 39-43.

[45] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is allowed. The Decision is quashed and the matter is returned for reconsideration by a different Board member;
2. The style of cause is amended to show the Principal Applicant's name is Ify; and
3. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4753-13

STYLE OF CAUSE: IFY FAVOUR OCHIE, TREASURE CHUKWUEBUKA
NEBO (MINOR), MICHELE CHISOM NEBO (MINOR)
v THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: NOVEMBER 13, 2014

JUDGMENT AND REASONS: RUSSELL J.

DATED: FEBRUARY 18, 2015

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