Federal Court  Cour fédérale

Date: 20160301

Docket: IMM-3772-15

Citation: 2016 FC 265

Ottawa, Ontario, March 1, 2016

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

FORSTER QUARCO AGYEMANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of an appeal decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada.

[2] In the decision under review, dated July 30, 2015, the RAD confirmed a decision of the Refugee Protection Division (RPD) denying the refugee claim of Forster Quarco Agyemang [the Applicant].

[3] The principal issue in this matter concerns the RAD's refusal to admit new documents furnished by the Applicant. The Court concludes that the refusal to admit the new documents was unreasonable and for that reason the decision must be set aside.

[4] The Applicant is a 47-year-old citizen of Ghana. He claims persecution as a result of a chieftaincy dispute between Nana Pemapem Yaw Kagbrese and Dr. Nana Agyare Bofour. The Applicant was a strong supporter and chief adviser to Dr. Nana Agyare Bofour.

[5] He claims he was involved in violent clashes between supporters of both chiefs and that events culminated when supporters of the rival chieftain came to his home searching for him. They destroyed his personal property and threatened to kill him. He fled shortly thereafter to Canada on November 17, 2013 and claimed refugee protection.

[6] In a decision dated February 25, 2015, the RPD rejected the Applicant's claim on grounds of credibility and state protection.

[7] On March 12, 2015, the Applicant appealed the negative RPD decision to the RAD.

[8] On April 7, 2015, the Applicant perfected his appeal by providing the RAD with his appellant's record. The Applicant also provided notice that, pursuant to subsection 110(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, SC 2001, c 27 [the IRPA], he intended to rely on new evidence which arose after his refugee hearing for the purpose of this appeal. The Applicant described the evidence as follows:

- [The evidence] relates to events that happened shortly before and after his hearing which did not exist or was not available to him at the time his refugee claim was rejected. In particular, evidence relating to the continued persecution of supporters of Dr. Nana Agyara Bofour by the agents of Nana Pemapem Yaw Kagbrese.

- The new evidence the Appellant is relying on for the purpose of this appeal is still being awaited from Ghana and the Appellant intends to provide it for the consideration of the RAD once received.

[9] On July 15, 2015, the Applicant applied to file two documents "not previously provided" pursuant to Rules 29 and 37 of the *Refugee Appeal Division Rules*, SOR/2012-25 (the RAD Rules):

1. "Kojo Boffour Sits on a Time Bomb", The New Statesmen (Monday, May 4, 2015) (Issue 7, No. 44, No. 0310) (Ghana) at p. 7.

2. The Ghanaian News (May 2015) (Vol. 19, No. 5) (Toronto, Ontario) at p. 7.

[10] The Applicant submitted that the New Statesmen article provided confirmation of the chieftaincy dispute. It mentioned the Applicant by name and established that persecution at the hands of Nana Pemapem Yaw Kagbrese was ongoing. The Applicant also submitted that the article showed how authorities in Ghana have not been doing enough to protect persons like him.

He submitted the Ghanaian News article provided corroborating evidence of the power and influence of Nana Pemapem Yaw Kagbrese.

[11] The RAD rendered its decision on July 30, 2015. It declined to admit the Applicant's new evidence. In doing so, I find it committed a reviewable error requiring the matter to be returned for a further appeal.

[12] With respect to the New Statesmen article, the RAD stated a number of reasons it decline to admit it. Firstly, it expressed concerns with the authenticity of the newspaper tendered, claiming that it appeared to be a photocopy on newsprint. The Applicant had submitted the original newspaper containing the article, but for some reason it was returned to him rather than retained as an exhibit. I allowed the Applicant to retender the newspaper and for it to be retained in the record as an exhibit on the judicial review application.

[13] Upon carefully examining the newspaper, which was clearly an original document, the only point of reference apparent to the Court mentioned in the reasons which would raise issues of authenticity is a slight rendering on the pages of the newspaper.

[14] It is obviously not for the Court to substitute its opinion for that of the RAD, but nevertheless I am concerned that the implication that the Applicant tendered a fraudulent document is serious enough that the appropriate response may have been to require proper authentication, as any opinion based on the document itself would normally require the assessment of an expert in document verification.

[15] More confusing however, is the RAD's statement that the Applicant had failed to explain why he could not have provided this evidence with his record, tendered on April 7, 2015, when the document in question is dated in May 2015. This confusion was perhaps accounted for because the Applicant had originally provided notice that the new evidence to be filed would confirm events that happened shortly before and after his hearing. Instead, the New Statesmen article was reporting two years after the fact on events that occurred in 2013.

[16] It is not clear whether the RAD was concerned about self-serving evidence originating coincidentally after the RPD hearing. However, the fact remains that the RAD's comments introduce another element of confusion with respect to the decision to reject the new document, as the article clearly was not reasonably available, having been published only after the RPD decision.

[17] Thirdly, the RAD noted that the evidence did not raise a "new issue", which I do not believe is the appropriate test. The factors listed in Rule 29(4) concern the document's relevance and probative value and any new evidence the document brings to the appeal.

[18] Fourthly, the RAD found that the document had limited probative value in that, "on its own it did not establish a reason for [the Applicant's] problems testifying as it relates to his credibility". I assume that by this the RAD meant that whatever probative value the document had, it was insufficient to overcome the Applicant's other credibility problems. If so, this is the barest of reasons that could be provided, leaving the Court to wonder on what basis the comment was made.

[19] The RAD then circles back by concluding that the document should be rejected under Rule 29(4)(c), which relates to whether the Applicant could, with reasonable effort, have provided the document with his record.

[20] While there may have been legitimate concerns about this document, the reasons do not permit the reviewing Court to understand fully why the decision was made and thereby whether the decision falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

[21] I have similar concerns with respect to the Ghanaian News article, which was rejected by the RAD on the ground that the Applicant had failed to adequately explain the probative value of this evidence.

[22] The Applicant submitted before the RAD that the article confirmed that the opposition chieftain was powerful and influential, thereby explaining why his supporters were not held responsible for the alleged incident on October 26, 2013 and why the Applicant remained at risk. The failure to provide any specific comment with respect to this submission again leaves the Court searching to understand fully why the document was rejected.

[23] In conclusion, the application is allowed because the reasons lack transparency, justification, and intelligibility, and render the decision unreasonable as a whole.

[24] Given my conclusions on the failure to admit the new evidence, there is no need to consider whether the RAD erred in confirming the decision of the RPD.

[25] No questions are certified for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. There is no order as to costs.

3. There is no question for certification.

"Peter Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3772-15
STYLE OF CAUSE:	FORSTER QUARCO AGYEMANG v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 10, 2016
JUDGMENT AND REASONS:	ANNIS J.
DATED:	MARCH 1, 2016

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