Federal Court  Cour fédérale

Date: 20170628

Docket: IMM-3387-16

Citation: 2017 FC 629

Toronto, Ontario, June 28, 2017

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

A.B., C.D. and E.F.

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a pre-removal risk assessment [PRRA] by a Senior Immigration Officer [Officer] dated June 29, 2016, in which the Officer determined that the Applicants would not be subject to risk of torture, be at risk of persecution, or face a risk to life or risk of cruel and unusual punishment or treatment if removed to Nigeria, their country of nationality.

[2] As explained in greater detail below, this application is dismissed, as the Applicants' arguments do not demonstrate any reviewable error in the Officer's decision. The decision was based on the sufficiency of the evidence presented by the Applicants, not on veiled credibility findings related to the principal Applicant. As such, the Officer was not required to grant, or consider granting, an oral hearing to the Applicants, and the decision cannot be characterized as turning on an adverse credibility finding based on a lack of corroborating evidence.

II. Background

[3] The principal Applicant is a citizen of Nigeria. The two other Applicants are her minor daughters.

[4] When the principal Applicant was a minor, she underwent female genital mutilation/circumcision [FGM]. She states that she contracted HIV from the instruments used in the procedure. She further alleges that, after her daughters were born, she was informed by the family of her common-law partner that they intended to circumcise the girls, and that her partner agreed with his family. The Applicants fled Nigeria and came to Canada on April 5, 2013, claiming refugee status on the basis of fear that the children would be subjected to FGM by their father or his family members.

[5] The Applicants' refugee claims were refused on December 30, 2013 as the Refugee Protection Division [RPD] found that they had not proven their identity. The Applicants appealed to the Refugee Appeal Division [RAD] and provided additional identity documents. In the absence of an explanation why the evidence was not provided to the RPD, the RAD refused

to admit the new evidence, and the appeal was refused on the grounds that the Applicants had failed to provide their identity. An application for leave and for judicial review of the RAD refusal was dismissed by the Federal Court on October 9, 2014.

[6] In March 2015, the Applicants submitted an application for permanent residence on humanitarian and compassionate [H&C] grounds, on the basis of the best interests of the children and anti-HIV stigma and discrimination in Nigeria. This application was refused on August 19, 2015. On February 12, 2016 the Applicants submitted their PRRA application, and on June 8, 2016 they filed a second H&C application. On July 26, 2016, the principal Applicant received the negative PRRA decision which is the subject of this judicial review. As of the time of the judicial review hearing, she had not yet received a decision on her second H&C application.

III. Preliminary Matter – Anonymization of Decision

[7] Prior to the hearing of this application, the Applicants filed a motion seeking that the Court anonymize its decision in this matter, i.e. that the style of cause which identifies the Applicants by name be amended to identify them as A.B., C.D. and E.F. The principal Applicant is conscious that the decision will contain information as to her HIV status and therefore does not wish to be identified by name in the published version of this decision. For the same reason, the Applicants also asked that their dates of birth not appear in the decision.

[8] The Applicants' motion was adjourned to be argued at the hearing of the judicial review application, and the parties agreed that the Court's decision on the motion be included in this

decision on the merits of the application itself. The Respondent does not oppose the motion, taking the position that, as the motion seeks only anonymization and not confidentiality, the requirements of Rules 151 and 152 of the *Federal Courts Rules* are not engaged.

[9] I am satisfied that the cases cited by the Applicants (*E.F. v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 842; *S.K. v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 788; *A. B. v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 640) support the authority of the Court to anonymize the style of cause in a matter in which a decision contains highly personal information or information that would place a party at risk. The principal Applicant's affidavit filed in support of the motion establishes that her HIV status is personal information which she does not publicly disclose. As such, the Judgment at the conclusion of these Reasons amends the style of cause as requested by the Applicants. As the Applicants' dates of birth are not material to the issues in this application, this decision does not refer to them, and no further relief is required to address that component of the Applicants' motion.

IV. Issues and Standard of Review

[10] The Applicants articulate the following issues for the Court's consideration:

A. Did the Officer make veiled credibility findings and breach procedural fairness in refusing an oral hearing?

B. Did the Officer err by requiring corroborating evidence?

[11] As a preliminary issue, the Court must also address the standard of review.

[12] The parties agree that the second issue is reviewable on a standard of reasonableness. The Court concurs, as this issue involves the Officer's assessment of the evidence (see *Haq v. Canada (Minister of Citizenship and Immigration)*, 2016 FC 370, at para 15; *Nguyen v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 59, at para 4).

[13] However, the parties disagree on the standard applicable to the first issue, which the Applicants frame as a question of procedural fairness, reviewable on a standard of correctness (*Zamari v. Canada (Minister of Citizenship and Immigration)*, 2016 FC 132, at paras 10-13; *Khabati v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1147, at para 14). The Respondent refers to authority that the standard applicable to a PRRA officer's decision whether to hold an oral hearing is reasonableness (*Ikeji v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1422, at para 20 [*Ikeji*]; *Sanchez v Canada (Minister of Citizenship and Immigration)*, 2016 FC 737, at para 4; *Ibrahim v Canada (Minister of Citizenship and Immigration)*, 2014 FC 837, at para 6, citing *Bicuku v Canada (Minister of Citizenship and Immigration)*, 2014 FC 339, at paras 16-20; *Ponniah v Canada (Minister of Citizenship and Immigration)*, 2013 FC 386 at para 24; and *Mosavat v Canada (Minister of Citizenship and Immigration)*, 2011 FC 647, at paras 7-10).

[14] Neither of the parties argued that there is a conceptual basis on which to reconcile the divergence in the jurisprudence. Rather, the selection of the applicable standard of review appears to depend on whether the Court in a particular case characterizes the issue of whether an oral hearing should have been granted as a matter of procedural fairness, in which case the

standard of correctness is selected, or as involving the interpretation of the *Immigration and Refugee Protection Act*, SC 2001, c.27 [IRPA], in which case the standard is reasonableness.

[15] In my view, when the issue is whether a PRRA Officer should have granted an oral hearing, the appropriate standard is reasonableness, as the decision on that issue turns on interpretation and application of the Officer's governing legislation. Section 113(b) of IRPA provides that a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required, and s. 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002/227 [IRPR] prescribes the applicable factors to be the following:

(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.

[16] The arguments in the present case focused on the first of these factors, whether there is evidence that raises a serious issue of the principal Applicant's credibility, and in particular on whether the Officer's reasoning, which is expressed in terms of sufficiency of evidence, is more properly characterized as a veiled credibility finding. At paragraph 20 of the decision in *Ikeji*,

Justice Strickland held that reasonableness is the standard of review for questions of veiled credibility findings and, while noting the divided jurisprudence on the standard of review applicable to a PRRA officer's decision respecting an oral hearing, held that this is also reviewable on the reasonableness standard. Justice Strickland reached this conclusion because such a decision is made by the officer by considering the requirements of s. 113(b) of IRPA and the factors in s. 167 of IRPR, which involves a question of mixed fact and law.

[17] I agree with this analysis and consider it to be particularly applicable to the present case, where the Applicants' position surrounding the issue of an oral hearing turns on the argument that the Officer made a veiled credibility finding. I will therefore apply the reasonableness standard to both issues in this application. However, I also note that my conclusions below would remain the same even if a standard of correctness was applied to the oral hearing issue.

V. Analysis

[18] While I have identified above the Applicants' articulation of the issues to be addressed by the Court, my conclusion following the parties' oral submissions is that these issues can be distilled down to the question whether the Officer made a veiled credibility finding in reaching the decision to reject the Applicants' PRRA application.

[19] The Applicants argue that the Officer improperly framed credibility findings as findings regarding sufficiency of evidence and therefore should have granted the Applicants an oral hearing (see *Liban v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1252 [*Liban*], at para 14). They submit that their request for an oral hearing, advanced through their PRRA

submissions, was particularly compelling and raised increased fairness considerations, given that they have not had the benefit of an oral refugee hearing on their allegations of risk (see *Abusasinah v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 234 [*Abusasinah*], at para 57.) I accept the analysis in *Abusasinah*, to the effect that the fact a claimant has not had an oral refugee hearing can impact the reasonableness of the discretionary decision whether to hold an oral PRRA hearing. However, as in *Abusasinah*, the potential availability of an oral hearing arises only when there is an issue of credibility, such that s. 113(b) of IRPA and s. 167 of IRPR are engaged.

[20] The Applicants also argue that the Officer erred simply in failing to consider, and provide reasons for rejecting, their request for an oral hearing (see *Chekroun v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 984, at para 72 [*Chekroun*]; *Whudne v. Canada (Minister of Citizenship and Immigration)*, 2016 FC 1033). However, in the authorities relied upon by the Applicants in support of this position, the Court was considering PRRA decisions in which an officer made credibility findings without calling a hearing. Again, given that the potential availability of an oral hearing applies only when the factors prescribed by s. 167 of IRPR are engaged, my conclusion is that the question whether the Officer erred in failing to give reasons for not providing an oral hearing turns on whether the Officer made credibility findings.

[21] Finally, the Applicants argue that the Officer erred by making an adverse credibility finding based on a lack of corroborating evidence. They rely on the decision in *Ayala v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 611, at paras 20-21, to the effect that a

decision-maker is not entitled to find that a claimant lacks credibility based on his or her failure to produce corroborating evidence.

[22] As such, the question to be decided, in considering all of the Applicants' arguments, is whether the Officer's decision is based on a veiled credibility finding as the Applicants submit.

[23] The Applicants' arguments focus on the final two paragraphs in the Officer's analysis of the risk of FGM. Those paragraphs, with references to the Applicants' identities anonymized, are as follows:

> I note there is an absence of information regarding [A.B's] former common-law partner, such as his name and place of residence. I also note that [A.B.] states that she received information that they are being sought, but no information has been provided regarding who gave [A.B.] this information or how the information was conveyed, whether in an email, in person, etc. Further, I note that a period of three years has passed since the Applicants came to Canada. [A.B.] also has not provided objectively verifiable documentation to establish that her former common-law partner, or his family and the elders, have continued to seek the applicants after such an absence from Nigeria. Such evidence could include sworn affidavits from persons with personal knowledge of the applicants or anything else that establishes [C.D. and E.F.] are at a continued risk from their extended family.
>
> Given the lack of information regarding [C.D.'s and E.F.'s] father and his level of continued interest in his daughters, and given that it is illegal in Nigeria for anyone to perform FGM, I find that on a balance of probabilities, there is insufficient evidence to demonstrate a personalized risk of being subjected to FGM in Nigeria.
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> [Emphasis from Applicants' Memorandum of Fact and Law]

[24] The Applicants have cited ample authority (see, e.g., *Liban*, at para 14; *Teremteva v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 1431, at para 45) supporting the

proposition that a decision-maker's conclusion that there is insufficient evidence to support an assertion can represent what is actually an adverse credibility finding. However, as submitted by the Applicants' counsel at the hearing of this application, whether an insufficiency finding is actually a veiled credibility finding is very fact specific. In the present case, the Officer's finding is framed as based on insufficiency of evidence and, as explained below, a review of the Officer's analysis and the record does not support a conclusion that the finding was actually one of credibility.

[25] The paragraphs cited above from the Officer's decision demonstrate that the Officer was not convinced that the minor Applicants' father had a continued interest in pursuing the performance of FGM upon his daughters, given that three years had passed since the Applicants came to Canada. The Applicants argue that, to reach this conclusion, the Officer must have disbelieved the principal Applicant's evidence that her daughters continued to face this risk.

[26] The Applicants also note that the country condition documentation reviewed by the Officer supported the conclusion, and the Officer indeed found, that while the practice of FGM is against the law in Nigeria, it is still widely practiced due to traditional cultural beliefs, and law enforcement rarely intervenes. The Officer supported the finding, that there was insufficient evidence to demonstrate a personalized risk of being subjected to FGM, in part by the fact that this practice is illegal in Nigeria. The Applicants argue that this reasoning represents a contradiction which further supports their position that the Officer was making a veiled finding that the principal Applicant was not credible.

[27] The difficulty for the Applicants' position is that the facts to which the principal Applicant deposes in her affidavits filed in the PRRA application do not relate to the point upon which the Officer's decision turned, i.e. her former partner's continued interest in them three years after leaving Nigeria.

[28] In her most recent and detailed affidavit filed in the PRRA application, the principal Applicant deposes to the fact that FGM is a cultural tradition in Nigeria, that in February 2013 her former partner's family informed her of their intent to circumcise her daughters, that her former partner supported his family's wishes as he is a traditional man, and that the Applicants left Nigeria in April 2013 as a result. She also deposes that the Applicants were held in immigration detention for three months after arriving in Canada and that she then called her mother, who told her that her former partner had come to the house looking for them. However, none of this evidence relates to the time period the Officer was addressing in the impugned paragraphs of the decision, three years after the Applicants left Nigeria.

[29] In these paragraphs of the decision, the Officer notes that the principal Applicant states she received information that the Applicants are being sought, but the Officer states that no information had been provided regarding who gave the principal Applicant this information or how the information was conveyed. The Applicants take issue with this statement by the Officer and refer to the principal Applicant's telephone conversation with her mother set out in her affidavit. However, while her affidavit does not state the precise timing of her conversation with her mother, as noted above it describes the conversation as taking place after the principal

Applicant was released from detention, which was early July 2013 and not the time period the Officer was considering.

[30] Rather, the Officer appears to have been considering the Applicants' assertion they were still being sought. At the beginning of the analysis of the Applicants' risk of FGM, the Officer refers to the principal Applicant stating she has been informed that the family of her former common-law spouse continue to look for her and her daughter and stating "they claim that she had disgraced their family and the community hence the only solution was for her to bring her daughters for circumcision." This quoted language is taken from the written submissions filed in support of the PRRA application and appears under the heading "New Developments After Refugee Hearing". The Applicants' hearing before the RPD was conducted on December 10, 2013. As such, the Applicants were asserting in their PRRA application that, at some more recent time, the principal Applicant had received information that she and her children were still being sought by her former partner and his family. However, as noted by the Officer, there was no information provided as to how or from whom this information was received.

[31] In fact, the record before the Officer does not appear to contain any evidence, even from the principal Applicant, supporting this assertion in the written submissions. Her affidavit does state that she is afraid of what will happen to her daughters if they are forced to return to Nigeria and that she believes that her ex-partner's family will continue to insist that they be circumcised. However, this is testimony as to the principal Applicant's fear and belief, not as to communications or other information that she and her daughters are still being sought.

[32] Even if the Officer's reference to the principal Applicant's statement, that she received information they were being sought, did relate to her conversation with her mother following her release from immigration hold, the Respondent points out that the principal Applicant still does not have any personal knowledge of any communications or contact received from her former partner or his family. In the impugned paragraphs in the decision, the Officer notes the absence of any evidence from persons with such personal knowledge.

[33] As such, I can find no basis in the Officer's decision or in the record from the PRRA application to support a conclusion that there was evidence presented by the Applicants which the Officer did not believe. Rather, as expressly reflected in the Officer's reasons, the decision was based on the Officer finding that there was a lack of evidence to support a finding of forward looking risk.

[34] Having concluded that the Officer did not base the decision on veiled credibility findings, the arguments advanced by the Applicants in this application for judicial review must fail, and I must dismiss the application. Neither party proposed a question for certification for appeal, and none is stated.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The style of cause in this application is amended to be as follows:

A.B., C.D. and E.F.

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

2. This application for judicial review is dismissed.

3. No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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