

Federal Court



Cour fédérale

Date: 20190308

Docket: IMM-2594-18

Citation: 2019 FC 275

Montréal, Quebec, March 8, 2019

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

**ISIOMA BARBARA ARISEKOLA,
OLUWATOBILOBA EMMANUEL
ARISEKOLA**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Ms. Isioma Barbara Arisekola and her four year old son, Oluwatobiloba Emmanuel Arisekola [the Applicants], seek judicial review of a decision by the Refugee Appeal Division [RAD].

[2] For the reasons outlined below, the application will be allowed.

II. Overview

[3] The Applicants are citizens of Nigeria. On January 4, 2017, while already in Canada, the Applicants claimed refugee status. Ms. Arisekola alleges that she and her son will suffer harm at the hands of her husband's family, who are members of the Oro cult. The members wanted to initiate her son by the time of his fourth birthday, which was on May 3, 2017.

[4] The Refugee Protection Division [RPD] rejected the claim, outlining the determinative issue as one of credibility. The panel disbelieved Ms. Arisekola's allegations with respect to persecution should she return to Nigeria.

[5] The RAD dismissed the Applicants' appeal. As a preliminary issue, the RAD considered an application pursuant to Rule 29 of the *Refugee Appeal Division Rules*, SOR/2012-257 [RAD Rules] to admit documents filed by the Applicants after the perfection of their appeal. In their request to the RAD to admit the evidence, the Applicants noted that their counsel was not available from November 15 to 30, 2018 as she was on vacation.

[6] The RAD outlined that it had to consider Rule 29 of the RAD Rules, subsection 110(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act], and the various factors contained in these provisions.

[7] The RAD noted essentially the factor that falls under paragraph 29(4)(c) of the RAD Rules, in that the date of perfection for the appeal was November 17, 2017, that it had been perfected on time, and that there was therefore no reason why these documents could not have been filed as a part of the perfected appeal. The RAD dismissed the request on this basis, and did not examine the two other factors, listed at paragraphs 29(4)(a) and (b) of the RAD Rules.

III. Issue

[8] The parties have raised a number of issues but the Court needs to examine only one to dispose of the present application.

[9] The Court must determine if the RAD breached the rules of procedural fairness by refusing to admit the new evidence, and specifically, whether the RAD should have explicitly considered all three criteria listed in subsection 29(4) of the RAD Rules, which it did not do in this case. The text of Rule 29 of the RAD Rules is reproduced in annex.

[10] The standard of review as to this issue is not obvious on the face of the jurisprudence, but this is not determinative as the Court is satisfied the RAD did breach procedural fairness. The RAD must consider all three criteria under subsection 29(4) of the RAD Rules, and cannot simply limit its analysis to one of the relevant factors, namely, whether the evidence could have been provided with the Appellants' perfected record.

[11] The language of subsection 29(4) requires that the RAD consider all three criteria: "must consider any relevant factors, including [...]". The leading case on the issue concerning new

evidence before the RPD is *Cox v Canada (Citizenship and Immigration)* 2012 FC 1220, where the Court considered whether or not the RPD was required to consider all three of the factors listed under Rule 43 of the RPD Rules, which contains similar language as the RAD's Rule 29.

Justice Near explains as follows:

[26] I am not satisfied that the Board met its procedural fairness obligations in this case. While the Board did not simply ignore the evidence submitted, like in *Nagulesan* and *Howlader*, above, it weighed only one factor listed in Rule 37(3). I agree with the Applicant that the documents' relevance and probative value were important facts that the Board should have considered in its treatment of the application to admit the post-hearing evidence, particularly given that the other basis for denying the Applicants' claim is related to the plausibility of their story.

[27] The Board acknowledged that the Applicants had been represented by counsel experienced in matters of refugee law at all material times throughout the procedure, had failed to give an explanation as to why the evidence was not provided at an earlier time, and failed to explain why they had not appeared to make reasonable efforts to obtain the documents until after the hearing – all considerations that fall within Rule 37(3)(c). Nonetheless, the Board was required to consider the relevance, probative value, and newness of the documents, i.e. the factors enumerated in Rules 37(3)(a) and (b). While the list of factors to be considered in Rule 37(3) is not exhaustive, the use of the word “including” rather than the words “such as” before the list of factors indicates the intent that each of the factors included in the sub-rule be considered. A failure to do so gives rise to a breach of procedural fairness.

[12] Given the identical language contained in the RPD and RAD Rules, the Court is convinced that the same analysis should be applied to subsection 29(4) of the RAD Rules. The RAD's failure to consider the other two factors gives rise to a breach of procedural fairness.

[13] The Respondent conceded that the RAD's treatment of the application for the late evidence lacked transparency and was unreasonable as the RAD provided its reasoning regarding

factor 4(c) of Rule 29. The Respondent adds that in doing so, the panel failed to acknowledge the other relevant factors: relevance, probative value, and any new evidence which the proposed documents might bring to the appeal. Hence, as there is no indication as to how the RAD weighed the two other factors of Rule 29, the Respondent asserts that the decision lacks transparency and is unreasonable.

[14] The Court is satisfied the RAD has not met its duty of procedural fairness by failing to consider the factors enumerated in paragraphs 29(4)(a) and (b) of the RAD Rules. While the list of factors to be considered in subsection 29(4) of the RAD Rules is not exhaustive, the use of the word “including” rather than the words “such as” before the list of factors indicates the intent that each be considered. A failure to do so gives rise to a breach of procedural fairness.

IV. Conclusion

[15] The file will be remitted to the RAD for reconsideration, taking into account the Court’s decision.

JUDGMENT in IMM-2594-18

THIS COURT'S JUDGMENT is that:

1. The application is allowed;
2. The file is remitted to the RAD for a new determination;
3. No question is certified.

“Martine St-Louis”

Judge

ANNEX

Part III - Rules applicable to all appeals

Documents or written submissions not previously provided

Documents or written submissions not previously provided — person

29 (1) A person who is the subject of an appeal who does not provide a document or written submissions with the appellant's record, respondent's record or reply record must not use the document or provide the written submissions in the appeal unless allowed to do so by the Division.

Application

(2) If a person who is the subject of an appeal wants to use a document or provide written submissions that were not previously provided, the person must make an application to the Division in accordance with rule 37.

Documents — new evidence

(3) The person who is the subject of the appeal must include in an application to use a document that was not previously provided an explanation of how the document meets the requirements of subsection 110(4) of the Act and how that evidence relates to the person, unless the document is being presented in response to evidence presented by the Minister.

Partie III - Règles applicables à tous les appels

Documents ou observations écrites non transmis au préalable

Documents ou observations écrites non transmis au préalable — personne en cause

29 (1) La personne en cause qui ne transmet pas un document ou des observations écrites avec le dossier de l'appelant, le dossier de l'intimé ou le dossier de réplique ne peut utiliser ce document ou transmettre ces observations écrites dans l'appel à moins d'une autorisation de la Section.

Demande

(2) Si la personne en cause veut utiliser un document ou transmettre des observations écrites qui n'ont pas été transmis au préalable, elle en fait la demande à la Section conformément à la règle 37.

Documents — nouvelle preuve

(3) La personne en cause inclut dans la demande pour utiliser un document qui n'avait pas été transmis au préalable une explication des raisons pour lesquelles le document est conforme aux exigences du paragraphe 110(4) de la Loi et des raisons pour lesquelles cette preuve est liée à la personne, à moins que le document ne soit présenté en réponse à un élément de preuve présenté par le ministre.

Factors

(4) In deciding whether to allow an application, the Division must consider any relevant factors, including

(a) the document's relevance and probative value;

(b) any new evidence the document brings to the appeal; and

(c) whether the person who is the subject of the appeal, with reasonable effort, could have provided the document or written submissions with the appellant's record, respondent's record or reply record.

Éléments à considérer

(4) Pour décider si elle accueille ou non la demande, la Section prend en considération tout élément pertinent, notamment :

a) la pertinence et la valeur probante du document;

b) toute nouvelle preuve que le document apporte à l'appel;

c) la possibilité qu'aurait eue la personne en cause, en faisant des efforts raisonnables, de transmettre le document ou les observations écrites avec le dossier de l'appelant, le dossier de l'intimé ou le dossier de réplique.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2594-18

STYLE OF CAUSE: ISIOMA BARBARA ARISEKOLA, OLUWATOBILOBA
EMMANUEL ARISEKOLA AND THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO

DATE OF HEARING: FEBRUARY 6, 2019

JUDGMENT AND REASONS: ST-LOUIS J.

DATED: MARCH 8, 2019

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